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LAWYERS REPORTS

ANNOTATED

NEW SERIES.

WEST VIRGINIA SUPREME COURT OF APPEALS.

GEORGE L. MCKAIN

v.

E. M. MULLEN, Impleaded, etc., Appt.

(65 W. Va. 558, 64 S. E. 829.)

Appeal — right — waiver.

1. A party who accepts the benefit of a decree waives his right to appeal from that decree, unless he is so absolutely entitled to the benefit received that a refusal will not affect his right to it.

Same — acceptance of benefit — effect.

2. One cannot avail himself of that part of a decree which is favorable to him, ac-

cept its benefit, and then prosecute an appeal to reverse such portion of the same decree as militates against him, when the acceptance of the benefit from the one part is totally inconsistent with the appeal from the other.

Same — facts — application.

3. The defendant in a suit by which his tax deed is set aside cannot unreservedly accept the taxes, interest, and charges tendered by the bill, and ordered by the decree to be paid him, and then appeal from the decree. His acceptance is a positively implied waiver of his right to appeal. Nor will an offer to return the money, made long after its acceptance, avail to prevent dismissal of an appeal in such case.

(April 27, 1909.)

Headnotes by ROBINSON, J.

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A PPEAL by defendant from a decree of the Circuit Court for Wood County in complainant's favor in a suit to set aside a certain tax deed for alleged irregularity. Appeal dismissed.

The facts are stated in the opinion.

Messrs. F. P. Moats and George W. Johnson for appellant.

Mr. F. H. McGregor, for appellee:

Voluntary acceptance by the appellant of the fruits and benefits of the decree constitutes a waiver of the right to appeal.

2 Cyc. Law & Proc. pp. 651, 652, 656; Webster-Glover Lumber & Mfg. Co. v. St. Croix County, 71 Wis. 317, 36 N. W. 864; Brown v. Vancleave, 86 Ky. 381, 6 S. W. 25; 2 Enc. Pl. & Pr. p. 174; Jackson v. Brocton, 182 Mass. 26, 94 Am. St. Rep.

635, 64 N. E. 418; Schmidt v. Oregon Gold Min. Co. 28 Or. 9, 52 Am. St. Rep. 759, 40 Pac. 406, 1014; Re Baby, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405; Watkins v. Martin, 24 Ark. 14, 81 Am. Dec. 59; Trapp v. Off, 194 Ill. 287, 62 N. E. 615; Bolen v. Cumby, 53 Ark. 514, 14 S. W. 928; Morgan v. Ladd, 7 Ill. 414; Re Sachleben, 106 Mo. App. 307, 80 S. W. 737; Chase v. Driver, 34 C. C. A. 668, 92 Fed. 780; Albright v. Oyster, 9 C. C. A. 173, 19 U. S. App. 651, 60 Fed. 644; Waddingham v. Waddingham, 27 Mo. App. 597; 29 Am. & Eng. Enc. Law, 2d ed. p. 1103; Kable v. Mitchell, 9 W. Va. 492; Ferguson v. Millender, 32 W. Va. 30, 9 S. E. 38; Bennett v. Van Syckel, 18 N. Y. 481; Murphy v. Spaulding, 46 N. Y. 556.

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I. Scope of note.

There have been included in this note all discovered cases wherein a partly successful litigant has essayed to review a decree, judgment, or order, upon appeal or by writ of error, after accepting its favorable part or parts, in order to escape its burdens or enhance its benefits to himself. Cases in which the contention was that the right to prosecute an appeal or writ of error had been lost by the compromise or settlement of the decree or judgment are esteemed to lie beyond the scope of the note.

II. The general rule.

a. The rule enunciated.

A party to an action may, by his acts subsequent to a judgment or order against him, waive his right to have such judgment or decree reviewed by the appellate court. Elwert v. Marley, 53 Or. 591, 133 Am. St. Rep. 850, 99 Pac. 887, 101 Pac. 671.

One who avails himself of the benefits of a decree or judgment must bear its burdens. Garner v. Garner, 38 Ind. 139.

A litigant who is dissatisfied with a decree partly in his favor must abstain from doing any act which may change the situation or impair the right of his adversaries in the event of a reversal, if he desires to review it upon appeal or writ of error. Thomas v. Negus, 7 Ill. 700; Cornell v. Donovan, 14 Daly, 292, 12 N. Y. S. R. 117.

It is the general rule that a litigant who has voluntarily, and with knowledge of all the material facts, accepted the benefits of an order, decree, or judgment of a court, cannot afterwards take or prosecute an appeal or writ of error to reverse it. He will not be heard to say that it was erroneous. His conduct amounts to a release of errors. His acceptance of benefits is a waiver of all errors, and estops him to question the correctness and justice of the 29 L.R.A. (N.S.)

order, decree, or judgment which has given him such benefits. Stanley v. Deihough, 50 Ark. 201, 6 S. W. 896; Bolen v. Cumby, 53 Ark. 514, 14 S. W. 928; San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047; Turner v. Markham, 152 Cal. 246, 92 Pac. 485; Morgan v. Ladd, 7 Ill. 414; Thomas v. Negus, 7 Ill. 700; Holt v. Rees, 46 Ill. 181; Corwin v. Shoup, 76 Ill. 246; Moore v. Williams, 132 Ill. 591, 24 N. E. 617; Trapp v. Off, 194 Ill. 287, 62 N. E. 615; Schaeffer v. Ardery, 238 Ill. 557, 87 N. E. 343; Sterne v. Vert, 108 Ind. 232, 9 N. E. 127; Newman v. Kiser, 128 Ind. 258, 26 N. E. 1006; Sonntag v. Klee, 148 Ind. 536, 47 N. E. 962; Williams v. Richards, 152 Ind. 528, 53 N. E. 765; Raborn v. Woods, 33 Ind. App. 171, 70 N. E. 399; Mississippi & M. R. Co. v. Byington, 14 Iowa, 572; Independent Dist. v. Delaware, 44 Iowa, 201; Buena Vista County v. Iowa Falls & S. C. R. Co. 55 Iowa, 157, 7 N. W. 474; Root v. Heil, 78 Iowa, 436, 43 N. W. 278; Weaver v. Stacy, 93 Iowa, 683, 62 N. W. 22; Ballinger v. Connecticut Mut. L. Ins. Co. 118 Iowa, 23, 91 N. W. 767; Babbitt v. Corby, 13 Kan. 612; Guaranty Sav. Bank v. Butler, 56 Kan. 267, 43 Pac. 229; Prairie Lumber Co. v. Kormsmeier (Kan.) 43 Pac. 773; Merchants' Nat. Bank v. Quinton, 9 Kan. App. 882, 57 Pac. 261; Stern v. Craig Bros. 59 Kan. 771, 51 Pac. 782; Missouri P. R. Co. v. Gruendel, 3 Kan. App. 53, 44 Pac. 439; Fenlon v. Goodwin, 35 Kan. 125, 10 Pac. 553; Cronkrite v. Evans-Snyder-Buel Co. 6 Kan. App. 173, 51 Pac. 295; Haggin v. Montague, 125 Ky. 507, 101 S. W. 893; Lanoue v. Bessy, 5 La. Ann. 233; Fluhart v. Golding, 7 La. Ann. 233; Sims v. Lawes, 22 La. Ann. 105; Roman Catholic Church v. Perche, 40 La. Ann. 201, 3 So. 542; Stewart v. McCaddin, 107 Md. 314, 68 Atl. 571; Adams v. Carter, 92 Miss. 579, 47 So. 409, 16 A. & E. Ann. Cas. 76; Robards v. Lamb, 76 Mo. 192; Wolfert v. Reilly, 133 Mo. 463, 34 S. W. 847; Houck v. Swartz, 25 Mo. App. 17; Waddingham v. Waddingham, 27 Mo. App. 596; Rosenberger v. Jones, 48 Mo. App. 606; Re Sachleben, 106 Mo. App. 307, 80 S. W. 737; Re Black, 32 Mont. 51, 79 Pac. 554; Parr v. Webb, 40 Mont. 346, 106 Pac. 353;

by tendering back the money received from plaintiff.

Portland Constr. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764; Paine v. Woolley, 80 Ky. 581; Morgan v. Ladd, supra; Dunham v. Randall & C. Co. 11 Tex. Civ. App. 264, 32 S. W. 720; Bigelow, Estoppel, 562, 673, 717; Bensiack v. Cook, 110 Mo. 173, 33 Am. St. Rep. 422, 19 S. W. 642; Hodges v. Winston, 95 Ala. 514, 36 Am. St. Rep. 241, 11 So. 200; Tatum v. Ballard, 94 Va. 374, 26 S. E. 871; Taylor v. Crook, 136 Ala. 354, 96 Am. St. Rep. 26, 34 So. 905; Croom v. Sugg, 110 N. C. 259, 14 S. E. 748; Chesapeake & O. R. Co. v. Rison, 99 Va. 18, 37 S. E. 320; Weston v. Ralston, 48 W. Va. 186, 36 S. E. 446; LeCompte v. Freshwater, 56 W. Va. 341, 49 S. E. 238.

Harte v. Castetter, 38 Neb. 571, 57 N. W. 381; Carll v. Oakley, 97 N. Y. 633; Alexander v. Alexander, 104 N. Y. 643, 10 N. E. 37; Strong v. Jones, 25 Hun, 319; Canary v. Knowles, 41 Hun, 542; Wood v. Richardson, 91 Hun, 332, 36 N. Y. Supp. 1001; Radway v. Graham, 4 Abb. Pr. 468; Kelly v. Bloom, 17 Abb. Pr. 229; Harris v. Taylor, 20 N. Y. Week. Dig. 379; Re Raber, 4 N. Y. S. R. 845; Sperry v. Hellman, 36 N. Y. S. R. 52, 13 N. Y. Supp. 271; Williams v. Williams, 6 N. D. 269, 69 N. W. 47; Tabler v. Wiseman, 2 Ohio St. 207; Moore v. Floyd, 4 Or. 260; Bush v. Mitchell, 28 Or. 92, 41 Pac. 155; Roots v. Boring Junction Lumber Co. 50 Or. 298, 92 Pac. 811, 94 Pac. 182; Elwert v. Marley, 53 Or. 591, 133 Am. St. Rep. 850, 99 Pac. 887, 101 Pac. 671; Laughlin v. Peebles, 1 Penr. & W. 114; Lyons v. Bain, 1 Wash. Terr. 482; Webster-Glover Lumber & Mfg. Co. v. St. Croix County, 71 Wis. 317, 36 N. W. 864; McKinnon v. Wolfenden, 78 Wis. 237, 47 N. W. 436; Chase v. Driver, 34 C. C. A. 668, 92 Fed. 780; Hill v. Phelps, 41 C. C. A. 569, 101 Fed. 650.

There is no doubt, said the court in Walnut Irrig. Dist. v. Burke (Cal.) 110 Pac. 517, that the general rule is that, if a party to a judgment accepts payment or satisfaction of a part thereof which is favorable to him, and that part is of such a character that the part adverse to him cannot be reversed without affecting the part which is in his favor, and requiring the reversal of that part also, he is estopped from prosecuting an appeal from those parts which are against him.

It is a rule often announced. King v. Campbell, 107 Mo. App. 496, 81 S. W. 635.

It is a settled rule of practice, according to the court in Grunberg v. Blumenahl, 66 How. Pr. 62.

It is unquestionably the general rule, said the court in Re Water Comrs. 36 Hun, 534.

The rule is well settled, said the court in Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468.

It is a correct rule of law, and well settled by the authorities. Mississippi & M. R. Co. 29 L.R.A. (N.S.).

The action of the purchaser at a tax sale after he has procured his deed, in voluntarily accepting money tendered as and for a redemption of the property, amounts in law to a redemption, and estops him from further claiming under his tax purchase and deed.

27 Am. & Eng. Enc. Law, 2d ed. p. 855; 2 Cooley, Taxn. 3d ed. 1050; 2 Blackwell, Tax Titles, §§ 715, 716; Jackson v. Neal, 136 Ind. 173, 35 N. E. 1021; Steiner v. Coxe, 4 Pa. 26; Coxe v. Wolcott, 27 Pa. 154; Thweatt v. Black, 30 Ark. 732.

Robinson, J., delivered the opinion of the court:

Mullen purchased real estate at a tax sale. The sale was made for a delinquency

v. Byington, 14 Iowa, 572; Baltimore, O. & C. R. Co. v. Johnson, 84 Ind. 420.

It is a rule well established, and upon the wisest and soundest principles of justice, said the court in Glackin v. Zeller, 52 Barb. 147.

The rule is well established in this jurisdiction, said the court in McKee v. Goodrich, 84 Neb. 479, 121 N. W. 577.

Whatever may be the law elsewhere, it seems to be well settled in this state, said the court in Merchants' Nat. Bank v. Quinton, 9 Kan. App. 882, 57 Pac. 261.

The rule is well settled in this state, and elsewhere, said the court in Merriam v. Victory Min. Co. 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

No rule is better settled, declared the court in Albright v. Oyster, 9 C. C. A. 173, 19 U. S. App. 651, 60 Fed. 644.

It is an established principle of law. McGrew v. Grayston, 144 Ind. 165, 41 N. E. 1027.

The principle is well settled. Storke v. Storke, 132 Cal. 349, 64 Pac. 578.

It is the settled doctrine of this court, said Walker, Ch. J., in delivering the opinion of the court in Ruckman v. Alwood, 44 Ill. 183.

And the passage of the opinion containing such statement was quoted with approval in Trapp v. Off, 194 Ill. 287, 62 N. E. 615.

"The doctrine has been frequently decided by the courts." Shreck v. Gilbert, 52 Neb. 813, 73 N. W. 276.

The doctrine has been asserted too frequently by the courts generally, according to the court in Harte v. Castetter, 38 Neb. 571; 57 N. W. 381, to be longer questioned.

The cases seem uniformly so to hold, said the court in Taussig v. Hart, 1 Jones & S. 157.

It has been so often decided by the supreme court and by this court, declared the court in Cronkhite v. Evans-Snider-Buel Co. 6 Kan. App. 173, 51 Pac. 295, that it can be assumed as the settled law on that question.

It seemed to the court, in Bechtel v. Evans, 10 Idaho, 147, 77 Pac. 212, that, as a

upon an assessment, in the name of the Little Kanawha Lumber Company, of a lot on Depot street, in the city of Parkersburg. The lot was not redeemed from this sale. After the expiration of the statutory period for redemption, Mullen received a deed for the lot from the county clerk. McKain, who had purchased, through McGraw, the title of the Little Kanawha Lumber Company to the lot in question, sought by suit in chancery to set aside Mullen's tax deed for irregularities alleged. He had tendered to Mullen a proper amount for redemption before the institution of his suit. The tender was refused. In his bill he kept this tender good, brought the money into court, and it was deposited with the clerk. This suit resulted in a decree annulling the tax deed,

and directing the clerk to pay Mullen the amount necessary to reimburse him in the premises. Mullen accepted that amount pursuant to the terms of the decree. He receipted to the clerk therefor. More than one year afterwards he applied for an appeal from the decree. The appeal was allowed him. The appellee, McKain, moved to dismiss the appeal upon the ground that by the acceptance of the taxes, interest, and charges, pursuant to the terms of the decree, Mullen acquiesced in the decree setting aside his tax deed, recognized the validity of that decree, and thereby waived his right to appeal from it. After this motion was made, Mullen sought to return the money to the clerk from whom he had accepted it. The clerk would not take it back. If

general proposition of law, a successful party should not be allowed to gather in and enjoy the fruits of his judgment, and thereafter prosecute an appeal and complain of error committed against him.

It would be manifestly unjust to permit a party who has accepted the fruits of a decree, by taking all the money the decree gives him, to prosecute an appeal. *Harte v. Castetter*, 38 Neb. 571, 57 N. W. 381.

A court cannot tolerate the pretensions of a litigant to reap the benefits of a judgment in its favorable features, and to ask in the same breath the reversal of such judgment in other respects in which it is unfavorable to him. *Stimson v. O'Neal*, 32 La. Ann. 947.

The rule which forbids a person who takes the benefit of a decree or judgment from questioning the rest of it rests upon the principle of estoppel. *Garner v. Garner*, 38 Ind. 139.

In *Holt v. Rees*, 46 Ill. 181, the appellant questioned the binding authority of the decisions in *Thomas v. Negus*, 7 Ill. 700, and *Morgan v. Ladd*, 7 Ill. 415, because they were made by a divided court, but the court answered: "We fully concur in the opinion of the majority."

b. The rule embodied in statutes.

1. The Indiana statute.

The general rule, which forbids one who accepts a benefit under a judicial decree to appeal from it, has, in the state of Indiana, been embodied in a statute providing that the party obtaining a judgment shall not take an appeal after receiving any money paid or collected thereon (2 Rev. Stat. 1876, p. 238, § 550; Rev. Stat. 1882, § 632; and Rev. Stat. 1894, § 644). *Sonntag v. Klee*, 148 Ind. 536, 47 N. E. 962.

Under this statute even a defeated party loses his right to appeal by paying the judgment against him. *Patterson v. Rowley*, 65 Ind. 108; *Clark v. Wright*, 67 Ind. 224; *State ex rel. Carson v. Hebel*, 70 Ind. 314.

It is settled, according to the court in *Princeton Coal & Min. Co. v. Gilmore*, 170 29 L.R.A. (N.S.)

Ind. 366, 83 N. E. 500, that when it is shown that a litigation or controversy has been ended or settled, or in some manner disposed of so far as the parties are concerned or has ceased to be between parties having adverse interests, an appeal will be dismissed as presenting only a moot question.

The court, in *Clark v. Wright*, 67 Ind. 224, after quoting the statute, said, in answer to the objection that the statute did not apply to an appeal taken before the collection of the judgment, we are not inclined to give this provision such a liberal interpretation as would allow an appeal to stand if taken before receiving any money paid or collected thereon, where money has been thus received after taking the appeal. We think the evident purpose of the provision was to prevent a party obtaining judgment from taking, prosecuting, or maintaining an appeal after thus receiving money paid or collected thereon. By taking such money, he ratifies the judgment as rendered, and ought not to have the benefit of the judgment and at the same time a right to prosecute an appeal therefrom.

The courts of last resort in this state, declared the court in *Martin v. Bott*, 17 Ind. App. 444, 46 N. E. 151, have had occasion many times to construe the Indiana statute providing that the party obtaining judgment shall not take an appeal after receiving any money paid or collected thereon, and it has been invariably held that the statute means exactly what it says, and has been universally held that a judgment creditor having received any part of a judgment is estopped from appealing therefrom.

Under this statute, no appeal will lie from a judgment that has been fully satisfied by the voluntary action of the successful party. *Monnett v. Hemphill*, 110 Ind. 299, 11 N. E. 230.

Neither can an appeal be prosecuted from a judgment upon which the plaintiff's attorney has received a payment. *Seigel Metzger*, 1 Ind. App. 367, 27 N. E. 647.

The cases go to the effect that where damages are assessed in a party's favor by competent tribunal, the acceptance of the damages so assessed precludes him from

then replied to the motion to dismiss, bringing the money into this court. He insists that he has a right to make restitution of the money he accepted, and that his right of appeal is not affected in the premises.

The motion to dismiss the appeal is, of course, first in order. If that motion is well taken, we have nothing to do with the merits of the errors assigned and submitted for our consideration.

Did Mullen lose his right to appeal? Clearly so, by reason and authority. The money he accepted represented what he had paid for the title declared void. It was tendered him by the decree as essential to the action of the court in setting aside the tax deed. Its tender to him was a substantial portion of the decree made upon the equi-

ties arising between the parties. That portion of the decree was inseparably connected with the order annulling the tax title. And so inseparably was it connected therewith that it could not be recognized by Mullen without his recognizing the decree annulling his tax deed. As the decree stood, it gave him benefit. True, it gave him not what he had sought in the litigation, but it gave him the fruits of the controversy that the court, in equity and law, deemed to be his. He voluntarily accepted these fruits, yet he seeks by appeal to destroy the rights under the decree belonging to the other party. He cannot have the one and deny the other. The acceptance of the taxes tendered and deposited was a recognition of McKain's title, and it is inconsistent with

taking further proceedings for the recovery of further damages. *Baltimore, O. & C. R. Co. v. Johnson*, 84 Ind. 420.

When an appellee has paid, and the appellant has accepted, payment of a judgment from which an appeal has been taken, there is nothing more in controversy, and the court will not entertain or permit the prosecution of the appeal. *State ex rel. Neal v. Kamp*, 111 Ind. 56, 11 N. E. 960.

The rule and the statute embodying it were applied in *Manlove v. State*, 153 Ind. 80, 53 N. E. 385, to prevent an appeal by one who had been convicted of crime, from the judgment of conviction, and who had been pardoned by the governor pending such appeal.

The statute was held, in *State ex rel. Carson v. Hebel*, 70 Ind. 314, to require the dismissal of an appeal by a county from a judgment in a suit upon the official bond of the county treasurer, esteemed to be too small, which had been paid by the defendants to the new treasurer, and acquitted by the county auditor without the explicit authority, sanction, or approval of the board of county commissioners.

The voluntary acceptance of damages assessed and awarded to a landowner in a proceeding by another to erect a dam in a water course, with the knowledge of all the facts, precludes him from afterwards controverting the rights of his adversary as established by such judgment. *Test v. Larsh*, 76 Ind. 452.

When a person voluntarily, and with full knowledge of the facts, accepts damages awarded him by a judgment establishing the right of his adversary to build a dam in a water course, he is bound by such judgment, and cannot thereafter question it, although the judgment may have been erroneous or even void. *Ibid.*

The statute has been applied to deprive litigants of the right to take or prosecute appeals after they had accepted and withdrawn from the court sums deposited by their adversaries in conformity with the judgments they sought to review. *Patterson v. Rowley*, 65 Ind. 108; *McCracken v. Cabel*, 120 Ind. 266, 22 N. E. 136; *Newman* 23 L.R.A. (N.S.)

v. Kiser, 128 Ind. 258, 26 N. E. 1006; *Holman v. Stannard*, 14 Ind. App. 146, 42 N. E. 645.

In the latter case the plea that appellant acted in ignorance of the legal effect of what he did was insufficient to avert the consequences.

The statute has been held absolutely to forbid a party who receives money in satisfaction of a judgment, in whole or in part, from thereafter prosecuting or maintaining an appeal therefrom, even where the acceptance of the payment was done to accommodate the appellee and under a distinct agreement that such acceptance should not affect the right of appeal. *Mutual Ben. L. Ins. Co. v. Simpson*, 163 Ind. 10, 71 N. E. 131.

Again, it has been held that, because of this statute, a mortgagee prosecuting a suit to foreclose a mortgage upon three separate parcels of land, and obtaining therein a decree of foreclosure and sale for two of such parcels, cannot thereafter prosecute an appeal from the decree denying the lien of the mortgage upon the third parcel, where the decree has been enforced by a sale of the other two. *Sterne v. Vert*, 108 Ind. 232, 9 N. E. 127.

It does not alter the case, said the court in *Sterne v. Vert*, supra, that there was no controversy respecting the several tracts upon which the decree was given in appellant's favor. The appeal was, and must of necessity have been, from the whole decree as given. Having availed herself of so much of the decree as was favorable to her, both the statute and the common law affirm that an appeal is thereafter denied to the appellant. Any other rule might result in bringing about embarrassing complications, and manifest injustice to the appellees, in case a reversal of the decree should result. The decree appealed from, and which was in force when the land was sold, having exempted the lands claimed by the appellees from the lien of the mortgage, they may not have deemed it of any importance to them to see that the other two tracts sold for a sum sufficient to pay the appellant's debt, or for the best price which might have

the prosecution of this appeal, which attacks the title. The money was tendered, and later decreed to be paid, for the sole purpose of clearing that title of a claim to it. Therefore the acceptance of the money so tendered and decreed plainly recognized the clearing away of the claim. Mullen had no right to the money, except as compensation for what he had paid out, as a basis of his claim of title to the land. When he accepted the money, he relinquished something for it. That which he relinquished was the claim that he was a valid tax purchaser. Surely he was not entitled to both the lot and this money. He could claim only the one or the other. The claim of the one is totally inconsistent with any claim of the other. His acceptance of

one can mean nothing but his release of the other. Any other view is at variance with reason and right. The clerk could pay him the money only for one purpose,—to reimburse him for giving up his claim of title set aside by the decree. When he accepted the money, he must have recognized this fact. And his acceptance can be taken to mean nothing but that he meant to be so reimbursed. He could not be so reimbursed without giving up his further claim of title upon the tax purchase. He knew that the money proffered him by the decree represented his relinquishment of this claim. When he accepted the money, he also accepted that which it represented. He is bound by his act. It cannot be otherwise in conscience, reason, or law.

been obtained. The appellant may have thereby secured a bargain in the purchase. If she may now hold on to what she has thus acquired, and yet reverse the judgment so far as it is unfavorable to her, the appellees will not be in the same situation they would have occupied in case the reversal had been secured before the sale of the other tracts. When the decree appealed from was rendered, the appellant had the election either to appeal or adopt the decree as it was, and avail herself of its benefits. Having decisively elected to pursue the latter course, she must now be confined exclusively to the course first adopted. Every consideration leads to the conclusion that the appeal cannot now be maintained.

A mortgagee who has obtained a decree foreclosing a mortgage, and accepted and enforced it as to two out of three separate parcels of land, is not only estopped from prosecuting an appeal to obtain a reversal of the judgment as to the third tract, in respect of which the decree was adverse, but is also barred from any further proceeding to obtain a new trial, under the statute provided therefor in such cases and for the same reasons. *Sterne v. Vert*, 111 Ind. 408, 12 N. E. 719, reaffirming and following, 108 Ind. 232, 9 N. E. 127.

The language of the court in *Sterne v. Vert*, supra, above given, was quoted approvingly in *McGrew v. Grayston*, 144 Ind. 165, 41 N. E. 1027, in which it was held that, by reason of the statute, after a party to a partition suit has sold the premises allotted to him by the judgment in partition, he is estopped from appealing from the judgment in partition.

The court again quoted a considerable portion of this language, and approved it, in *Sonntag v. Klee*, 148 Ind. 536, 47 N. E. 992, and there decided upon the same grounds that the acceptance in an action to recover possession of chattels of a part of the property claimed, under a judgment awarding that part and refusing to award the rest, precludes the prosecution of an appeal from the remainder of the judgment.

Under the statute a member of a partnership who accepts the share allotted to him 29 L.R.A. (N.S.)

by a decree dissolving the partnership and distributing its effects thereby waives his right to appeal from such decree. *William v. Richards*, 152 Ind. 528, 53 N. E. 765.

And the same consequence is entailed when in such an action, and after the rendition of such a decree, the aforesaid partners consent that one of them shall receive for a certain length of time the rents of certain real property alleged to belong to the firm, and surrender all further claim to such rents. *Ewing v. Ewing*, 161 Ind. 484, 69 N. E. 156.

The statute was invoked and applied in *Thompson v. Midland Portland Cement Co.* 37 Ind. App. 459, 77 N. E. 299, to dismiss an appeal from a judgment dissolving a corporation,—a suit in which the tangible property sold for enough to pay the corporate debts, and a receiver was appointed to the intangible assets, who, after the appeal was taken, paid certain money to the appellant's attorney on account of his services in prosecuting the case, at the request of such attorney.

In *Martin v. Bott*, 17 Ind. App. 444, 4 N. E. 151, the court held that a ward who had brought suit against her guardian, and refused a sum tendered by him in settlement, which tender had been made good by bringing the amount of it into court and depositing it with the clerk to abide the event of the suit, was concluded, by accepting the tender and withdrawing the money, from appealing from the decree in the action, by virtue of the Indiana statute; but the force of this decision was somewhat weakened by the court's adding to its opinion that, while it was unnecessary, it deemed it highly proper to say that it had examined the record with much care, and was of the opinion that the court below had arrived at a correct and equitable conclusion, and that the appeal was wholly without merit.

Merely taking a judgment for money in accordance with an offer made in the complaint and by consent of the plaintiff is not an election on the part of a defendant to pursue a course inconsistent with a prosecution of an appeal from the real matters in controversy. But if, after taking such jud-

"It is a general rule that a party who accepts the benefit of a judgment waives a right to prosecute an appeal from it." Elliott, App. Proc. § 150. This principle has been almost universally approved. 2 Cyc. Law & Proc. p. 651; 2 Enc. Pl. & Pr. p. 174; Paine v. Woolley, 80 Ky. 568; Dunham v. Randall, & C. Co. 11 Tex. Civ. App. 265, 32 S. W. 720; Tyler v. Shea, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468. Extensive notes of cases touching the subject are found in 13 Am. Dec. 546, and in 45 Am. St. Rep. 271. The rule does not apply "to cases where the appellant is shown to be so absolutely entitled to the sum collected upon the judgment that the reversal of it will not affect his right to it." 2 Cyc. Law & Proc. p. 653; Embry v. Pal-

mer, 107 U. S. 8, 27 L. ed. 348, 2 Sup. Ct. Rep. 25; *Reynes v. Dumont*, 130 U. S. 394, 32 L. ed. 934, 9 Sup. Ct. Rep. 486. The case before us is plainly without the scope of this exception. Mullen's act in accepting the money decreed was wholly inconsistent with his appeal. He was not so absolutely entitled to the sum that a reversal would not affect his rights to it. A reversal such as he seeks would declare that he had no right whatever to the money which he received under the decree. "He stands thus in the attitude of holding the fruit of the judgment to which he may not be entitled if his appeal succeeds, and yet persisting in his appeal. The trouble is that he cannot gain the right to recover more without incurring the hazard of recovering less." Al-

ment, the defendant should proceed to enforce it by execution, an entirely different question would arise for decision. *Sills v. Lawson*, 133 Ind. 137, 32 N. E. 875.

2. The Louisiana statute.

In the state of Louisiana there is a statute (Code Prac. § 567) which deprives a party who voluntarily satisfies a judgment against him of his right to appeal from such judgment. In virtue of this statute the right of appeal is lost by the voluntary satisfaction of the judgment or decree. *Lanoue v. Bessy*, 5 La. Ann. 233; *Fluhart v. Golding*, 7 La. Ann. 233; *Priestly v. Shaughnessy*, 10 La. Ann. 455; *Sims v. Lawes*, 22 La. Ann. 105.

This is so even when the satisfaction is partial only, if the judgment is an entirety. *DeEgana's Succession*, 18 La. Ann. 59.

It cannot be controverted, declared the court in *DeEgana's Succession*, supra, that under the laws and jurisprudence of this state, the party who voluntarily executes, either partially or in toto, a judgment rendered for or against him, or who voluntarily acquiesces in or ratifies, either partially or in toto, the execution of that judgment, is not permitted to appeal from it.

The voluntary execution in part of a judgment appealed from is as efficient to defeat the appeal as a full and complete acquiescence in such judgment would have been. *Stimson v. O'Neal*, 32 La. Ann. 947.

To receive the amount of a judgment, in whole or in part, is, in its natural significance, as well as under the Louisiana jurisprudence, an acquiescence in the judgment. And to receive a part of a judgment is as significant of an acquiescence of the judgment as would be the reception of the whole. *Flowers v. Hughes*, 46 La. Ann. 436, 15 So. 14.

The principle which debars from the right of prosecuting an appeal a party who voluntarily executes even partially a judgment against him is incorporated, according to the court in *Stimson v. O'Neal*, supra, in the Louisiana Code of Practice, and has

received the sanction of the Louisiana courts in numerous decisions.

A party who has obtained a judgment, and has voluntarily carried it into execution, has acquiesced therein, and cannot appeal from such judgment. *State v. Parish Ct. Judge*, 4 Rob. (La.) 85.

An appellant from a judgment in his favor for a less amount than he claimed, who, after taking his appeal, causes a *fi. fa.* to be issued upon the judgment, will be considered voluntarily to have executed such judgment, and to have abandoned his appeal. *Campbell v. Orillion*, 3 La. Ann. 115.

A party in whose favor a judgment appealed from was rendered, who partially executes the same by compulsory legal process, must be considered as having acquiesced in such judgment, and cannot afterwards, by appeal or answer to his adversary's appeal, or otherwise, ask that the judgment be amended. *Wiemann's Succession*, 112 La. 293, 36 So. 354.

One prosecuted for the violation of a municipal ordinance, who, when arraigned, pleads guilty, and voluntarily pays the fine imposed upon him by the judgment, is estopped to appeal. *State ex rel. Lamarque v. Burthe*, 39 La. Ann. 328, 1 So. 652.

A mortgagor who voluntarily acquiesces in a judgment against him directing the sale of the mortgaged property, by bidding in such property at the sale, and paying the purchase price partly in cash, is estopped to take an appeal from such judgment. *Sims v. Lawes*, supra.

A defendant in partition, who accepts voluntarily a portion of the sum decreed to him by the judgment, thereby waives his right to appeal from such judgment, notwithstanding his attempt in receiving the sum accepted expressly to reserve such right to appeal. *Flowers v. Hughes*, supra.

The right of a defeated party to appeal from a judgment against him or prejudicial to him is a constitutional one in Louisiana, and exists in all cases except where he has confessed judgment or has acquiesced in it by voluntarily executing it. *Lochbaum v. Southwestern Box & Lumber Mfg. Co.* 121 La. 176, 46 So. 201.

exander v. Alexander, 104 N. Y. 643, 10 N. E. 37. A party cannot avail himself of that part of a decree which is favorable to him, and accept its benefit, while prosecuting an appeal to reverse such portion of the same decree as militates against him, when the acceptance of the benefit from the one part is inconsistent with the appeal from the other. *Moore v. Williams*, 29 Ill. App. 597; *Albright v. Oyster*, 9 C. C. A. 173, 19 U. S. App. 651, 60 Fed. 644; *Chase v. Driver*, 34 C. C. A. 668, 92 Fed. 780; *Webster-Glover Lumber & Mfg. Co. v. St. Croix County*, 71 Wis. 317, 36 N. W. 864. "The defendant could not proceed to enforce such portions as were in his favor, and appeal from those which were against him. The right to proceed on the judgment and enjoy its

fruits, and the right of appeal, were not concurrent; on the contrary, were totally inconsistent. An election to take one of these courses was therefore a renunciation of the other." *Bennett v. Van Syckel*, 18 N. Y. 481. So connected was the money with the order sought to be reversed that Mullen could not convert it to his use without acquiescing in the decree against him. "If a party to an action acquiesces in a judgment or order against him, he thereby waives his right to have such judgment or order reviewed by an appellate court." 2 Cyc. Law & Proc. p. 644. Nothing can be implied from Mullen's voluntary act in accepting, without reservation, what the decree gave him, but that he recognized the validity of the decree against him. "Any

An act should be unequivocal, to authorize a presumption of the abandonment of so important a right as the right of appeal. *Leggett v. Peet*, 1 La. 288.

An alleged estoppel which does not amount to a voluntary execution of the judgment is insufficient to defeat the right of appeal from such a judgment. *Lochbaum v. Southwestern Box & Lumber Mfg. Co. supra*.

When it is alleged that an appellant from a judgment has accepted and acquiesced in it partly executing it voluntarily, the only question with which the court has to deal is the interpretation of his conduct which is asserted to amount to such acquiescence, and if it is found that his conduct does constitute acceptance and acquiescence, the appeal must be dismissed. *Stinson v. O'Neal, supra*.

A creditor obtaining judgment against his debtor in an action commenced by attachment, and in which the writ was discharged by the filing of a bond, who, after the return of a *fi. fa.* unsatisfied, takes a rule against the surety to show cause why he should not be condemned to pay the debt, and appeals from a judgment dismissing such rule, does not waive or abandon his appeal by again issuing process to collect the judgment from the principal debtor. *Clements v. Cassily*, 3 La. Ann. 358.

The application of a husband for letters of administration upon the estate of a decedent does not preclude his wife from prosecuting her appeal, as executrix and legatee of the deceased, from a judgment annulling his last will and testament. *Theriot's Succession*, 114 La. 611, 38 So. 471.

A defendant against whom a judgment is recovered for a specific sum of money and interest, subject to an offset of a lesser sum, and who appeals from such judgment, is not precluded from prosecuting such appeal by computing the amount of the appeal bond necessary to obtain a stay of execution upon the basis of the allowance of the offset. *Ackermann v. Larner*, 119 La. 744, 44 So. 452.

And the mere service by the defeated party of a copy of a judgment upon his

adversary is not such an execution of it as to preclude the taking and prosecuting an appeal from such judgment. *Leggett v. Peet*, 1 La. 288.

The receipt by an appellant of a sum tendered to him by his adversary, equivalent to the amount of the judgment appealed from, expressly subject to the decision of the appellate court upon appeal, and to be held intact pending the decision of such appeal, cannot be considered a satisfaction of the judgment or an acquiescence therein, and therefore is not an abandonment of the appeal. *Guenivet v. Perrett*, 18 La. Ann. 363.

An appellant who distinctly expressly reserves his right to prosecute his appeal, in a receipt given by him to the defendant for a voluntary part payment of the claim, is not thereby estopped from prosecuting such appeal. *Staehle v. Leopold*, 107 La. 399, 31 So. 882.

III. The reason of the rule.

No waiver or release of errors operating as a bar to the further prosecution of an appeal or writ of error can be implied except from conduct which is inconsistent with the claim of right to reverse the judgment or decree sought to be reviewed. *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

To make the acceptance of the benefit under an order operate as a waiver of the right of appeal, there must be an inconsistency in retaining such benefit and at the same time appealing from the order. *Re Water Comrs.* 36 Hun, 534; *Ziadi v. Interurban Street R. Co.* 97 App. Div. 137, 89 N. Y. Supp. 606; *Re Raber*, 4 N. Y. S. R. 845; *Souder's Appeal*, 57 Pa. 498.

The right to accept the fruits of a judgment and the right of appeal therefrom are not concurrent. On the contrary, they are totally inconsistent. An election to take one of these courses is therefore a renunciation of the other. *Re Shaver*, 131 Cal. 219, 63 Pac. 340; *San Bernardino County, v. Riverside County*, 135 Cal. 618, 67 Pac. 1047; *Adams v. Carter*, 92 Miss. 579, 47 So.

act on the part of a defendant by which he impliedly recognizes the validity of a judgment against him operates as a waiver of his right to appeal therefrom, or to bring error to reverse it." 2 Cyc. Law & Proc. p. 656. "A person who does some positive act which, according to its natural import, is so inconsistent with the enforcement of a right in his favor as to induce a reasonable belief that such right has been dispensed with, will be deemed to have waived it." 29 Am. & Eng. Enc. Law, 2d ed. p. 1103. It is this principle of acquiescence and waiver which gives existence to the general rule we have quoted. True, the law favors appeal. The act of waiver must be clear and decisive. And it has been authoritatively said that "no waiver or re-

lease of errors operating as a bar to the further prosecution of an appeal or writ of error can be implied except from conduct which is inconsistent with the claim of a right to reverse the judgment or decree which it is sought to bring into review." *Embry v. Palmer*, supra. This court held at this term, in *Shields v. Simonton*, 65 W. Va. 179, 63 S. E. 972, that appellant's act did not amount to a waiver of appeal, because it was not inconsistent under the circumstances presented with a claim of right to reverse the decree. In that case the act itself had in its purview the continuance of the appeal. The force of the act was expressly contingent upon the result of the appeal. In the case now before us it is not so. No other import than that

409, 16 A. & E. Ann. Cas. 76; *Re Black*, 32 Mont. 51, 79 Pac. 554; *Parr v. Webb*, 40 Mont. 346, 106 Pac. 353; *Bennett v. Van Sickle*, 18 N. Y. 481; *Moore v. Floyd*, 4 Or. 260; *Merriam v. Victory Min. Co.* 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997; *Roots v. Boring Junction Lumbering Co.* 50 Or. 298, 92 Pac. 811, 94 Pac. 182; *Webster-Glover Lumber & Mfg. Co. v. St. Croix County*, 71 Wis. 317, 36 N. W. 864.

The rule which precludes a party from taking and prosecuting an appeal from a judgment which he has voluntarily accepted and enforced is founded on the principle that a party will not be allowed in a court of justice to acquire advantages by assuming inconsistent positions. *McGrew v. Grayston*, 144 Ind. 165, 41 N. E. 1027.

One who complains of a judgment must be consistent in his conduct with reference to it. If he recognizes its validity, he will not be heard to say that it is erroneous. *Babbitt v. Corby*, 13 Kan. 612; *Merchants' Nat. Bank v. Quinton*, 9 Kan. App. 882, 57 Pac. 261.

A party who is dissatisfied with a decree in his favor has the option to have it reviewed by proper proceedings, or to enforce it and receive its benefits; but he cannot pursue both courses, since one is inconsistent with the other. *Harte v. Castetter*, 38 Neb. 571, 57 N. W. 381.

If one desires to appeal from an order made in a litigation in which he is a party, he should accept no benefit under it, for he cannot do both. *Cogswell v. Colley*, 22 Wis. 399.

It is inconsistent that a party should proceed on his judgment as good and valid in one court, while he is contending in another tribunal that it is erroneous and ought to be reversed. *Smith v. Jack*, 2 Watts & S. 101.

The right to proceed upon a judgment or decree and invoke the process of the court, and thus acquire or otherwise secure and enjoy the fruits of such judgment or decree, is wholly inconsistent with the right to appeal from it. *Merriam v. Victory Min. Co.* supra.

A party having received money, the re-
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tention of which is inconsistent with the reversal of the judgment or decree by virtue of which he received it, cannot, standing in that condition, prosecute an appeal. *Hoard v. Hoard*, 41 Ala. 590.

We entertain no doubt of the general proposition, said the court in *Atkinson v. Tabor*, 7 Colo. 195, 3 Pac. 64, that it is inconsistent with the principles of justice and the rules of law to permit a party who has voluntarily taken advantage of a judgment afterwards to prosecute proceedings to reverse it.

IV. The rule applied.

a. In litigations relating to land.

1. Title.

A party to an action to try the title to lands, which results in a judgment or decree directing a conveyance to him of a large quantity of such lands, who, pursuant to such decree, accepts a deed from his adversary and puts it upon record, is estopped from appealing from such judgment or decree. *Albright v. Oyster*, 9 C. C. A. 173, 19 U. S. App. 651, 60 Fed. 644.

A defendant in an action relating to land, who claims a title to the premises by virtue of tax deeds, is estopped from appealing from a decree against the validity of his deeds, by the voluntary acceptance of the sum of money and interest decreed to be paid him out of the proceeds of the sale of the property to redeem it from the tax sales. *Babbitt v. Corby*, 13 Kan. 612.

A defendant is not estopped from prosecuting an appeal from a decree in an action to dispel a cloud upon title to real estate, by not objecting to the receipt of money by a codefendant, tendered by the plaintiff in compliance with the terms of the decree appealed from, when such payment and acceptance does not end the controversy between himself and the plaintiff. *Utterback v. Meeker*, 16 Wash. 185, 47 Pac. 428.

2. Ejectment.

A plaintiff in ejectment who takes pos-

of waiver of right to reverse can be implied from Mullen's act in taking that which the decree gave him. It was his privilege to accept what the decree offered in redemption of the lot from his claim thereto. His acceptance of the offer consummated this redemption. This principle of waiver of right to appeal by an act without reservation clearly inconsistent with the right is distinctly acknowledged in the *dictum* of Judge Haymond in *Kable v. Mitchell*, 9 W. Va. 520.

Mullen, when he was awarded his appeal, plainly had no right to it. Does his offer to make restitution avail him? We hold that it does not. Repayment cannot reinstate a right that he did not have. More than a year elapsed between his accept-

ance of the money decreed to him and his taking this appeal. During all that time he was enjoying what the decree had given, — a return of the money he had invested in the claim of tax title. And during all that time by his act he was causing McKain to believe that all litigation affecting his lot by reason of the tax sale was at an end. Acting upon this belief, McKain had a right to treat the property as clear, to make improvements upon it, or to dispose of it without risk of further claim thereto by Mullen or depreciation in value of the lot. Shall we now change the situation that Mullen's own act brought forth? It would not be right to do so. Mullen, having elected to adopt a course of action, must be confined to it, so as not to prejudice McKain.

session of the land in controversy under a judgment in his favor, and appropriates to his use the rents and profits arising therefrom, and exercises all acts of ownership, thereby waives his right to appeal from the judgment, and releases any errors of which he might have complained. *Raborn v. Woods*, 33 Ind. App. 171, 70 N. E. 399.

The election by a successful plaintiff in ejectment to take the value of his land rather than pay for the defendant's improvements upon it, made after the court has denied his motion to quash the order appointing commissioners to determine the value of such improvements, upon the ground that the defeated party is not within the terms of the statute because lacking title derived from the commonwealth, does not preclude such plaintiff from afterwards questioning the correctness of the decision appointing such commissioners, or prevent him from prosecuting an appeal from the order of appointment. *Clay v. Miller*, 4 Bibb, 461.

A plaintiff in ejectment who recovers only a portion of the land claimed waives his right to prosecute a writ of error from such judgment by suing out a *fiat facias*, and collecting the costs from his adversary. *Smith v. Jack*, 2 Watts & S. 101; *Hall v. Lacy*, 37 Pa. 366.

The right of a defendant in ejectment to appeal from the judgment is not impaired by his surrender of the premises. *Bolen v. Cumby*, 53 Ark. 514, 14 S. W. 926.

A defendant in ejectment who accepts a sum adjudged to him as recompense for the loss of possession and his supposed title to the land cannot prosecute an appeal from the judgment. He cannot have the title and possession, and remuneration for their loss. He cannot retain the remuneration awarded him, and appeal from the judgment. *Ibid*.

A defendant in ejectment is estopped from prosecuting a writ of error to review the judgment in favor of his adversary, by making claim to the amount of taxes paid by him while in possession of the land, and receiving and accepting from his suc-

cessful adversary the amount of such claim. *Strong v. Irwin*, 12 Neb. 446, 11 N. W. 877.

A defeated defendant in ejectment who has been allowed by the judgment the amount of taxes paid by him upon the land while in possession, or to obtain title by tax deed, is estopped from prosecuting a writ of error to review the judgment by voluntarily accepting and receipting for the sum awarded him by such judgment. *Gray v. Smith*, 17 Neb. 682, 24 N. W. 340.

A defendant granted permission to remove buildings from land from which he has been ejected by a judgment of the court, who avails himself of that permission and removes the buildings, accepts and acquiesces in the judgment against him awarding the possession of the land to his adversary, and waives his right to appeal. *Harper v. Foster* (Tex. Civ. App.) 40 S. W. 40.

A party cannot avail himself of the benefit of a clause in a judgment giving him possession of land after the lapse of a stated time, and yet by appeal ask for a new trial, the result of which may be a decision that he is not entitled to the possession of the land. *Tyler v. Shea*, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468.

A defendant who has been adjudged to hold a lease for the use of the plaintiff and required to assign it upon being indemnified against its personal covenants and reimbursed by the plaintiff for rent and taxes paid, who enforces the provisions of the judgment in his favor, is estopped from taking and prosecuting an appeal from the rest of the judgment, because all its provisions are connected and interdependent. *Bennett v. Van Syckel*, 18 N. Y. 481.

3. Partition.

A party cannot receive and retain the share awarded to him by a judgment in partition, and appeal from such judgment. *Alexander v. Alexander*, 104 N. Y. 643, 10 N. E. 37.

A plaintiff in error who receives and retains his share of the proceeds of a parti-

He cannot in fairness revoke his acceptance of the money and his positively implied waiver of appeal. "A party waives an error when he goes by and proceeds in the case with other matters, so that it would be unjust or unfair to go back and take advantage of it." Powell, Appellate Proceedings, § 96. We assume that McKain relied upon the waiver, as he had a right to do. After the right of appeal had been lost to Mullen, then McKain had a vested right to his decree, free from review. No further right of appeal from the decree can be conferred. 7 Current Law, 130. "In some decisions it has been intimated that a restitution of the money collected upon a judgment restores the right to appeal or bring error; but in those jurisdictions where the question has been directly passed

upon, it has been held otherwise." 2 Cyc. Law & Proc. p. 654. "The appellant cannot revive his right of appeal, lost by acceptance of payment, by tendering the money received back to the appellee." 2 Enc. Pl. & Pr. p. 177. Many cases that have considered this point so hold. Among them are Paine v. Woolley and Dunham v. Randall & C. Co. supra; Portland Constr. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764; Morgan v. Ladd, 7 Ill. 414. "Payment produces a permanent and irrevocable discharge, after which the judgment cannot be restored by any subsequent agreement, nor kept on foot to cover new and distinct engagements." 2 Freeman, Judgm., § 406.

The motion is sustained. The appeal will be dismissed.

tion sale, being pursuant to the order and decree, waives his right to prosecute the writ. *Tabler v. Wiseman*, 2 Ohio St. 207.

But the defendants in an action for the partition of lands are not estopped from prosecuting an appeal from the judgment, for the purpose of reversing the award of a share in the lands to the plaintiff, by receiving and retaining the shares awarded to themselves. *Mellen v. Mellen*, 137 N. Y. 606, 51 N. Y. S. R. 73, 33 N. E. 545.

When the lands of infants are sold under a decree in partition, and the infants, after coming of age, settle with their guardian and receive their share of the proceeds of the sale, they are estopped from prosecuting a writ of error to reverse the partition decree. *Corwin v. Shoup*, 76 Ill. 246.

The purchaser of land belonging to a life tenant and infant contingent remaindermen, under a decree directing it to be sold for reinvestment of the proceeds in more productive property, who accepts a commissioner's deed, puts it upon record, takes possession of the property, and proceeds to remove the buildings therefrom and dispose of their materials, is estopped from prosecuting an appeal upon the theory that the actual width of the land was somewhat short of what it was represented to be at the time of sale, so as to entitle him to an abatement of the purchase price. *Haggin v. Montague*, 125 Ky. 507, 101 S. W. 893.

4. Specific performance.

The provisions of a judgment in an action for the specific performance of a contract to convey real estate, or in the alternative for damages for the breach thereof, are so connected and interdependent that an appeal from the one part denied, where the other is awarded, cannot be maintained by a party who has elected to accept and enter the judgment in his favor. *Murphy v. Spaulding*, 46 N. Y. 556.

A defendant in an action in equity for the specific performance of a contract of sale and purchase of land, under which the plaintiff is in possession, where there is a

growing crop ready for harvest planted and raised by the plaintiff, is estopped from taking and prosecuting an appeal from a judgment awarding him possession, coupled with the condition that he pay the plaintiff a stated sum of money, by taking possession of the land under the judgment and harvesting the crop and retaining its proceeds. *Easton v. Lockhart* (N. D.) 89 N. W. 75.

5. Reformation of deeds into mortgages.

A grantee in a deed absolute upon its face, which has been decreed to be a mortgage, who enforces a decree of foreclosure and sale by bidding in the mortgaged property for the amount due upon the mortgage, cannot prosecute an appeal from the decree adjudging his deed to be a mortgage and directing a foreclosure and sale. *Reichelt v. Seal*, 70 Iowa, 275, 41 N. W. 16.

A decree adjudging a conveyance which was absolute upon its face to be a mortgage, and directing the sum secured thereby to be paid with interest to the grantee, and upon the payment a reconveyance of the land to be made to the grantor, cannot be reviewed on error after the amount of the mortgage debt has been paid into court and in part withdrawn by the mortgagee or his attorney of record. *Ruckman v. Alwood*, 44 Ill. 183.

A plaintiff in an action seeking to set aside a conveyance of real estate, or in the alternative to declare it a mortgage, who accepts payment of costs awarded by a judgment making the conveyance a mortgage and refusing to set it aside, and who acquiesces in the alternative relief, waives his right to appeal from so much of the judgment as refuses to annul the conveyance. *Harris v. Taylor*, 20 N. Y. Week. Dig. 379.

A plaintiff in an action for an accounting and the cancelation of a deed, in which a judgment is rendered declaring such deed to be a mortgage and ordering it foreclosed and the land covered by it to be sold to

satisfy the sum found due thereon, who, after a sale under the judgment, voluntarily pays and satisfies the mortgage and redeems the land, waives the right to appeal from such judgment. *Signor v. Clark*, 13 N. D. 35, 99 N. W. 68.

6. Mortgages.

A mortgagee in foreclosure who accepts voluntarily a distributive share of a fund in court, under a decree apportioning it to him and others, is estopped from prosecuting proceedings in error to review the judgment and decree. *Smith v. Powell*, 5 Kan. App. 652, 47 Pac. 992.

A mortgagee who proceeds to sell the mortgaged premises under a decree of foreclosure waives his right to appeal from a part of such decree directing the sale to be made subject to a lien adjudged to be prior to that of the mortgage. *Male v. Harlan*, 12 S. D. 627, 82 N. W. 179.

In *Male v. Harlan*, supra, the court, in concluding that an appellant in an action to foreclose a mortgage had waived his right to appeal from a decree directing the sale of the mortgaged premises subject to an encumbrance adjudged to have priority over the mortgage, said: "The right to sell the property in the case at bar was only absolute provided the sale was made subject to the prior lien of respondent. If the judgment is reversed as to respondent, the position of the parties will be . . . very materially changed. Appellants will be holding the title to property presumably purchased at a price less than its value to the extent of respondent's lien. Respondent's lien being adjudged to be subsequent and subject to appellants' lien, his right of redemption will be, or might be, cut off."

In a controversy respecting the priority of certain mortgages and the right to the rents of the mortgaged real estate, the acceptance by one of the litigants of the rents awarded him in the decree precludes him from appealing from the remaining part of the decree awarding priority to his adversary. *Thomas v. Negus*, 7 Ill. 700.

Caton, J., dissented upon the ground that the appellant was entitled in any event to the rents awarded him and therefore had a right to review that part of the decree which gave priority to his adversary's mortgage. The court, however, afterwards in *Morgan v. Ladd*, 7 Ill. 414, expressly cited and proved its decision in the first case.

A right of one party to appeal from a decree of foreclosure and sale in a suit to foreclose a mortgage, in so far as it determines the question of priority between himself and another, is not waived by his having issued an execution and procured a sale of the mortgaged premises under such decree. *Miller v. Washington Sav. Bank*, 5 Wash. 200, 31 Pac. 712.

A plaintiff in an action to foreclose a mortgage conceded to be a prior lien upon the mortgaged premises does not waive his right to take and prosecute an appeal from 29 L.R.A. (N.S.)

a decree rendered therein directing the sale of a portion of the mortgaged premises separate and apart from the rest, and the application of the proceeds of such sale to the discharge of subsequent mechanics' liens, in preference to the mortgage, by suing out an execution upon the decree, and proceeding to sell the remainder of the mortgaged premises. *Inverarity v. Stowell*, 10 Or. 261.

A mortgagee who causes the mortgaged property to be sold under a decree of foreclosure and sale, and the proceeds to be applied to the satisfaction of the judgment and the mortgage, is precluded thereby from appealing from so much of such judgment as releases and discharges certain of the defendants from personal liability for the mortgage debt. *Guaranty Sav. Bank v. Butler*, 56 Kan. 267, 43 Pac. 229.

A mortgagee does not waive his right to appeal from that part of a decree of foreclosure which fixes the personal liability of the defendants for any deficiency arising from the sale of the mortgaged premises, by availing himself of the right to sell said premises under the foreclosure decree. *Goodlett v. St. Elmo Invest. Co.* 94 Cal. 297, 29 Pac. 505.

The right of a mortgagee in a suit to foreclose the mortgage, to sell the mortgaged premises, is an absolute one, independent of and unrelated to his claim for any deficiency that may arise upon the sale, and therefore his exercise of that right does not impair or affect his right to review the other parts of the judgment. *Ibid.*

When the amount to which a mortgagee is entitled by a decree of foreclosure and sale of the mortgaged premises is to some extent dependent upon credits to be given for rents collected by a trustee of the mortgaged premises, the voluntary action of such mortgagee in causing execution to be issued, and the mortgaged premises to be sold under such decree for an amount which fully satisfies it, is a waiver of the right to take and prosecute an appeal from the judgment of foreclosure and sale. *Anglo-American Land Mortg. & Agency Co. v. Bush*, 84 Iowa, 272, 50 N. W. 1063; *Lombard v. Bush*, 85 Iowa, 718, 50 N. W. 1068.

A mortgagee, by enforcing a decree of foreclosure by a sale of the mortgaged premises, and a waiver of all claims for deficiency, is not precluded from appealing from a judgment upon a counterclaim for money deposited with him by the mortgagor, and alleged to have been misappropriated. *First Nat. Bank v. Wakefield*, 138 Cal. 561, 72 Pac. 151.

When, in an action for an account of the amount due upon a mortgage and for a sale of the mortgaged premises, the only contested question is whether or not such mortgage embraces illegal and usurious interest, the mortgagee is not precluded from taking and prosecuting an appeal from a decree adjudging a certain sum to be illegal and usurious interest, by accepting and receipting for the principal sum and legal interest due on the mortgage, which is his

absolutely in any event. *Beals v. Lewis*, 43 Ohio St. 220, 1 N. E. 641.

A defendant in an action upon a note, and to foreclose a mortgage given to secure the payment of such note, cannot take and prosecute an appeal from a judgment of foreclosure and sale providing, in addition, for a conveyance to him by his adversary of the latter's interest in the property, after voluntarily paying the judgment and accepting the deed. *Wolf v. McMahon*, 26 Kan. 141.

A mortgagee who, after appealing from an order of a court continuing an injunction against the foreclosure and sale of the mortgage, with a proviso that it shall in no wise prevent proceedings to foreclose and sell the mortgaged premises on account of any after-occurring default, proceeds to advertise the mortgaged property for sale on account of a subsequent default in the payment of interest, and to invoke the authority of the order from which he has appealed as warrant for his course, thereby estops himself from further prosecuting his appeal from such order. *Stewart v. McCaddin*, 107 Md. 314, 68 Atl. 571.

7. Mechanics' Liens.

A party who voluntarily receives his proportionate share of the proceeds of property sold on foreclosure of mechanics' liens, and distributed according to the terms of the decree, is precluded from taking and prosecuting an appeal from such judgment. *Prairie Lumber Co. v. Korsmeyer* (Kan.) 43 Pac. 773.

The right to appeal from a decree denying the foreclosure of a mechanics' lien is waived by bringing subsequently an attachment action upon the same claim, under a statute making the right to the attachment conditional upon the fact that the claim is unsecured by any lien or mortgage. *Ehrman v. Astoria R. Co.* 26 Or. 377, 38 Pac. 306.

b. To decrees of distribution.

1. Estates of decedents.

The acceptance of the sum awarded in a decree distributing the estate of a deceased person, in full of the distributive share of the person accepting it, extinguishes and satisfies the decree, and requires the dismissal of an appeal from it. *Re Baby*, 87 Cal. 200, 22 Am. St. Rep. 239, 25 Pac. 405.

An heir or legatee cannot appeal from a decree distributing the estate of a deceased person, entered upon a consent to the settlement and allowance of the executor's account, and which has been fully executed according to its terms, and accepted by the persons entitled to share in the estate. *Re Shaver*, 131 Cal. 219, 63 Pac. 340.

An appeal cannot be maintained from a probate order fixing the balance of assets in the hands of a retiring administrator, and discharging him upon the payment

thereof to his successors, after the successors have received and accepted the amount fixed by said order and the administrator has been discharged accordingly. *RoBards v. Lamb*, 76 Mo. 192.

A person interested in an estate and entitled to a distributive share thereof, who voluntarily accepts and retains a share awarded him under a will by a decree of distribution, is estopped from taking and prosecuting an appeal from such decree, upon the ground that he was entitled to the whole of the estate against such will. *Burton v. Brown*, 22 Gratt. 1.

A legatee in a will does not waive his right to appeal from a judgment and decree distributing the estate, by accepting and giving a receipt in full for the share awarded him in the judgment or decree, when, upon the law and the facts, he was entitled to a larger amount. *Catlin v. Wheeler*, 49 Wis. 507, 5 N. W. 935.

A creditor of the estate of a decedent, who was a party to a suit whereby title to land was adjudged to have been in the decedent at the time of her death, and the land was ordered to be sold to pay debts, is estopped from appealing from the judgment after a sale thereunder has been had and by his consent confirmed, and he has received the sum due him from the estate out of the proceeds. *Parsons v. Rutherford*, 84 Miss. 70, 36 So. 187.

In *Re Black*, 32 Mont. 51, 79 Pac. 554, there was a controversy over an administrator's account, and the parties entitled to distribution of the estate accepted the amounts allowed them, and took appeals for the purpose of obtaining additional amounts which had been disallowed. It was contended that the amounts allowed were due to the distributees in any event, and that their right to appeal from the disallowance of their other claims was within the exception of the general rule. In this, said the court, we do not agree. The appeals were taken generally, both from the judgment and from the order denying a new trial, and the purpose sought is a reversal of the action of the district court as a whole. Where the appeal is general, and a reversal of the judgment as a whole is sought, so that the trial court may hear the case anew, with the probable result that the amount awarded to the appellants may be greater or less under proof of facts and circumstances which may be entirely different, the result of the appeals should put the parties *in statu quo*. In this case objections were made to many items. Some of them were sustained and some overruled, and the action of the court as a whole is complained of. If these appeals should be tried upon their merits, and the judgment reversed, upon another trial in the court below the administrator might be sustained in some of his claims upon adducing other proof, and thus the result would be that the parties would not stand relatively in the same position as when the original judgment was entered. Under such circumstances, we feel constrained to hold that

the appeals fall under the general rule, and that they must therefore be dismissed.

A ward who, after a controversy with his guardian in respect of the account of the latter, in which he claimed certain sums that the guardian had not charged himself with, accepts and receives from the guardian the amount admitted and found to be due by the probate court in proving and settling the account, is precluded from taking and prosecuting an appeal from the decree of settlement. *Re Sachleben*, 106 Mo. App. 307, 80 S. W. 737.

In *Gibson's Appeal*, 108 Pa. 244, a decree of distribution of the estate of a deceased testator who had devised and bequeathed his residuary estate to trustees to pay the net income in equal third parts to his widow, his son, and his daughter during their lives, without disposing of the principal, made after the death of the widow and the son, awarding one half of the personalty to the son's administrator and the daughter each, after the latter's election to terminate the trust, was affirmed on the merits as against the claim of the daughter that she was entitled to the entire *corpus*; but, in declaring the decree right upon the merits, the court went further and held that the daughter had waived her right to appeal by accepting the amount awarded to her by such decree.

2. Estates of debtors.

When, in an action brought by a judgment creditor of an insolvent corporation in behalf of himself and other creditors, against it and its stockholders, to wind up its affairs, judgments are directed against sundry stockholders, after specified amounts and costs are allowed to the attorneys for such stockholders, payable out of the assets of the corporation, the acceptance and retention by an attorney for one of such stockholders of the sum allowed him for costs is an acquiescence in the judgment, and estops such stockholder or his representative from taking and prosecuting an appeal from such judgment. *Carll v. Oakley*, 97 N. Y. 633.

A creditor in a suit to set aside a preferential trust deed, who accepts the share of the proceeds of the trust awarded to him by the judgment, waives his right to appeal from such judgment. *Dunham v. Randall & C. Co.* 11 Tex. Civ. App. 265, 32 S. W. 720.

After a party to a proceeding to liquidate and distribute the estate of an insolvent debtor under a statutory assignment for creditors has perfected, and is engaged in prosecuting, his appeal from orders and decrees made in the course of the proceedings, his acceptance and retention of the distributive share allowed him by a decree of distribution does not constitute a waiver of his appeal, nor operate to estop him from prosecuting it. *Re Day*, 18 Wash. 359, 51 Pac. 474.

The acceptance by a judgment debtor of a part of the proceeds of the sale of his 29 L.R.A. (N.S.)

homestead property upon execution is a waiver of his right to appeal from the judgment subjecting the property to the execution sale. *Turner v. Markham*, 152 Cal. 246, 92 Pac. 485.

In the case of *Turner v. Markham*, supra, the defendant's property which he claimed to be exempt as a homestead was, by a judgment of the court in regular proceedings initiated for the purpose, directed to be sold upon execution, and it realized at the sale about \$20,000. The debtor appealed, but, pending his appeal, accepted from the sheriff \$5,000, to which he was entitled by the judgment as the amount of his homestead exemption. Against a motion to dismiss the appeal, it was argued that the \$5,000 belonged to the judgment debtor in any event,—it was a sum which was unquestionably his, and therefore did not destroy his right to have the judgment subjecting his property to sale on execution reviewed upon appeal. And then again it was contended that the acceptance of the \$5,000 was not voluntary, but was under legal compulsion, because a refusal to accept it, if persisted in for more than six months, pending the determination of the appeal, would have left the money liable to seizure by other creditors. To this argument the court replied as follows: It is true, as appellant says, that the amount of money to which he was entitled was not in dispute, but none the less the very matter in controversy was whether his homestead should take the form of money or of land, and in accepting the money there is an acquiescence upon his part in the judgment which decreed the form which the exemption should take.

The appellant has accepted \$5,000 and has devoted it to his own use. He is a judgment debtor in insolvency. If he succeeded upon his appeal in overthrowing the sale of his homestead, the purchaser at that sale could recover from the judgment creditor the full amount paid. So that, if this appeal should, under these circumstances, be successfully prosecuted, the respondent would become liable for the \$5,000 which appellant has taken to his own use. Here clearly a situation is presented where the appellant, by his election, has changed the position of the respondent to the latter's injury, and the doctrine of estoppel by election clearly applies.

c. In actions to recover possession of personal property.

A plaintiff suing to recover the possession of several slaves, and recovering judgment for one only, which he afterwards enforces as to the particular slave awarded cannot be permitted to prosecute an appeal from the judgment refusing him possession of the remaining slaves, without restoring the one he has recovered by means of the judgment. *Earle v. Reid*, 25 Ala. 463.

The effect of permitting one who sues to recover possession of several chattels to accept a judgment for one of them, and prose-

cute an appeal from the refusal to award him the others, would be to split up a cause and render several judgments in one suit for different parts of the property sought to be recovered. *Ibid.*

If a judgment in an action of detinue to recover several slaves is for one slave when it should have been for several, it is erroneous, and in order that the whole number sued for may be recovered, it must be reversed, that upon another trial the proper judgment may be granted. In such a case a plaintiff cannot affirm the correctness of the judgment by enforcing its satisfaction, and at the same time assign errors for not awarding him enough. *Ibid.*

We have, said the court in *Earle v. Reid*, supra, seen no case, and we apprehend none can be found, where, in a proceeding in a common-law court, a plaintiff in error has had a judgment affirmed for all that he has recovered in the case below, and has procured a reversal of the judgment as to what he failed to recover, with an order remanding that portion of the case for a subsequent trial.

A plaintiff in replevin for the possession of three hogs, who recovers judgment for two of the animals claimed and costs, and against whom judgment for the remaining animal and his adversary's costs is rendered, and who enforces by execution and collects his own costs, is estopped from thereafter prosecuting error from so much of the judgment as awarded the other animal and costs to his adversary. *McKee v. Goodrich*, 84 Neb. 479, 121 N. W. 577.

When, in an action to recover possession of a promissory note with damages for detaining it, the plaintiff recovers both the note and the damages, the omission of the defendant to complain of so much of the judgment as awarded possession of the note to the plaintiff, and his acquiescence in that part of the judgment, does not estop him from taking and prosecuting an appeal from the portion of the judgment which awarded damages for the detention. *Liles v. New Orleans Canal v. Bkg. Co.* 6 Rob. (La.) 273.

A defendant in replevin brought to recover the possession of several chattels does not waive his right to appeal from a judgment awarding some of the chattels to his adversary, by accepting the others that were awarded to him, when they are voluntarily tendered by his opponent. *Jaynes v. Jaynes*, 8 N. Y. Civ. Proc. Rep. 94.

From my examination of the authorities, said *Signor, J.*, in *Jaynes v. Jaynes*, supra, I think it will be found that, in every case where an appellant has been held to have estopped himself from prosecuting an appeal, by availing himself of the fruits of the judgment, either the provisions were so dependent on each other that availing himself of any part was entirely inconsistent with his appeal, or he has taken active steps to enforce a judgment which he sought wholly to reverse; and that no case of a voluntary payment or voluntary delivery of property, without any steps being

taken by the appellant to enforce the judgment, has been held an estoppel, especially where not inconsistent with what the appellant sought to accomplish by appeal.

d. In divorce suits.

The marriage of one against whom a decree of divorce has been granted bars him from prosecuting an appeal from such decree. *Garner v. Garner*, 38 Ind. 139; *Rariden v. Rariden*, 33 Ind. App. 284, 104 Am. St. Rep. 252, 70 N. E. 398.

It seems to be the law, said the court in *Garner v. Garner*, supra, that one cannot be relieved from a judgment of divorce after using the privileges of the judgment.

A party to a decree of divorce who not only fails to prosecute a writ of error, but receives, enjoys, and retains property awarded to her by the decree, and uses the privilege allowed by it to marry again, cannot, in a new and different suit, complain of and avoid the burdens imposed by such decree, if any exist. *Bourne v. Simpson*, 9 B. Mon. 454.

A defendant in an action for divorce, who has been awarded a specific sum of money for alimony, counsel fees, and costs, by a judgment dissolving the bonds of matrimony between the parties, waives her right to appeal from the judgment by accepting the sum awarded. *Storke v. Storke*, 132 Cal. 349, 64 Pac. 578.

The acceptance by a wife in a suit for alimony against her husband, of a sum awarded specifically for the support and maintenance of a child of the marriage, does not preclude her from appealing from the order refusing an allowance of alimony to herself, nor does it justify a dismissal of her appeal. *Coley v. Coley*, 128 Ga. 654, 58 S. E. 205.

A defendant in a divorce suit who accepts costs and alimony directed by the court in the final order for judgment, to be paid by her adversary, is precluded from taking and prosecuting an appeal from the decree of divorce. *Williams v. Williams*, 6 N. D. 269, 69 N. W. 47.

An appellant in an action brought to obtain a divorce and to cancel a deed does not waive a right to prosecute an appeal or writ of error from a judgment refusing to annul the deed, by accepting and enforcing such judgment with respect of the divorce and allowance of alimony. *Woeltz v. Woeltz*, 93 Tex. 548, 57 S. W. 35.

A party against whom a divorce has been granted is not estopped from taking and prosecuting an appeal from an order denying a motion to vacate the judgment of divorce on the ground that it was procured by fraud, by having accepted the benefits of such judgment prior to making the motion to vacate it. *Wiemer v. Wiemer* (N. D.) 126 N. W. 1009.

e. To recoveries of money.

1. Collections.

(a) In general.

One who has recovered a judgment and

collected it will not be permitted to reverse it on error. *Watkins v. Martin*, 24 Ark. 14, 81 Am. Dec. 59.

A plaintiff who collects and satisfies a judgment in his favor cannot prosecute an appeal from an order denying his motion for a new trial. *People ex rel. Dunn v. Burns*, 78 Cal. 645, 21 Pac. 540.

It is manifestly unjust to permit a partly successful litigant to take all the money the decree gives him, and then speculate upon the possibilities of getting more by means of a writ of error. *Holt v. Rees*, 46 Ill. 181.

An appellant who elects to collect his judgment ratifies it, and is estopped from prosecuting an appeal, as being inconsistent with his conduct in collecting the judgment as a valid one. *Paine v. Woolley*, 80 Ky. 568. The counsel for appellants have cited a number of authorities, said the court in that case, which it is contended establish a different rule; but after a patient and thorough examination of each case, we are unable to find that any of them go further than to hold that neither a voluntary payment by the defendant of the judgment, nor a partial satisfaction thereof under coercion, will constitute a waiver of the appeal or a release of errors; but the weight of authority is to the effect that an acceptance of full satisfaction of the judgment annihilates the right further to prosecute the appeal, although there are cases holding the contrary view.

The reasons for the general rule were tersely stated by the court in *Paine v. Woolley*, supra, as follows: The judgment must be either legal or erroneous. If legal, no appeal should have been prosecuted from it; if illegal, its collection ought not to have been enforced. So the appellants are in this dilemma: they have wronged the appellees either by coercing the satisfaction of an unlawful judgment, or by appealing from the valid judgment. Therefore, if the collection of the judgment be right, the appeal must be wrong, and if the appeal is well taken, the judgment ought not to have been collected.

It is generally agreed that whoso, by process or other compulsion, coerces payment of or enforces according to its terms a judgment or decree which has been rendered in his favor, thereby waives or abandons his right to take or maintain appeal or error to review it. *Owens v. Read Phosphate Co.* 115 Ga. 768, 42 S. E. 62; *Reichelt v. Seal*, 76 Iowa, 275, 41 N. W. 16; *Anglo-American Land, Mortg. & Agency Co. v. Bush*, 84 Iowa, 272, 50 N. W. 1063; *Lombard v. Bush*, 85 Iowa, 718, 50 N. W. 1068; *Paine v. Woolley*, supra; *Com. v. South*, 80 Ky. 582; *Meek v. Lacy*, 6 Ky. L. Rep. 510; *Noe v. Litsey*, 8 Ky. L. Rep. 610; *Cassell v. Fagin*, 11 Mo. 207, 47 Am. Dec. 151; *Waddingham v. Waddingham*, 27 Mo. App. 596; *McKee v. Goodrich*, 84 Neb. 479, 121 N. W. 577; *Bennett v. Van Syckel*, 18 N. Y. 481; *Knapp v. Brown*, 45 N. Y. 207, 11 Abb. Pr. N. S. 118; *Moore v. Floyd*, 4 Or. 260; *Merriam v. Victory Min. Co.*, 29 L.R.A. (N.S.)

37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pa. 997; *Matlow v. Cox*, 25 Tex. 578; *Fly Bailey*, 36 Tex. 119.

If a litigant would reverse a judgment he must abstain from enforcing those parts of it that are in his favor, and which are so connected with or dependent upon the parts that he assails that they ought all stand or fall together. *Cornell v. Donovan*, 14 Daly, 292, 12 N. Y. S. R. 117.

The enforcement of a judgment by execution or otherwise is a ratification of an acquiescence in it, and is an abandonment by the party in whose favor it was rendered of the right to appeal from it. *Fli v. Keefe*, 37 N. S. 67.

If a judgment is rendered in favor of a plaintiff which he regards as too small, may except and have the question tested or may suppress his dissatisfaction and collect the judgment; but he cannot do both. *Coley v. Coley*, 128 Ga. 654, 58 E. 205.

If a successful party, after collecting judgment, seeks to gain more by the production of an appeal, and thereby incurs hazard of eventually recovering less, appeal should be dismissed. *Bechtel v. Ans*, 10 Idaho, 147, 77 Pac. 212.

A plaintiff who causes a general execution to issue upon a judgment which has recovered, and institutes proceedings in garnishment to collect it, thereby waives his right to prosecute a writ of error previously taken to review such judgment. *Merchants' Nat. Bank v. Quinton*, 11 App. 882, 57 Pac. 261.

But the mere issue of an execution upon a judgment after a plaintiff has paid his appeal therefrom, when the execution has been returned unsatisfied, and remains wholly uncollected, does not amount to a waiver of the right of the plaintiff to prosecute an appeal from the judgment. *Nish v. Peck*, 53 Iowa, 157, 1 N. W. rehearing denied in 53 Iowa, 163, 4 898.

We may conclude with perfect confidence said the court in *Paine v. Woolley*, supra, after citing a goodly number of cases decided in other states, that the general principle is that a party who has recovered judgment on a claim which cannot be set up and made the basis of several causes of action, and afterwards coerced full satisfaction by writ of execution or authority of the court, cannot maintain an appeal from the judgment against the objecting judgment debtor. The doctrine is supported by the authorities cited and a list of cases, from which we deem it necessary to make quotations.

The identical question raised on this appeal, said the court in *Com. v. South*, supra, was decided by this court at the present term in the case of *Paine v. Woolley*, supra. It is there settled that a party who obtains the benefit of a judgment in a cause, by coercing payment from the debtor, or is afterwards precluded from prosecuting an appeal in this court for the purpose of reversing it.

plaintiff in an action to recover damages for personal injuries caused by the negligence of the defendant, who recovers a judgment and collects it with costs without execution, is precluded thereafter from taking and prosecuting an appeal from such judgment upon the ground that he collected his damages to external injury, and denied him any recovery of damages for consequential shock. *Flinn v. supra*.

It has, however, been held in the United States Supreme Court that the partial satisfaction of a judgment, whether obtained by or voluntary payment, is no bar to an appeal of error brought by the party in whose favor the judgment was rendered to the supreme court, where it appears that the levy made or the payment was received for the service of the writ. *United States v. Dashiell*, 3 Wall. 688, 18 L. ed. 511; *Grier, Nelson, and Davis, JJ.*, dissenting.

It has also been held in New York that a plaintiff who recovers a judgment for a sum less than that demanded by his complaint is not estopped from thereafter prosecuting an appeal upon the ground that it is insufficient, by issuing an appeal and instituting supplementary proceedings upon such judgment. *New Roch-ester & Fuel Co. v. Van Benschoten*, 100 N. Y. Div. 477, 62 N. Y. Supp. 398.

In Kentucky a statute has been enacted (Code, § 757) providing that when a plaintiff recovers judgment for a part only of his demand, the enforcement of such judgment shall not prevent him from thereafter appealing as to the part not recovered. This statute has the effect to make the dismissal of an appeal by one who has collected the judgment appealed from, as to the part of his complaint in which he did not prevail, all that he was entitled to recover. *Turner v. Johnson*, 18 Ky. L. Rep. 101, 3 S. W. 1027, on rehearing 35 S. W. 1027.

A judgment creditor who has appealed from a judgment in an action brought by him to set aside a conveyance, and to recover certain real estate to the lien of a judgment, does not waive his right to thereafter appeal from such judgment, by executing an execution upon his original judgment and selling the land in controversy, and collecting a part of the sum due. *Fenton v. Morgan*, 16 Wash. 30, 47 P. 14.

A plaintiff in a trustee process who recovers a judgment against the principal defendant, but fails to recover against the trustee, and who, after appealing from the judgment, discharging the trustee, takes out an execution against the principal defendant, does not waive his right further to prosecute an appeal. *Jarvis v. Mitchell*, 99 Mass. 530. *Kasting v. Kasting*, 47 Ill. 438, the plaintiff having recovered a judgment for a sum before a justice of the peace, deeming it insufficient, appealed for a new trial in the circuit court. Having collected the judgment, a motion was made to

dismiss upon the authority of the decisions in *Morgan v. Ladd*, 7 Ill. 414, and *Thomas v. Negus*, 7 Ill. 700, which was denied upon the appellant's paying into court the amount collected. A judgment having been recovered for a very much larger amount, the defendant sought to reverse it in the supreme court upon writ of error. The court distinguished the cases cited, in the following terms: "We have no disposition to question the correctness of these decisions, but this case is not within the principle recognized by them. This circuit court, on an appeal from a justice of the peace, does not sit as a court of errors, but tries the cause *de novo*. It will not be denied that a party has a right to appeal from a judgment of a justice of the peace in his own favor, and, on trial *de novo* in the circuit court, recover a much larger amount, as much larger as the proof will allow, so that the amount is not beyond the jurisdiction of a justice of the peace, and does not exceed the amount indorsed on the summons. This is the theory and the law of such proceedings. Even from a judgment in the circuit court in favor of a plaintiff, he may appeal or bring error to the supreme court. The only embarrassing feature in this case is the fact that the plaintiff received the amount of the judgment, and then appealed. It is very manifest from the affidavit of the plaintiff, that this was done with no expectation that his rights would be compromised thereby; and in ignorance of his rights he innocently supposed the amount of the judgment was for his damages in not getting the corn, and that he was to have the corn as well. It is very evident that the plaintiff did not recover anything like the amount of his demand, and to which there was no defense. His right to take the case by appeal to the circuit court for a new trial, although he did, under the circumstances shown, accept the small amount found by the jury, was not thereby destroyed, and the question whether the plaintiff received the amount of the judgment rendered by the justice as a satisfaction of his demand could not be presented and tried on a motion to dismiss the appeal and suit. If so received, it should have been relied upon as a bar on the trial *de novo* in the circuit court, like payment, accord and satisfaction, or other defense arising after a trial before a justice of the peace. It was for the jury to determine with what intention the plaintiff received the amount; if only as a partial payment, it should have been allowed as a credit *pro tanto*, but if in discharge of the plaintiff's claim, then as a bar to any further recovery.

(b) In Alabama.

In the state of Alabama the general rule is that the collection of a judgment by an appellant precluded the prosecution of his appeal was, in the earlier cases at least, subject to the qualification, unless he shall have refunded or replaced his adversary in his antecedent status.

It has been held frequently in Alabama,

that one in whose favor a judgment or decree has been rendered, and who has collected or enforced it, will not be allowed to prosecute or maintain an appeal to review, revise, or reverse it, until he has first refunded or put his opponent *in statu quo ante*. Hall v. Hrabrowski, 9 Ala. 278; Bradford v. Bush, 10 Ala. 274; Riddle v. Hanna, 25 Ala. 484; Garner v. Prewitt, 32 Ala. 13.

The receipt of money due upon a decree, and the allowance of its satisfaction in consequence of the payment in full before an appeal, is a waiver of all errors, unless the money thus received is returned or tendered to the appellee before the proceeding to assign errors in the appellate court. Murphy v. Murphy, 45 Ala. 123.

The rule holds good in cases where the plaintiff sues out execution and collects only a part of the judgment.

When a plaintiff sues out execution and collects the amount of a judgment or decree in his favor for a part of it, and thus affirms the regularity of such judgment or decree, he will not be allowed to assign error, until the defendant has been placed *in statu quo*. Knox v. Steele, 18 Ala. 815, 54 Am. Dec. 181.

The court in Knox v. Steele, supra, considered the rule settled by the cases in Hall v. Hrabrowski and Bradford v. Bush, supra, that where a plaintiff has sued out an execution and collected all or a portion of the judgment or decree, he will not be heard upon errors assigned by him, until the money collected by him on execution has been refunded.

It is, according to the court in Hall v. Hrabrowski, supra, obviously unjust that a plaintiff should collect the amount of his judgment, which he complains of as erroneous and in which he may, upon another trial, fail entirely to recover anything, and at the same time be permitted to prosecute a writ of error to review such judgment. And, according to the same court in Bradford v. Bush, supra, it is both vexatious and oppressive in a plaintiff to prosecute a writ of error to reverse a judgment, the correctness of which he has impliedly affirmed by coercing payment from the defendant by means of it.

The doctrine that an appeal cannot be prosecuted without restitution does not involve the idea of a waiver or of a denial of the appeal. It says you cannot equitably sustain an appeal unless you make restitution. It does not say you have waived an appeal, or that an appeal is denied. It simply says justice and right require the performance of a precedent condition, and until that condition is complied with, an appeal cannot be prosecuted. Hoard v. Hoard, 41 Ala. 590.

The principle upon which appellate tribunals refuse to entertain appeals unless restitution is made is strictly analogous to the chancery doctrine that he who seeks equity must do equity. Ibid.

It is inequitable for one to reverse a judgment or decree while he retains that which the judgment or decree awarded, and 29 L.R.A. (N.S.)

to which, without such judgment or decree, he was not entitled. Ibid.

The judicial position in Alabama has been heretofore that it is discretionary in a court of errors or appeals to dismiss an appeal or writ of error from a decree or judgment which the litigant seeking to review has enforced or collected. McCreliss v. Hinkle, 17 Ala. 459; Tarleton v. Goldthwaite, 23 Ala. 346, 58 Am. Dec. 296.

The court in Knox v. Steele, supra, while conceding that power to restrain a plaintiff in error from prosecuting a writ to reverse a judgment which he had collected, until he had refunded the money, was discretionary, and would not be exercised in a case where the payment upon the judgment had been voluntary, and was one to which the plaintiff in every possible aspect of the case was lawfully entitled,—held to the general rule which forbids the plaintiff to collect a judgment and at the same time seek to reverse it.

The power of an appellate court to stay or dismiss an appeal from a decree of probate court is discretionary; but it should be exercised only in a case where it is clearly justified. Hoard v. Hoard, supra.

There is no general rule by which to determine whether or not an appeal or writ of error should be stayed or dismissed by the appellate tribunal, but every case must be decided upon the particular circumstances. Ibid.

In the later cases in Alabama, it seems to be held that a plaintiff in error loses his right to review a judgment in his favor in an action at law, by collecting it, without reference to restitution of his adversary to his antecedent status.

It is declared to be well settled in the practice of the Alabama supreme court that, if a judgment be rendered in favor of a party in a lower court, especially in an action at law, and he coerces or receives payment of the amount of such judgment, he will not be permitted to maintain an appeal to set it aside. Shingler v. Martin, 54 Ala. 354.

The appeal of a plaintiff from a judgment which he has enforced in full will be dismissed. Phillips v. Towles, 73 Ala. 406.

Where an ordinary judgment is obtained in a court of law, it was said in Phillips v. Towles, supra, the practice is well settled that if the plaintiff coerces satisfaction of it, he cannot afterwards sue out an appeal.

In general a party who avails himself of a judgment or decree by coercing its payment affirms its correctness, and is denied the right to vex the defendant in execution by requiring him to litigate in the appellate court the matters determined by the judgment. Whetstone v. McQueen, 137 Ala. 301, 34 So. 229.

2. Withdrawing funds in court.

A plaintiff who accepts money deposited in court, for the purpose of satisfying the judgment which he has recovered, is precluded from taking and prosecuting an appeal from such judgment. Brown v. Van-

cleave, 86 Ky. 281, 6 S. W. 25; Harte v. Castetter, 38 Neb. 571, 57 N. W. 381; Graham v. Sapery, 19 Misc. 690, 44 N. Y. Supp. 1109.

This has been held to be so even when the attorney of record receives from the clerk of the court the amount of a judgment rendered in his client's favor, which was paid into court by the opposite party, notwithstanding the money was withdrawn without the knowledge or consent of the client, and applied by the attorney to the payment of his claim for services in the case. Cronk-hite v. Evans-Snider-Buel Co. 6 Kan. App. 173, 51 Pac. 295.

When, in an action against the county to annul certain taxes and restrain their collection, a judgment is rendered holding a portion of the taxes in controversy to be valid, and directing the plaintiff to pay such portion into court, and upon doing so to have a perpetual injunction against the collection of the rest, the payment by the plaintiff into court of the required sum, and the subsequent voluntary withdrawal by the county of the fund in court, operate to estop the county from taking and prosecuting an appeal from the judgment. Webster-Glover Lumber & Mfg. Co. v. St. Croix County, 71 Wis. 317, 36 N. W. 864.

When a judgment is rendered upon a disputed claim for a sum beyond that which the defendant admits to be due, but less than the plaintiff claims, and the amount of the judgment is paid into court, the acceptance and withdrawal of that amount by the plaintiff operate as a satisfaction, and estop the plaintiff from taking or prosecuting an appeal for the purpose of recovering more. Portland Constr. Co. v. O'Neil, 24 Or. 54, 32 Pac. 764.

It has, however, been held in a Pennsylvania case that a party who claims the entire amount of a fund in court for distribution is not estopped from prosecuting an appeal from a decree distributing it and awarding a part of it to another claimant, by withdrawing and retaining the balance, no part of which was claimed by anyone else. Souder's Appeal, 57 Pa. 498.

One who claims a part of a fund in court, and whose application for payment is denied upon the ground that he has no legal or equitable claim thereon, is estopped from prosecuting an appeal from the order disallowing his claim, by accepting an offer of a smaller sum out of such fund made in open court by the opposing claimants, and its payment to and retention by him pursuant to such offer. Talbot v. Mason, 60 C. C. A. 145, 125 Fed. 101.

There is said to be a distinction between money tendered and paid into court to make a tender good and a sum awarded by a decree upon trial. Money paid into court to keep a tender good is brought in voluntarily, and is a deliberate admission that such sum is due to the adverse party. If accepted or taken out of court, the party tendering it cannot recover it back; but money paid into court under the pressure of a decree, if such decree is reversed, and it is 29 I.R.A. (N.S.)

ascertained that it awarded too large a sum, the party having paid would be entitled to a restoration of the excess. There is therefore no analogy between a case where an appellant accepts a sum awarded to him by a decree and then appeals, and where he accepts a sum voluntarily tendered by his adversary. Holt v. Rees, 46 Ill. 181.

3. Accepting voluntary payments.

(a) Unconditionally.

It is maintained by most jurists that the voluntary acceptance of a sum of money awarded by a judgment is a waiver of the recipient's right to appeal from such judgment for the purpose of gaining more.

The appeal of a party from a judgment, the provisions of which he has voluntarily accepted and which he has satisfied, cannot be maintained, and must, upon a proper application, be dismissed. Re Shaver, 131 Cal. 219, 63 Pac. 340.

A decree in chancery awarding the complainant an injunction upon the payment to the defendant of a sum of money cannot be reviewed for alleged error by the defendant after he has received and accepted the money awarded him. Morgan v. Ladd, 7 Ill. 414.

A party recovering a judgment, who accepts the amount awarded by it when such amount or any part of it is in dispute, thereby waives his right to take and prosecute an appeal from such judgment. Balingier v. Connecticut Mut. L. Ins. Co. 118 Iowa, 23, 91 N. W. 767.

The right to appeal from a judgment, and from the whole and every part thereof, is waived by the acceptance and retention of a sum of money awarded to the appellant by such judgment. Laird v. Giffin, 84 Wis. 286, 54 N. W. 584.

When it may easily happen upon the reversal of a decree appealed from in part, that upon a new trial the court might find a smaller sum to be due the appellant than previously had been awarded, the acceptance by him of the award is fatal to his right to review the decree upon appeal. Holt v. Rees, 46 Ill. 181.

"We are clearly of opinion," said the court in Holt v. Rees, *supra*, "that a party cannot accept money directed to be paid him by a decree, and then ask a reversal on the ground that it did not give him enough. His acceptance was a ratification."

The force of the decision in Holt v. Rees, *supra*, affirming unqualifiedly the proposition that a litigant partly successful cannot accept a sum of money awarded him by a decree, and appeal from the other parts of such decree, in any circumstances short of an actual tender and payment into court to keep the tender good, is somewhat weakened by the court's having gone on to say that the other parts of the decree complained of in that case did not prejudice the rights of the complaining party, and in effect that, irrespective of his acceptance of the sum awarded to him, the decree would have been affirmed anyway.

A claimant against a county who is allowed but a part of his claim by the county commissioners waives his right to appeal by accepting voluntarily a warrant drawn for the sum allowed him. *Hamilton County v. Bailey*, 12 Neb. 56, 10 N. W. 539.

But the assignment by a claimant against a county of a sum allowed him upon his claim by the county court, smaller than the amount demanded, is no bar to an appeal by him taken for the purpose of recovering a larger amount. *Nicholas County v. McNew*, 7 Ky. L. Rep. 364.

A plaintiff who recovers a judgment upon an indivisible claim, although made up of several items, and whose attorney thereafter receipts in full for the amount of such judgment, and collects it, waives his right to appeal. *Larson v. Vinje* (Iowa) 109 N. W. 786.

If, in an action against a municipal corporation and a contractor with it for improving a street, the right of such contractor to payment of the contract price is contested *in toto*, and the trial results in a judgment reducing the amount of the contractor's claim to a considerable extent, and yet awarding him a substantial amount on account thereof, from which judgment both parties appeal, the voluntary acceptance and retention by the contractor of the sum awarded him by such judgment, and the voluntary payment of such sum by his adversary, is a waiver of the right of either party further to prosecute his appeal from the judgment. *Neel v. Toledo*, 5 Ohio C. C. 203.

There have been several applications of the doctrine stated in cases where principal sums had been recovered, and appeals were taken to recover interest, attorney's fees, or costs.

The holder of a certificate of deposit issued by a bank for a definite sum of money, who, after bringing an action to recover the amount thereof with interest, accepts the principal without interest, awarded by a judgment of the trial court, is thereby precluded from further litigating the claim in respect of the interest. *Trimble v. First Nat. Bank*, 101 Ill. App. 75.

A plaintiff who recovers a judgment upon a promissory note and several interest coupons attached thereto, and who voluntarily receives the full amount of the judgment, together with interest and costs, cannot take and prosecute an appeal from so much of the judgment as refuses a recovery upon earlier coupons upon the ground that they were barred by the statute of limitations. *Perkins v. Bunn*, 56 Kan. 271, 43 Pac. 230.

A plaintiff in an action upon a promissory note, who recovers judgment for the amount of such note, but who is denied an attorney's fee, is estopped from taking and prosecuting an appeal from such judgment by accepting the amount awarded to him. *Bush v. Mitchell*, 28 Or. 92, 41 Pac. 155.

A plaintiff who elects to take according to a judgment in his favor as it was entered, notwithstanding he was entitled to 29 L.R.A. (N.S.)

costs, waives his right to a review and correction of such judgment so as to include costs. *Ullery v. Clark*, 18 Pa. 148.

The voluntary acceptance of costs and allowances awarded to attorneys and counsel have also been held to preclude appeal by their clients from the judgments and decrees by which the awards were made.

The acceptance by a plaintiff's attorney of a fee awarded him by a judgment abating a nuisance precludes the plaintiff from taking and prosecuting an appeal from such judgment. *Root v. Heil*, 78 Iowa, 436, N. W. 278.

A defendant who, after appealing from judgment, collects the costs and extra allowance granted him by such judgment, and consents that the codefendants receive the shares under it, waives his right to prosecute his appeal. *Miller v. Wright*, 60 Hu 579, 39 N. Y. S. R. 44, 14 N. Y. Supp. 40 affirmed in 129 N. Y. 639, 29 N. E. 1031.

In an action to assess the statutory liability of stockholders of a corporate plaintiff cannot appeal as against such defendant stockholders as pay the full amount of the judgment against the *Marriott v. Columbus, S. & H. R. Co.* Ohio C. C. N. S. 573.

But an allowance by the court, and the receipt and retention by attorneys for the plaintiff in an action to assess the statutory liability of stockholders of a corporation, of counsel fees and expenses out of the fund collected, do not estop the plaintiff from prosecuting an appeal from the judgment pursuant to which such allowance and expenses were paid, as against such stockholders as do not pay the amounts awarded against them. *Ibid.*

The doctrine just stated is not universally accepted by the courts. It has found no favor in Alabama, California, and New York.

When a defendant is not subjected to a legal coercion, but acts voluntarily in making a payment awarded to his adversary by a decree, there is an entire absence of vexation or oppression on the part of the adversary, and hence no ground for standing or dismissing his appeal from the decree. *Hoard v. Hoard*, 41 Ala. 590.

Not one of the various adjudications of the supreme court of Alabama, according to the court in *Hoard v. Hoard*, *supra*, recognizes a mere voluntary payment as sufficient to bar the right of the party retaining the payment to prosecute an appeal to any matter out of which the payment grew.

When the amount of a judgment is paid to the successful party by the defeated party unconditionally, without a concession upon either side, and not by way of compromise, such payment does not preclude the prosecution of an appeal. *Warner Bros. Co. v. Freud*, 131 Cal. 639, 82 Am. St. Rep. 463 Pac. 1017.

A plaintiff, by accepting payment of the amount of a judgment he has recovered, does not waive his right to take and prosecute an appeal from so much of such judgment

ment as denied him a recovery to a larger sum which he claimed. *Monnet v. Merz*, 28 Jones & S. 256, 17 N. Y. Supp. 380, affirmed without opinion in 131 N. Y. 646, 30 N. E. 866.

An appellant, in receiving money voluntarily paid to him, although adjudged to be due by an order, judgment, or decree from which he has appealed, is not thereby estopped from prosecuting an appeal to gain more. *Benkard v. Babcock*, 2 Robt. 175.

Numerous authorities have been cited to us, said the court in *Benkard v. Babcock*, supra, on the argument to sustain the position that the plaintiffs have waived their appeal by accepting from the defendants the amount of the verdict with costs; but they will all be found to be cases where an appellant had attempted actively to enforce either the whole of a judgment, order, or decree in his favor, or else some part thereof, connected with and dependent upon such other part thereof as he may have appealed from; or else where he had availed himself of some benefit or favor granted or offered to him by such judgment, order, or decree, as an alternative to exercising the right of appeal.

Whatever may be the result of an appeal by a party in whose favor the judgment appealed from has been rendered, he cannot be compelled to restore money voluntarily paid him by his adversary. The only effect of such payment is to extinguish his claim or part of it in any subsequent litigation. *Ibid*.

(b) *With reservations.*

A plaintiff granted leave to discontinue his action upon the payment of the defendant's taxable costs with an extra allowance, and who complies with the conditions of the order by paying such costs and the allowance under protest, estops himself from taking and prosecuting an appeal from that part of the order which grants the allowance. *Dambmann v. Schulting*, 6 Hun, 29.

A plaintiff in an action upon promissory notes, who recovers a judgment for the principal and interest due thereon, but who has been denied a recovery for stipulated attorney's fees, is not estopped, by accepting satisfaction of the judgment so far as it was rendered in his favor, from appealing from the part of it which denies him the attorney's fees, where his acceptance of satisfaction was made upon the express understanding that it should not affect the claim for such fees. *Haynes v. Halverton* (Tex. Civ. App.) 111 S. W. 166. The authority of this decision upon the proposition stated, although clearly maintained in the opinion of the court by the chief justice without dissent, is somewhat impaired by the circumstance that the judgment appealed from was affirmed upon the merits, and a recovery of the attorney's fees denied.

A stipulation entered into between the parties after an appeal has been taken, for a division and distribution of a portion of a fund in controversy in the action, and 29 L.R.A. (N.S.)

made expressly without prejudice to the appeal, when a balance of the fund is left sufficient to cover all contemplated contingencies, does not constitute a waiver of the right to prosecute such appeal. *Seattle v. Liberman*, 9 Wash. 276, 37 Pac. 433.

4. *Accepting damages in condemnation proceedings.*

A landowner who accepts payment of damages awarded him for the taking of a portion of his land for a public highway cannot be heard afterwards to declare the proceedings for opening such way void. *Town v. Blackberry*, 29 Ill. 137; *Kile v. Yellowhead*, 80 Ill. 208; *Hartshorn v. Potroff*, 89 Ill. 509.

A landowner who accepts the damages awarded him for land taken in the laying out of a public highway virtually dedicates his land as a public highway, and is estopped from contesting the validity of the proceedings to take it, however defective they may be. *Karber v. Nellis*, 22 Wis. 215; *State v. Langer*, 29 Wis. 68; *Schatz v. Pfeil*, 56 Wis. 429, 14 N. W. 628; *Moore v. Roberts*, 64 Wis. 538, 25 N. W. 564.

The acceptance by a landowner of a sum awarded to him as damages for opening a highway across his land estops him from prosecuting an appeal to reverse the judgment establishing the highway. *Glassburn v. Deer*, 143 Ind. 174, 41 N. E. 376.

A landowner who accepts the sum awarded to him as damages for the condemnation of a right of way for a railroad across his land is estopped from taking and prosecuting an appeal from the award. *Mississippi & M. R. Co. v. Byington*, 14 Iowa, 572.

A landowner appealing from an assessment of damages awarded him for the taking of his lands by a railroad company, who receives voluntarily the sum assessed from the clerk of the court to whom it has been paid, is barred from the further prosecution of his appeal. *Baltimore, O. & C. R. Co. v. Johnson*, 84 Ind. 420.

A landowner who accepts and retains the sum deposited by a railroad company to pay the damages awarded to him in a condemnation proceeding to appropriate his land for railway purposes is estopped from prosecuting a writ of error to reverse the judgment. *Parks v. Dallas Terminal R. & Union Depot Co.* 34 Tex. Civ. App. 341, 78 S. W. 533.

A landowner who accepts the value of his land appropriated for railroad purposes under the power of eminent domain, whether fixed by agreement with the railroad company or by the award of commissioners or the judgment of a court in condemnation proceedings, acquiesces in the taking, as much so as if he had conveyed the lands to the railroad company by deed. *Burns v. Milwaukee & M. R. Co.* 9 Wis. 450.

A landowner whose land has been condemned by right of eminent domain waives his right to appeal from the judgment in

the condemnation proceedings, by accepting and retaining the damages awarded to him for his property; and this, notwithstanding the law under which the condemnation was had may be unconstitutional because it authorizes the taking of private property for other than public purposes. *Sherman v. McKeon*, 38 N. Y. 266.

And yet in Kentucky it has been held that the acceptance and receipt by a statutory guardian of infants of their share of the damages awarded by a judgment condemning lands by right of eminent domain does not preclude the guardian *ad litem* in the condemnation proceedings from taking and prosecuting, in the name and behalf of such infants, an appeal from the judgment of condemnation and award. *Reed v. Louisville Bridge Co.* 8 Bush, 69.

And in the same state it has also been held that the acceptance of an award of damages upon condemnation of property for railroad purposes, when the recipient gives approved security to make restitution, does not preclude him from prosecuting an appeal. *Elizabethtown, L. & B. S. R. Co. v. Catlettsburg Water Co.* 110 Ky. 175, 61 S. W. 47.

It was held, and rightly, in the case of *Re New York & H. R. Co.* 39 Hun, 338, that a landowner who accepts and retains the compensation awarded him in condemnation proceedings for property taken by a railroad company has no right to appeal from the order appointing commissioners to ascertain and appraise his damages.

The decision in that case was reviewed in 98 N. Y. 12, in which the court of appeals took the ground that when the land taken belongs to a municipal corporation, the mere payment of the award by the railroad company to the city chamberlain or treasurer, and leaving it upon deposit with that officer, without some evidence that the city has used or in some way appropriated or exercised dominion over the fund, does not deprive the city of the right to appeal from such order.

5. Payment by defeated party.

(a) In general.

It has been broadly asserted that when a judgment has been paid, it has passed beyond review, the satisfaction of it being the end of the proceedings. *Re Black*, 32 Mont. 51, 79 Pac. 554.

And that by the act of payment and performance of orders and judgment of the court, parties are estopped to deny the sufficiency of the adjudication against them. *Borgalathous v. Farmers' & M. Ins. Co.* 36 Iowa, 250.

The payment of a judgment by a surety upon an appeal bond after its affirmation on appeal, made for the purpose of satisfying such judgment and discharging the obligation of the surety on such bond, precludes the prosecution of a further appeal from such judgment. *Plover Mercantile Co. v. Peterson* (Iowa) 111 N. W. 944. 29 L.R.A. (N.S.)

And it has also been held in Alabama that the payment of a judgment against him rendered by a justice of the peace, and the consequent satisfaction and extinguishment of the judgment, is a waiver by the defendant of the right to review the same on certiorari. *Smith v. Patton*, 128 Al. 611, 30 So. 582.

But it has been held in California that the payment by one of several defendants of a judgment from which all have appealed, without the consent of any of the other appellants, does not entitle the respondent to a dismissal of the appeal. *Warner Bros. Co. v. Freud*, 131 Cal. 63, 82 Am. St. Rep. 400, 63 Pac. 1017.

Elsewhere the rule is general that one against whom a judgment or decree has been rendered for a sum of money does not, by paying and satisfying it, waive or lose his right to review it upon writ of error or appeal. Certainly not, if the payment is made under compulsion, and usually not, when it is made voluntarily, unless by way of settlement and compromise and under an agreement not to appeal. *Thomas v. Negus*, 7 Ill. 700; *Schaeffer v. Ardery*, 238 Ill. 557, 87 N. E. 343; *Nashville, C. & St. L. R. Co. v. Bean*, 128 Ky. 72, 129 Am. St. Rep. 333, 109 S. W. 323; *Farmers' Bank v. Calk*, 4 Ky. L. Rep. 617; *Weaver v. Weaver*, 5 Ky. L. Rep. 600; *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 10; *Dyett v. Pendleton*, 8 Cow. 325; *Hayes v. Nourse*, 107 N. Y. 578, 1 Am. St. Rep. 891, 14 N. E. 508; *Wells v. Danforth*, N. Y. Code Rep. N. S. 415; *State ex rel Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729; *Edwards v. Perkins*, 7 Or. 149; *Dodd v. Gregson*, 35 Wash. 402, 77 Pac. 79; *Hixon v. Oneida County*, 82 Wis. 515, N. W. 445.

It is true, admitted the court in *Princeton Coal & Min. Co. v. Gilmore*, 170 Ill. 366, 83 N. E. 500, that the mere payment of a judgment by a defendant does not prevent him from appealing to the proper appellate tribunal.

The law is well settled, said the court in *Chapman v. Sutton*, 68 Wis. 657, 32 N. W. 683, that payment of a judgment is a waiver of the right to appeal therefrom or to bring a writ of error to review it.

It must be deemed too well settled, said the court in *Hayes v. Nourse*, 107 N. Y. 578, 1 Am. St. Rep. 891, 14 N. E. 508, that a party against whom a judgment has been rendered is not prevented from appealing to this court by the fact that he has paid the judgment, unless such payment was one of compromise or was an agreement not to take or pursue an appeal.

A transfer by a plaintiff in error to a defendant in error of property or securities in full satisfaction of the judgment no bar to the prosecution of the writ, to the reversal of such judgment if found to be erroneous. *Gordon v. Gibbs*, 3 Smead & M. 143.

Only a voluntary payment made for

purpose, clearly established, of settling a judgment, operates to extinguish the judgment and the right to appeal or prosecute an appeal from it. *Plano Mfg. Co. v. Rasey*, 69 Wis. 246, 34 N. W. 85.

The payment of costs adjudged against an appellant in the court below does not preclude him from prosecuting an appeal from the judgment. *Bruce v. Smith*, 44 Ind. 1; *Kootenai County v. Hope Lumber Co.* 13 Idaho, 262, 89 Pac. 1054.

The voluntary payment by a plaintiff of the costs awarded against him in a judgment dismissing his complaint on the merits does not preclude him from taking and prosecuting an appeal to reverse such judgment. *Champion v. Plymouth Cong. Soc.* 42 Barb. 441.

A party against whose petition a demurrer interposed by his adversary has been sustained with costs does not waive his right to take and prosecute an appeal from the judgment sustaining the demurrer, by paying the costs. *Territory v. Cooper*, 11 Okla. 699, 69 Pac. 813.

The payment under the compulsion of an execution, of costs imposed by a decree, does not deprive the party paying of his right to appeal from such decree. *Burch v. Newbury*, 4 How. Pr. 145.

The payment, either voluntarily or under compulsion, of an execution, does not bar a party against whom it was rendered from taking and prosecuting an appeal. *Lindenborn v. Vogel*, 131 App. Div. 75, 115 N. Y. Supp. 962.

The payment of the amount of a judgment which the judgment creditor refuses to accept in satisfaction, made for the purpose of preserving the rights of the defeated party, does not preclude the taking and prosecuting of an appeal from such judgment, or warrant the dismissal thereof by the appellate court. *Warner Bros. Co. v. Freud*, 131 Cal. 639, 82 Am. St. Rep. 400, 63 Pac. 1017.

We have looked into many decisions on this subject, said the court in *Lumaghi v. Abt*, supra, and find them practically unanimous in holding that payment of a judgment by a party who got no benefit from it is no obstacle to an appeal or the prosecution of a writ of error.

A defendant is not precluded from taking and prosecuting an appeal from a judgment recovered against him for the purchase money of real estate subject to a lien for taxes and assessments, to be deducted from the amount of the judgment if paid by the defendant, or paid out of the judgment by the plaintiff by paying such taxes, because the provision for the payment or credit of the taxes out of or against the purchase money is in no sense a benefit secured by him. *Kelly v. Bloom*, 17 Abb. Pr. 229.

A defendant does not estop himself from prosecuting an appeal from a judgment against him, one half of which the judgment creditor has assigned to his attorneys in payment of services, by compromising and settling the unassigned half. *Wells*, 29 L.R.A. (N.S.)

F. & Co. v. Boyle (Tex. Civ. App.) 98 S. W. 441.

The payment to a trustee named in a decree of money found to be due from a defendant does not preclude the opposite parties from reviewing such decree upon appeal, despite the fact that the trustee is also the attorney of record for some of them, and from time to time pays over a portion of the funds in his custody, where he reserves, to abide the event of the suit, an ample amount to cover all questions and disputes. *Thornton v. Houtze*, 91 Ill. 199.

An appeal given by statute to the state in a criminal trial before a justice of the peace is not barred by the receipt by a county treasurer of the amount of fine imposed upon the prisoner upon conviction. *State v. Tait*, 22 Iowa, 140. The reason assigned by the court was that the county treasurer was not a party to the prosecution accepting the amount of the judgment and knew nothing of the circumstances and had no discretion to refuse a fine collected by the justice when paid over to him.

A plaintiff in an action upon two promissory notes in which the defendant pleads both the general issue and a counterclaim, who not only fails to recover upon the notes, but has judgment rendered against him for a portion of the counterclaim, and who pays and satisfies the counterclaim, thereby extinguishes the entire controversy, and is estopped from taking and prosecuting an appeal from the judgment with respect of the promissory notes. *King v. Campbell*, 107 Mo. App. 496, 81 S. W. 635.

When, in separate actions upon promissory notes given upon the same contract, the maker pleads a counterclaim for damages on account of the payee's alleged fraud in making the contract, and in one of such actions a demurrer to the counterclaim is sustained, the defendant waives his right to prosecute an appeal from the decision sustaining the demurrer, by a compromise and settlement of the other action, including an agreed allowance for the counterclaim credited in reduction of the note in that action. *Matthews v. Davis*, 39 Ohio St. 54.

(b) In condemnation proceedings.

The doctrine is widely prevalent that the payment by a public or a public service corporation of damages awarded a landowner upon the appropriation of his property for the public use by right of eminent domain, in order to gain immediate possession and use of the condemned property, does not preclude the corporation from appealing to reduce the award. *Chicago, S. F. & C. R. Co. v. Phelps*, 125 Ill. 482, 17 N. E. 769; *Indianapolis & C. R. Co. v. Brower*, 12 Ind. 374; *Cleveland, C. C. & St. L. R. Co. v. Nowlin*, 163 Ind. 497, 72 N. E. 257; *Com. v. Hall*, 8 Pick. 440; *Fort Street Union Depot Co. v. Backus*, 92 Mich.

33, 52 N. W. 790; Fort Street Union Depot Co. v. Peninsular Stove Co. 103 Mich. 637, 61 N. W. 1007; St. Louis & S. F. R. Co. v. Evans, & H. Fire Brick Co. 85 Mo. 307; Re New York, W. S. & B. R. Co. 29 Hun, 646.

A railroad company is not precluded from taking and prosecuting an appeal from a judgment condemning land for a right of way, and awarding damages to the landowner, by depositing in court the amount of the damages, in order that it may take immediate possession of such land. New Orleans Terminal Co. v. Firemen's Charitable Asso. 115 La. 441, 39 So. 437.

The payment by a railroad company to the clerk of the court of damages awarded to a landowner upon the condemnation of his land for right of way, in order to enable such company to take possession of the land, pursuant to the terms of a statute requiring payment to be made before possession is taken, is not voluntary, and does not estop the company from taking and prosecuting an appeal from the decree or judgment of award. Cleveland, C. C. & St. L. R. Co. v. Hayes, 35 Ind. App. 539, 74 N. E. 531.

When a street railroad company appeals from an award of damages in due season, and pays the amount of the award to the clerk of the court in order to enter at once upon the property condemned, its payment is not voluntary in a legal sense, but compulsory, and does not therefore estop the company from prosecuting its appeal from the award. Union Traction Co. v. Basey, 164 Ind. 249, 73 N. E. 263.

f. To interlocutory orders.

1. In general.

If, by an order of court, a right or favor is given to one party in consideration of making a payment to the other party, he who accepts the payment will be held to have assented to the granting of the favor or right. San Bernardino County v. Riverside County, 135 Cal. 618, 67 Pac. 1047.

Thus, when an order is made upon the condition that costs be paid, the acceptance of such costs is a waiver of the right to appeal from the order. *Ibid*; Lewis v. Irving F. Ins. Co. 15 Abb. Pr. 140, note; Lupton v. Jewett, 19 Abb. Pr. 320; Wood v. Richardson, 91 Hun, 332, 36 N. Y. Supp. 1001; Cogswell v. Colley, 22 Wis. 309.

The general rule that a party cannot take the benefit of an order, and at the same time appeal from it, applies invariably only when the benefits or advantages of the order are conditional. *Re Water Comrs.* 36 Hun, 534; *Ziadi v. Interurban Street R. Co.* 97 App. Div. 137, 89 N. Y. Supp. 606.

The rule does not apply when the costs received were awarded absolutely, and the recipient was entitled to them as a matter of right, and not of favor. *Re Amsterdam* 29 L.R.A.(N.S.)

Water Comrs. supra; *Seymour v. Spring Forest Cemetery Asso.* 4 App. Div. 359, 38 N. Y. Supp. 726.

The acceptance of the statutory \$10 costs allowed to a party opposing a motion, for leave to serve a supplemental answer of another party, is not a waiver of the right to appeal from the order granting such leave, because the allowance of costs is not conditional, but absolute. *Farmers' Loan & T. Co. v. Bankers' & M. Teleg. Co.* 109 N. Y. 342, 16 N. E. 539.

A party against whom an application for sundry items of relief is made by his adversary, and granted in part and denied in part with costs, is not precluded from taking and prosecuting an appeal from so much of the order as grants his opponent relief, by collecting the costs granted upon denying the other parts of the motion. *McIntyre v. German Sav. Bank*, 59 Hun, 536, 37 N. Y. S. R. 545, 13 N. Y. Supp. 674.

As to the claim that the plaintiff, said the court in *McIntyre v. German Sav. Bank, supra*, by appealing from so much of the order as restrained her from collecting the costs, leaving standing in her favor that part of the order denying the motion to compel her to enter judgment, thereby waived her right to appeal, we fail to see the force of the suggestion. A party moved against is successful in defeating a part of the relief asked upon such motion, and because of such success it is claimed she is deprived of the right to appeal from so much of the order as grants relief against her. This is certainly a novel proposition, that a party must be entirely defeated in order that she may have a right to appeal, and that where the success of the moving party is only partial, no right of appeal exists.

In a suit for the construction of a will, in which an intermediate appellate court reverses the judgment of the court below, but, in so doing, makes an allowance of costs to the appellee payable out of the fund, the acceptance of the payment of such costs by such appellee does not estop him from taking and prosecuting an appeal to the court of last resort, from the judgment of reversal. *Re Ferguson*, 28 Can. S. C. 38.

A party to an action applying for a favor, and obtaining upon condition such as the payment of costs to his adversaries, who accepts the benefit of the order, waives his right to appeal from the part of it which imposes the condition. *Flanders v. Merrimac*, 44 Wis. 621.

Thus, when an order has been granted dismissing an appeal on condition that the respondent should consent to a modification of the decree appealed from, and pay the costs of the motion, the right to appeal from such order is waived by giving the consent and paying the costs. *Marvin v. Marvin*, 11 Abb. Pr. N. S. 97.

And an appellant against whom a motion has been made to dismiss his appeal for failure to comply with the terms im-

posed upon granting an extension of time to serve the case on appeal, and who has complied with the condition that such motion be denied upon the payment of costs, has thereby waived his right to appeal from the order imposing the condition. *Levy v. Fidelity & D. Co.* 87 N. Y. Supp. 487.

Again, a plaintiff whose judgment has been reversed on appeal unless he stipulates to reduce his recovery, in which case the judgment as reduced shall be affirmed, waives his right to a further appeal by giving the stipulation required and entering judgment for the reduced amount. *Sperry v. Hellman*, 36 N. Y. S. R. 52, 13 N. Y. Supp. 271.

A litigant who avails himself of a privilege given him to renew a motion which the court has denied is estopped thereby from appealing from the order denying his motion. *Noble v. Prescott*, 4 E. D. Smith, 139; *Harrison v. Neher*, 9 Hun, 127.

The mere payment to a public officer of his official fees upon the dismissal of an action does not estop an unsuccessful litigant from taking and prosecuting an appeal from the judgment in such action. *State ex rel. Hinkley v. Martland*, 71 Iowa, 543, 32 N. W. 485.

A party entitled to appeal from an order of a court requiring each party to pay his own witness fees does not, by paying the fees of his own witnesses, lose his right to take and prosecute an appeal from such order. *Smith v. Ellyson*, 137 Iowa, 391, 115 N. W. 40.

The execution and compliance with a decree in equity at the instance of the successful party, containing a condition imposed on him requiring the payment of money to his adversary, and the acceptance by the unsuccessful party of such conditional payment, does not entitle such successful party to a dismissal of a writ of error procured by his adversary to review such decree. *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655.

2. Allowing amendments to pleadings.

A party asking to amend his pleading, and obtaining permission to do so, may reject the permission if it is given with terms which he does not wish to accept; but he cannot accept a conditional order so far as it is for his benefit, and reject the rest. *Smith v. Rathbun*, 75 N. Y. 122.

A defendant who accepts costs awarded to him as a condition in an order allowing the plaintiff to amend his complaint waives his right to review such order upon appeal. *Logeling v. New York Elev. R. Co.* 5 App. Div. 198, 38 N. Y. Supp. 1112.

The right of a defendant to appeal from an order consolidating two actions into one, and allowing the service of an amended complaint, is waived by accepting service of such complaint without objection, and by giving a stipulation permitting the plaintiffs to serve a second amended complaint upon condition of paying \$10 costs, 29 L.R.A. (N.S.)

and the receipt of such costs, followed by the service of an offer of judgment and an answer in the consolidated action. *Rockefeller v. St. Regis Paper Co.* 85 App. Div. 267, 83 N. Y. Supp. 138.

A defendant waives his right to appeal from an order allowing an amendment to the plaintiff's complaint upon condition that the plaintiff pay to the defendant all the taxable costs of the action to date, by accepting and retaining such costs and the amended complaint served pursuant to such order, and proceeding with the action to final judgment; and this, notwithstanding the amendment allowed essentially changed the cause of action by substituting an entirely new and different claim against a different party. *Serrell v. Forbes*, 106 App. Div. 482, 94 N. Y. Supp. 805.

A plaintiff who accepts service of a defendant's amended answer, and the payment of costs allowed him as a condition of granting leave to amend, and who thereafter serves a reply to such amended answer, and proceeds to trial upon the new issues, waives his right to take or prosecute an appeal from the order granting leave to amend. *Taussig v. Hart*, 1 Jones & S. 157.

A defendant whose demurrer to the complaint has been sustained, with permission to the plaintiff to amend upon payment of costs, waives his right to appeal from the order allowing the amendment, by receiving and retaining the amended complaint and the costs, and thereafter answering. *Hood v. Hood*, 6 N. Y. S. R. 6.

When, upon a trial before a referee, a plaintiff is allowed to amend his complaint by inserting additional and material allegations, upon condition that the defendant be permitted to answer or demur to the complaint as amended, and he avails himself of the permission to amend by amending accordingly, he is precluded from questioning the power of the referee to allow the defendant to demur. *Smith v. Rathbun*, supra.

A defendant who, upon a trial of the action before a referee, accepts costs imposed upon his adversary as a condition of allowing an amendment to the complaint, and who proceeds with the trial under the complaint as amended, waives his right to appeal from the order allowing the amendment. *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281, 36 Am. Rep. 617.

A plaintiff threatened with a nonsuit, who asks and gains permission to amend his complaint and postpone the trial upon payment of costs, waives his right to appeal from the order allowing the amendment and postponement upon terms, by accepting the benefit of so much of it as permits him to amend and gives him a postponement. *Austin v. Waful*, 36 N. Y. S. R. 779, 13 N. Y. Supp. 184; *Weichsel v. Spear*, 15 Jones & S. 223.

The effect of the acceptance and retention by a defendant, after a dismissal of the plaintiff's complaint, of a specific sum

of money paid him by the plaintiff as a condition of an order permitting the complaint to be amended, as an estoppel, if in any case it can be regarded as operating as an estoppel, against the taking and prosecuting of an appeal by the defendant from the order allowing the amendment, is waived by the acquiescence of the plaintiff in the appeal, and his failure seasonably to move to dismiss the appeal, and his proceeding to argue such appeal upon the merits. *Todd v. Bettingen*, 102 Minn. 260, 18 L.R.A. (N.S.) 263, 113 N. W. 906.

But if a defendant takes and prosecutes successfully an appeal from an order allowing an amendment to the plaintiff's complaint upon condition, with which his adversary complied, of the payment of a specific sum of money, he must restore the sum paid before he can have the benefit of a reversal of the order. *Ibid*.

3. Relating to provisional remedies.

A defendant under arrest who moves for his discharge in a civil action, and obtains an order discharging him upon condition that he stipulates to bring no action for damages because of arrest, and who does so stipulate, and is accordingly discharged, waives his right to appeal from that part of the order of discharge imposing the condition. *Clafin v. Frenkel*, 29 Hun, 288.

A litigant against whom a temporary injunction has been granted, coupled with an order to show cause why it should not be continued, waives his right to appeal from an order continuing the injunction unless he shall stipulate to pay a stated amount of damages in case his adversary succeeds, if he complies with the condition and gives the stipulation, notwithstanding in the stipulation he expressly protests against the condition, and reserves his right to appeal from the order. *Canary v. Knowles*, 41 Hun, 542.

A party who accepts and complies with a condition contained in an order granting his application to dissolve an injunction, as an alternative to continuing such injunction, does not act upon compulsion or under any duress, since he has an equal right to appeal from the order containing the condition that he would have had, had his motion been denied unconditionally. *Ibid*.

One who obtains a dissolution of an injunction against him by giving a stipulation required by the court as an alternative to continuing such injunction waives his right to appeal from the order, no matter how expressly he may have attempted, in complying with the condition, to reserve such right. *Ibid*.

A plaintiff has a right to take and prosecute an appeal from so much of an order as vacates a warrant of attachment procured by him on the defendant's stipulating not to bring any action on the undertaking furnished on the issuing of such attachment or on account thereof, without appealing from the rest of the order, notwithstanding the defendant makes and de-

livers such stipulation. *Wallace & Sons v. Castle*, 68 N. Y. 370.

A defendant who, upon moving to vacate an attachment upon the papers upon which the warrant issued, permits his adversary without objection to read additional affidavits supporting the process, and who afterwards accepts payment of costs allowed to him upon his opponent's motion for leave to file such additional papers *pro tunc* as if a part of the original papers, and amending the proceedings, accordingly waives his right to appeal from the order allowing such papers to be filed and the proceedings to be amended conformably. *Fisher v. Dougherty*, 42 Hun, 167.

4. Opening defaults.

A plaintiff is estopped from appealing from an order allowing the defendant to answer upon payment of costs, by accepting the costs and receiving the answer. *Radway v. Graham*, 4 Abb. Pr. 468.

A plaintiff who accepts and retains costs paid pursuant to an order vacating his judgment against the defendant, obtained by default, waives his right to appeal from the order setting aside the judgment. *Lounsbery v. Erickson*, 16 S. D. 375, 92 N. W. 1071.

The acceptance by a plaintiff of a sum of money awarded to him upon the condition that the default of the defendant, as the judgment entered thereon, should be set aside, is deemed an assent to the opening of the judgment, and a waiver of the right to appeal from the order. *San Bernardino County v. Riverside County*, 1 Cal. 618, 67 Pac. 1047.

A party who recovers judgment by default, and afterwards receives and accepts costs awarded to him by the court as a condition of opening the default upon the application of his adversary, waives his right to complain of, or to appeal from, to review, such order. *Smith v. Coleman*, 77 Wis. 343, 46 N. W. 664.

A plaintiff waives his right to appeal from an order vacating a judgment obtained against the defendant, and granting leave to answer upon payment of costs, by accepting the costs imposed by such order and obtaining an extension of time in which to reply to the answer. *Parr v. Webb*, Mont. 346, 106 Pac. 353.

The rule has long been established that where a party has accepted money ordered paid by his adversary for costs and expenses, as a condition of an order setting aside a default, he will be deemed to have consented to the order, and to have waived the right to appeal from it. *Ibid*.

The acceptance by a party of payment of witnesses' fees, and the proceeding to try without objection, pursuant to an order setting aside a dismissal of the cause upon condition of the payment of such fees, is a waiver of the right to appeal from the order restoring the cause for trial. *Drake v. Scheunemann*, 103 Wis. 458, 79 N. W. 7.

A defendant whose application to open

default taken against him, and to be allowed to answer, is granted upon terms and the payment of costs, and who submits to such terms, pays the costs, and serves his answer, waives his right to appeal from the order. *Negley v. Short*, 18 N. Y. Civ. Proc. Rep. 45, 27 N. Y. S. R. 274, 7 N. Y. Supp. 674.

5. Granting new trials.

In *Tyson v. Wells*, 1 Cal. 378, the court refused to dismiss an appeal from an order granting a new trial upon condition of the payment of the costs by the defeated party, to his successful adversary, who was held not to have waived his right to appeal by accepting payment of the costs thus conditionally imposed. The courts elsewhere, however, take an opposite course.

A party who accepts an allowance of costs imposed upon his adversary as a condition of granting a new trial is estopped from objecting to the order allowing such new trial upon that condition. *Cook v. McComb*, 98 Wis. 526, 74 N. W. 353.

And estopped from taking and prosecuting an appeal from such order. *Applebaum v. Bonagur*, 56 Misc. 615, 107 N. Y. Supp. 635.

The acceptance by a plaintiff of a sum of money awarded by the court as a condition of granting the defendant a new trial precludes the plaintiff from contending that the application for such new trial was improperly granted. *Buena Vista County v. Iowa Falls & S. C. R. Co.* 55 Iowa, 167, 7 N. W. 474.

When a new trial is granted upon the application of the defeated party, upon condition of paying the costs of the former trial and of the application for a new trial to his adversary, and such costs are paid to and accepted by the successful party, the latter is precluded from taking and prosecuting an appeal from the order granting the new trial. *Cogswell v. Colley*, 22 Wis. 399.

The acceptance by the attorney for a defendant of costs awarded as a condition of granting a new trial to a plaintiff in an action for personal injury, upon the ground that the damages awarded by the jury were inadequate, is a waiver of the right to appeal from such order. *Platz v. Cohoes*, 8 Abb. N. C. 392.

A plaintiff who accepts from the defendant payment of a sum of money ordered to be paid by the court for costs and witnesses' fees, as a condition of granting a new trial, waives the right to take and prosecute an appeal from the order. *Lamprey v. Henk*, 16 Minn. 405, Gil. 362.

A defendant who obtains a verdict, and against whom a new trial is awarded, waives his right to appeal from the order granting the new trial by proceeding under it, and taking his chances of success upon the second trial. *Grunberg v. Blumenlahl*, 66 How. Pr. 62.

When a defendant's motion for a new trial of an action which has gone against 29 L.R.A. (N.S.)

him is granted unless the plaintiff shall stipulate to reduce the verdict by a certain amount, in which event the motion is denied, a plaintiff who gives the stipulation thus reducing the verdict, and enters judgment for the reduced amount, waives his right to appeal from such judgment. *Clarke v. Meigs*, 10 Bosw. 337.

A plaintiff recovering a verdict, against whom the defendant's motion for a new trial has been granted unless the plaintiff consents to reduce such verdict, does not waive his right to appeal from the order by obtaining a stay of proceedings under it except to permit his appeal. *Cullen v. Uptegrove*, 101 App. Div. 147, 91 N. Y. Supp. 511.

V. Acquiescence in the adjudication.

a. Unconstrained.

A plaintiff in an action upon a contract for the sale of lands, who prays judgment directing a specific performance, or, in case a conveyance is impracticable, damages for the breach, and who is denied specific performance, but awarded damages, and who, after his adversary has entered a judgment denying the specific performance, voluntarily enters judgment in his own favor for the damages awarded by such action, waives his right to take and prosecute an appeal from the judgment denying a specific performance. *Murphy v. Spaulding*, 46 N. Y. 556.

A defendant in an equity action who, after prevailing in the court of appeals, enters upon the remittitur judgment absolute against the plaintiff, with costs only of the court of appeals, after an order has been made denying him costs in the court below, and who enforces satisfaction of such judgment, is estopped from appealing or reviewing the order denying additional costs. *Prentiss v. Bowden*, 14 Misc. 185, 25 N. Y. Civ. Proc. Rep. 144, 70 N. Y. S. R. 517, 35 N. Y. Supp. 653.

The defendants in an action to dissolve a partnership and for an accounting, who obtain by their own motion an order dissolving a preliminary injunction and canceling the undertaking given to obtain it, with leave to liquidate the business of the copartnership upon giving a bond, who afterwards offer to allow judgment to be entered dissolving the partnership and directing an accounting (which offer is accepted by their adversary), and take possession of the partnership assets, and proceed to liquidate the business, are estopped to take, and prosecute an appeal from that portion of the order which canceled the undertaking upon injunction and discharged the sureties. *Kraeger v. Warnock*, 81 App. Div. 150, 80 N. Y. Supp. 687.

A bond holder under a land grant railway mortgage, who surrenders his bonds to trustees and accepts in lieu thereof other stocks and bonds, cannot object to an order of confirmation of a sale made subject to the payment of such bonds and interest.

Crawshay v. Soutter, 6 Wall. 739, 18 L. ed. 845.

The court, in *Carlson v. Benton*, 60 Neb. 486, 92 N. W. 600, 1 A. & E. Ann. Cas. 159, in disposing of the contention that the appellant had acquiesced in the judgment from which he appealed, because such judgment had been entered upon his motion, said: It is true the record shows that the judgment was rendered on the plaintiff's motion. The motion was made at a term subsequent to the term at which his motion for a new trial had been denied. He had a right to a hearing in the court of last resort. A final judgment was necessary to that end. It would be a mockery of justice to deny him a hearing in this court, because he asked the trial court to do that without which he could not obtain such hearing.

The right of a plaintiff in an action for damages composed of several distinct and independent items, to review an order of the court sustaining a demurrer to several items of his claim, is not lost by his consent for the entry of a judgment in his favor after such action by the court, for the undisputed and admitted items of his claim. *Wright v. Hollywood Cemetery Corp.* 112 Ga. 884, 52 L.R.A. 621, 38 S. E. 94.

The mere withdrawal of his appeal by a party complaining of a judgment, without further action, does not preclude him from afterwards prosecuting an appeal anew, provided he does so within the time allowed by law for such an appeal to be taken; but if he withdraws or countermands his appeal, and then takes out an execution upon the judgment for the purpose of enforcing it, he thereby waives his exceptions, and cannot afterwards appeal. *Hay v. Jenkins*, 28 Md. 564.

A complainant in chancery who has taken, but afterwards abandoned, an appeal from a decree in his favor, alleged to be inadequate, may, notwithstanding he afterwards collects what it awards him, still prosecute a writ of error for the purpose of increasing the amount of his recovery, if he chooses to take the risk of being compelled to refund in case the result of his writ should be a failure to obtain any decree at all, or one for a less amount than that of which he complained. *Bond v. Greenwald*, 4 Heisk. 453.

b. In order to preserve rights.

One condition to the operation of the rule that the acceptance of the benefit of a decree is a release of errors, which precludes the person accepting it from reviewing it upon appeal, is that the acceptance must be voluntary in the sense that the party is not required by the decree to do the act relied upon as effecting the release of errors. *Schaeffer v. Ardery*, 238 Ill. 557, 87 N. E. 343.

A county auditor who complies in part with a peremptory writ of mandamus commanding a county warrant to issue to the 29 L.R.A. (N.S.)

relator, under threat of proceedings to punish for contempt in case of refusal, is not precluded from taking and prosecuting an appeal from such writ. *State ex rel. Wiles v. Albright*, 11 N. D. 22, 88 N. W. 729.

When a statute limits the power of the court in granting a postponement of a trial, to requiring as a condition the payment of \$10 costs and the fees of witnesses and taxable disbursements rendered ineffectual by the adjournment, a party upon whom the court imposes, as a condition of postponing a trial, an excessive and illegal charge, does not waive his right to appeal from the order imposing the terms by paying the illegal amount under protest, in order to prevent a dismissal of his complaint or a judgment against him, since he acts upon compulsion, and cannot do otherwise with safety. *Kennedy v. Wood*, 54 Hun, 14, 7 N. Y. Supp. 90.

A plaintiff in an action to annul and restrain the collection of taxes does not waive his right to appeal from a judgment adjudging some of the taxes valid and others invalid, and directing the payment by him into court of the sum of the taxes held to be valid, as a condition precedent to the granting of an injunction against the remainder, by paying the amount into court under protest and perfecting the judgment. *Hixon v. Oneida County*, 82 Wis. 515, 52 N. W. 445.

A plaintiff, by complying with a decree providing for a deposit of a deed and for certain payments within a stated time, as a condition to the granting of the relief sought, which included the establishment of a judgment lien in his favor, and by taking out an execution on such judgment, does not waive his right to take and prosecute an appeal with respect of the costs. *Mountain v. Low*, 107 Iowa, 403, 78 N. W. 55.

A party who pays a judgment rendered against him in order to discharge the lien of it upon his land, so as to enable him to convey the property free and clear, is not thereby precluded from prosecuting a writ of error from such judgment, since his payment is compulsory, and not voluntary. *Lumaghi v. Abt*, 126 Mo. App. 221, 103 S. W. 104.

It has, however, been decided, that the payment by a landowner who has brought an action to quiet the title to his land, of the sum adjudged requisite to redeem the land from a sale for taxes, made a condition in the decree in his favor, precludes him from taking and prosecuting an appeal from that part of the decree fixing such amount. *Hintrager v. Mahoney*, 78 Iowa, 537, 6 L.R.A. 50, 43 N. W. 522.

A plaintiff who elects, under compulsion of an order of the court, to strike out one of two causes of action, and to proceed upon the other, instead of allowing his action to be dismissed, does not thereby waive his right to object to such compulsory order, but is entitled to bide his time for the correction of the error upon a final appeal. *Jones v. Johnson*, 10 Bush, 649.

A defendant does not waive his right to appeal from an order refusing to set aside the service of the summons, by serving an answer pleading improper service of such summons, and want of jurisdiction in the court by reason thereof, of his person. *McNamara v. Canada S. S. Co.* 16 N. Y. Week. Dig. 86.

The right to take and prosecute an appeal from a decree directing the specific performance of a contract to convey certain real and personal property is not lost by the acceptance by the defeated party of a suggestion on the part of the court that he turn over the possession of the property in controversy pending his appeal, for the purpose of reducing the amount of his bond. *Sample v. Collins*, 81 Iowa, 23, 46 N. W. 742.

An appellant has a right, after being defeated upon the main issue in an action, to protect himself against loss under the judgment by setting up and proving his just claims, without thereby affecting his right to appeal from such judgment. *Barker v. White*, 58 N. Y. 204.

Hence, a defendant in an action in equity to subject lands to the claims of creditors and of associates in a copartnership of which the owner of the legal title was a member, who contests the fact that such lands were copartnership assets, or other than the full individual property of the owner of the legal title, and who is defeated upon that issue, does not waive his right to take and prosecute an appeal from the final judgment in the action, by offering proof of his own claims against the property, and contesting the claims of others in a proceeding under an interlocutory judgment for an accounting and distribution. *Ibid.*

The withdrawal for safe-keeping of a fund in litigation on deposit in a bank in a failing condition, made by one party for the sole purpose of saving it, when his adversary has refused to consent to a change of depository, is not such an appropriation of it as operates as a waiver of the right to prosecute an appeal from the judgment under which the fund was deposited. *Atkinson v. Tabor*, 7 Colo. 451, 5 Pac. 814.

VI. Effect of tendering restitution.

The courts who hold that a litigant complaining of a decree or judgment partly in his favor, who has received the money it awarded him, will not be allowed to prosecute appeal or error to review it unless he shall restore his adversary to the *statu quo ante*, logically imply that if he repays or tenders restitution of what he has received under such decree or judgment, he will be permitted to proceed with his appeal or writ of error. No express decision to this effect has been found. The few decisions concerning the effect of tenders of restitution, that have been reported, have been rendered by courts not subscribing to the *statu quo* doctrine.

An appellant, by tendering a return of

the money he has received under a judgment, cannot regain the right to prosecute an appeal from such judgment, which he has waived by voluntarily accepting such payment. *Dunham v. Randall & C. Co.* 11 Tex. Civ. App. 265, 32 S. W. 720.

A party cannot escape the consequences of waiving his right to appeal from an order under which he has accepted payment of costs imposed as a condition of granting it, nor regain his right to appeal from such order by tendering back the costs that he has received, upon the ground that he accepted them inadvertently. *Platz v. Cohoes*, 8 Abb. N. C. 392.

An appellant from a decree cannot escape the effect of accepting money paid into court under the terms of such decree, as a waiver of his right to appeal therefrom, by tendering it back or returning it. *Lyons v. Bain*, 1 Wash. Terr. 482.

But the fact that a plaintiff's attorney who has filed in court a lien for his fees upon the judgment recovered withdraws a part of the amount of such judgment, which the defendant had paid into court with costs, does not preclude the plaintiff from taking and prosecuting an appeal from the judgment, where, as soon as the facts are brought to his knowledge, he repudiates the transaction, and pays back to the clerk the amount withdrawn by the attorney. *Jewell v. Reddington*, 57 Iowa, 92, 10 N. W. 306.

VII. The exceptions to the rule.

a. Judgments and decrees composed of separable parts.

The general rule, which is beyond question, that a party who has taken advantage of a judgment or decree may not afterwards question its validity, does not apply where such judgment or decree consists of two separate, distinct, and unrelated parts,—the disposition of either of which can in no wise affect the decision as to the other. *Worthington v. Beeman*, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232.

The rule that the right to appeal from one part of a judgment or order is waived by appealing from another part thereof, and not from the rest of it, applies only to cases where the provisions of the judgment or order are such that the party enforces or accepts a substantial benefit therefrom by not appealing from the whole of it. *Wallace & Sons v. Castle*, 68 N. Y. 370.

Where the reversal of a judgment or order cannot affect the right of the party to the benefit which he has secured thereby, the general rule does not apply. *Walnut Irrig. Dist. v. Burke* (Cal.) 110 Pac. 517.

The general rule that a party cannot appeal from a judgment after he has accepted the benefit under it does not apply where the judgment or decree consists of two distinct parts, from one of which an appeal is taken, while the other is accepted, and where the appeal cannot affect in any manner the part acquiesced in. *Wishek v. Hammond*, 10 N. D. 72, 84 N. W. 587.

When an appeal involves a bona fide dispute over matters apart from or in excess of those adjudicated in the trial court, the case is an exception to the general rule that a party cannot maintain an appeal from a judgment or decree which he has enforced. *Whetstone v. McQueen*, 137 Ala. 301, 34 So. 229.

When an appeal is taken from some specific part of a judgment in a case in which several independent issues have been tried, and a review of the action of the court on one or more of them by the appellate court will not disturb the determination already had of those about which no complaint is made, the case is an exception to the general rule that the acceptance of the fruits of a judgment precludes the right to appeal from the rest of it. *Re Black*, 32 Mont. 51, 79 Pac. 554.

An appellant is not estopped from appealing from a portion of a decree unfavorable to him, by accepting the benefit of another portion of such decree, which is entirely independent of and unrelated to the part appealed from, and to which he had a right in any aspect of the case. *Kelley v. Laconia Levee Dist.* 74 Ark. 202, 85 S. W. 249, 87 S. W. 638.

Where the different parts of a decree are in effect distinct and separate decrees, an appeal prosecuted from one part of the decree has no effect upon the decree in any other respect. *Rose v. Hale*, 185 Ill. 378, 76 Am. St. Rep. 40, 56 N. E. 1073.

When the provisions of a judgment are so disconnected and independent of each other that a part of it can be reversed without affecting the rest, the right to appeal from one part is unaffected by the acceptance, acquiescence, or enforcement of the other parts of the judgment. *First Nat. Bank v. Wakefield*, 138 Cal. 561, 72 Pac. 151.

Whenever the subjects of a judgment are distinct, the adjustment or withdrawal of one of the demands will not prejudice the right to an appeal in respect of the other subjects in controversy. *Kaiser's Succession*, 48 La. Ann. 973, 20 So. 184.

When there are two or more judgments in an action affecting separate parties or relating to separate and distinct matters in litigation, the acceptance of acquiescence of a party with respect of one is no waiver or estoppel of his right to take and prosecute an appeal from another or the others. *Genet v. Davenport*, 60 N. Y. 194.

A party cannot on principle be estopped from seeking to be relieved of a part of a decree or judgment at law, because he has taken advantage of another independent part, which in no manner affects or is affected by the part which he would question. *Worthington v. Beeman*, supra.

The acceptance and retention of benefits under one portion of a decree of court wholly separate and distinct from another portion of such decree does not estop the recipient from taking and prosecuting an appeal from the latter portion of the de-

creed. *Gillfillan v. McKee*, 159 U. S. 303, 40 L. ed. 161, 16 Sup. Ct. Rep. 6.

Where two appeals in respect of matters wholly separate and distinct are disposed of by one order, a party may appeal from the decision in respect of one of the appeals, while taking advantage of the decision in respect of the other. *Clarke v. Creighton*, 14 Ont. Pr. Rep. 100.

Where a judgment consists of distinct and separate parts, either of which may be affirmed, reversed, or modified on appeal or error without affecting the other part or parts, an appellant does not, by enforcing one of such parts, waive or lose his right to take and prosecute an appeal or writ of error to reverse the other part. *Woeltz v. Woeltz*, 93 Tex. 548, 57 S. W. 35.

When a plaintiff in an equitable action demands several distinct, separate, and different kinds of relief, one or more of which is awarded him by the judgment of the court, but of the others the court refuses to take jurisdiction at all, such plaintiff is not precluded from prosecuting an appeal from so much of such judgment as denies jurisdiction or relief, by accepting the relief which the court did award. *Milam v. Hill*, 29 Tex. Civ. App. 573, 69 S. W. 447.

A party to an action in which are united two distinct, separate, and different causes of action, who obtains a judgment upon one of such causes, and procures the satisfaction thereof, is not precluded from taking and maintaining a writ of error to review the judgment in favor of his adversary upon the other cause of action, notwithstanding only single judgment has been entered. *Worthington v. Beeman*, 33 C. C. A. 475, 63 U. S. App. 536, 91 Fed. 232.

If the relief which an appellant seeks by his appeal can be given him by a modification of the judgment, eliminating from it the part which was erroneously judged against him and leaving the remainder in force, his acceptance and retention of costs allowed him by the judgment will not affect his right to take and prosecute an appeal from it. *Walnut Irrig. Dist. v. Burke (Cal.)* 110 Pac. 517.

A party does not waive his right to take and prosecute an appeal from a judgment by accepting something under it, in a case where the appellate court has the power to modify the judgment so as to make it more favorable to him, without reversing it or disturbing the provisions in his favor which he accepted. *Tyler v. Shea*, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468.

b. When appellant's right to what he has received is absolute.

When an amount found in favor of a litigant by a judgment or decree is due him in any event,—when there is no controversy over his right to receive and retain it,—so that the only question to be determined by the appellate tribunal is whether he is or is not entitled to a greater or an

additional sum, the general rule does not apply, and his acceptance and retention of the amount awarded him by the judgment or decree he seeks to review does not preclude him from prosecuting the writ of error or appeal in order to obtain more. *McCalley v. Otey*, 103 Ala. 469, 15 So. 945; *San Bernardino County v. Riverside County*, 135 Cal. 618, 67 Pac. 1047; *Dudman v. Earl*, 49 Iowa, 37; *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621; *Re Black*, 32 Mont. 51, 79 Pac. 554; *Meade Plumbing, Heating & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N. W. 391, 111 N. W. 636; *State v. Central P. R. Co.*, 21 Neb. 172, 26 Pac. 225, 1109; *Clowes v. Dickenson*, 8 Cow. 328; *Seymour v. Spring Forest Cemetery Asso.* 4 App. Div. 359, 38 N. Y. Supp. 726; *New Rochelle Gas & Fuel Co. v. Van Benachoten*, 47 App. Div. 477, 62 N. Y. Supp. 398; *Beals v. Lewis*, 43 Ohio St. 220, 1 N. E. 641; *Hodges v. Smith*, 34 Tex. Civ. App. 635, 79 S. W. 328; *Morriss v. Garland*, 78 Va. 215; *Southern R. Co. v. Glenn*, 98 Va. 309, 36 S. E. 395.

The acceptance and retention of money to which an appellant or plaintiff in error is absolutely and unconditionally entitled in any event does not estop him from taking or prosecuting an appeal or writ of error to review the decree or judgment under which such money was paid. *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

The acceptance by an appellant of what is confessedly his is no admission that a decree which he seeks to reverse was not erroneous; neither does it take away the jurisdiction of the appellate court to review such decree. *Reynes v. Dumont*, 130 U. S. 354, 32 L. ed. 934, 9 Sup. Ct. Rep. 486.

When a sum received upon a judgment is not in dispute, its receipt is not a waiver of the right to appeal from the judgment, since no more is taken than must in any event be adjudged to be due. *Ballinger v. Connecticut Mut. L. Ins. Co.* 118 Iowa, 23, 91 N. W. 767.

When the pleadings in an action admit a stated sum to be due to the plaintiff, and that sum is paid into court, it may be accepted and withdrawn without waiving the right to appeal from a judgment denying the recovery of any additional sum. *Portland Constr. Co. v. O'Neil*, 24 Or. 54, 32 Pac. 764.

The right to appeal from a judgment or decree is not inconsistent with the acceptance of the amount admitted to be due under it by the pleadings in a case, where the purpose of the appeal is the enforcement of a contested or disputed right, additional to that which is conceded by all parties to the litigation. *Merriam v. Victory Min.* Co. 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

The right of a litigant to appeal from a part of a judgment is not lost or waived by his accepting the benefit of another part of such judgment, over which there is not and has not been any controversy. *Funk* 29 L.R.A.(N.S.)

v. Mercantile Trust Co. 89 Iowa, 264, 56 N. W. 496.

The collection of a judgment for the part of an appellant's demand which was undisputed and uncontested in the court rendering the judgment does not prevent him from appealing from such judgment so far as it dismisses his action with respect of the part which is really and solely in controversy. *Campbell v. Cincinnati Southern R. Co.* 80 Ky. 585.

If the demands passed upon by a judgment are separate and distinct, a settlement tendered and accepted as to one cannot be deemed an acquiescence in the judgment rejecting the other demands, not at all connected with that settled or abandoned. *Kaiser's Succession*, 48 La. Ann. 973, 20 So. 184.

When it appears beyond question that a plaintiff in error is entitled at all events and in every contingency to the sum awarded him by the judgment sought to be reviewed, and that he has collected it without compulsion or process, the proceedings upon such writ of error will neither be dismissed nor stayed upon the ground that he has collected the judgment, since the defendant in error in no aspect of the case can suffer injury. *McCreeliss v. Hinkle*, 17 Ala. 459; *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296.

There can be no injustice or vexatious oppression to a defendant in allowing a plaintiff to receive and retain that to which he is unquestionably entitled, and to confine future litigation only to so much of his claim as is disputed in good faith. *Phillips v. Towles*, 73 Ala. 406.

The principle of the decisions sanctioning the prosecution of an appeal by one retaining money paid to him voluntarily is that, when part of a money demand is voluntarily paid, it is a legitimate inference that so much was due; and there is no inconsistency between a retention of what is thus acknowledged to be due and the prosecution of an appeal to obtain the balance claimed. *Hoard v. Hoard*, 41 Ala. 590.

We take the true rule to be, both upon the authorities and the clear principles of reason, said the court in *Phillips v. Towles*, supra, as follows: "That, in all cases of appeals from the chancery and the probate courts (whose decrees are of a peculiar nature, and not necessarily entireties, as are judgments at law), if a certain sum is admitted to be due by the defendant in execution, or there seems to be no controversy or bona fide dispute as to the fact that the sum recovered by the appellant is actually due, so that the appellate court can clearly see, from the facts presented in the record, that upon a new trial a less sum will not again be recovered by the plaintiff, the motion to dismiss or stay proceedings ought to be refused."

No doubt, said the court in *Jackson v. Brockton*, 182 Mass. 26, 94 Am. St. Rep. 635, 64 N. E. 418, it is a commonplace that

a party may preclude himself from setting up error in a judgment by taking advantage of it, and this rule has been applied not only when execution has been taken out and satisfied, but in the case of an appeal from an assessment of land damages, when there has been a simple acceptance of the sum found payable; but the principle is that of election, at least when the judgment is formally outstanding, and when a party has taken under a judgment only benefits to which he equally would be entitled if the judgment were reformed, we see no reason why his acceptance of them, especially while ignorant of the mistake, should stand in the way of his getting his additional right.

The distinction between cases where the acceptance of the fruits of a judgment bars a party in whose favor the judgment was rendered from prosecuting an appeal from it, and those in which it has no such effect, was stated by the court in *State v. Central P. R. Co.* 21 Nev. 172, 26 Pac. 225, 1109, as follows: Where a reversal upon the plaintiff's appeal would require him to refund to the defendant money or property which he has obtained under the judgment, there is reason for holding that the acceptance of the benefits of the judgment is a waiver of the right to appeal. Having elected to receive the fruits of the judgment, he is estopped from attempting to destroy the very foundation of his right to receive them. But where a reversal would not work this result,—where his right to what he has received would still remain intact,—it is difficult to conceive why he should not be allowed to take what is now, and always will be, his, and still prosecute his claim for more. There are, remarked the court, decisions which seem to hold the contrary; but if so, we decline to follow them, believing that they are not founded upon principle, and are contrary to the weight of authority.

The language of the supreme court of North Dakota, in *Tyler v. Shea*, 4 N. D. 377, 50 Am. St. Rep. 660, 61 N. W. 468, to wit: "The rule is well settled that one cannot accept or secure a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by the reversal of the judgment. . . . It is the possibility that his appeal may lead to a result showing that he was not entitled to what he has received under the judgment appealed from that defeats his right to appeal. Where there is no such possibility, the right to appeal is unimpaired by the acceptance of benefits under the judgment appealed from. . . . The appellant waived his right to appeal if he obtained any benefit under the judgment which on the appeal may be taken from him," was quoted and adopted as the governing rule in *Meade Plumbing, Heating, & Lighting Co. v. Irwin*, 77 Neb. 385, 109 N. W. 391.

It is an established rule of procedure 20 L.R.A. (N.S.)

that a party to an action cannot receive a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute and cannot possibly be affected by a reversal of the judgment. *Easton v. Lockhart* (N. D.) 89 N. W. 75.

It is only in some peculiar cases of appeals from the courts of probate or in chancery, in which it is apparent or admitted that the appellants are entitled to recover all they have received from the judgment appealed from, and perhaps more, that the supreme court of Alabama will not stay an appeal until restitution has been made, or will not dismiss it if restitution is refused. *Shingler v. Martin*, 54 Ala. 354.

When it is clear to an appellate court that a new trial cannot in any view of the case diminish the recovery, the collection by the appellant of the sum awarded by the decree appealed from is not a ground for dismissing or staying the appeal; but this is an exception to the general rule. *Whetstone v. McQueen*, 137 Ala. 301, 34 So. 229.

A limitation to the general rule that the acceptance of a benefit or advantage from an order, judgment, or decree of the court, is a waiver of the right to appeal from it, exists where a reversal of such judgment, order, or decree cannot affect the right of the party to the benefit which he has secured thereby. *San Bernardino County v. Riverside County*, 135 Cal. 618, 67 Pac. 1047.

One may prosecute an appeal from a judgment partly in his favor and partly against him even after accepting the benefit awarded him by the judgment, provided the case is one in which the record discloses that what he recovers is his in any event, that is, whether the judgment be reversed or affirmed. *Bolen v. Cumby*, 53 Ark. 514, 14 S. W. 926.

A litigant does not waive his right to appeal from a judgment by accepting a benefit under it, to which he is so absolutely entitled that a reversal of the judgment will not affect his right to it. *Tyler v. Shea*, *supra*.

When it is apparent that an appellant is entitled in any event to all that he has received under the judgment appealed from, no matter what disposition is made of the case on appeal, his acceptance of the same is not a waiver of the right to prosecute the appeal. *Hinchman v. Point Defiance R. Co.* 14 Wash. 349, 44 Pac. 867; *Re Day*, 18 Wash. 359, 51 Pac. 474.

A party has a right to accept the benefits awarded by a judgment or decree in his favor, and at the same time take and prosecute an appeal from such decree, where that which is awarded and accepted would be his in any event, whether a reversal, modification, or affirmation of the decree occurred. *Merriam v. Victory Min. Co.* 37 Or. 321, 56 Pac. 75, 58 Pac. 37, 60 Pac. 997.

When it is conceded that an appellant has received nothing to which he would not be entitled in any event, regardless of the final result of the litigation, his receipt and retention thereof does not estop him from prosecuting an appeal from the rest of the judgment. *Mellen v. Mellen*, 137 N. Y. 606, 51 N. Y. S. R. 73, 33 N. E. 545.

One who is absolutely entitled to a sum of money by a judgment does not, by accepting that money, waive, or become estopped from prosecuting, an appeal from so much of the judgment awarding it as does not involve a reversal of the part under which he takes the money. *Fiedler v. Howard*, 99 Wis. 388, 67 Am. St. Rep. 865, 75 N. W. 163.

If an appeal is from such an order or judgment as that the successful party can in no event recover a less favorable judgment, and he incurs no hazard of ever receiving less than the judgment awarded him, there is no objection to his prosecuting an appeal from such judgment, because he collected it. *Bechtel v. Evans*, 10 Idaho, 147, 77 Pac. 212.

This exception to the general rule has been recognized and allowed in numerous specific instances and a great variety of cases, enough, perhaps, to give rise to a new rule.

One who accepts a share of a special fund under a decree of court does not waive his right to appeal from another part of the decree denying him a share in a general fund, which is a separate and distinct matter in such decree. *Gilfillan v. McKee*, 159 U. S. 303, 40 L. ed. 161, 16 Sup. Ct. Rep. 6.

A plaintiff in a litigation over several items of an account is not precluded from taking and prosecuting an appeal from a judgment disallowing certain items, by a subsequent acceptance of payment of the items allowed. *Byram v. Polk County*, 76 Iowa, 75, 40 N. W. 102.

A complainant in a suit in equity dissatisfied with the allowance made by the decree rendered therein of certain contested credits to the defendant, and claiming to be entitled to recover more than he was awarded, is not precluded from taking and prosecuting an appeal from such decree, by withdrawing from the registry of the court sums of money on deposit awarded him by the decree and belonging to him in any contingency. *Snow v. Hazlewood*, 179 Fed. 182.

A special guardian of an incompetent, appointed in the surrogate's court upon an accounting by the committee of such incompetent, is not precluded from appealing from the surrogate's decree settling the committee's account, by the receipt and retention of a sum allowed in such decree to him for his services upon the accounting, since that sum was merely his compensation to which he was in any event entitled, regardless of the result of the proceeding. *Re Edwards*, 110 App. Div. 623, 97 N. Y. Supp. 185.

A widow entitled by her husband's will

to a stated annuity from his estate, which, upon proceedings in surrogate's court, is reduced in amount, is not precluded from taking and prosecuting an appeal from the decree of reduction, by instituting subsequent proceedings to require a reinvestment of the securities belonging to the estate and accepting the reduced annuity, since in any aspect of the case such annuity belongs absolutely to her. *Cocks v. Haviland*, 55 Hun, 605, 28 N. Y. S. R. 622, 7 N. Y. Supp. 870.

When a decree settling an estate of a deceased testator allows a sum of money to a claimant, and there is no dispute as to the right of such claimant to receive such sum in any and every event, he does not, by accepting it, waive his right to have it determined upon appeal whether he is not entitled to a larger sum. *Re Youngerman*, 136 Iowa, 488, 114 N. W. 7, 15 A. & E. Ann. Cas. 245.

The acceptance and retention of a sum awarded by a decree of distribution of a fund in court does not estop the recipient from prosecuting an appeal from such decree so far as it denies him any more of the fund, when he was entitled absolutely and in any event to the amount awarded him. *Souder's Appeal*, 57 Pa. 498.

The payment and acceptance, after a judgment settling an executor's accounts, of certain items which were found to be due from the executor to the persons entitled to take under the will, does not prevent the taking and prosecuting an appeal from so much of the judgment or decree of settlement as involves other items in the executor's account which were the subject of dispute and controversy. *Kaiser's Succession*, 48 La. Ann. 973, 20 So. 184.

A creditor is not estopped from taking and prosecuting an appeal from a surrogate's decree of distribution of the proceeds of the sale of a decedent's lands to pay debts, upon the ground that the expenses and allowances are excessive, by receiving and accepting his dividend. *Higbie v. Westlake*, 14 N. Y. 281.

A creditor who has obtained a decree for a sale of the lands of his deceased debtor to satisfy or apply on the debt, and who has caused an execution upon the decree to be issued and the lands to be sold thereunder, and bid them in at the sale, is not thereby precluded from prosecuting an appeal from so much of the decree as fixes allowances to others, and makes them liens upon the land. *Crane v. Guthrie*, 48 Iowa, 693.

A plaintiff claiming a lien against certain parcels of property may take and prosecute an appeal from a judgment denying his lien in respect of some of such parcels, notwithstanding he has enforced the judgment upon the other parcels upon which it awarded him a lien. *Haman v. Steele*, 11 Ky. L. Rep. 287.

The acceptance by a junior mortgagee of part of the proceeds of sale of mortgaged premises under a decree of foreclosure of

the senior mortgage and his own does not estop him from appealing from so much of such decree as is separable from and independent of the portion under which he received money. *Hinchman v. Point Defiance R. Co.* 14 Wash. 349, 44 Pac. 867.

When a decree in a suit to foreclose a mortgage may stand in part and may be reversed or modified in another part, it can be separately enforced by the plaintiff, and if he is entitled in any event, as a matter of right, to the benefit of a portion of the decree, he is not precluded from prosecuting an appeal from the rest of it, by taking advantage of the portions in his favor. *Inverarity v. Stowell*, 10 Or. 261.

One who is perpetually enjoined from suing on a judgment in his favor upon being paid a certain sum of money is not estopped from prosecuting a writ of error to review the decree of injunction, by receiving the money and applying it on his judgment. *Embry v. Palmer*, 107 U. S. 3, 27 L. ed. 346, 2 Sup. Ct. Rep. 25.

A creditor against whom an injunction has been granted arresting the sale of his debtor's property seized under a fl. fa. which has been dissolved in part as to a portion of the property and continued as to the rest, does not, by proceeding to execute his fl. fa. against the property relieved of the injunction, waive his right to appeal from the portion of the judgment which continued the injunction as to the remaining property. *Mitchell v. Lay*, 3 La. Ann. 593.

The acceptance by a judgment creditor from his debtor of the amount of the judgment for a principal sum and costs, from which erroneously interest to which he was entitled has been omitted, does not preclude such creditor from prosecuting a writ of error, or taking other appropriate action to review or amend the judgment and correct the mistake, in case he received the money in ignorance of the error. *Jackson v. Brockton*, 182 Mass. 26, 94 Am. St. Rep. 635, 64 N. E. 418.

The state is not barred of its right to appeal from a decree fixing the amount of a collateral inheritance tax, upon the ground that an insufficient sum has been allowed, by accepting and retaining the amount allowed it voluntarily paid by the legatee. *Commonwealth's Appeal*, 128 Pa. 603, 18 Atl. 386.

While for convenience the succession, transfer, or inheritance tax upon the several interests passing under the will of testator are included in a single order, the judgments against the recipients of the shares of the estate upon which the tax rests are nevertheless separate and independent; hence the acceptance by the comptroller of the city of New York of the transfer tax ordered to be paid on a life estate does not preclude him from taking an appeal from so much of the same order as declares that a vested remainder after the life estate "is at present undeterminable, and is not now subject to tax." *Re Bogert*, 25 Misc. 466, 55 N. Y. Supp. 751. 29 L.R.A. (N.S.)

When, in an action by the state to recover delinquent taxes from a railroad corporation, both parties appeal from the judgment rendered,—the state upon the ground that it should have recovered more, and the corporation upon the ground that the judgment was too much,—the affirmance of such judgment upon the defendant's appeal, and the payment by the defendant of the amount and costs, does not estop the state from prosecuting its independent appeal to increase the judgment. *State v. Central P. R. Co.* 21 Nev. 172, 26 Pac. 225, 1109.

When, in an action to restrain a collector of taxes from enforcing against the plaintiff certain taxes alleged to be in excess of a sum lawfully due, a decree is made fixing the amount justly payable and enjoining the collection of any excess, the acceptance by the defendant of the tax conceded to be due and payable is not a waiver of his right to review the decree in so far as his claim for the excess is concerned. *Schaeffer v. Ardery*, 238 Ill. 557, 87 N. E. 343.

In the case of *Schaeffer v. Ardery*, supra. a suit to restrain the collection of excessive taxes, a portion of each tax, according to the court, was conceded to be justly due, and the decree provided that nothing contained in it should be construed to prevent the defendant from collecting the same. The statute made it the duty of the tax collector to collect the taxes, and, if not paid, to enforce the collection. When voluntarily tendered to him he had no discretion, but was bound to accept payment. The right to the taxes did not arise out of the decree, and was not conferred by it, and the receipt of the taxes not in dispute, but admitted to be due, was not the voluntary acceptance of any right conferred by the decree.

In an action between two railroad companies to determine the validity of a lease of the railroad of one to the other, the right of one party to take and prosecute an appeal from the judgment or decree is not waived by the payment or receipt of the rent reserved in the lease according to its terms, after the entry of judgment, since whether such lease is ultimately held to be valid or invalid, and whether the appeal is successful or unsuccessful, the one is bound to pay, and the other is entitled to receive, in any event some compensation for the use of the road, and the amount agreed upon in the lease to be paid as rent is a fair measure of such compensation. *Ogdensburgh & L. C. R. Co. v. Vermont & C. R. Co.* 63 N. Y. 176.

When one has a claim against a county, the amount of which has been fixed by statute, as, for example, compensation for public printing, so that he is entitled in any event to the full amount of such claim if he has done the printing, the mere fact that the board of supervisors to whom such claim is presented audits it, and issues a warrant for it for a less amount than the claimant is entitled to, does not estop such claimant from disputing the correctness of the action of the board, and

taking proceedings to recover the balance, where, upon the tender of the warrant, he declines to accept it in full, although he receives and collects it upon the refusal of the messenger to take it back. *People ex rel. Kinney v. Cortland County*, 58 Barb. 139.

Where a landlord lays claim to the entire sum awarded as damages against a city to land and buildings caused by changing the grade of a street, and a part of such damages is also claimed by the tenant of the buildings, the receipt and retention by the landlord of the portion awarded him, to which his right was undisputed, does not preclude him from taking and prosecuting an appeal from the rest of the judgment awarding the balance to the tenant. *St. Louis v. Nelson*, 108 Mo. App. 210, 83 S. W. 271.

A defendant in a suit to enjoin him from cutting timber on certain lands, who claims the right by contract to cut all of the timber thereon, who is enjoined by the decree from cutting any timber under a stated diameter, does not waive his right to appeal from such decree by cutting the timber which the decree allows him to cut. *Roots v. Boring Junction Lumber Co.* 50 Or. 298, 92 Pac. 811, 94 Pac. 182.

The acceptance by a bankrupt of the benefit of an order of a referee in bankruptcy, allowing him certain personal property as exempt, does not preclude him from appealing from so much of the same order as denied his right of exemption to his homestead. *Re Letson*, 84 C. C. A. 582, 157 Fed. 78.

The payment by certain stockholders of sums adjudged to be due from them, under a judgment in an action to assess the statutory liability of the stockholders of a corporation, does not estop the plaintiff from appealing from such judgment as against other stockholders who do not pay. *Marriott v. Columbus, S. & H. R. Co.* 10 Ohio C. C. N. S. 573.

The acceptance by a plaintiff who has brought an action upon two promissory notes, of money paid into court by the defendant upon a judgment for the amount due upon one of such notes, does not preclude the plaintiff from prosecuting an appeal from the judgment denying him a recovery upon the other note. *Upton Mfg. Co. v. Huiske*, 69 Iowa, 557, 29 N. W. 621.

In *Dudman v. Earl*, 49 Iowa, 37, the plaintiff had brought an action to recover the amount due upon a lost promissory note, in which the defendant had tendered and paid into court the sum due thereon at the time of making his tender, but the litigation proceeded over the question of indemnity and subsequent interest and costs to the defeat of the plaintiff. After the rendition of judgment and the signing of a bill of exceptions, but before the formal entry of such judgment, the plaintiff accepted the sum tendered, and the question was raised as to his right to prosecute an appeal after such acceptance. We think, said the court, in the circumstances the 29 L.R.A. (N.S.)

plaintiff did not waive his right to appeal. Although he did accept the money before judgment was formally entered up by the clerk, he could never recover a less sum than the amount of the tender, and might upon appeal be entitled to more. When it was adjudged by the court that he was entitled to this amount, and his further claim was denied him, and the money was paid into court for his use, he could not be compelled to allow the sum paid in to remain idle until he could upon appeal try the only questions in dispute upon the facts,—whether he should have the interest he claimed, and whether he was liable for the costs of the action. The cause would have been different if he had accepted the tender before or upon the trial in the court below.

In *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414, the action was brought to restrain the defendant from selling the land of the plaintiff which had been pledged as security for a loan of money bearing interest at the rate of 20 per cent per annum, upon the ground that an excessive and usurious amount was demanded, praying judgment fixing the amount lawfully due upon the loan, and compelling the defendant to accept it in satisfaction. A decree was made fixing the sum payable as the balance due upon the note given, together with interest at the stipulated rate until its maturity, and thereafter at the rate of 6 per centum, and from that decree the defendant appealed. There was at that time a statute in the state of Mississippi declaring that all judgments and decrees founded on any contract should bear interest after the rate of the debt on which such judgment or decree should be rendered. After taking the appeal the plaintiff paid, and the defendant received, the sum directed to be paid by the decree appealed from, and thereupon the appellee set up such payment and acceptance as a bar to the appeal. Chief Justice Campbell, in delivering the opinion of the court, said the appellant was not barred from his appeal by his acceptance of the sum decreed to be paid him. The suit was by the appellee to compel the appellant to accept in satisfaction of his demand a less sum than he claimed to be due, and after obtaining the decree, the appellee paid the sum decreed, which was received and receipted for by the appellant, whose acceptance of it is now pleaded as a bar to his appeal. In this case we adopt the view of the Supreme Court of the United States in a similar case. *Erwin v. Lowry*, 7 How. 172, 12 L. ed. 655. We decline to lay down a rule for any other state of case than that here presented. The members of the court are not agreed on the general question whether acceptance of what is adjudged precludes an appeal from the judgment or decree. We have examined all the cases on the subject and fully considered it, and have failed to harmonize our views. One member of the court holds the opinion that coercion of satisfaction will bar an appeal, while mere acceptance of perform-

ance will not. Another entertains the view that acceptance of payment will bar an appeal; and the third contends that the right to enforce a judgment or decree and to appeal from it are coexistent rights conferred by statute, and that the right to appeal is not impaired by the exercise of the legal right to have execution. All of us agree that the right to appeal was not lost by the acceptance of the money by the appellant, and this result would follow the application of the views by a majority of the court as given above.

VIII. *Distinction between judgments at law and decrees in equity.*

A judgment at law is an entirety. If reversed in part it must be reversed in whole, and it must be accepted as a whole, or altogether rejected. *Waddingham v. Waddingham*, 27 Mo. App. 596.

The reason a litigant cannot at the same time enjoy the fruits of a judgment, and appeal from the parts which are unfavorable, is that the court cannot reverse part of a judgment without reversing the whole, and an election to receive its benefits is a renunciation of the right to appeal from it. *Kelly v. Bloom*, 17 Abb. Pr. 229.

On appeal from a judgment in an action at law there must be either an entire reversal or affirmance. *Bush v. Mitchell*, 28 Or. 92, 41 Pac. 155.

When a judgment or decree is not severable, so that upon an appeal from it it must either be reversed or affirmed as an entirety, an appeal cannot be taken from a part of it, so as to leave undisturbed the rest of it as favorable to the appellant. *New Zealand Ins. Co. v. Smith*, 41 Or. 466, 69 Pac. 268.

In an action at law there is necessarily but one judgment, namely, that the plaintiff or the defendant, as the case may be, recovers so much money of his adversary. Therefore, any appeal from such judgment must of necessity either affirm or reverse the judgment as an entirety. *Cromwell v. Burr*, 9 Daly, 482.

When a judgment is rendered an action at law as an entirety, and a successful appeal therefrom can only result in reversing the judgment and remanding the case for a new trial, the acceptance by the successful party of the amount of the judgment from his adversary is a bar to the prosecution of any appeal therefrom. *Adams v. Carter*, 92 Miss. 579, 47 So. 409, 16 A. & E. Ann. Cas. 76.

An appeal by a plaintiff from the judgment of a common-law court awarding him only a part of his demand, when there is no admission of any kind, either in the pleadings or the evidence, that any sum whatever was due him, is barred by his accepting payment of the judgment, because a reversal would permit and require a retrial of the whole case. *Ibid*.

The principle which forbids a plaintiff in error to prosecute a writ to reverse a judgment which he has enforced by execu-

tion, unless he restores the proceeds to the defendant and places him *in statu quo*, is one peculiarly applicable to judgments at law, but not necessarily so to cases arising in orphans' or chancery courts. The reason for the distinction is said to be that if a judgment at law is reversed, it is totally abrogated. It cannot be reversed in part and affirmed in part. Whereas, in cases from the probate court or in chancery cases, the judgments or decrees may be reversed in part and affirmed in part. *Tarleton v. Goldthwaite*, 23 Ala. 346, 58 Am. Dec. 296.

The authorities in this country, according to the court in *Paine v. Woolley*, 80 Ky. 568, make no distinction between common-law and equity causes in the application of the rule that the coercion of the satisfaction of a judgment precludes the party resorting to it from appealing from it. But there is, according to the court in that case, greater room in equity causes than in common-law cases for exceptions to the rule that the enforcement of a judgment precludes the party enforcing it from taking and prosecuting an appeal from it based on the divisibility of questionable charges, as in such cases the decree may have various parts, "some of which may be good and executed, while others may be litigated on appeal."

In an action in equity there may be and often are many separate and independent provisions in the judgment, and a party may appeal from any distinct and separate provision without appealing from the whole judgment. *Cromwell v. Burr*, *supra*.

In *Adams v. Carter*, 92 Miss. 579, 47 So. 409, 16 A. & E. Ann. Cas. 76, a state revenue agent who had recovered a judgment for the default of the defendant's intestate in not paying over taxes collected, in an action at law in which all liability was denied, was held barred from prosecuting an appeal by acceptance of the amount recovered, and the court, citing *Meaders v. Gray*, 60 Miss. 400, 45 Am. Rep. 414, as the only decision in Mississippi upon the subject, distinguished it by saying, "that was an appeal from an equity decree, and is not here in point."

We have found several cases, said the court in *Adams v. Carter*, *supra*, apparently maintaining the proposition that, when the plaintiff accepted money paid, he may still appeal, where the object of the appeal is simply to have a judgment modified by increasing his demand, as where sufficient damages had not been allowed, or where proper interest had not been allowed. But every one of these cases was either, first, under a statute, as in Kentucky, Nevada, and Iowa, and possibly other states; or, second, where there had been a concession in the pleadings that the amount received by the plaintiff was due to him; or, third, a case in equity; or, fourth, where the court by its judgment itself required the successful party to do certain things as the condition of entitling him to the benefit of the judgment; or, fifth, where there

was reference to matters clearly severable, as in the case of accounts, wherein different items were passed upon, allowed, and disallowed by the receiver or a master or a referee,—all cases equitable in their nature; or, sixth, where the case was of a peculiar nature, as, for example, where the amount awarded in a partition proceeding to the plaintiff was the proceeds of his own property, so recognized in the pleadings, as in the case of *Mellen v. Mellen*, 137 N. Y. 606, 33 N. E. 545.

Apropos the subject of this note, the Mississippi supreme court in *Adams v. Carter*, 92 Miss. 579, 47 So. 409, 16 A. & E. Ann. Cas. 76, remarked, owing to the large number of states in which the distinction between equity and common law has been abolished, where the same court administers both equitable and common-law jurisdiction, a practice wholly foreign to this state, great care and nice discrimination are required in order to determine whether any cited authority is authority for us under our system.

IX. When the benefits are refused.

It would appear to be unnecessary to cite cases to show that the rule forbidding appellants to prosecute appeals after accepting the benefits of the mandates of which they complain cannot apply where the benefits have not been accepted, yet there have been a few cases in which it was contended to the contrary, and it is well to cite them to put the matter at rest.

A mere tender of a sum found due by a judgment or decree, which the opposite party refuses to accept on the ground of its insufficiency, does not preclude the taking and prosecuting an appeal from the judgment awarding it. *Wolfort v. Reilly*, 133 Mo. 463, 34 S. W. 847.

A tender by the successful party in an action of ejectment, of the remuneration awarded to the defeated party, which is not accepted, but, on the contrary, is explicitly refused, does not affect or impair the right of the defeated party to appeal from the judgment, notwithstanding the sum as left in the custody of his attorney. *Alexander v. Jackson* (Cal.) 25 Pac. 415.

Mere payment into court by a defendant against whom judgment has been rendered, of the amount of such judgment, does not entitle him to a dismissal of the plaintiff's appeal therefrom, when the plaintiff has not accepted, and refuses to accept, such amount. *McKelvy v. Burlington*, C. R. & N. R. Co. 94 Iowa, 668, 63 N. W. 608.

A mere allowance of a credit to one having a claim against a county of a sum awarded him in the county's accounts, which he refuses to accept and which is not paid, does not preclude him from prosecuting an appeal from the order of allowance, upon the ground that the sum allowed him was insufficient. *Center v. Breathitt County*, 28 Ky. L. Rep. 1003, 90 S. W. 1054.

An appeal will not be dismissed on the ground that the appellant has coerced on ac-

cepted satisfaction of the judgment appealed from, when it is established that the execution was issued without his authority, and that he refused to accept from the sheriff the proceeds when informed of its collection, and instructed that officer to return them to the defendant. *May v. Sharp*, 49 Ala. 140; *Chapman v. Lee*, 51 Ala. 106.

X. Conclusion.

Under the operation of the general rule, no litigant is permitted a review of an entire judgment or decree, all parts of which are mutually interdependent, after he has acquiesced in its terms by enforcing it or taking advantage of the provisions in his favor. The rule applies to all judgments and decrees which finally adjudicate the whole controversy between or among the parties, and award reciprocating benefits to opposing disputants. The rule applies also in respect of orders of court made during the progress of the litigation, in which one party is granted relief conditioned upon terms payable or advantageous to his adversary, and where the attached conditions are complied with on the one side or accepted on the other voluntarily. The exceptions to the rule which are generally admitted embrace the right to review upon appeal or error onerous parts of the judgment, after first acquiescing in and taking the benefit of another part or other parts separate and distinct from, independent of, unconnected with, and unrelated to, the part or parts alleged to be erroneous; and second, accepting and retaining benefits and advantages conferred by the judgment or decree, to which the complaining litigant is so absolutely and unquestionably entitled that his right to keep them cannot possibly be affected by his defeat.

The foundation of the rule is the receipt by the plaintiff in error or appellant of some benefit or advantage by or under the judgment or decree of which he complains. If, therefore, he declines the benefit and puts aside the advantage, or if all the benefits and advantages accrue to his adversary, so that he confers instead of receives them, or if he ineffectually attempts and so fails to get the benefits in any of these cases, he does not lose his right to prosecute a writ of error or maintain an appeal.

J. B. G.

IOWA SUPREME COURT.

STATE OF IOWA

v.

ANDREW D. ROZEBOOM, Appt.

(— Iowa, —, 124 N. W. 783.)

Evidence — record subsequent to transaction.

1. Upon the question of larceny by a shipper of freight of material loaded in the

car, a shipping receipt is not admissible upon which a notation was made of facts tending to show a larceny after the shipper had been charged therewith.

Appeal — cumulative evidence.

2. The admission of inadmissible, corroborative evidence which is merely cumulative, is not reversible error.

Evidence — corporate character — oral testimony.

3. Oral evidence of an agent of a railroad company as to its corporate character is sufficient to take to the jury an indictment charging larceny from it as a corporation.

Larceny — asportation — sufficiency.

4. The mere dragging or rolling by a shipper of butter of tubs of that material belonging to another shipper, from one por-

tion of the car to another, with intent to appropriate them to his own use, is sufficient asportation to constitute larceny, although he does not lift them from the floor, —at least where he changes the addresses on them, so as to cause the carrier to transport them as his agent.

(February 9, 1910.)

A PPEAL by defendant from a judgment of the District Court for O'Brien County convicting him of larceny. Affirmed.

The facts are stated in the opinion.

Messrs. J. T. Conn and Herrick & Herrick for appellant.

Messrs. H. W. Byers, Attorney General, and Charles W. Lyon, for appellee:

Note. — Larceny: what constitutes asportation.

Circumstances held sufficient to show asportation.

The general rule is that any removal of an article, however slight, from the place where it was found, will amount to a carrying away thereof, and under this rule the following circumstances have been held to amount to such an asportation of property as would support an indictment for larceny:

—cutting the throat of a hog after having shot and killed it. *Kemp v. State*, 89 Ala. 52, 7 So. 413;

—killing a hog by knocking it in the head and running when detected. *Cross v. State*, 64 Ga. 443;

—shooting a cow and taking possession of the carcass sufficiently to partly remove the hide before being detected. *Lundy v. State*, 60 Ga. 143;

—driving a cow for a short distance within the pasture in which it was found and then killing it. *Wilburn v. Territory*, 10 N. M. 402, 62 Pac. 968, 14 Am. Crim. Rep. 500;

—taking lambs from the fold and killing them in the yard. *R. v. Rawlins*, 2 East, P. C. 617;

—driving sheep from a field into an empty house in the field, and seizing one of them before being frightened away. *State v. Gray*, 106 N. C. 734, 11 S. E. 422;

—taking a horse in a close and leading it some distance, but without getting it out of the close. *Anonymous*, 2 East, P. C. 555; *State v. Gazell*, 30 Mo. 92;

—catching sheep and taking them into the bushes in the same field, where one was killed and the other tied to a tree. *State v. Carr*, 13 Vt. 571;

—leading a jack from a stable into the yard and there killing him. *Delk v. State*, 64 Miss. 77, 60 Am. Rep. 46, 1 So. 9;

—taking a mule out of a lot and attempting to harness it to drive it away. *Garris v. State*, 35 Ga. 247;

—any moving of a steer while alive, so as to get it into position for killing, though 29 L.R.A. (N.S.)

it was not moved after killing. *State v. Gilbert*, 68 Vt. 188, 34 Atl. 697;

—taking possession of hogs sufficiently to brand them, with intent to claim them afterward. *Scott v. Harbor*, 18 Cal. 704;

—shooting a hog and covering it with brush, and later removing it by the consent of the owner obtained by false representations. *Frazier v. State*, 85 Ala. 17, 7 Am. St. Rep. 21, 4 So. 691;

—removing a package from one end of a wagon to the other. *R. v. Cozlett*, 2 East, P. C. 556;

—throwing wheat over a partition from one garner in a mill into another containing defendant's wheat. *State v. Craig*, 89 N. C. 475, 45 Am. Rep. 698;

—filling sacks with grain and concealing them on the premises. *R. v. Samways*, *Dears*. C. C. 371;

—taking wheat from its place in the granary and piling it in sacks and tying it. *State v. Hecox*, 83 Mo. 531, 5 Am. Crim. Rep. 98;

—taking property from its place in a house, though defendant was detected before removing it from the house. *State v. Wilson*, 1 N. J. L. 430, 1 Am. Dec. 216;

—removing goods from their accustomed places in a store, without removing them from the store. *State v. Taylor*, 136 Mo. 66, 37 S. W. 907;

—breaking open a box on a vessel, and taking shoes therefrom, and concealing them in another part of the vessel, under a charge of larceny from a vessel. *Nutzel v. State*, 60 Ga. 264;

—taking sheets from a bed in which the defendant had slept in a hotel, and carrying them into the hall, where they were left while defendant went to get his horse. *Anonymous*, 1 Leach, C. L. 322;

—removal of merchandise from a store to the sidewalk. *State v. Mitchener*, 98 N. C. 689, 43 S. E. 26;

—taking plate out of a trunk and laying it on the floor. *Anonymous*, 2 East, P. C. 556;

—drawing porter from a barrel into a can on the ground. *R. v. Wallis*, 3 Cox, C. C. 67;

The corporate character of the railroad company was sufficiently alleged.

State v. Fogerty, 105 Iowa, 32, 74 N. W. 754; State v. Grant, 104 N. C. 908, 10 S. E. 554; State v. Congrove, 109 Iowa, 60, 80 N. W. 227; State v. Cunningham, 21 Iowa, 433; State v. Carr, 43 Iowa, 418; State v. King, 37 Iowa, 462.

Proof of the existence of the corporation *de facto* is enough.

1 McClain, Crim. Law, § 604.

The proof shows asportation of the butter by defendant.

Wilson v. State, 21 Md. 9; State v. Higgins, 88 Mo. 354; R. v. Walsh, 1 Moody, C. C. 14; R. v. Cozlett, 2 East, P. C. 556; Delk v. State, 64 Miss. 77, 60 Am. Rep. 46, 1 So. 9; Nutzel v. State, 60 Ga. 264; State

v. Craig, 89 N. C. 475, 45 Am. Rep. 698; 3 Greenl. Ev. 16th ed. § 154; Gettinger v. State, 13 Neb. 308, 14 N. W. 403.

Weaver, J., delivered the opinion of the court:

Rock Valley and Hartley are stations on the line of the Chicago, Milwaukee, & St. Paul Railway. At the time in question it was the custom of the company on certain specified days to run a refrigerator car from Rock Valley east through Hartley, for the transportation of shipments of butter and eggs to the Chicago, New York, and other eastern markets. Among the shippers making use of this convenience were C. H. Day, doing business at Rock Valley, and Andrew D. Rozeboom, the defendant herein, doing

—taking meat out of a barrel and laying it beside the barrel. Tobias's Case, 1 N. Y. City Hall Rec. 30;

—removal of a till, so that the money fell on the floor. State v. Higgins, 88 Mo. 354; —removal of a drawer from a safe and handling the money therein at the door of the safe. State v. Green, 81 N. C. 560;

—opening a money drawer and disarranging the money therein. Eckels v. State, 20 Ohio St. 508;

—lifting a bag from the boot of a coach without getting it out of the boot. R. v. Walsh, 1 Moody, C. C. 14;

—being in the act of removing a harness from its hook when detected. State v. Williams, 199 Mo. 137, 97 S. W. 562;

—breaking up a heavy cast-iron balance wheel, and carrying it away for old iron, where an indictment charged larceny of the wheel as a wheel. Gettinger v. State, 13 Neb. 308, 14 N. W. 403;

—lifting a pocketbook from the bottom of a pocket, without removing it entirely therefrom. Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517; Scott's Case, 5 N. Y. City Hall Rec. 169; State v. Chambers, 22 W. Va. 779, 46 Am. Rep. 550;

—taking a watch from the pocket and detaching the chain from the buttonhole, though the chain immediately caught again upon a button. R. v. Simpson, Dears. C. C. 421;

—detaching an earring from the ear, but dropping it so that it caught upon the owner's hair. R. v. Lapier, 2 East, P. C. 557;

—taking a bond from the hand of one who was holding it out and expecting payment thereon, and putting it in the mouth and chewing it and then throwing it away. Vaughn v. Com. 10 Gratt. 763;

—taking money from a person who was stupefied by liquor, and did not notice it until the money was in defendant's hands. State v. Jackson, 65 N. C. 305;

—taking up and putting in the pocket indictments which an officer had produced in setting a trap to catch defendant in the larceny thereof, the officer not having such possession for the state as would give him authority to consent to defendant taking 29 L.R.A. (N.S.)

them. People v. Mills, 178 N. Y. 274, 67 L.R.A. 131, 70 N. E. 786;

—inserting a pipe and conveying gas thereby around a meter. R. v. White, 3 Car. & K. 363;

A carrying away at different times, but as part of the same transaction, of separate articles, will support an indictment for the greater offense of larceny of the total amount. State v. Martin, 82 N. C. 672; State v. Mandich, 24 Nev. 336, 54 Pac. 516.

And in R. v. Dyer, 2 East, P. C. 767, it was held that where others took articles from one part of a boat to another and hid them, and later defendant assisted in carrying them away, the carrying away was a continuous transaction, and defendant was guilty as a principal in larceny.

—when property carried away by agency of innocent third person.

The question, What amounts to asportation, sometimes arises where the accused makes such arrangements concerning property of another that the actual carrying away is accomplished through the agency of an innocent third party. As indicated in STATE v. ROZEBOOM, such conduct may amount to an asportation, and has been held to be such under the following circumstances:

—where defendant pointed out a horse as his own to the hostler, and had him saddle and lead it out of the yard to be mounted. R. v. Pitman, 2 Car. & P. 423;

—where defendant pointed out a hog and sold it as his own, so that the purchaser took it away. Cummings v. Com. 5 Ky. L. Rep. 200;

—where defendant changed a check on a trunk, so that it was transported by the railroad company to a wrong destination. Com. v. Barry, 125 Mass. 390;

—where defendant claimed an impounded animal and sold it to a third party, who took it away. State v. Hunt, 45 Iowa, 673.

But in People v. Gillis, 6 Utah, 84, 21 Pac. 404, where defendant claimed an impounded animal and sold it to the pound-keeper, who then took it out of the pound,

business at Hartley. Each shipped butter packed in wooden tubs of the same general size, shape, and appearance. The direction or address of the consignees of such shipments was placed upon the tubs by the use of stencil plates or stamps, or tags, the identity of the shipper being indicated by a number the significance of which was known to the consignees. The evidence in the case was sufficient to justify the jury in finding that, on or about March 25, 1907, Day made a shipment from Rock Valley, in a refrigerator car, of seventy-seven tubs of butter, forty-six of which were consigned to the address of Gude Brothers, New York, such address being placed upon the cover of each by the use of a stencil plate, together with the shipper's number. This shipment was

deposited in one end of the car, leaving the floor between the side doors clear and unobstructed. Thus partially loaded, the car was hauled to Hartley, at which place it arrived during the night, and was placed upon a side track at a convenient place for receiving shipments in the morning. At an early hour of the following morning, the defendant loaded several tubs of butter from his creamery and hauled them to the car. The station agent was not there, but, following what he claims to have been the custom, defendant proceeded to open the car, and transferred a part of the tubs from his wagon to the car floor between the doors. It is his contention that he brought from the creamery to the car six tubs, and in this he is corroborated by a special agent

the court held that this did not amount to asportation.

Circumstances held insufficient to show asportation.

The courts have refused to sustain charges of larceny, because sufficient carrying away was not shown by the following circumstances:

—chasing and shooting a hog, without removing it afterward. *State v. Seagler*, 1 Rich. L. 30, 42 Am. Dec. 404;

—where the evidence showed that defendant shot a cow and went and stood over it, and that three months thereafter no remains of the cow were found at that spot. *State v. Perkins*, 104 N. C. 710, 10 S. E. 175;

—shooting a hog and partly skinning it and cutting its ears off, the court saying that merely having the power to remove it was not sufficient. *State v. Alexander*, 74 N. C. 232;

—shooting a cow and cutting off and carrying away its ears. *State v. Butler*, 65 N. C. 309;

—shooting a hog and turning it on its back and cutting its throat. *Williams v. State*, 63 Miss. 58;

—shooting a hog and chasing it and being in the act of striking it with a gun when interrupted. *Wolf v. State*, 41 Ala. 412;

—striking a hog with an ax after it had been coaxed some distance by another. *Edmonds v. State*, 70 Ala. 8, 45 Am. Rep. 67;

—shooting a hog and being near enough to exercise dominion and control over it after the killing. *Molton v. State*, 105 Ala. 18, 53 Am. St. Rep. 97, 16 So. 795;

—standing a package on end and removing the outside wrapper more easily to get at its contents. *R. v. Cherry*, 2 East, P. C. 556;

—turning a barrel of turpentine which was standing on end over on its side. *State v. Jones*, 65 N. C. 395;

—attempting to remove the brass journals from a railroad car, but without having succeeded in actually doing so when detected. *State v. Knolle*, 90 Mo. App. 238; 29 L.R.A. (N.S.)

—grabbing at money displayed and knocking it from the hand without securing it. *Thompson v. State*, 94 Ala. 535, 33 Am. St. Rep. 145, 10 So. 520;

—lifting a pocketbook partly from a pocket before being detected. *R. v. Thompson*, 1 Moody, C. C. 78. This case was disapproved, however, in *R. v. Simpson*, Dears. C. C. 421;

—taking a coat from a dummy in front of a store, but failing to get away with it because it was attached to the dummy by a chain, the dummy being attached to the building. *People v. Meyer*, 75 Cal. 383, 17 Pac. 431;

—taking an article which was tied to a string, but without severing the string before being detected. *Phillips's Case*, 4 N. Y. City Hall Rec. 177; *Anonymous*, 2 East, P. C. 556;

—taking from a pocket a purse which remained attached by a string to keys in the pocket. *Wilkinson's Case*, 1 Hale, P. C. 508;

—entering a house, partly filling a basket with corn, and, when detected, making false statements as to the purpose in doing so, it not appearing that any corn was actually carried away from the house, and the indictment charging larceny from the house. *Hicks v. State*, 101 Ga. 581, 28 S. E. 817.

And in *Com. v. Luckis*, 99 Mass. 431, 96 Am. Dec. 769, where defendant was seen by an officer putting her hand in a woman's pocket, and, on his seizing her hand, the pocket and dress were torn down so that the pocketbook dropped to the ground, it was held that merely an alteration of the position of the pocketbook by the struggle between the defendant and the officer would not be an asportation, but that if defendant's hand had reached or seized the pocketbook, and she altered its position in attempting to secure and retain it, asportation would be shown.

The Texas cases.

In Texas the statute defining larceny omits the words "carried away," and it is therefore only necessary in that state to es-

of the railroad company who appeared about this time, and swears that he saw the transaction. It is the theory and claim of the state that defendant, having placed some of his tubs on the car floor, took other tubs which were a part of Day's shipment, mingled them with his own, and, having scraped from the covers the address of Gude Brothers, New York, substituted therefor the address of his own correspondents, Merrill & Eldridge, Chicago, Ill. This theory of the defendant's offense has direct support in the testimony of the special agent who claims to have surprised him in the act, and it has corroboration in the testimony of two or three other persons who arrived on the scene immediately afterwards, and swear that pieces of glass and shavings

or scrapings of wood were found on the floor, and that several tub covers showed signs of erasures. The defendant's stamp and printing pad for stamping the address of his consignees were also admittedly found in the car or in the wagon just outside of the car door. He denies that he interfered in any manner with any of the tubs, except those brought to the car by himself, and says that he was bent over one of his own tubs fastening a cover, which he discovered to be loose or insecure, when he was suddenly and violently assaulted by the railway company's special agent and accused of stealing butter. As we understand the record there were two tubs from Day's shipment on which the state asserts the proper address had been obliterated, and the ad-

establish a taking, without proving an asportation.

—circumstances held sufficient to show a taking.

Practically the same questions arise in establishing a taking as in establishing an asportation, and the following circumstances have been held to be a sufficient taking under the statute defining larceny:

—snatching money suddenly from hands of owner, who had no chance to resist. *Clemmons v. State*, 39 Tex. Crim. Rep. 279, 73 Am. St. Rep. 923, 45 S. W. 911;

—unlocking drawer and taking out part of a sum of money therein, and having hand in drawer when detected, the indictment charging larceny of the whole amount. *Harris v. State*, 29 Tex. App. 101, 25 Am. St. Rep. 717, 14 S. W. 390;

—marking and branding an animal for the purpose of appropriating it. *Coward v. State*, 24 Tex. App. 590, 7 S. W. 332;

—going up to a horse and being in the act of unhoppling it when detected. *Conner v. State*, 24 Tex. App. 245, 6 S. W. 138;

—shooting a cow that was in the woods, with intent to appropriate it. *Coombes v. State*, 17 Tex. App. 258, overruling *Martin v. State*, 44 Tex. 172;

—killing and skinning cattle which were trespassing in defendant's cornfield, with fraudulent intent to sell the hides. *McPhail v. State*, 9 Tex. App. 164;

—being in the act of skinning a freshly killed hog. *Walker v. State*, 3 Tex. App. 70;

—throwing a bale of cotton from a moving train. *Price v. State*, 41 Tex. 215, 1 Am. Crim. Rep. 423;

—driving oxen to a convenient place, killing and skinning them, and selling their hides. *Musquez v. State*, 41 Tex. 226;

—killing hogs in the woods, out of the immediate custody of the owner. *Hall v. State*, 41 Tex. 287;

—seizing pocketbook and drawing it half way out of the pocket. *Flynn v. State*, 42 Tex. 301, 1 Am. Crim. Rep. 424;

—selling an animal to a third party, who

took actual possession thereof. *Lane v. State*, 41 Tex. Crim. Rep. 558, 55 S. W. 831; *Madison v. State*, 16 Tex. App. 435; *Doss v. State*, 21 Tex. App. 505, 57 Am. Rep. 618, 2 S. W. 814; *Dale v. State*, 32 Tex. Crim. App. 78, 22 S. W. 49.

—circumstances held insufficient to show taking.

The following circumstances have been held insufficient to establish a taking as an element of the crime of larceny:

—having pulled a dress down to bottom of a female figure, when detected, it appearing it could not be taken off that way. *Clark v. State* (Tex. Crim. Rep.) post, —, 128 S. W. 131;

—taking watch from pocket without severing chain. *Herr v. State*, 52 Tex. Crim. Rep. 53, 105 S. W. 190;

—inserting hand in pocket of another far enough to touch money, without securing it. *Tarrango v. State*, 44 Tex. Crim. Rep. 385, 71 S. W. 597, 14 Am. Crim. Rep. 423;

—grasping diamond stud in shirt bosom and attempting to unscrew it, but not succeeding in doing so before capture. *Rodriguez v. State* (Tex. Crim. Rep.) 71 S. W. 596, 14 Am. Crim. Rep. 424;

—having stolen cattle in possession and assisting in branding them, no evidence being given to connect defendant with the original taking. *Guinn v. State*, 39 Tex. Crim. Rep. 257, 45 S. W. 694;

—shooting and wounding a hog and pursuing it, without getting actual possession of it. *Minter v. State*, 26 Tex. App. 217, 9 S. W. 561;

—putting hand into pocket and seizing pocketbook, if owner knew defendant was attempting to do so and did not resist. *Files v. State*, 36 Tex. Crim. Rep. 206, 36 S. W. 93; *McLin v. State*, 29 Tex. App. 171, 15 S. W. 600;

—merely claiming ownership of a steer running on the range and selling it without it coming into possession of defendant or his vendee. *Hardeman v. State*, 12 Tex. App. 207.

R. L. S.

dress of defendant's consignees substituted, while other of said tubs had been moved over from their proper place in the car to the place between the doors. The indictment charges defendant with larceny of two tubs of butter of an aggregate value of more than \$20, and upon the showing made the jury returned a verdict of guilty. There was other evidence than we have mentioned, but it is circumstantial only, and none of it does more than furnish some degree of corroboration for the respective theories of the prosecution and defense. Whether the defendant did thus feloniously convert or attempt to convert any portion of Day's shipment to his own use was therefore a fair question for the jury, and its verdict thereon cannot be set aside unless the record discloses reversible error in the rulings of the court or in its charge to the jury.

(1) The court admitted in evidence a carbon copy of an alleged shipping bill sent, or claimed to have been sent, by the railway company with the butter received by it from defendant on the morning of the alleged larceny, and forwarded to the consignees. It appears to have been first written describing seven tubs, but gives evidence of a change by which the figure 7 has been converted into an 8. The paper also bears a notation as follows: "Two tubs had been rechecked. Shipper claimed he had seven tubs, only had six when he drove over to car, as counted by J. Wernick." Wernick was the special agent. About the same time the station agent made a freight receipt to the defendant in which, for the carrier, he acknowledges receiving from defendant for shipment to Merrill & Eldridge, Chicago, Illinois, "six tubs of butter," but adding thereto a notation as follows: "Eight tubs marked Merrill & E. Shipper claimed had seven tubs. Only six brought from creamery, as counted by J. Wernick." We think the paper thus made by the company, after its agent had charged the defendant with the larceny, and without the knowledge of defendant, was not competent evidence, and the objection thereto should have been sustained. But we are unable to see how it could have prejudiced the defense. Defendant claims to have delivered six tubs only, and the writing in question concedes the receipt of six tubs. The statement that there were two more tubs addressed to Merrill & Eldridge, and that defendant claimed to have delivered seven, was only what both the station agent and Wernick had testified to on the stand, and the written statement of the agent to the same effect cannot be presumed to have given their version of the affair any increased weight in the minds of the jury.

(2) The indictment charged the larceny 29 L.R.A. (N.S.)

to have been from the Chicago, Milwaukee, & St. Paul Railway Company, a corporation, and the point is made that there is a failure of proof of the corporate character of the company. There was oral evidence by one of the company's agents that the Chicago, Milwaukee, & St. Paul Railway Company was a corporation, and this was enough to take the case to the jury. Indeed we are not prepared to say that an entire omission of all evidence on this point—no objection being raised until after verdict—would constitute any failure of proof requiring a new trial. Where corporate character is a mere collateral matter, not essential to the main question being tried it may be established by parol proof or by proof that it is acting and doing business as such. *Fleener v. State*, 58 Ark. 98, 23 S. W. 1; *Roberts v. National Ice Co.* 6 Daly. 426; *People v. Ah Sam*, 41 Cal. 645; *Doyle v. Frank Douglas Mach. Co.* 73 Ill. 273; *Norton v. State*, 74 Ind. 337; *Reed v. State*, 15 Ohio, 217; *Calkins v. State*, 18 Ohio St. 366, 98 Am. Dec. 121; 1 McClain, Crim. Law, § 604; Iowa Code, § 5286; *State v. Congrove*, 109 Iowa, 66, 80 N. W. 227.

(3) Counsel appear to base their demand for a reversal very largely on the alleged failure of the state to prove any asportation of the property charged to have been stolen. It will be remembered that the tubs of butter shipped by Day from Rock Valley were shown to have been placed in one end of the car, and it is the theory of the state that defendant removed several of these tubs to the clear floor space between the doors, and there altered the address which had been placed on the covers. Applied to this state of facts the defendant asked the court to instruct the jury as follows:

"(5) Before you can find the defendant guilty of any degree of crime charged in the indictment, you must be satisfied beyond all reasonable doubt that he in fact took and carried away the three tubs of butter mentioned in the indictment, or some of them. While it is not necessary, in order to constitute a taking and carrying away of the property, that the same should have been taken and retained in the possession of the defendant, yet it must be shown beyond all reasonable doubt that the defendant did, in fact, take some or all of said tubs of butter from their original place and position in the car, and remove the same completely to another place in said car, with the intent of stealing the same, and that, in making such removal, he did, in fact, lift said tubs or some of them completely clear of the floor of said car or other resting place of the same, and did, for some period of time at least, so have the same in his

complete possession and under his control; and if you do not so find, you must acquit.

"(6) You are further instructed that it is not sufficient to constitute such a taking and carrying away as is required by law to make larceny, that the defendant did, if you so find he did in fact do, merely roll or slide said tubs of butter or some of them over the floor of said car and so change their position, with intent to steal the same; and if you do not find beyond all reasonable doubt that he did, in fact, lift the same or some of them clear of said floor or other resting place of the same, while so removing them from one position to another, then you must acquit."

These requests were refused, and, upon the question thus suggested, the court on its own motion charged the jury as follows:

"Par. 8. Before you can find the defendant guilty of any degree of the crime charged in the indictment, you must be satisfied beyond a reasonable doubt that he in fact took and carried away the three tubs of butter mentioned in the indictment, or some of them. While it is not necessary, in order to constitute a taking and carrying away of the property, that the same should have been taken and retained in the possession of the defendant, yet it must be shown beyond a reasonable doubt that the defendant did in fact take some or all of said butter tubs from their original place and position in the car, and remove the same to some extent, with intent on his part to steal the same or some of them,—the lifting, shoving, or pushing the same on the bottom of said car in any manner and to any extent would be such moving.

"Par. 9. You are further instructed that if you find that the defendant did in fact remove said tubs of butter, or some of them, from their original place or position in the car, where he found them in the car, and had the same in his possession, and you further find that only a part of said tubs were so removed from their original position and place in said car, then you cannot find the defendant guilty, except as to the tub or tubs of butter you so find was or were removed from their original position in said car, and taken into possession of the defendant, with the intent to steal the same. The removal of the stamps or address on said tubs, or any of them, and placing the stamp of defendant thereon, being the address of Merrill & Eldridge, if you find defendant did so change stamped address on said tubs, or any of them, with intent to steal the tubs of butter or any of them, is not in law larceny, and will not alone warrant a conviction."

A reading of these quotations will sufficiently indicate the difference between the 29 L.R.A. (N.S.)

instructions asked and those given, and we are of the opinion that defendant's assignment of error cannot be sustained. It is true that, in order to constitute larceny, it must appear that the property was not only stolen and taken by the thief, but also that it was "carried away" by him. To use the more ancient and technical expression, there can be no larceny without asportation. But this has never been held to mean that it is essential to a complete larceny that the thief shall so far succeed in removing the property that it is completely and permanently lost to the owner. If the wrongdoer by trespass obtain complete possession and control of an item of personal property belonging to another, with the felonious intent to deprive the owner thereof, and carries it or moves it in the slightest degree from the place where he finds it, the asportation is complete, and the crime of larceny has been committed. As is very natural, border-line cases have given rise to some very nice distinctions, for most of which valid reasons may be given. For instance, where a thief, with intent to steal, picked up a package of goods tied by a string to a merchant's counter, but did not succeed in severing the string before he was detected and arrested, it was held the larceny was not complete, because the accused never had the goods in his complete possession; but had he broken the string and then dropped the goods, or had been arrested before leaving the store with them, the crime would have been fully consummated. So, also, where the accused took a purse from the pocket of another, but did not succeed in carrying it away, because of its being fastened by a small chain to the owner's clothing, it was held there was no asportation, and therefore no larceny. On the other hand, where the accused snatched a watch from the pocket of the owner, breaking the chain, which, in the movement, caught in a button on the owner's coat and was thus saved, it was held to be a case of complete larceny, because, in the short interval between the breaking of the chain and the entanglement with the button, the watch had been wholly within the possession of the trespasser. The same rule has been applied where a thief pulled a ring from a lady's ear, although the jewel immediately fell from his fingers and lodged in the owner's hair. It has frequently been held that the least removal of the property from the place where the thief finds it, with intent to steal it, is a sufficient asportation. 2 Russell, Crimes, 4; Harrison v. People, 50 N. Y. 518, 10 Am. Rep. 517.

Says the West Virginia court in defining a complete larceny: "The property so taken must also be 'carried away.' It need not

be retained in the possession of the thief. Any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient, but nothing short of this will do. Therefore, if the thief has the absolute control of the thing but for an instant, and he removes it ever so little space, the larceny is complete. . . . Upon the question of what is a sufficient asportation or carrying away of goods feloniously taken, the authorities, both ancient and modern, uniformly hold that the felony lies in the very first act of removing of the property, and therefore the least removing of the thing taken from the place it was before, with intent to steal it, is a sufficient asportation, though it be not quite carried off." *State v. Chambers*, 22 W. Va. 779, 46 Am. Rep. 550. The precedents holding to this rule are very numerous. Illustrative examples are found in *Eckles v. State*, 20 Ohio St. 508; *Gettinger v. State*, 13 Neb. 308, 14 N. W. 403; *State v. Gazell*, 30 Mo. 92.

We find no authority which goes to the extent of holding it necessary to complete asportation, that the stolen article must be lifted entirely from the ground or floor or other thing on which it rests, provided, of course, there be no unsevered attachment by which such article is bound or fastened to some other thing which is not removed. It is true that, as we approach the border line where criminal intent, which of itself is not crime, materializes into an act which is a crime, distinctions are of a necessity somewhat finely drawn, but they always have a basis in sound logic and reason. We are unable to find any support for the rule insisted upon by the appellant. If the tubs of butter shipped from Rock Valley were placed in one end of the car, and appellant took them from such place to the open space in the middle of the car, with the felonious intent to mingle them with his own and thereby deprive the owner of his property, it is entirely immaterial whether he accomplished the removal by lifting and carrying the tubs in his arms, or by rolling or pushing or pulling them along upon the car floor without lifting them clear therefrom. There is also another theory on which the asportation may be held to have been complete. If the appellant erased the address from any of the tubs of butter shipped by Day, and replaced it by the address of his own consignees, for the purpose of having the carrier transport them to said consignees as his own property, he would properly be held to have made the railway company his agent for such transportation, and the carriage of the property by such agent would be his act, and constitute an asportation within the meaning of the law. See *Com. 29 L.R.A. (N.S.)*

v. Barry, 125 Mass. 390. In the cited case the changing of a check upon a trunk in the possession of a railway company, by which device the carrier was induced to transport the trunk to another city and deliver it to the wrongdoer or to a confederate, was held to be larceny. We regard it very clear that there was no error in refusing the instructions asked by the appellant, or in those given by the court.

Complaint is made that the sentence imposed upon defendant is excessive. Under our present statute this objection is probably not one for the consideration of this court. It is to be presumed that the board of parole, in exercising the wide discretion given it in such matters, will take into consideration the nature of the offense of which conviction has been had, and all the reasons, if any, for mitigating the extreme penalty imposed, and make such order as shall be required by the real merits of the case.

We find no reversible error in the record, and the judgment of the District Court is affirmed.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL. FRED S. JACKSON, Attorney General,

v.

WILLIAM J. LEMP BREWING COMPANY.

(79 Kan. 705, 102 Pac. 504.)

Quo warranto — ousting corporation from state — evidence — sufficiency.

1. The evidence in this case is reviewed, and found to be sufficient to support the findings of fact; and it is held that the findings and evidence support the conclusion that judgment of ouster should be entered.

Foreign corporation — intoxicating liquor — soliciting orders — interstate business.

2. A Missouri corporation whose traveling salesmen solicit and receive orders in this state for intoxicating liquors, which orders, when accepted by the corporation, are filled by shipping the liquors f. o. b. cars at St.

Headnotes by BENSON, J.

Note. — The decision of the United States Supreme Court in *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733, having, in the view of the court in the reported case at least, removed any objection arising from the interstate commerce clause of the Federal Constitution, to the validity of the state statute involved in that case, the question before the court was merely wheth-

Louis to the purchasers, is engaged in business in Kansas, and subject to the provisions of the statutes relating to foreign corporations doing business in this state.

Interstate commerce — foreign corporation — intoxicating liquor — soliciting orders.

3. Within the recent decisions of the Supreme Court of the United States, the provisions of our statute relating to the taking of orders for intoxicating liquors are not repugnant to the commerce clause of the Federal Constitution.

(April 10, 1909.)

PETITION for a writ of quo warranto to oust defendant from exercising its corporate franchise in the state of Kansas. Judgment of ouster.

Statement by Benson, J.:

This is an action in quo warranto to oust the defendant from exercising corporate franchises in this state. It is alleged in the petition that the defendant is engaged in business in this state without any permission from the charter board, and that, without any authority therefor, it is engaged in the unlawful sale of intoxicating liquors, and in maintaining places where such liquors are sold and delivered, and in assisting others in keeping such places in violation of the laws of this state. The defendant is a Missouri corporation, organized to brew and sell beer, and to manufacture and sell ice. The petition was filed, and summons was issued, May 10, 1907, and an alias summons was served June 13, 1907. Similar actions were commenced about the same time against other foreign brewing companies, and receivers were appointed in the several cases. State ex rel. Jackson v. Anheuser-Busch Brewing Asso. 76 Kan. 184, 90 Pac. 777.

The commissioner appointed for that purpose heard the testimony and made findings of fact, which, in substance, are that on the 22d day of April 1907, and for many years prior thereto, the defendant was the owner and in possession of three tracts of land in Crawford county, two lots in the city of Everest, three lots in the city of Wichita, and several lots in the city of Leavenworth, as described; that on the 20th day of April, 1907, at a

meeting of the directors of the Brewing Company, the secretary stated: "That the conditions in the state of Kansas were threatening, and that, according to the present indications, the state will not allow anyone to wholesale or retail beer. The secretary informed the board furthermore that certain ouster and injunction proceedings had been brought against certain breweries doing business in the state of Kansas. He called the attention of the board to the fact, furthermore, that this company is not actually selling its beer within the state of Kansas, for the reason that its product is sold exclusively to wholesalers, and that shipments made by the William J. Lemp Brewing Company in the state of Kansas come within the provisions of the interstate commerce law, while, on the other hand, the secretary has reason to believe that the breweries against whom the actions have been brought are conducting a business in Kansas of their own account, through branches or salaried agencies; and, inasmuch as the action of the state may involve the question of destruction and confiscation of property, personal and real, owned by breweries, he thought it best for the Lemp Brewing Company to take immediate steps for the purpose of selling or disposing of the property owned by it in the state of Kansas, in order to guard against the trouble and complications." Thereupon the proposition of Edwin A. Lemp, who was then a director, assistant secretary, and treasurer of the corporation, to purchase its real estate in Kansas was accepted, and on the 22d day of April a conveyance was made accordingly, for the purpose, as found by the commissioner, of evading responsibility for previous infractions of the law. John Baum, of the city of Leavenworth, was for more than twenty years prior to the filing of this action a dealer in the beer manufactured by the defendant company, at Leavenworth, Kansas, and had charge of all of the defendant's property in that city. He rented the properties, looked after the collection of rent thereon and repairs thereof, paid the taxes, and furnished the tenants with bar fixtures, with the understanding that such tenants should purchase of him defendant's beer, and retail the same to the trade. S. W. Knecht had charge

er the solicitation of orders for liquor within the state under the circumstances shown constituted the doing of business within the state so as to come within the operation of the statute. That point is annotated in notes to *Berger v. Pennsylvania R. Co.* 9 L.R.A.(N.S.) 1214, and *Saxony Mills Co. v. Wagner*, 23 L.R.A.(N.S.) 834. The case of *International Text-book Co. v. Pigg*, 76 Kan. 328, 91 Pac. 74, cited in the latter note, was reversed by the United States Supreme Court (217 U. S. 91, 54 L. ed. 678, 30 Sup. Ct. Rep. 481) upon the ground that the statute there involved was an unlawful interference with interstate commerce as applied to the subject of commerce there involved. The Federal court, however, agreed with the state court upon the proposition that what was done in that case amounted to doing business within the state.

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of defendant's property in Crawford county, Kansas, and with the permission of the defendant company placed buildings thereon, furnished the same with bar fixtures, supplied by defendant company, with the understanding that defendant's beer should be sold thereon. He listed \$2,835 worth of defendant's property for taxation in Crawford county for the year of 1907 as the agent of defendant company, and had charge of defendant's property in Crawford county for some years prior to the commencement of this action, paid the taxes thereon for the company, and remitted rents therefor to it. Among the property listed for taxation by S. W. Knecht as agent of the defendant company were four sets of bar fixtures, which were being used to violate the laws of the state of Kansas at the time the same were so listed, and until the same were seized by the receivers. During the month of June, 1907, the receivers took possession of all of the property described in the findings, except the real estate in Crawford county, and found therein several sets of bar fixtures belonging to defendant company. A wholesale malt liquor dealer's license stamp was issued to the defendant by the internal revenue collector for this district, for No. 1218 South Walnut Street, Coffeyville, and was posted by its agent in the building on that lot, which was used by the defendant's agent as a distributing depot for its beer until March 1, 1907, when the stamp was removed and the building was abandoned. The rent for the building and the amount of the license tax was paid by the company from its Kansas City office. The defendant paid an employee to unload this beer from the cars in Coffeyville, and to haul it to this distributing depot.

The commissioner also found: "That at the time this suit was commenced, and for several years prior thereto, defendant company had been doing business in the state of Kansas contrary to law, and had been aiding and assisting in the violation of the laws of the state by furnishing bar fixtures, and renting its buildings and other property in the state, for the purpose of encouraging the sale of its beer in said state." The commissioner concluded as matter of law that the company should be ousted from doing business in this state.

Messrs. Fred S. Jackson, Attorney General, and Charles D. Shukers for the State.

Messrs. F. B. Dawes, and C. P. Rutherford, and R. C. Miller, for defendant:

Defendant was not doing business in 29 L.R.A. (N.S.)

the state of Kansas within the meaning of the corporation law.

State v. American Book Co. 69 Kan. 1, 1 L.R.A. (N.S.) 1041, 76 Pac. 411, 2 A. & E. Ann. Cas. 56; Missouri Coal & Min. Co. v. Ladd, 160 Mo. 435, 61 S. W. 191; Beard v. Union & American Pub. Co. 71 Ala. 60; Bateman v. Western Star Mill. Co. 1 Tex. Civ. App. 90, 4 Inters. Com. Rep. 260, 20 S. W. 931; Scruggs v. Scottish Mortg. Co. 54 Ark. 566, 16 S. W. 563; New York & S. Constr. Co. v. Winton, 208 Pa. 467, 57 Atl. 955; Goldsberry v. Carter, 100 Va. 438, 41 S. E. 858; People ex rel. Lembeck & B. Eagle Brewing Co. v. Roberts, 22 App. Div. 282, 47 N. Y. Supp. 949; Caesar v. Capell, 83 Fed. 403; People ex rel. H. B. Smith Co. v. Roberts, 27 App. Div. 455, 50 N. Y. Supp. 355; Milan Mill. & Mfg. Co. v. Gorten, 93 Tenn. 590, 28 L.R.A. 135, 4 Inters. Com. Rep. 851, 27 S. W. 971; 2 Beach, Priv. Corp., §§ 416-890; D. S. Morgan & Co. v. White, 101 Ind. 413; Clews v. Woodstock Iron Co., 44 Fed. 31; Bentlif v. London & C. Finance Corp. 44 Fed. 667; Carpenter v. Westinghouse Air-Brake Co. 32 Fed. 434; St. Louis Wire-Mill Co. v. Consolidated Barb-Wire Co. 32 Fed. 802; United States v. American Bell Teleph. Co. 29 Fed. 17; Sullivan v. Sullivan Timber Co. 103 Ala. 371, 25 L.R.A. 543, 15 So. 941.

The owning of real estate does not constitute the doing of business.

Goldsberry v. Carter, supra; Lakeview Land Co. v. San Antonio Traction Co. 95 Tex. 252, 60 S. W. 766; Sullivan v. Sullivan Timber Co. supra; 2 Beach, Corp. § 410; Wilson v. Peace, 38 Tex. Civ. App. 234, 85 S. W. 31; Louisville Property Co. v. Nashville, 114 Tenn. 213, 84 S. W. 810.

Benson, J., delivered the opinion of the court:

The defendant excepted to the finding that the conveyance to Edwin A. Lemp was made to evade responsibility for violations of law. The recital of the proceedings of the corporate meeting at which the transfer was ordered, and the course of business of the defendant in the state appear to warrant the inference. The property was used after the conveyance, precisely as it had been used before, for the sale of the beer received from the defendant, and the defendant's bar fixtures were used in the various places, just as they were used before, to promote the sale of beer so furnished by the defendant. Mr. Baum continued to collect the rents and look after the property in Leavenworth but accounted therefor to Mr. Lemp, instead of the Lemp Brewing Company. 1

view of these facts the particular motive for the transfer is not very important.

The defendant also excepted to the finding concerning the use made of the property in Crawford county, and the returns for taxation made by Mr. Knecht, the agent in charge. The evidence shows that these tracts, situated in the mining districts, were purchased upon the advice of Mr. Knecht, a wholesale liquor dealer at Minden, Missouri, who was handling the Lemp beer. Mr. Knecht arranged with the defendant to put up small buildings on these tracts for use in making sale of beer bought by him from the defendant. He ordered and paid for the beer, and it was shipped to him at Minden f. o. b. the cars at St. Louis. He delivered it by wagons to the various places occupied by his tenants on the defendant's lands in Crawford county, and took back the empty kegs and cases. The defendant furnished bar fixtures for these places, which were shipped to Mr. Knecht at Minden, and by him placed in the premises, where they remained in the various buildings for the use of the different tenants until taken by the receivers. The finding that these bar fixtures were listed for taxation for the year 1907 by S. W. Knecht as agent for the defendant is supported by certified copies of the returns. When asked if he made such return, Mr. Knecht said, "I can't say that I have." When asked if he could say that he had not, he answered, "No, I can't do that either." The finding is therefore supported by the evidence. In any event, the property belonged to the defendant, and was subject to taxation. It was the duty of the defendant to have it listed for that purpose. Besides, the taxes upon this and other property of the defendant so listed by Mr. Knecht were paid by him, and credit was given to him for the amount by the defendant. The only importance of this matter of assessment and taxation is the evidence it affords that the defendant had this property in the state, and the bearing that the latter fact may have upon the question whether it was engaged in business here in violation of law, as found by the commissioner. This finding is challenged, and is the principal subject of contention. The defendant argues that it was not doing any business in this state. Hence that "it was not in Kansas," and therefore cannot be ousted therefrom. The real estate, whether owned by the corporation or its secretary, was being used in violation of law to promote the sale of the beer manufactured by the defendant. The bar fixtures necessary for the unlawful use, and to promote the sale of its product, were supplied by the de-

fendant. The greater the quantity of beer sold by these means, the greater would be the sales by the defendant. Thus the defendant by furnishing the fixtures, to say nothing of the real estate, was aiding and abetting in the violation of the laws of this state, and, to that extent at least, was doing business here. The rents for the defendant's warehouse at Coffeyville, and the internal revenue tax upon its business there, and the charges of the drayman for delivering beer, were paid through its Kansas City branch. These payments were entered upon its books, which were regularly checked up by its traveling auditor. The manager of that office testified that he knew that the company had a warehouse at Coffeyville, which city was within the territory of the Kansas City branch. In the light of this evidence the claim of the defendant that it was ignorant of the transactions at Coffeyville is not sustained. A traveling salesman of the defendant took orders for beer at Coffeyville, and when a sufficient number of orders had been taken to make up a car load, the beer was shipped to that city, consigned to the various purchasers, but received by a drayman employed by this salesman and paid by the defendant's agents, who stored it in this warehouse, where the revenue stamp was posted, and from which place it was taken by the various purchasers, or delivered to them by the drayman. Some of it was taken from the cars by purchasers before being stored in the warehouse.

The salesman testified:

Q. Who looked after this beer that was shipped to Coffeyville in car-load lots after its arrival there?

A. This drayman, Mr. Bouilly.

Q. How would he know that there was a car of Lemp beer at Coffeyville to be unloaded?

A. We would write him to that effect, and, besides, the customers would tell him to look out for a car; that there was one coming. Furthermore, I would see him every time I would go down there, and he would know what orders I would take, and would be on the lookout for the car.

Q. Then he would look out for the car, and when it came he would unload the beer?

A. He would unload the beer, distribute it to these different parties who had ordered, and what they couldn't take at the time would be put in this warehouse.

Q. And then when they needed more beer, he would take it out of the warehouse and distribute it to them, would he?

A. They would go to the bank, and lift their drafts or orders attached to the

drafts for the goods there belonging to them. I would sometimes give him a copy of the orders I had taken for these different parties, and he would know what each one was to get out of the car, and could keep track of it in that way. . . .

Q. Who paid Mr. Bouilly for looking after the warehouse and unloading the cars of beer and storing it; distributing and storing it?

A. Why, we would pay him so much a car for handling the goods and delivering to these different parties, which was added to the amount which we would charge the customer.

The fact that the revenue stamp was sent to Kansas City, and this warehouse closed in March, 1907, ought not to preclude a fair consideration of the course of business before that date, as evincing the purposes and intent of the company, and its attitude with reference to the laws of this state. The evidence also shows that the defendant had agents in this state soliciting and taking orders for beer, subject to the approval of the company, which shipped the beer f. o. b. cars at St. Louis. Under the construction of the Wilson Act (act Aug. 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177 by the Supreme Court of the United States, this manner of dealing in intoxicating liquors is doing business in this state. *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733; *Phillips v. Mobile*, 208 U. S. 472, 52 L. ed. 578, 28 Sup. Ct. Rep. 370.

In the *Delamater* Case it was held that, where the salesman of a liquor firm doing business at St. Paul, Minnesota, was engaged in the business of soliciting orders from residents of South Dakota, which were accepted, and the liquor shipped accordingly from St. Paul to the purchasers in South Dakota, this was a violation of the laws of the latter state, imposing a license charge upon "the business of selling or offering for sale" intoxicating liquors within the state, and that this statute of South Dakota was not repugnant to the commerce clause of the Constitution of the United States. The court said: "Of course, if the owner of the liquor in another state had a right to ship the same into South Dakota as an article of interstate commerce, and, as such, there sell the same in the original packages, irrespective of the laws of South Dakota, it would follow that the right to carry on the business of soliciting in South Dakota was an incident to the right to ship and sell, which could not be burdened without directly affecting interstate commerce. 29 L.R.A.(N.S.)

But, as by the Wilson act the power of South Dakota attached to intoxicating liquors, when shipped into that state from another state, after delivery, but before the sale in the original package, so as to authorize South Dakota to regulate or forbid such sale, it follows that the regulation by South Dakota of the business carried on within its borders of soliciting proposals to purchase intoxicating liquors, even though such liquors were situated in other states, cannot be held to be repugnant to the commerce clause of the Constitution, because directly or indirectly burdening the right to sell in South Dakota, a right which by virtue of the Wilson act did not exist. . . . It having been thus settled that under the Wilson act a resident of one state had the right to contract for liquors in another state and receive the liquors in the state of his residence for his own use, therefore it is insisted the agent or traveling salesman of a non-resident dealer in intoxicating liquors had the right to go into South Dakota and there carry on the business of soliciting from residents of that state orders for liquor to be consummated by acceptance of the proposals by the nonresident dealer. The premise is sound, but the error lies in the deduction, since it ignores the broad distinction between the want of power of a state to prevent a resident from ordering from another state liquor for his own use and the plenary authority of a state to forbid the carrying on within its borders of the business of soliciting orders for intoxicating liquors situated in another state, even although such orders may only contemplate a contract to result from final acceptance in the state where the liquor is situated. The distinction between the two is not only obvious, but has been foreclosed by a previous decision of this court." In the opinion in *Crigler v. Shepler*, 79 Kan. 834, 23 L.R.A.(N.S.) 500, 101 Pac. 619, the effect of the foregoing decision upon the rule announced in *State v. Hickox*, 64 Kan. 650, 68 Pac. 35, is stated. The construction placed upon the commerce clause of the Federal Constitution and upon the Wilson act by the Supreme Court of the United States must prevail.

Our conclusion is that the findings and the evidence warrant the conclusion that the defendant was, at the commencement of this action, engaged in business in this state in violation of its laws. A judgment of ouster will therefore be entered as prayed for.

All the Justices concur.

A petition for rehearing having been

made, the following additional opinion was handed down June 5, 1909.

In a petition for a rehearing the defendant complains that the judgment seems to have been rendered on the ground that the defendant had aided and abetted violations of the prohibitory liquor law, rather than because it was doing business in this state without complying with the requirements of the statute concerning foreign corporations. The evidence warranted the finding that the defendant, not only aided, but was, through its agents and employees, doing business in violation of the prohibitory law. Proof that it was engaged in business here necessarily revealed the nature of that business, and the fact that this involved infractions of one statute cannot exempt the corporation from its duty to comply with the conditions prescribed in other statutes.

The defendant also complains that the Federal decisions cited in the opinion are not applicable. The answer pleaded that the business transactions of the defendant were in accordance with, and under the protection of, the Federal Constitution. This must have been intended as a reference to business done through its soliciting agents; and the authorities cited are pertinent to the issue thus presented, although the findings, supported by the evidence, relating to its other business in this state justify the judgment. After careful consideration the petition for rehearing is denied.

A motion was filed by Edwin A. Lemp, the transferee of the real estate, for its release, which motion, it appears, was submitted with the principal issue, but was inadvertently overlooked. This real estate was conveyed by the company to Mr. Lemp, who was a director, assistant secretary, and treasurer of the corporation, "to evade responsibility for previous infractions of the law," as found by the commissioner, and to avoid "trouble and complications," as stated in the record of the corporate meeting, quoted in the statement. Considering the inferences fairly to be drawn from its previous conduct, present methods, the time and reason of the transfer, the relation of the grantee to the corporation, the management and use of the property after the transfer, and all the attendant circumstances, this motion must be denied.

The property in the hands of the receivers will be disposed of as provided in State ex rel Jackson v. Anheuser-Busch Brewing Assn., 76 Kan. 184, 90 Pac. 777. Bar fixtures and other personal property used in the unlawful sale of intoxicating liquor, or in places where such liquors are sold or drunk contrary to law, shall, as soon as practicable, be removed from the state. 29 L.R.A. (N.S.)

Personal property whose ordinary use is lawful may be sold or removed from the state at the defendant's option, expressed to the receivers. The receivers may permit removals and sales of personal property to be made by the defendant, but only under their supervision, and when satisfied of the good faith of the transaction. All real estate belonging to the defendant shall be sold. A reasonable time is allowed in which to make sales, and upon application to the court, accompanied by proof of an actual sale in good faith, any parcel of real estate will be discharged from the custody of the receivers. If, after reasonable opportunity to dispose of it without undue sacrifice, any real estate remains unsold, the receivers shall sell it as upon execution, and pay the proceeds, after deducting expenses to the defendant. The receivers shall reserve and sell, as upon execution, sufficient property to pay costs and accruing costs, unless the same are voluntarily paid by the defendant.

KANSAS SUPREME COURT.

MARY E. STOTLER

v.

H. L. ROCHELLE et al., Appts.

(— Kan. —, 109 Pac. 788.)

Nuisance — cancer hospital.

The establishment of a cancer hospital in a residence neighborhood in near proximity to dwellings may be enjoined at the instance of one owning and occupying adjacent property.

(July 9, 1910.)

Headnote by MASON, J.

Note. — Hospital as nuisance.

It may be laid down as a generally accepted rule of law that a hospital, whether for treatment of ordinary diseases or for treatment of contagious and infectious ones, is not a nuisance *per se*, though it may become such by reason of the place of its location or because of the manner in which it is conducted. *Bessonies v. Indianapolis*, 71 Ind. 190; *Anable v. Montgomery County*, 34 Ind. App. 72, 107 Am. St. Rep. 173, 71 N. E. 272; *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081; *Paducah v. Allen*, 20 Ky. L. Rep. 1342, 49 S. W. 343; *Banks v. Henderson County*, 24 Ky. L. Rep. 1560, 71 S. W. 902; *Manning v. Bruce*, 186 Mass. 282, 71 N. E. 537; *Heaton v. Packer*, 131 App. Div. 812, 116 N. Y. Supp. 46; *Cherry v. Williams*, 147 N. C. 452, 125 Am. St. Rep. 566, 61 S. E. 267, 15 A. & E. Ann. Cas. 715; *Lorain v. Rolling*, 24 Ohio

APPEAL by defendants from a judgment of the Court of Common Pleas for Wyandotte County permanently enjoining them from using certain property as a hospital for the care of persons afflicted with cancer. Affirmed.

The facts are stated in the opinion.

Messrs. L. W. Keplinger, James T. Cochran, W. A. Morris, and J. A. McLane, for appellants:

Plaintiff must clearly prove a state of facts, leaving no doubt as to the question of nuisance, or its results being irreparable, serious, and substantial.

Phillips v. Lawrence Vitrified Brick & Tile Co. 72 Kan. 643, 2 L.R.A. (N.S.) 92, 82 Pac. 787; Spelling, Extr. Relief, § 411; 14 Enc. Pl. & Pr. p. 1144; Hutchinson v. Delano, 46 Kan. 345, 26 Pac. 740; 21 Am. & Eng. Enc. Law, 2d ed. p. 686; Chambers v. Cramer, 49 W. Va. 395, 54 L.R.A. 545, 38 S. E. 691; Holke v. Herman, 87 Mo. App. 126; McDonough v. Robbins, 60 Mo. App. 156.

C. C. 82; Youngstown Twp. v. Youngstown, 25 Ohio C. C. 518; Baines v. Baker, 1 Ambl. 158; Metropolitan Asylum Dist. v. Hill, L. R. 6 App. Cas. 193; 16 Eng. Rul. Cas. 550, 22 Eng. Rul. Cas. 80; Atty. Gen. v. Manchester [1893] 1 Ch. 87; Atty. Gen. v. Nottingham [1904] 1 Ch. 673; Bendelow v. Wortley Union, 57 L. J. Ch. N. S. 762; Atty. Gen. v. Rathmines & P. Joint Hospital Board [1904] 1 Ir. Ch. 161; Crawford v. Protestant Hospital, 7 Montreal L. Rep. 57; Elizabethtown Twp. v. Brockville, 10 Ont. Rep. 372.

Thus, in Frazer v. Chicago, 186 Ill. 480, 51 L.R.A. 306, 78 Am. St. Rep. 296, 57 N. E. 1055, it was held that the establishment of a smallpox hospital by a city, under statutory authority, could not, in the absence of carelessness or negligence or an abuse of the police power, in any way be a public nuisance, and that it could not be a private nuisance unless it became such in its subsequent use or operation.

And in State ex rel. Board of Health v. Trenton (N. J. Eq.) 63 Atl. 897, it was held that a building used as a hospital for the treatment of contagious and infectious diseases was not *per se* a nuisance, and the erection and use of such a building in a sparsely settled neighborhood, upon a tract of land entirely surrounded by highways, on which there were no buildings other than those used for hospital purposes, would not in the absence of any showing of negligence in its management, be restrained simply because there was an apprehension that it might result in being a nuisance.

On the other hand, in Deaconess Home & Hospital v. Bontjez, 207 Ill. 553, 64 L.R.A. 215, 69 N. E. 748, while it was admitted that a hospital was not a nuisance *per se*, the court refused to permit such an institution to be conducted in such proximity to a private residence that the sight, sounds, and

Hospitals and homes like this for the sick are not nuisances *per se*. A lawful business can only become a nuisance where necessary precautions to avoid unlawful injury to the neighborhood are disregarded.

15 Am. & Eng. Enc. Law, 2d ed. p. 764; Joyce, Nuisances, § 397; Barnard v. Sherley, 135 Ind. 547, 24 L.R.A. 568, 41 Am. St. Rep. 454, 34 N. E. 600, 35 N. E. 117; Lane v. Concord, 70 N. H. 485, 85 Am. St. Rep. 643, 49 Atl. 687; Fogarty v. Junction City Pressed Brick Co. 50 Kan. 478, 18 L.R.A. 756, 31 Pac. 1052; Westcott v. Middleton, 43 N. J. Eq. 478, 11 Atl. 490.

The business of conducting a hospital, being a lawful and legitimate enterprise, and not *per se* a nuisance, the mere fact of the depreciation in the value of plaintiff's property on account of the location of the hospital there is not proper ground to warrant the interference of a court of equity by injunction.

smells which were a necessary part of its operation became an intolerable nuisance to those dwelling in the residence.

And in Gilford v. Babies' Hospital, 21 Abb. N. C. 159, 1 N. Y. Supp. 448, it was held that the location of a hospital in the residential part of a large city, for the care of sick infants, including such as might after admission develop contagious diseases, though not a nuisance *per se*, would be restrained where, by reason of circumstances inseparable from its maintenance, including the noise of patients, their advent, removal, and death, with its consequences, and the probabilities of the presence of contagious disease, made it a menace to the health of the community.

So, in Haag v. Vanderburgh County, 60 Ind. 511, 28 Am. Rep. 654, it was held to be a nuisance to keep and maintain a pesthouse for the treatment of smallpox so near the plaintiff's dwelling house that it became dangerous for her and her family to occupy the same, and her property greatly depreciated in value, and her sons became sick from, and died of, smallpox.

And in Thompson v. Kimbrough, 23 Tex. Civ. App. 350, 57 S. W. 328, it was held that the establishment of a detention station and pesthouse in which to place those who had been exposed to smallpox and those afflicted with the disease, in such close proximity to a public school that the germs of the disease might and probably would be disseminated among the children attending such school, "would be the very worst character of nuisance."

For a discussion of a particular branch of this specific question,—the right of a property owner to complain of the location of a contagious disease hospital in his neighborhood,—see the note to Barry v. Smith, 5 L.R.A. (N.S.) 1028. J. A. C.

1 High, Inj. 2d ed. § 742; Fallon v. Schilling, 29 Kan. 292, 44 Am. Rep. 642; Rhodes v. Dunbar, 57 Pa. 274, 98 Am. Dec. 221.

If this hospital be a nuisance, it affects the community, and to obtain an injunction plaintiff must show special damage peculiar to herself.

Hayden v. Stewart, 71 Kan. 11, 80 Pac. 43; Atchinson Street R. Co. v. Nave, 38 Kan. 744, 5 Am. St. Rep. 800, 17 Pac. 587; School Dist. No. 1 v. Neil, 36 Kan. 617, 59 Am. Rep. 575, 14 Pac. 253; School Dist. No. 1 v. Shadduck, 25 Kan. 467; 14 Enc. Pl. & Pr. p. 1137; Van De Vere v. Kansas City, 107 Mo. 83, 28 Am. St. Rep. 396, 17 S. W. 695; Hessin v. Manhattan, 81 Kan. 153, 25 L.R.A.(N.S.) 228, 105 Pac. 44.

Messrs. Getty, Hutchings, & Carson for appellee.

Mason, J., delivered the opinion of the court:

A hospital for the treatment of patients afflicted with cancer was about to be established in Kansas City, Kansas, in a building formerly used as a dwelling house. The owner and occupant of adjacent premises brought an action to enjoin its establishment, upon the ground that in view of the character of the neighborhood its presence there would render it in legal contemplation a nuisance. A permanent injunction was granted, and the defendants appeal.

The home of the plaintiff is 78 feet from the main building which it is proposed to use as a hospital. The two houses face in the same direction, and each has a number of windows looking toward the other. A 15-foot alley runs between them, near which is a small building belonging to the hospital property, formerly used for a billiard room. Two other residences are situated about 90 feet from the hospital building, and three others at a distance of about 150 feet. All the houses in the vicinity are used solely as dwellings.

Witnesses for the plaintiff, who were familiar with real estate values, testified that in their judgment the establishment of the hospital would cause a material depreciation in the rental and market value of the surrounding property. Several physicians expressed the opinion that there would be some danger of the communication of the disease through transmission by means of insects, and perhaps in other ways. There was also evidence that offensive odors resulting from the disease itself and from disinfectants used on account of it might reach the occupants of neighboring dwellings. On behalf of the defendants, there

was testimony that none of the anticipated evils had resulted from a cancer hospital formerly maintained by them under somewhat similar conditions; that under proper management there need be no offensive odors about such a place; and that cancer is not contagious or infectious. Perhaps the court may take notice of the prevailing view in the medical profession upon the last proposition. From the current literature of the subject, it appears that while it has not been proved to the satisfaction of the profession generally that cancer can be communicated from one individual to another, except by the process of grafting or transplanting cancerous tissue, competent investigators are not lacking who believe that it is of parasitic origin and in some degree infectious. That theory is presented and argued at length in an address published in the *Lancet* of January 11, 1908, to which is appended a bibliographical note. Results of experiments tending to support the theory are recorded in the issues of June 5, 1909, and April 9, 1910. An article in the same publication (December 4, 1909, pp. 1709-1711) describes observations made in Paris covering a period of two years and a half, which lend color to the popular belief in the existence of "cancer houses;" that is, houses the occupants of which are peculiarly subject to cancer. In the present state of accurate knowledge on the subject, it is quite within bounds to say that, whether or not there is actual danger of the transmission of the disease under the conditions stated, the fear of it is not entirely unreasonable.

It is of course not necessary that the use to which property is put shall be unlawful in itself in order to constitute it a nuisance in the eye of the law. 29 Cyc. Law & Proc. p. 1160; 21 Am. & Eng. Enc. Law, p. 692. Whether in a given case the obligation so to use one's own property as not to injure another's has been or is about to be so far transgressed as to justify the interference of a court is a question to be determined as a matter of reason, fairness, and justice under all the circumstances. The injury need not extend beyond annoyance if, in view of all the facts, it is unreasonable. For instance, offensive odors, although not injurious to health, have often been held to constitute sufficient ground for injunction.

The general considerations upon which the line is to be drawn between annoyances that can be restrained and those which must be endured are thus stated in *Barnes v. Hathorn*, 54 Me. 124, 125: "What is a nuisance? In considering this question, when the complaint is based upon the use

of another of his own property, we are first met by the general doctrine of the right of every man to regulate, improve, and control his own property; to make such erections as his own judgment, taste, or interest may suggest; to be master of his own, without dictation or interference by his neighbors. On the other hand, we meet that equally well-established and exceedingly comprehensive rule of the common law,—*sic utere tuo, ut alienum non ladas*—which is the legal application of the Gospel rule of doing unto others as we would that they should do unto us. The difficulty is in drawing the line in particular cases, so as to recognize and enforce both rules, within reasonable limitations. It is quite clear that the law does not recognize any legal right in any one to compel his neighbor to follow his tastes, wishes, or preferences, or to consult his mere convenience. He cannot dictate the style of architecture or, generally, the location of the buildings; or maintain that an unsightly or ill-proportioned edifice is a nuisance because it offends his eye or his too cultivated taste. Nor can he interfere because he has idle and unfounded fears of ill-effects from the use of the adjoining lot. There may be many acts which, to the eyes of others, appear to be unneighborly and even unkind, and entirely unnecessary to the full enjoyment of the property,—vexatious and irritating, and the source of constant mental annoyance,—and yet they may be but the legal exercise of the right of dominion, and therefore cannot be deemed nuisances. The diminution of the market value of adjacent buildings, by such use, will not of itself make it a nuisance. But there is a limit to such right. No man is at liberty to use his own without any reference to the health, comfort, or reasonable enjoyment of like public or private rights by others. Every man gives up something of this absolute right of dominion and use of his own, to be regulated or restrained by law, so that others may not be hurt or hindered unreasonably in the use and enjoyment of their property. This is the fundamental principle of all regulated civil communities, and without it society could hardly exist, except by the law of the strongest. This illegal, unreasonable, and unjustifiable use to the injury of another, or of the public, the law denominates a nuisance."

The same thought runs through the discussion of the subject by the text-writers, as shown by the following typical expressions:

"It is not practical to give other than a general definition of what constitutes a nuisance. A precise, technical definition, 29 L.R.A. (N.S.)

applicable at all times to all cases, cannot be given, because of the varying circumstances upon which the decisions are based.

One of the great difficulties in defining a nuisance technically is to describe the degree of annoyance necessary to cause the actionable injury. . . . It is difficult to define just what degree of injurious influence must be reached in order to warrant the court in determining what circumstances constitute a nuisance. .

The determination, however, of the question rests in sound judgment and depends upon common sense in each case.

Even that which causes a well-founded, reasonable apprehension of damage may be a nuisance." Joyce, Nuisances, §§ 1, 19.

"Thus a business or erection which should be located in a remote locality may be a nuisance merely because located in a residence or populous neighborhood." 21 Am. & Eng. Enc. Law, 2d ed. p. 692.

"The locality is to be considered in determining whether there is a nuisance, for what might be a nuisance in one locality might not be so in another." 29 Cyc. Law & Proc. p. 1157.

"A hospital is not a nuisance *per se*, or even *prima facie*; but it may be so located and conducted as to be a nuisance to people living close to it. Even a pesthouse is not a nuisance *per se*, although it may be a nuisance where it is . . . situated near to property used or suitable for residence purposes." 29 Cyc. Law & Proc. p. 1175.

"The locality, the condition of property, and the habits and tastes of those residing there, divested of any fanciful notions, or such as are dictated by 'dainty modes and habits of living,' is the test to apply in a given case. In the very nature of things, there can be no definite or fixed standard to control every case in any locality. The question is one of reasonableness or unreasonableness in the use of property, and this is largely dependent upon the locality and its surroundings." Wood, Nuisances, § 9.

Cases bearing more or less directly on the question involved are collected in a note in 15 A. & E. Ann. Cas. 719.

In *Deaconess Home & Hospital v. Pontjes*, 207 Ill. 553, 560, 64 L.R.A. 215, 69 N. E. 748, 751, an injunction against the maintenance of a hospital close to dwelling houses was sustained, the court saying: "It is said that a screen may be erected between the two properties, and that the windows of the hospital may be kept closed and the curtains drawn on the side next the property of appellee. It is manifest that in the summer time the windows must be

opened and the curtains drawn aside in both buildings for ventilation, and it is equally apparent that the screen would not prevent the cries of the suffering, the moans of the dying, and other offensive noises being heard in the home of the appellee; nor would such an obstruction entirely prevent the transmission of the smell of iodoform, ether, and other offensive substances; nor would the annoyance resulting from the frequent visits of the hearse and the ambulance to the hospital be materially lessened by the proposed precautions. The work in which appellant is engaged is philanthropy of the highest order, but the law will not permit it to be conducted in such a manner that it becomes an intolerable nuisance to those who are in no wise responsible for its location and operation."

In *Baltimore v. Fairfield Improv. Co.* 87 Md. 352, 364, 365, 40 L.R.A. 494, 67 Am. St. Rep. 344, 39 Atl. 1081, 1084, an injunction against the placing of a leper for care and restraint in a residence neighborhood was justified in part upon grounds thus stated in the opinion "Leprosy is and always has been universally regarded with horror and loathing. . . . The horror of its contagion is as deep-seated to-day as it was more than 2,000 years ago in Palestine. There are modern theories and opinions of medical experts that the contagion is remote and by no means dangerous; but the popular belief of its perils, founded on the Biblical narrative, on the stringent provisions of the Mosaic law that show how dreadful were its ravages and how great the terror which it excited, and an almost universal sentiment, the result of a common concurrence of thought for centuries, cannot in this day be shaken or dispelled by mere scientific assertion or conjecture. It is not, in this case, so much a mere academic inquiry as to whether the disease is in fact highly or remotely contagious; but the question is whether, viewed as it is by the people generally, its introduction into a neighborhood is calculated to do a serious injury to the property of the plaintiff there located."

Much the same reasoning may be applied here. The question is not whether the establishment of the hospital would place the occupants of the adjacent dwellings in actual danger of infection, but whether they would have reasonable ground to fear such a result, and whether, in view of the general dread inspired by the disease, the reasonable enjoyment of their property would not be materially interfered with by the bringing together of a considerable number of cancer patients in this place. However carefully the hospital might be conducted, and however worthy the insti-

tution might be, its mere presence, which would necessarily be manifested in various ways, would make the neighborhood less desirable for residence purposes, not to the over sensitive alone, but to persons of normal sensibilities. The court concludes that upon these considerations the injunction was rightfully granted.

The plaintiff, as the owner and occupant of adjacent property, has such a peculiar interest in the relief sought as to enable her to maintain the action.

The judgment is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

COLUMBIA TRUST COMPANY, Appt.,
v.

LINCOLN INSTITUTE OF KENTUCKY.

(138 Ky. 804, 129 S. W. 113.)

School — colored pupils — power to prohibit.

1. The legislature cannot, under its police power, prohibit, or authorize the voters of the county to prohibit, the establishment within the county limits, by a private charitable corporation, of an industrial school for colored children.

Corporation — amended charter — general statute.

2. A statute invalidly prohibiting a corporation from establishing a school for colored children within a certain county can-

Note. — Power to regulate or prohibit private schools.

The decisions bearing upon the state's power to regulate or prohibit private schools are few, and mostly involve incorporated schools, and seem to turn upon the fact that the school is a private corporation, of which the state has no right to revoke or alter the charter or take away the franchises or property without its consent, unless such right was reserved in the original charter. It seems to be the rule, however, that the power to regulate or prohibit private schools is subject to the same limitations as the power to regulate private property rights in general, under constitutional provisions, although public schools and the subject of education are within legislative control, and the legislature, under the police power, may regulate education in many respects in private schools. But the exercise of such police power must not be arbitrary, and must be limited to the preservation of the public safety, the public health, or the public morals.

Power of legislatures.

In the case of *Berea College v. Com.* 123

not be upheld as an amendment of the charter of the corporation, so as to take away its power to locate the school there.

Statute — general law — exempting cities.

3. A statute exempting from its provisions the first four classes of cities of the state is included under a constitutional provision that the legislature shall not enact any special law by exempting from the operation of a general act any city, town, district, or county.

Same — delegation of authority — validity.

4. A statute making the right to establish a private industrial school in a county depend upon a vote of the electors of the county violates a constitutional provision that no law, except such as relate to intoxicating liquors, bridges, public roads and buildings, fences, stock, common schools, paupers, and the regulation of local affairs of municipalities, shall be enacted to take effect upon the approval of any other authority than the general assembly.

(June 17, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Jefferson County in plaintiff's favor in an action brought to recover certain trust funds to

which plaintiff alleged it was entitled. Affirmed.

The facts are stated in the opinion.

Messrs. Bodley & Baskin, for appellant:

Education is exclusively within legislative control.

Barbier v. Connolly, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; Interstate Consol. Street R. Co. v. Massachusetts, 207 U. S. 79, 52 L. ed. 111, 28 Sup. Ct. Rep. 26, 12 A. & E. Ann. Cas. 555.

The legislature may impose even unreasonable conditions in matters within its exclusive control.

Davis v. Massachusetts, 167 U. S. 47, 42 L. ed. 72, 17 Sup. Ct. Rep. 731; Crowley v. Christensen, 137 U. S. 86, 34 L. ed. 620, 11 Sup. Ct. Rep. 13.

A corporation has no inherent rights, and the legislature may control its powers, even arbitrarily.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Cumberland & O. R. Co. v. Barren County (t. 10 Bush, 604; Tomlinson v. Jessup, 15 Wall. 454, 21 L. ed. 204; Miller v. New York, 15 Wall. 478, 21 L. ed. 98.

Ky. 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 A. & E. Ann. Cas. 337, it was held that a state may lawfully prohibit the maintenance and operation of a private school in which white and colored persons may be taught at the same time and in the same place,—the right to teach white and negro children in a private school at the same time and place not being a property right, and such prohibition being a valid exercise of the police power for the protection of society, the preservation of the public safety, and the promotion of the welfare of all the people, and not violative of any constitutional provision.

On another branch of the same case, however, it was held that in so far as the statute in question prohibited the maintenance, by any institution of learning, of separate and distinct branches for white and colored persons less than 25 miles apart, it was an unreasonable and arbitrary exercise of the police power, and accordingly unconstitutional and void.

Upon a writ of error to the Supreme Court of the United States (211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33), that court affirmed the judgment of the court of appeals of Kentucky on the first branch of the case above, but considered the validity of the prohibition only as applied to corporations, holding that a state legislature may prohibit domestic corporations from teaching white and negro pupils in the same institution, where the state has reserved the power to alter, amend, or repeal the charter of such corporation.

29 L.R.A. (N.S.)

Mr. Justice Brewer pointed out the ruling of the Kentucky court that "the right to teach white and negro children in a private school at the same time and place is not a property right. Besides, appellant, as a corporation created by this state, has no natural right to teach at all. Its right to teach is such as the state sees fit to give to it. The state may withhold it altogether, or qualify it." Further: "The decision by a state court of the extent and limitation of the powers conferred by the state upon one of its own corporations is of a purely local nature. In creating a corporation a state may withhold powers which may be exercised by, and cannot be denied to, an individual. It is under no obligation to treat both alike."

It seems quite evident, however, that the court of appeals of Kentucky intended to hold the statutory prohibition in this case lawful and valid as to individuals as well as to corporations, as otherwise—considering the validity of the statute only as applied to corporations subject to special control and limitations—the court would have ruled differently on the second branch of the case, and have held the whole statute valid as to the corporation in this case, as an amendment to its charter.

It will be remembered that in the Dartmouth College Case (Dartmouth College v. Woodward, 4 Wheat. 518, 4 L. ed. 629), reversing 1 N. H. 11, it was held that a legislature has no right to alter in a material respect the charter of a private educational corporation, without the consent of the cor-

Messrs. Humphrey & Humphrey and Alexander G. Barret, for appellee:

The Holland bill, which forbids conducting an industrial school on more than 75 acres of land, without the consent of the voters of the precinct, is unconstitutional and void, as it is an excessive, unreasonable, and arbitrary exercise of the police power.

Boyd v. Frankfort, 117 Ky. 204, 111 Am. St. Rep. 240, 77 S. W. 669; **Com. v. Bacon**, 13 Bush, 210, 26 Am. Rep. 189; **Com. v. Fowler**, 96 Ky. 172, 33 L.R.A. 839, 28 S. W. 786; **Re Quong Woo**, 13 Fed. 229; **Ex parte Sing Lee**, 96 Cal. 354, 24 L.R.A. 195, 31 Am. St. Rep. 218, 31 Pac. 245; **Tilford v. Belknap**, 126 Ky. 246, 11 L.R.A. (N.S.) 708, 103 S. W. 289; **Yick Wo v. Hopkins**, 118 U. S. 356, 30 L. ed. 220, 6 Sup. Ct. Rep. 1064; **Owensboro & N. R. Co. v. Todd**, 91 Ky. 175, 11 L.R.A. 285, 15 S. W. 56; **St. Louis v. Russell**, 116 Mo. 248, 20 L.R.A. 721, 22 S. W. 470; **Com. v. Payne Medicine Co. (Ky.)** 127 S. W. 760.

The act cannot be sustained as against a corporation, under the pretext that it is an amendment to the charters of all incorporated industrial schools.

Berea College v. Com. 123 Ky. 227, 124 Am. St. Rep. 344, 94 S. W. 623, 13 A. & E. Ann. Cas. 337; **Com. v. Remington Typewriter Co.** 127 Ky. 177, 105 S. W. 399.

And to the same effect is **University of Maryland v. Williams**, 9 Gill & J. 365, 31 Am. Dec. 72. But in these cases there was no express reservation by the charter of the right to alter or repeal. The custom of inserting such provisions grew out of the decision in the **Dartmouth College Case**.

In **State ex rel. White v. Neff**, 52 Ohio St. 375, 28 L.R.A. 409, 40 N. E. 720, a state statute was held unconstitutional and void under a provision that "private property shall ever be held inviolate," where in terms it gave absolute control and management of the affairs and property of a private school to the directors of another educational corporation, in effect taking the property of the former, and donating it to the latter, institution, which the legislature assumed to do under its reserved power to alter the charter of the school.

An act of a legislature altering the tenure of his office and removing the president of a private college corporation, where the visitatorial and all other powers are vested in the boards of trustees and overseers, was held unconstitutional, as impairing the obligation of a contract, in **Allen v. McKean**, 1 Sumn. 276, Fed. Cas. No. 229.

An act creating a new board of trustees of an academy, a private corporation, and clothing them with the powers exercised by an existing board under a previous act, violates the obligation of the contract created by the latter, and is therefore illegal and void. **Montpelier Academy v. George**, 14 La. 395, 33 Am. Dec. 585.
29 L.R.A. (N.S.)

The act excepts cities of the first four classes, thus offending Ky. Const. § 60, which forbids local legislation by exempting from the operation of any general act any city, town, district, or county.

Droege v. McInerney, 120 Ky. 796, 87 S. W. 1085.

The act violates Ky. Const. § 60, in leaving to an authority other than the legislature, a question which the Constitution does not expressly permit so to be submitted.

Western & Southern L. Ins. Co. v. Com. 133 Ky. 292, 117 S. W. 378.

The Holland bill violates that portion of Ky. Const. § 60, which provides that "no law except such as relates to [the sale of liquor, etc.,] shall be enacted to take effect upon the approval of any other authority than the general assembly, unless otherwise expressly provided in this Constitution."

Com. v. Weller, 14 Bush, 218, 29 Am. Rep. 407; **Western & Southern L. Ins. Co. v. Com.** supra.

The legislature cannot clothe any person or set of persons with the arbitrary power to forbid at pleasure the exercise of a harmless occupation or the harmless use of property.

Boyd v. Frankfort, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669; **Pfingst v. Senn**, 94 Ky. 558, 21 L.R.A. 569, 23 S. W. 358;

Where a legislature, pursuant to a constitutional provision, established a university, granting to it certain property escheated to the state, a subsequent act divesting such property is unconstitutional and void. **Den ex dem. University of North Carolina v. Foy**, 5 N. C. (1 Murph.) 58, 3 Am. Dec. 672.

An attorney general cannot maintain an action to determine who are entitled to vote at elections of trustees or at other corporate meetings of the stockholders of an incorporated private school. **Atty. Gen. ex rel. Saunders v. Albion Academy & Normal Institute**, 52 Wis. 469, 9 N. W. 391.

Power of courts.

In **Auburn Academy v. Strong**, Hopk. Ch. 278, the court said, in considering the question of its jurisdiction, that the court of chancery had no power of visitation over private schools.

And under a statute allowing a party aggrieved by a decree of the visitors of a theological institution, to appeal to a court, and authorizing the court to declare null and void any decree or sentence of the visitors which is contrary to the statutes of the founders, and beyond the limits of the power prescribed to them thereby, the court is restricted to the determination of the questions whether the visitors have acted contrary to those statutes, and whether they have exceeded their jurisdiction. **Re Murdock**, 7 Pick. 303.

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Berea College v. Com. 123 Ky. 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 A. & E. Ann. Cas. 337; *Lochner v. New York*, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; *Com. v. Bacon*, supra; *Com. v. Fowler*, 96 Ky. 171, 33 L.R.A. 839, 28 S. W. 766; *Ex parte Sing Lee and Re Quong Woo*, supra; *Tilford v. Belknap*, 126 Ky. 244, 11 L.R.A. (N.S.) 708, 103 S. W. 280; *Yick Wo v. Hopkins*; *Owensboro & N. R. Co. v. Todd*; *St. Louis v. Russell*; and *Com. v. Payne Medicine Co.*,—supra.

Barker, Ch. J., delivered the opinion of the court:

The sole question arising for adjudication upon this record is the constitutionality of an act of the general assembly of the commonwealth of Kentucky, commonly known as the "Holland bill," and which is as follows:

"An Act to Regulate the Establishment of Industrial Schools.

"Be it enacted by the general assembly of the commonwealth of Kentucky:

"Section 1. That it shall be unlawful for any person, company, corporation, or association to own, control, operate, or maintain any industrial school, college, or institute where farming or any other occupation, trade, profession, or calling is taught or sought to be taught in its course of study or instruction, where such persons, company, corporation, or association owns, operates, or controls exceeding 75 acres of land, unless said person, company, corporation, or association shall obtain the consent of a majority of the legal voters residing in the voting precinct where such school is to be maintained or operated, in the manner hereinafter provided.

"Sec. 2. Before any such school, college, or institute shall hereafter commence operation, the person, company, corporation, or association owning or controlling said school shall apply to the judge of the county court of the county wherein said school, college, or institute is located or sought to be located or operated, for permission to operate, conduct, or maintain such school, college, or institute; and thereupon it shall be the duty of the said county judge to call an election in the voting precinct wherein such school, college, or institute is located or sought to be located, operated, or maintained, for the purpose of taking the sense of the legal voters residing in said precinct upon the question of whether or not such school, college, or institute shall be located, operated, or maintained in said voting precinct, and in the event a majority of the legal voters in said voting precinct, voting

upon said proposition, shall vote for the granting of said permission, then the said county judge shall grant same; but if the vote in said voting precinct be against granting such permission, then said county judge shall not grant such permission.

"Sec. 3. When application for such permission is filed with the judge of the county court of the county wherein such school, college, or institute is sought to be located, operated, or maintained, said judge shall call an election to be held between the hours of 6 o'clock A. M. and 4 o'clock P. M. on a date to be fixed by him, giving notice thereof by at least twenty written or printed notices posted in conspicuous places in said precinct for at least forty days prior to the date fixed for said election, and the board of election commissioners for such county shall appoint the officers of election to hold said election in such precinct where a vote is ordered, which officers shall be two judges, one clerk, and one sheriff, whose duties and qualifications shall be the same as those serving in a general election; and said election officers shall certify the result of the vote within three days to the board of election commissioners of said county, who shall canvass the returns and certify the result to the county judge of said county. All expenses for said election to be paid by the applicant for such permission.

"Sec. 4. Any person, company, corporation, or association who shall own, operate, control, or maintain any such school, college, or institute without procuring the permission hereinbefore set out, shall be fined \$100 for each and every day such school is so owned, operated, controlled, or maintained.

"Sec. 5. The provisions of this act shall not apply to cities of the first, second, third, or fourth class, or to those schools, colleges, and institutes already built and in actual operation for a period of one year before the passage of this act.

"Sec. 6. All laws and parts of laws in conflict with this act are hereby repealed.

"This act shall take effect from the date of its passage."

The question arose as follows: The appellee, Lincoln Institute of Kentucky, is a charitable corporation organized under the laws of the commonwealth of Kentucky, with power to establish a normal and industrial school for colored people. For the purposes for which it was organized, it has an endowment of some \$400,000, which is held, in part, at least, by the Columbia Trust Company as its trustee. The appellee purchased a tract of land in Shelby county, Kentucky, of about 444 acres, upon which it proposes to erect the necessary buildings and to place the necessary implements and appara-

tus, and to inaugurate and maintain a normal and industrial school for colored people. in accordance with the purposes for which it was organized, and demanded of its trustee enough of the funds held by it to pay for the land so purchased. With this request the appellant refused to comply, for the reason that the provisions of the Holland bill had not been complied with, and that it would be unlawful to establish the school at the place selected without first complying with the provisions of the statute. A general demurrer to this answer was interposed and sustained, and, the defendant refusing to plead further, a judgment was rendered in accordance with the prayer of the petition; and of this the appellant complains. It being admitted that the appellee has failed to comply with the provisions of the Holland bill, it follows that, if that act is valid, the position of the appellant is sound, and the judgment should be reversed; on the other hand, if the act is unconstitutional, then the judgment of the trial court must be affirmed.

In order that the purposes and aims of the appellee corporation may be more fully understood, we insert herein the preamble and the first four articles of its constitution:

"Preamble.—In order to promote the cause of Christ, we, the undersigned, hereby associate ourselves and our successors, to form a corporation under the provision of article VIII. chapter 32, of the Kentucky statutes, and adopt the following articles:

"Article I.—Name. This institution shall be called the Lincoln Institute of Kentucky and located in Shelby county, Kentucky, 9 miles west of Shelbyville, with such adjunct institutions as may be established in any other parts of the commonwealth.

"Art. II.—Object. The object of this institute shall be to furnish thorough Christian education in as many departments as resources permit, with special attention to the training of teachers and instruction in industrial pursuits, and with all possible adaptation to the educational needs of the colored people of this state.

"Art. III.—Christian character. This institute shall endeavor to exert through all its departments and officers an influence distinctly Christian, but in the employment of officers and teachers, no sectarian test shall be applied, and no one Christian body shall be allowed to preponderate in the list of trustees or teachers."

The primary question with which we are confronted is: May the general assembly of the commonwealth of Kentucky prohibit the institution and maintenance of such a school as appellee? We say, may the general assembly prohibit, because it is manifest

that, if the legislative power may be exercised in such a way as to authorize the voters of a precinct to prohibit the establishment of such an institution, clearly the legislature may itself prohibit it. For the appellant it is maintained that the act in question is a valid exercise of the police power of the state, and for the appellee it is contended that it is an exercise of mere arbitrary power, in violation both of the Constitution of the state of Kentucky and the Constitution of the United States. To the solution of this question, we will now address ourselves.

Section 1 of the Bill of Rights is as follows: "All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First. The right of enjoying and defending their lives and liberties. . . . Third. The right of seeking and pursuing their safety and happiness. . . . Fifth. The right of acquiring and protecting property.

"Sec. 2. Absolute and arbitrary power over the lives, liberty, and property of free-men exists nowhere in a republic, not even in the largest majority."

"Sec. 26. To guard against transgression of the high powers which we have delegated, we declare that everything in this Bill of Rights is excepted out of the general powers of government, and shall forever remain inviolate; and all laws contrary thereto, or contrary to this Constitution, shall be void."

The Lincoln Institute is a legally constituted corporation, having power and authority, among other things, under its charter, to acquire and hold property and to use it for the purpose of establishing such a school as it seeks to establish in Shelby county. Undoubtedly, it will be admitted at once that any law which seeks arbitrarily to deprive the appellee of the right of using its property in any way it sees fit which is not inimical to the public welfare is contrary to the provisions of the Bill of Rights above quoted, and therefore void. And we do not think it will be controverted that, unless it can be shown that the establishment of such an institution as the one under consideration is in some way inimical to the public safety, the public health, or the public morals, the act which forbids its operation is an exercise of arbitrary power. In other words, the act in question must find its justification in the police power of the state, or it must be declared to be invalid.

In the case of *Com. v. Fowler*, 96 Ky. 171, 33 L.R.A. 839, 28 S. W. 787, this court said: "Everyone has the right to follow an innocent calling without permission from the government. He may do with his own whatever he pleases, so that he injure no one else.

We agree with learned counsel that 'the doctrine of legislative permission, as a condition precedent to the conduct of any useful or harmless business, is grossly repugnant to those obvious principles of human right which lie at the foundation of just government among men.' So, then, without governmental interference or consent, we say the farmer may till his soil, the merchant may buy and sell, the lawyer and the doctor practise their professions, and the druggist and pharmacist compound their medicines." In the case of *Com. v. Bacon*, 13 Bush, 210, 26 Am. Rep. 189, there was involved the validity of a statute which provided that it should be unlawful for anyone, without the consent of the directors of the Bourbon County Agricultural Society, to open a lot, stable, shed, or other place during the continuance of the society's fairs, for the purpose of receiving, for pay, horses or vehicles of any kind; or for any person or persons to permit the use of his lot, stable, shed, or place for any such purposes. Among other things, this court, said, in the opinion, holding the act invalid: "The effect of the act then is to restrict the right of one person to use and enjoy his property in a particular manner, that another may use his in that manner to greater profit than he could if each was left free to use his own as he pleased. In this country, where the right of the citizen to acquire, hold, and enjoy property is guaranteed by the fundamental law, it would seem that the statement of the proposition is enough to refute it."

It is useless to multiply authorities on so obvious a proposition. If the teaching of the young to be useful, upright, Christian citizens is not inimical to the public safety, public morals, or the public health, then it must follow that an act which seeks either to prohibit it altogether, or to authorize others to prohibit it, must be invalid. It is difficult to find language to make plainer that which is so obvious as is the proposition before us. The purposes of the institution under discussion include the whole circle of the solid virtues with which youth may be endowed. Undoubtedly, it is a substantial good to educate the youth of the state; and such is the declared policy of the Constitution. Section 183 provides: "The general assembly shall, by appropriate legislation, provide for an efficient system of common schools throughout the state." It cannot, then, be in any way injurious to the public to aid in forwarding the great educational policy which the people themselves have declared in their fundamental law,—the giving of every young man and woman in the commonwealth a sound education. And when academic education is supplemented by religious training and special in-

struction in the agricultural and mechanical arts and sciences, it seems to us that it is contrary to the most obvious public policy that an institution which affords such an education should be in any way blocked or impeded. What good reason can be given for prohibiting the exercise of such a charity as that which we have under discussion, unless it can be shown that education, supplemented by religious training, may be in some way an evil to society? Does not the mind of every virtuous and right-thinking person at once admit that the contrary is true? Do we not know that religious educational training has a tendency to make men more industrious, more virtuous, and better generally, morally and physically? In other words, better, wiser, and more useful citizens. What would be thought of an act which prohibited the former from cultivating a piece of land of greater extent than 75 acres, without the permission of his neighbors? By what argument could an act be supported which prohibited a manufacturer from working more than a given number of artisans? And yet it is seriously contended that a school which seeks to make religious, upright, educated citizens may be prevented under the police power of the state as a public nuisance. Education strengthens the mind, purifies the heart, and widens the horizon of thought. It magnifies the domain of hope, multiplies the chances of success in life, and opens wide the door of opportunity to the poor as well as to the rich. It makes men better husbands, better fathers, and better citizens. It is not doubted that the legislature, under the police power, may regulate education in many respects. It may prohibit the mingling of white and colored children in the same schools or in schools of immediate proximity. Perhaps, it may be within the police power to prohibit coeducation of the sexes, or to, in any other reasonable way, regulate the mere manner of educating the youth of the state; but to arbitrarily prohibit education is in direct violation of the Bill of Rights above quoted. In the case of *Berea College v. Com.* 123 Ky. 209, 124 Am. St. Rep. 344, 94 S. W. 623, 13 A. & E. Ann. Cas. 337, it was held that, while it was within the power of the legislature to prohibit the voluntary mingling of white and colored students in the same school, it was not within its competency to prohibit schools for white and colored students from being conducted within 25 miles of each other; it being there held that such a prohibition was an arbitrary exercise of power, which could not be upheld in a constitutional form of government. So, in the case before us, no good reason can be given for either prohibiting or impeding in any

way the institution and maintenance of the school involved in this litigation. The principle here announced is upheld and maintained in *Boyd v. Frankfort*, 117 Ky. 199, 111 Am. St. Rep. 240, 77 S. W. 669, where it was held unconstitutional to prohibit by ordinance the right of a colored congregation in Frankfort, to erect a church building and carry on therein services of Christian worship; and in *Tilford v. Belknap*, 126 Ky. 244, 11 L.R.A. (N.S.) 708, 103 S. W. 289, where it was held that an ordinance of the city of Louisville was unconstitutional, in that it prohibited the erection of a frame building within 60 feet of a stone or brick building, without the consent of the owner of the latter.

We conclude, then, on this branch of the case, that religious and scientific education, instead of being in any wise injurious or dangerous to the public safety, morals, health, or welfare, on the contrary, is promotive of public virtue, intelligence, and good citizenship, and is therefore to be desired and promoted, rather than prohibited or impeded; and this being true, the act under discussion, which puts it within the power of the voters of any precinct to prohibit the establishment of such a school as that contemplated by appellee, is unconstitutional, and therefore void. Nor can the act be upheld as an amendment to the charters of such corporations as appellees. It is true that one branch of the case of *Berea College v. Com.* was affirmed on a writ of error to the Supreme Court of the United States (211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33, upon this principle, but that doctrine was repudiated by our own court on another branch of the case, which was decided in favor of the college, and therefore not appealed from. In that case, as said above, we held that so much of the "Day act" (Acts 1904, chap. 85) as prohibited the conducting of schools for white and black students within 25 miles of each other was illegal, and therefore invalid; and this could not have been done under the principle that even an invalid act may be upheld as an amendment to the charter of the complaining corporation. If that principle had prevailed in our court, then the Day act would have been upheld in both branches. We adhere to the principle announced by us in *Berea College v. Com.* on this branch of the case.

The act under consideration is also in violation of § 60 of the Constitution, which, in so far as pertinent to the subject in hand, is as follows: "The general assembly shall not directly enact any special or local act by the repeal in part of a general act, or by exempting from the operation of a general act, any city, town, district, 29 L.R.A. (N.S.)

or county. . . . No law, except such as relates to the sale, loan, or gift of vinous, spirituous, or malt liquors, bridges, turnpikes, or other public roads, public buildings or improvements, fencing, running at large of stock, matters pertaining to common schools, paupers, and the regulation by counties, cities, towns, or other municipalities of their local affairs, shall be enacted to take effect upon the approval of any other authority than the general assembly, unless otherwise expressly provided in this Constitution." The act in question exempts cities of the first, second, third, and fourth classes from its provisions. In other words, what purports to be a general law is made special by exempting from its provisions the first four classes of the cities of the commonwealth. It also makes the establishment of such a charity as appellee to depend, not upon the legislative authority, but upon the votes of the citizens of the precinct wherein the school is proposed to be established. In the case of *Droege v. McInerney*, 120 Ky. 796, 87 S. W. 1085, an act of the general assembly establishing a county board of election commissioners was held to be invalid because it excepted from its provisions cities of the second class; and in *Western and Southern L. Ins. Co. v. Com.* 133 Ky. 292, 117 S. W. 376, an act of the general assembly which made the tax on foreign insurance companies in this state to depend upon the amount of the tax assessed against similar corporations in their home states was held to be in violation of § 60 of the Constitution, because its operation was made to turn upon an authority other than that of the legislature of this state. These two cases are conclusive as to the invalidity of the act because contrary to the provisions of § 60 of the Constitution.

We are therefore of opinion that the act in question is unconstitutional, first, because it is an exercise of arbitrary power and contrary to those provisions in the Bill of Rights above cited; and, second, that it is invalid because contrary to the provisions of § 60 of the Constitution. The judgment of the Chancellor, so holding, must be affirmed; and it is so ordered.

LOUISIANA SUPREME COURT.

STANDARD MARINE INSURANCE COMPANY, Limited, Appt.,

v.

BOARD OF ASSESSORS et al.

(123 La. 717, 49 So. 483.)

Taxation — outstanding accounts.

1. Outstanding accounts are rather a com-

Headnotes by MONROE, J.

mon variety of credits. They are recognized, in law and in practice, as "property," and, so long as they have their situs here, are liable to taxation here.

Same — assessment — reduction.

2. The proposition that, an application that an assessment should be "wiped out" and should be "reduced to nothing" is an application to "reduce" an assessment, within the meaning of the law, is untenable. In the one case, the applicant denies the existence of property liable to taxation; in the other, he admits the existence of such property and complains of its overvaluation.

(April 26, 1909.)

A PPEAL by plaintiffs from an order of the Civil District Court for the Parish of Orleans in defendants' favor in an action brought to reduce certain tax assessments. Affirmed

The facts are stated in the opinion.

Note. — Outstanding accounts as "property" or "credits" subject to taxation.

Outstanding accounts seem quite generally to be recognized as a form of "property" or "credits" subject to taxation under the various statutes. The dispute in most cases involving the taxation of this form of property is as to its situs for purposes of taxation. That question, however, is not within the scope of this note.

In the few cases, however, where it has been contended that outstanding accounts are not "property" or "credits" within the meaning of those terms as used in statutes providing for the taxation of those forms of property, such contention has been generally held to be unsound.

In *Adams v. Clarke*, 80 Miss. 134, 31 So. 216, a case arising from proceedings on notice of the state revenue agent, against a merchant doing a supply business, for the assessment of property omitted from his assessment list, being solvent credits largely for sums due defendant arising from his mercantile business, the court said: "On two propositions involved, the court is unanimous. As to these we hold . . . (2) the solvent credits arising from a mercantile business are taxable as such in years subsequent to that in which the debt was contracted, and do not, therefore, continue indefinitely to be covered by the assessment of 'amount of money employed in merchandise.'"

In *McCurdy v. Prugh*, 59 Ohio St. 465, 55 N. E. 154, an action by a county treasurer to recover certain taxes claimed to be due on account of the defendant's having listed at too low a valuation certain "notes and other evidences of indebtedness," the court says in its syllabus: "Promissory notes, book accounts, and other credits are property, and fall within that provision of . . . the Constitution of this state which declares that 'all real and personal property' shall be 29 L.R.A. (N.S.)

Messrs. Farrar, Jonas, Kruttschnitt, & Goldberg for appellant.

Mr. Harry P. Sneed, with *Messrs. F. C. Zacharie, George H. Terriberry, and H. Garland Dupre*, for appellees:

A reduction of assessment cannot be decreed in a suit which is distinctly and exclusively for cancellation.

Travelers' Ins. Co. v. Board of Assessors, 122 La. 129, 24 L.R.A. (N.S.) 388, 47 So. 439.

Debts due on open account to a nonresident are taxable at the domicile of the debtor when they have arisen out of a business carried on in the taxing state and form a part of the capital of the business.

National F. Ins. Co. v. Board of Assessors, 121 La. 108, 126 Am. St. Rep. 313, 46 So. 117; *General Electric Co. v. Board of Assessors*, 121 La. 116, 46 So. 122; *New England Mut. L. Ins. Co. v. Board of Assessors*, 121 La. 1068, 26 L.R.A. (N.S.) 1120, 47 So.

taxed 'according to its true value in money.'"

Under a Constitution providing that "all property in the state not exempt . . . shall be taxed. . . . The word 'property,' as used in this article, is hereby declared to include moneys, credits, bonds, stocks, franchises, and all matters and things (real, personal, and mixed) capable of private ownership."—it was held, in *Home F. Ins. Co. v. Lynch*, 19 Utah, 189, 56 Pac. 681, that outstanding accounts held by a fire insurance company against the insured for unearned premiums are property subject to taxation.

In *People ex rel. Burke v. O'Donnel*, 62 Misc. 560, 115 N. Y. Supp. 140, it is held that debts due a foreign corporation on open accounts for imported goods sold in original packages are taxable against the corporation, the court saying: "In another proceeding brought by this relator to review the assessment against it for the year 1903, the court of appeals (*People ex rel. Burke v. Wells*, 184 N. Y. 275, 12 L.R.A. (N.S.) 905, 121 Am. St. Rep. 840, 77 N. E. 19) held that 'bills receivable belonging to a foreign corporation maintaining an office within the state for the sale of its products, which are imported into this country and sold in the original packages, are taxable as capital employed.' And Chief Justice Cullen, in delivering the opinion of the court, on page 277, further says: 'It is well settled that while imported goods are in the hands of the importer in the original packages, they are not subject to taxation by the state nor can any tax be imposed upon their sale by way of a license tax, or percentage on the price for which they may be sold but, though no tax can be imposed either on the goods themselves or their sale, we find no authority for the proposition that the proceeds of the sales have a similar immunity from taxation.' I am therefore of the opinion that the court of appeals intend

27; *Liverpool & L. & G. Ins. Co. v. Board of Assessors*, 122 La. 98, 47 So. 415; *United States Fidelity & G. Co. v. Board of Assessors*, 122 La. 139, 47 So. 442; *Travelers' Ins. Co. v. Board of Assessors*, supra; *Monongahela River Consol. Coal & Coke Co. v. Board of Assessors*, 115 La. 564, 2 L.R.A. (N.S.) 637, 112 Am. St. Rep. 275, 39 So. 601; *Metropolitan L. Ins. Co. v. Board of Assessors*, 115 La. 698, 9 L.R.A. (N.S.) 1240, 116 Am. St. Rep. 179, 39 So. 846.

Monroe, J., delivered the opinion of the court:

Plaintiff alleges that in 1906 it made its returns to the board of assessors, showing that it had no property liable to assessment; that the board, nevertheless, assessed it on:

Money at interest, all credits, etc...	\$33,000
Money in possession.....	3,000
	<hr/> \$36,000

ed to hold not only that bills receivable, but open accounts, were subject to taxation."

Under a statute enacting that foreign corporations are to be assessed and taxed on all sums invested in any manner in business in the state, the same as if they were residents of the state, it was held in *People ex rel. Yellow Pine Co. v. Barker*, 23 App. Div. 524, 48 N. Y. Supp. 553, affirmed on prevailing opinion below in 155 N. Y. 665, 49 N. E. 1103, that such a corporation is taxable (among other things) upon outstanding accounts due to the corporation for merchandise sold by it in the course of the transaction of its business in the state. In the prevailing opinion of the court below, it is said: "Whether it is in the shape of a promissory note or a book credit, or in any other form, it is as substantially invested for the purposes of business as if it were tangible property, such as goods or merchandise of any description. . . . Book accounts, which merely show the particular status of certain assets of a business, are records of the then present condition of so much of the sum used or invested in the business as constitutes the items of those accounts. Any other view of such accounts would permit not only of the evasion of taxation, but of the separation of a going business (which must be considered in its entirety) into component parts, and of taking out some of the assets for one special purpose, although they are retained for all the general purposes of business."

Open accounts owing to a foreign corporation for merchandise sold by it in the course of the transaction of its business in the state were held properly to be included in the assessment against the corporation, under a statute providing that "nonresidents of the state doing business in the state . . . should be taxed on the capital invested in such business as personal 29 L.R.A. (N.S.)

That in due time it applied to the board for reduction of said assessment, complaining that it had no money at interest and no credits and no money in possession in this state, but that the board declined to reduce the assessment. That it thereafter appealed to the board of revision of the city council, and asked it to "wipe out and reduce" the said assessment, and was equally unsuccessful; and it therefore now appeals to the courts. It further alleges that the rate of taxation is 28 mills, and that it will be compelled to pay \$1,008, if the assessment stands as it is. Wherefore it prays that the board of assessors, the city of New Orleans, and the state tax collector be cited, and that it have judgment decreeing that said assessment be reduced to nothing, etc.

The parties made defendant in effect affirm the correctness of the assessment.

The evidence shows that plaintiff is a British marine insurance company, having a local agent and doing business in New

property at the place where such business is carried on, to the same extent as if they were residents of the state," in *People ex rel. Armstrong Cork Co. v. Barker*, 157 N. Y. 159, 51 N. E. 1043, cited in *People ex rel. Crane Co. v. Feitner*, 49 App. Div. 108, 62 N. Y. Supp. 1107.

Where one by parol sold a farm to another, and received a small cash payment, the remainder of the purchase price to be paid on a certain future date, when the vendor was to give the purchaser possession and execute to him a warranty deed, and no notes were given, but the contract was wholly in parol, it was held that the debt thus arising from the purchaser to the vendor was an assessable "credit," as defined by a statute providing that it "includes every claim and demand for money, labor, or other valuable thing." *Perrine v. Jacobs*, 64 Iowa, 70, 19 N. W. 861.

Under a Constitution not providing for the taxation of "credits," it was held in *People v. Hibernia Sav. & L. Soc.* 51 Cal. 243, 21 Am. Rep. 704, that credits of all kinds (whether secured or unsecured) were not property in the sense in which the word "property" was used in the constitutional provision for taxation, and could not be assessed for taxes or taxed as property.

In *Bank of Mendocino v. Chalfant*, 51 Cal. 471, following the *Hibernia Case*, supra, the court said: "It is now beyond question that solvent debts, notes, and mortgages are not subjects of taxation."

Under a later Constitution, however, expressly providing that all credits should be taxable, it was held in *Pacific Coast Sav. Soc. v. San Francisco*, 133 Cal. 14, 65 Pac. 16, that a balance of money account, held by an incorporated building and loan and savings society on general deposit with a bank in another state, is taxable to such society as a solvent credit.

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Orleans. Application is made to the local agent, who issues the policies here, and they are paid for in cash or on presentation of monthly bills rendered by the local office. The company has thus at all times capital in this state, used in the conduct of its business, in the shape of cash on hand and uncollected bills.

Counsel for plaintiff say in their brief (referring to the judgment appealed from, which rejected plaintiff's demand): "We shall not quarrel with that part of the court's judgment which dismisses our suit for reduction in the item of money in possession. It may fairly be concluded that \$3,000 was the average deposit of the company. But we most strenuously submit that there was no legal grounds for any assessment on 'money at interest, all credits, etc.'"

On this point the judge said: "It had no money at interest; but it had credits outstanding, averaging more than the assessment complained of. Its business was done on the basis of bills rendered monthly to its customers. . . . There were in existence, on January 1, 1906, the date when the assessment was made, outstanding accounts for only \$4,360.46. The January contracts, which were collected in February, amounted to \$7,643.79, and the February contracts, which were collected in March, amounted to \$5,500.65," etc.

The counsel argue that these credits were not taxable because (they say): "Credits, within the meaning of the law, are obligations which represent taxable things which have changed their form, such as notes or open accounts for money loaned or property purchased."

They further argue that if the credits in question were liable to taxation, they "could only be taxed on such accounts as were in existence at the time the assessment was made." And, finally, they say: "If the court should disagree with us as to the taxability of these monthly accounts, and conclude that those in existence when the assessment was made were alone liable to assessment, then we are entitled to have the judgment below reversed, and to have our assessment of \$36,000 in the aggregate reduced to an aggregate of \$7,360.46 and the judgement against us for attorneys' fees rejected entirely."

Plaintiff has not, from the beginning, proceeded upon the theory that an error has been committed in the valuation of any property owned by it which was liable to assessment. It stated in its sworn return to the board of assessors, and reiterated in its application to that board and to the board of revision, that it had no money at interest or in possession, or credits liable to

taxation; and the prayer of the petition filed in this suit is that it have "judgment declaring that the said assessments against your petitioner of money at interest and all credits, of \$33,000, and money in possession, of \$3,000, should be reduced to nothing, and your petitioner declared not liable for any taxes on said assessments."

Plaintiff, through its counsel, now admits (that which it would be impossible, in the face of the evidence, oral and documentary, to deny) that it had "money in possession" liable to assessment, and that "it may fairly be concluded that \$3,000 was the average amount." It also admits that it had credits, but "most strenuously" insists that they were of a variety not liable to taxation, and though it concedes that the "average amount or value was \$4,360.46, its learned counsel argues that, for some reason not explained, the average of credits, unlike the average of money in possession, is not to be taken as the basis of the assessment (if it be found that the credits are assessable at all), but that the credits which alone could legally have been assessed for the year 1906 were those which existed on January 1, 1906, when the assessment was made. Outstanding, uncollected accounts, it seems to us, are rather a common variety of credits. They figure conspicuously in the active mass upon schedules in bankruptcy and inventories of the estates of merchants, they may be utilized for the compensation of debts and seized under execution, and they are generally recognized, in law and in practice, as property, and, that being the case, so long as they have their situs in Louisiana, are liable to taxation here, and are included in the assessment of "all credits, etc." Upon the question of the amount or value of such credits, for which plaintiff should have been assessed, we do not find that plaintiff is before the court; no such question having been presented to the board of assessors or the board of revision, and it being a condition precedent to an appeal to the courts for the reduction of an assessment that a timely appeal should previously have been made to those authorities. The proposition that an application to the boards to "wipe out and reduce to nothing" an assessment as made, and to the court for the reduction of such assessment "to nothing," is an application to "reduce" an assessment, within the meaning of the law, is untenable. In the one case, the application denies the existence of property liable to taxation; in the other, it admits the existence of such property and complains of its overvaluation.

Judgment affirmed.

Petition for rehearing denied May 24, 1909.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ALBERT H. MEADS et al.

v.

EUGENIA M. EARLE.

(205 Mass. 553, 91 N. E. 910.)

Will — signature at the beginning — sufficiency.

A signature sufficient to meet the statutory requirements is effected by one who, writing his own will, begins by writing his name, with intent that it should stand as his signature to the will when completed, and, after disposing of his property, secures the witnesses' signature to the attestation clause, although he does not sign the will at the end.

(May 18, 1910.)

Note. — Wills: writing name in body of will as a signature thereto.

The place of signature of a will originally was considered of little importance, the statute of frauds being sufficiently complied with if it appeared in any portion of the instrument, provided it was the testator's intention that it should stand as a signature; but the statute of wills, as enacted in England and several states of this country, expressly requires the testator's signature to be placed at the end or foot of his will; and while such requirement, so far as it is applicable to holographic wills, has not been expressly passed upon except in California, Louisiana, and Pennsylvania, it cannot be stated with certainty that wills of this character fall within the terms of the statute, although in New York it has been held, in cases involving sufficiency of publication and acknowledgment, that holographic wills do not form an exception to the requirements of such statute.

It was said in *Kolowski v. Fausz*, 103 Ill. App. 528, that, in the absence of statutory requirement as to the place of signature, the statute of frauds was complied with irrespective of where the signature of the testator was placed, if placed there with the intention of authenticating the instrument.

It was held in *Armstrong v. Armstrong*, 29 Ala. 538, that a statutory requirement that a will shall be signed by a testator, or by some person in his presence and at his direction, was sufficiently complied with where his name was written in the commencement of a will by the scrivener who drew it, the testator stating to witnesses that he was unable to sign the instrument and that it was a good will.

So, a will of real and personal property is sufficiently signed where the testator's name was written by another, at his request, in the commencement of the will, which was acknowledged before witnesses. *Miles's Will*, 4 Dana, 1.

And in *Martin v. Wotten*, 1 Lee, Eccl. 29 L.R.A. (N.S.)

REPORT by the Supreme Judicial Court for Norfolk County after reversing a decree of the Probate Court refusing to probate the will of Sarah J. Armstrong, deceased, for the opinion of the full bench of an application to probate such will. Will admitted.

The facts are stated in the opinion.

Messrs. Boyden, Palfrey, Bradlee, & Twombly, for proponents:

The will was sufficiently signed by the testatrix, in accordance with the requirements of the statute.

Lemayne v. Stanley, 3 Lev. 1; 1 Jarman, Wills, 5th Am. ed. 79, 80; *Adams v. Field*, 21 Vt. 256; *Armstrong v. Armstrong*, 29 Ala. 538; *Selden v. Coalter*, 2 Va. Cas. 553; *Miles's Will*, 4 Dana, 1; *Allen v. Everett*, 12 B. Mon. 371.

Less formal instruments, such as con-

Rep. 130, where a will written by another, beginning with the name of the testator, was read over and approved by him, but, not having strength to sign it, he published and acknowledged it as his will in the presence of two attesting witnesses, it was held to be sufficient to pass personal property.

But it was held in *Catlett v. Catlett*, 55 Mo. 330, that a will drawn by one in the absence of testator was not "signed," within the meaning of a statutory requirement that wills shall be signed by testator, or at his direction by some person in his presence, where it appears that a scrivener wrote testator's name in the caption of a will, which the latter adopted as his signature, as it was apparent from the fact that the instrument concluded with the usual testimonium clause that the testator contemplated a different signing thereof.

And it was held in *Right v. Price*, 1 Dougl. K. B. 241, that a will did not comply with a similar statutory requirement, where a testator, in the presence of witnesses, affixed his signature to the first two sheets of a will consisting of five pages, with a seal and a form of attestation affixed to the last, and, being unable from weakness to sign the rest of them, said, "I can't do it; but this is my will," and upon a later date attempted, but was unable, to sign the remaining sheets, and thereafter the witnesses, when the testator was insensible, placed their names thereon as witnesses, as it clearly appeared that when the testator signed the first two sheets he had an intention of signing the others, and therefore did not mean such signature to constitute a signature of the whole.

It was said in *Funston's Estate*, 24 Pa. Co. Ct. 135, that the common-law rule as to the execution of wills was abrogated by a statutory requirement that wills should be signed by the testator at the end thereof, unless prevented by the extremity of his last sickness.

As to the effect of matter following a

tracts for the sale of goods, are sufficiently signed if the name of the person to be charged appears in his handwriting in any part of the instrument.

Penniman v. Hartshorn, 13 Mass. 87; *Cabot v. Haskins*, 3 Pick. 95; *Hawkins v. Chace*, 10 Pick. 505; *Coddington v. Goddard*, 16 Gray, 444; *New England Dressed Meat & Wool Co. v. Standard Worsted Co.* 165 Mass. 331, 52 Am. St. Rep. 516, 43 N. E. 112; *Merritt v. Clason*, 12 Johns. 102, 7 Am. Dec. 286; *Clason v. Bailey*, 14 Johns. 484; *Taylor v. Dobbins*, 1 Strange, 399;

testator's signature, see the cases cited in the note to *Sears v. Sears*, 17 L.R.A. (N.S.) 355.

As to when a will is to be deemed to have been signed or subscribed at the end thereof, in compliance with a statutory requirement to that effect, see the notes to *Mader v. Apple*, 23 L.R.A. (N.S.) 515, and *Sears v. Sears*, 17 L.R.A. (N.S.) 353.

Holographic wills.

A holographic will is sufficiently signed by the testator where his name is written only in the initial clause thereof. *Lemayne v. Stanley*, 3 Lev. 1; *Re Camp*, 134 Cal. 233, 66 Pac. 227; *Re Stratton*, 112 Cal. 513, 44 Pac. 1028; *Johnson's Estate*, *Myrick*, Prob. Ct. Rep. (Cal.) 5; *Barker's Estate*, *Myrick*, Prob. Ct. Rep. (Cal.) 78; *Donoho's Estate*, *Myrick*, Prob. Ct. Rep. (Cal.) 140; *Hooper v. McQuary*, 5 Coldw. 129; *Selden v. Coalter*, 2 Va. Cas. 553.

Although the contrary has been held in the Virginia cases hereinafter referred to.

And the court, in *Catlett v. Catlett*, supra, apparently assumes that a holographic will is sufficiently executed if the testator's name is written in the caption thereof.

In *Lemayne v. Stanley*, supra, a frequently cited English case of early date, it was held that a holographic will was sufficiently signed so as to satisfy the statute of frauds, if the testator's signature was written in the commencement thereof, and not at the end, the statute simply requiring a signature, without designating whether at the commencement, margin, or foot of the instrument.

And in *Selden v. Coalter*, supra, the court was of opinion that under such circumstances *Lemayne v. Stanley*, supra, should be followed; although in this case the instrument under consideration was denied probate for other reasons. But see *contra*: *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564; *Ramsey v. Ramsey*, 13 Gratt. 664, 70 Am. Dec. 438; *Roy v. Roy*, 16 Gratt. 418, 84 Am. Dec. 696; and *Warwick v. Warwick*, 86 Va. 596, 6 L.R.A. 775, 10 S. E. 843.

So, a holographic will in which the testator's name appears only in the caption, if he intended thus to execute the instrument, is a sufficient compliance with statutory requirement that wills shall be

Hammersley v. De Biel, 12 Clark & F. 73; *Morison v. Turnour*, 18 Ves. Jr. 183.

Messrs. John S. Patton and Frederick J. Raullett for contestant.

Hammond, J., delivered the opinion of the court:

This was an appeal from a decree of the probate court disallowing an instrument as the last will of Sarah J. Armstrong. The case was heard by a single justice of this court upon an inspection of the will, the agreed facts, and the depositions of the

"signed" by the testator. *Lawson v. Dawson*, 21 Tex. Civ. App. 361, 53 S. W. 64.

And in *Adams v. Field*, 21 Vt. 256, a similar will was held to comply with a statute of similar purport, notwithstanding the instrument contained the usual testimonium clause at the end thereof, where the testator, in the presence of witnesses to the instrument, declared it to be his last will. But see *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564, *infra*.

So, a holographic will in which the testator's signature is written in the commencement thereof, although there is appended the usual testimonium clause, is good where the instrument itself evinces deliberation and foresight in the disposition of a large amount of property. *Watts v. Public Administrator*, 4 Wend. 168.

But in a number of New York cases involving the question of the sufficiency of publication and acknowledgment of holographic wills, it has been held that they must be executed with all the formalities prescribed by 2 Rev. Stat. § 40, which, among other essentials, requires that a testator shall subscribe his name at the end of his will, as such statute, the court has said, makes no exception with respect to wills of this character in its requirements as to execution, although a substantial compliance with the prescribed formalities will be sufficient. *Re Turell*, 166 N. Y. 330, 59 N. E. 910; *Re Beckett*, 103 N. Y. 167, 8 N. E. 506; *Re Moore*, 109 App. Div. 762, 96 N. Y. Supp. 729, affirmed without opinion in 187 N. Y. 573, 80 N. E. 1114; *Re Akers*, 74 App. Div. 461, 77 N. Y. Supp. 643; *Re Eakins*, 13 Misc. 557, 35 N. Y. Supp. 489.

As to the necessity of attesting holographic wills before witnesses, see the cases cited in the note to *La Rue v. Lee*, 14 L.R.A. (N.S.) 968.

And a statutory requirement that the testator's signature shall be placed at the end of a will does not apply to holographic wills. *Re Camp*; *Re Stratton*; *Johnson's Estate*; *Barker's Estate*; and *Donoho's Estate*, —supra.

But it was held in *Armant's Succession*, 43 La. Ann. 310, 26 Am. St. Rep. 183, 9 So. 50, that, as the Code required holographic wills to be signed at the end thereof, the testator's signature written only in the caption of such an instrument is insufficient.

three subscribing witnesses. The appellee requested the judge to rule as matter of law that the instrument was not signed by the testatrix, and attested and subscribed in her presence by three competent witnesses, in accordance with the requirements of Rev. Laws, chap. 135, § 1. The justice declined so to rule, and found as facts "that, so far as the will is in manuscript, the handwriting, including her name or signature, is that of Sarah J. Armstrong; that although she did not sign at the end of the instrument, yet when she wrote her name at the

beginning of the will, it was with the intention that this act was a signing of the will; that independently of the attestation clause, she by words and conduct acknowledged and declared the will before the subscribing witnesses, and that the subscribing witnesses signed the attestation clause in her presence at her request, and upon her acknowledgment and declaration that it was her will, although neither of them saw her signature."

Having so found, he ruled that the document was signed, attested, and subscribed

And in *Funston's Estate*, supra, it was said that whether a will is holographic or not, the common-law rule as to its execution is abrogated by a statutory requirement that every will shall be signed by testator at the end thereof, unless prevented by the extremity of his last sickness.

So, where by statute it is necessary that holographic wills shall be signed by the testator, it is very manifest, said the court in *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564, that the legislature intended to provide that such formality should be present to afford proof upon the face of the instrument, of identity, and connection with the testator, and of finality, to which the law attaches testamentary intent.

Therefore, a holographic will in which the testator's name was written only in the caption, with an unsigned testimonium clause at the end thereof, did not comply with such statute. *Ibid*. But see *Adams v. Field and Watts v. Public Administrator*, supra.

So, a holographic will, with the testator's name written in the caption thereof, which contains intrinsic evidence of its unfinished state, cannot be proved as a will unless the proponent shows that the testator intended the instrument in such condition to be and operate as his will, as the inference drawn from its uncompleted condition is that the testator intended to complete it at some subsequent period, and that he did not, when it was written, intend that it should operate as his will until it was completed. *Jones v. Jones*, 3 Met. (Ky.) 266.

Assuming that the common-law rule that a testator's signature in the caption or body of a will will be sufficient, if written with the intention to execute the instrument in that manner, is in force in New Jersey, such intent is not shown where it appears that the testator's name which appears only in the beginning of his will, was written by himself in that state, by the fact that he handed the instrument to another person with the statement, "This is my will; take it and sign it." *Re Booth*, 127 N. Y. 109, 12 L.R.A. 452, 24 Am. St. Rep. 429, 27 N. E. 826, affirming 57 Hun, 587, 10 N. Y. Supp. 944.

So, it has been held that the writing of a testator's name at the beginning of a holographic will is an equivocal act, and unless it affirmatively appears from something on the face of the instrument that he

intended it as his signature, it is not a sufficient compliance with a statutory requirement that a will shall be signed in such a manner as to make it manifest that the testator intended his name as his signature. *Ramsey v. Ramsey*; *Roy v. Roy*; and *Warwick v. Warwick*,—supra.

Thus, in *Ramsey v. Ramsey*, supra, where this doctrine was applied to a holographic will which began with the testator's name and a declaration that he thereby made his last will and testament, after which he directed the payment of his debts, disposed of his estate, appointed an executor, and revoked all former wills, the court was of opinion that the statute would recognize no will as sufficiently signed unless it affirmatively appears from the position of the signature, as at the foot or end, or from some other internal evidence, equally convincing, that the testator designed, by the use of the signature, to authenticate the instrument.

And in *Roy v. Roy*, supra, this doctrine was also applied to an instrument similarly executed, which did not, however, profess to dispose of all the testator's property nor contain a residuary clause, notwithstanding the instrument was indorsed upon the back in testator's handwriting, "David M. Roy's will," such indorsement not being sufficient to make it manifest that he thereby intended it as his signature.

And in *Warwick v. Warwick*, supra, a holographic will was held not to comply with such statute, where the testator's name appeared only at the beginning of it, notwithstanding he declared the instrument to be his last will and testament, and on the envelop in which it was inclosed were indorsed the words, "my will," followed by his signature.

But in *Dinning v. Dinning*, 102 Va. 467, 46 S. E. 473, it was held that such statute was sufficiently complied with by a holographic will which purported to make an orderly and apparently complete disposition of all of the testator's property, which ended with the words, "I, William Dinning, say this is my last will and testament."

Attention is called to *Brown v. Tilden*, 5 Harr. & J. 371, which holds that a codicil to a properly executed will in the testator's own handwriting, although not signed by him or executed by witnesses, will be valid.

W. J. L.

"within the meaning of the statute," and that it was a valid will. The case is before us upon his report. If the ruling requested by the appellee should have been given, a decree is to be entered affirming the decree of the probate court; otherwise a decree is to be entered reversing that decree, admitting the will to probate and remanding the case to that court for further proceedings.

The findings of the single justice are to stand unless plainly wrong. At the time of the execution of the will, Miss Armstrong was temporarily stopping at the Manhattan Hotel in New York city, on the eve of a voyage to Italy. It is a reasonable inference from the testimony that the will was drafted just before its execution. She had procured a blank form containing at the beginning the following printed words, to wit: "Be it remembered that I, . . . of . . ., in the commonwealth of Massachusetts, being of sound mind and memory, but knowing the uncertainty of this life, do make this my last will and testament. After the payment of my just debts and funeral charges, I bequeath and devise as follows." At the end of the blank was printed the "in testimonium" clause, blanks being left for the date, and following that clause was the printed attestation clause, as follows: "On this . . . day of . . ., A. D. 19 . . ., . . ., of . . . Massachusetts, signed the foregoing instrument in our presence, declaring it to be . . . last will; and as witnesses thereof we three do now at . . . request, in . . . presence, and in the presence of each other, hereto subscribe our names." Between the printed words at the beginning of the will and the printed "in testimonium" words at the end, there was an extended blank space for the body of the will, but the space between the latter clause and the attestation clause was small, and there was no line, dotted or otherwise, indicating the place for a signature, while following the attestation clause there were three dotted lines, indicating where the subscribing witnesses were to sign.

With this blank before her she begins, apparently unaided, to write her will. She first makes the proper changes in the exordium. She fills the blank space after the word "I" with her name. She writes in the next blank space, "Cincinnati, Ohio," and crosses out the words "in the commonwealth of Massachusetts." As thus changed the exordium reads: "Be it remembered that I, Sarah J. Armstrong, of Cincinnati, Ohio, being of sound mind," etc. She proceeds to write in the blank space provided for the body of the will. The will deals with her estate in great detail, containing nearly twenty different bequests. She then fills the

proper spaces in the "in testimonium" and attestation clauses, putting her name and residence and the pronouns in the proper places in the latter clause. After the attestation clause and below the dotted lines indicating the places for the signatures of the three witnesses, she writes the clause nominating the executors and requesting that they be required to give no bonds. Every written word is in her handwriting. The will is clearly and intelligently drawn. The evidence of the subscribing witnesses shows that she was a woman of refinement and superior mental endowment. She had been for several years in charge of a young ladies' school; and from the glimpses we get of her it is not difficult to detect her resolute and self-reliant nature. There is no indication that she was not in good health. In a day or two she was to take the steamer for Italy.

With this document this intelligent, self-reliant woman came to Miss Hall, the first witness, who describes the interview thus: "I was at the Manhattan Hotel writing home, when Miss Armstrong came up to me and asked me if I would sign her will as a witness. She said: 'I would not ask this of you, but Miss Hunter and the Clays cannot because they are mentioned in the will, and it requires three witnesses; the Misses Jaudon have said they would.' She then sat down and wrote something on the paper which I did not read, then handed it to me, and I signed my name where she told me to; she was by my side when I signed it."

Subsequently, and apparently upon the same day, the other two witnesses signed. Each of the three witnesses testified in substance that Miss Armstrong stated that the document was her last will, and asked her to sign as a witness. In no other way did Miss Armstrong mention her signature or call it to the attention of the witnesses. Shortly afterwards, the instrument, thus written and thus attested, was deposited, at the request of Miss Armstrong, in her safe deposit vault, and there remained until her death.

There can be no doubt that she intended to make, and supposed she had made, a valid will. The care she took in writing the paper, in seeing to its attestation, and in putting and keeping it in a safe place, show that. She does not appear to have been advised or assisted by anyone. She personally superintended the whole work. There was, however, no signature at the end; and it is contended by the contestants that the single justice was not warranted in finding that she wrote her name at the beginning *anim signandi*.

The finding must be interpreted to mean not simply that, after writing her whole will, she adopted as her signature her name as written previously in the exordium, but that, at the time she wrote her name there, she intended that it should stand as her signature to the will when completed, and that this intent continued to the end. Such a finding is perfectly consistent with what she did, and is not inconsistent with any act of hers. It explains any apparent incongruity in the evidence. It welds all the circumstances into one harmonious whole, and is supported by the evidence.

The will was therefore properly signed. *Lemayne v. Stanley*, 3 Lev. 1. And the signature was properly attested. *Dewey v. Dewey*, 1 Met. 349, 35 Am. Dec. 367, and cases cited; *Adams v. Field*, 21 Vt. 256. The ruling requested by the appellee was properly refused.

In view of this finding as to Miss Armstrong's intent at the time she wrote her name in the exordium, it becomes unnecessary to consider the question whether there is evidence of a subsequent adoption of the name as her signature, even if originally written with no intent to have it finally stand as such.

Upon the question as to the kind of evidence required to prove such adoption, the cases are not in complete harmony. Among the authorities bearing upon this, as well as the general question involved in the case, see, in addition to the authorities hereinbefore cited, the following: *Hall v. Hall*, 17 Pick. 373; *Hogan v. Grosvenor*, 10 Met. 54, 43 Am. Dec. 414; *Ela v. Edwards*, 16 Gray, 91; *Penniman v. Hartshorn*, 13 Mass. 87; *Nickerson v. Buck*, 12 Cush. 332; *Right v. Price*, 1 Dougl. K. B. 241; *Grayson v. Atkinson*, 2 Ves. Sr. 454; *Griffin v. Griffin*, 4 Ves. Jr. 197, note; *Morison v. Turnour*, 18 Ves. Jr. 175, 183; *Ellis v. Smith*, 1 Ves. Jr. 11; *Armstrong v. Armstrong*, 29 Ala. 538; *Merritt v. Clason*, 12 Johns. 102, 7 Am. Dec. 286; *Clason v. Bailey*, 14 Johns. 484; *Re Booth*, 127 N. Y. 109, 12 L.R.A. 452, 24 Am. St. Rep. 429, 27 N. E. 826; *Catlett v. Catlett*, 55 Mo. 330; *Warwick v. Warwick*, 86 Va. 596, 6 L.R.A. 775, 10 S. E. 843; *Waller v. Waller*, 1 Gratt. 454, 42 Am. Dec. 564; 1 Jarman, Wills, 5th Am. ed. 79, 80; 1 Redf. Wills, 4th ed. 210 et seq.

In accordance with the terms of the report, a decree is to be entered reversing the decree of the Probate Court, admitting the will to probate, and remanding the case to that court for further proceedings.

So ordered.

29 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

JOHN McMAHON, by Guardian, Appt.,
v.

GERMAN-AMERICAN NATIONAL BANK
OF LITTLE FALLS, Resp't.

MARY McMAHON, Appt.,
v.

SAME, Resp't.

(— Minn. —, 127 N. W. 7.)

Gift — execution — bank — deposit for minor — payment to depositor — liability.

A mother of two minor children, through her deceased husband's cousin, T., deposited \$1,000 in bank, and took two certificates of deposit, each in one half of that sum, in the name of her two minor children, respectively, payable to the order of each, or guardian, on return of the certificates, properly indorsed. T. retained the certificates. The bank knew the children were minors, and dealt with T. as their guardian. T. subsequently surrendered the original cer-

Headnote by JAGGARD, J.

Note. — Payment of money deposited to credit of minor to person other than guardian.

It will be noticed that this note is confined to cases where the person attempting to withdraw the deposit was one other than the minor or the guardian of the minor. The question whether deposits made for minors are subject to be taken upon legal process is not within the scope of this note. And the question of whether there has been a valid gift to minors of the property in question is not herein considered.

A bank, in paying deposits standing to the credit of minors, is bound at least to use ordinary care to safeguard their interests.

Thus, where a deposit was made by a grandfather for his minor granddaughter, under the title, "James Reid, for Clara M. Reid," and the child's father subsequently presented the pass book and received payment, the bank is not thereby discharged, although a by-law provided that the bank book should be sufficient authority for the bank to warrant payments, and that while it would endeavor to prevent fraud on its depositors, yet all payments to persons producing the pass book should be valid payments to discharge the bank. *Picken v. Emigrants' Industrial Sav. Bank*, 33 Misc. 92, 67 N. Y. Supp. 143. The court said: "It is well settled that, notwithstanding stipulations of this character, the bank still owes a duty to its depositor to exercise ordinary care in making payments, and that, in the absence of such, it still continues liable to the depositor, where it has made payment to the wrong person, notwithstanding that such person presented the pass book to the bank at the time such payment was made.

. . . Here the bank was fully advised of

tificates and obtained new ones. The certificates were finally issued to the order of the minors, respectively, or their guardian, T. T. cashed the certificates and became bankrupt. He had never been appointed guardian, by the probate court or otherwise. Actions were brought against the bank by the duly appointed guardian of the minors to recover the amount deposited. It is held:

(1) The evidence showed the gift to the minors to have been completely executed.

(2) The bank did not discharge the original obligation by payment to T.

(a) A payee who has given his agent credit with the payor by employing that agent in obtaining the obligation, and then

by allowing him to retain its possession, has clothed him with apparent authority to receive the payments of interest and principal according to the tenor of the instrument.

(b) Payment of money to a person not authorized to receive it does not discharge the debt.

(c) Apparent authority, attributed to a party to whom is intrusted an instrument to secure the payment of money, permits payment to be made only according to the terms of the instrument.

(d) The original certificates of deposit determined the obligation of the bank.

(e) When a certificate of deposit is made

all of the facts. It was apparent, of course, that the plaintiff's father was not the depositor nor the beneficiary of the deposit. When he presented the pass book to the bank the latter knew that he was the plaintiff's father, and that he was not entitled to receive the money, unless it appeared that he was the guardian of the plaintiff, and, as such, authorized to collect and receive her personal property. It is manifest, therefore, that, in so far as the defendant seeks to escape liability by reason of the by-law above mentioned, its position is utterly untenable."

And testimony of the father that the money was used in carrying a question "pending, . . . in our family to such a head" that the daughter was enabled to remain one year longer in college than she otherwise could have done was held not to justify a conclusion that the daughter received the benefit of the money, so as to defeat her right to recover. *Ibid.*

In *Sayre v. Weil*, 94 Ala. 467, 15 L.R.A. 544, 10 So. 546, where a deposit had been made in the name of "D. Weil, trustee for the Goldman children," it was held that the gift to the children was complete, and that if D. Weil had drawn against the fund in his trust character, the bank, if ignorant of any improper use intended by the trustee, would be discharged from liability; but that where it knew that he intended to apply the trust funds drawn to the payment of his individual obligations, it could not be held to be discharged as to the *cestui que trust* by such a payment.

In *Dickinson v. Leominster Sav. Bank*, 152 Mass. 49, 25 N. E. 12, where a statute provided that "money deposited in the name of a minor may, at the discretion of the trustees or committee of investment, be paid to such minor, or to the person making such deposit, and the same shall be a valid payment," it was held that the provision did not validate all payments made to the father of a minor of deposits standing in the latter's name, made partly by the father and partly by the minor, but validated them only as to deposits made by the father. The court said: "This statutory provision was plainly enacted for the benefit of the banks. It enabled them to pay money deposited in the name of a minor without requiring that a guardian be appointed to receive it, or that a suit be

brought in the name of the minor by a guardian or next friend. If the minor deposited the money the statute authorizes the payment only to the minor; if some other person deposited the money in the minor's name, the statute authorizes the payment of the money either to the minor or to the person making the deposit. Independently of this statute, the bank had no right to make the payments to the father, if the deposits were absolutely the property of the plaintiff, even if the father had made the deposits."

In *Schluter v. Bowery Sav. Bank*, 117 N. Y. 125, 5 L.R.A. 541, 15 Am. St. Rep. 494, 22 N. E. 572, where a mother deposited money in trust for her minor daughter, and subsequently moved to another state where she died, it was held that a payment made to her husband, who was appointed her administrator in the second state, was a valid payment.

It does not appear in *Boone v. Citizens' Sav. Bank*, 84 N. Y. 86, 38 Am. Rep. 498, whether or not the *cestui que trust* was a minor, but it was held in that case that a bank was discharged by a payment to the administrator of one who had deposited money in the bank, and received a pass book stating that the deposit was "in trust for Christopher Boone," where the administrator presented the pass book, and it was one of the terms of the deposit that the pass book should be the voucher of the depositor, and sufficient authority to the bank to make any payment to the bearer.

In *Eagle & P. Mfg. Co. v. Belcher*, 89 Ga. 218, 15 S. E. 482, in an action by a child's guardian against a bank to recover money paid to its grandmother which had been deposited in the child's name by the grandmother, where the evidence was uncontradicted that the bank had notice that the money was a gift to the child, it was held a question for the jury whether the guardian's consent could be inferred from facts showing that the bank sent for the guardian, and that the grandmother had a conversation with the guardian as to the former's right to withdraw the money, and that the latter, who had previously given the bank notice not to pay to the grandmother, failed, after the conversation, to give notice that she still objected to such payment.

J. T. W.

payable to the order of a minor or guardian, and the bank pays a person not named in the certificate, the burden rests on the issuing bank to show that the person to whom it pays the money was a legally appointed guardian.

(f) The payment of such money to a person supposed to be, but who is not in fact, the guardian of the minors, does not estop the minors from subsequently requiring the bank to pay the certificates.

(July 1, 1910.)

A PPEAL by plaintiffs from an order of the District Court for Morrison County denying a new trial after judgment dismissing consolidated actions brought to recover certain bank deposits. Reversed.

The facts are stated in the opinion.

Messrs. Harris Richardson, Harold C. Kerr, and Gilbert & Greenman, for appellants:

A payment cannot be legally made to an infant.

State ex rel. Hutson v. Joest, 46 Ind. 235.

The mistaken representations of a person that he is a guardian will not estop a minor.

Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Sherman v. Wright, 49 N. Y. 227; Conrad v. Lane, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695; Folds v. Allardt 35 Minn. 488, 29 N. W. 201; Barbieri v. Messner, 106 Minn. 102, 118 N. W. 258.

A guardian derives his authority from an act of court, which must be evidenced by a court record.

Holden v. Curry, *supra*.

It was the fault of the bank that it dealt with Tomelty as guardian without ascertaining his right so to act.

Sherman v. Wright, *supra*; Holmes v. Field, 12 Ill. 424; Lochenmeyer v. Fogarty, 112 Ill. 572; Walker v. State Trust Co. 40 App. Div. 55, 57 N. Y. Supp. 525.

The gift was complete.

Jennings v. Rohde, 99 Minn. 339, 109 N. W. 597; Neaseth v. Hommedal, 109 Minn. 153, 123 N. W. 287; Love v. Frances, 63 Mich. 181, 6 Am. St. Rep. 290, 29 N. W. 817; Campbell v. Sech, 155 Mich. 634, 119 N. W. 922; Murphy v. Bordwell, 83 Minn. 57, 52 L.R.A. 840, 85 Am. St. Rep. 454, 85 N. W. 945; Harley v. Sims, 100 Minn. 337, 8 L.R.A. (N.S.) 828, 117 Am. St. Rep. 694, 111 N. W. 269, 10 A. & E. Ann. Cas. 473; Nelson v. Olson, 108 Minn. 113, 121 N. W. 609; Copeland v. Summers, 138 Ind. 219, 35 N. E. 314, 37 N. E. 971; Waterman v. Morgan, 114 Ind. 237, 16 N. E. 590; Richards v. Reeves, 149 Ind. 427, 49 N. E. 348; Goelz v. People's Sav. Bank, 31 Ind. App. 67, 67 N. E. 232; De Levillain v. Evans, 39 Cal. 120; Devol v. Dye, 123 Ind. 321, 7 L.R.A. 439, 24 N. E. 246; Davis v. Ney, 125 Mass. 29 L.R.A. (N.S.)

590, 28 Am. Rep. 272; Martin v. McCullough, 136 Ind. 331, 34 N. E. 819; Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935; Martin v. Funk, 75 N. Y. 134, 31 Am. Rep. 446; Gerrish v. New Bedford Inst. for Savings, 128 Mass. 159, 35 Am. Rep. 365; Hallowell Sav. Inst. v. Titcomb, 96 Me. 62, 51 Atl. 249; Davis v. Garrett, 91 Tenn. 147, 18 S. W. 113; Minor v. Rogers, 40 Conn. 512, 16 Am. Rep. 69; Kerrigan v. Rautigan, 43 Conn. 17; Gardner v. Merritt, 32 Md. 78, 3 Am. Rep. 115; Millspaugh v. Putnam, 16 Abb. Pr. 380; Blanchard v. Sheldon, 43 Vt. 512; Blasdel v. Locke, 52 N. H. 238; Ray v. Simmons, 11 R. I. 266, 23 Am. Rep. 447; Hill v. Stevenson, 63 Me. 364, 18 Am. Rep. 231; Zacharie's Succession, 119 La. 150, 43 So. 988; Malone v. Lebus, 116 Ky. 975, 77 S. W. 180.

Mr. Archibald H. Vernon, for respondent:

The mere deposit of money in the name of a third party, without the delivery of the evidence of deposit, or notice to the donee, will not constitute a valid gift, or pass the title to the money so deposited.

20 Cyc. Law & Proc. p. 1204; Harris Bkg. Co. v. Miller, 190 Mo. 640, 1 L.R.A. (N.S.) 790, 89 S. W. 629; Branch v. Dawson, 36 Minn. 193, 30 N. W. 545; Beaver v. Beaver, 117 N. Y. 421, 6 L.R.A. 403, 15 Am. St. Rep. 531, 22 N. E. 940; Cunningham v. Davenport, 147 N. Y. 43, 32 L.R.A. 373, 49 Am. St. Rep. 641, 41 N. E. 412; Telford v. Patton, 144 Ill. 625, 33 N. E. 1110; Davis v. Lenawee County Sav. Bank, 53 Mich. 163, 18 N. W. 629; Bailey v. New Bedford Inst. for Savings, 192 Mass. 564, 116 Am. St. Rep. 270, 78 N. E. 648; Re Bolin, 136 N. Y. 177, 32 N. E. 626; Re Totten, 179 N. Y. 112, 70 L.R.A. 711, 71 N. E. 748, 1 A. & E. Ann. Cas. 900; Ingersoll v. First Nat. Bank, 10 Minn. 396, Gil. 315.

Without possession of the certificates of deposit, plaintiffs did not have control of or dominion over the money sought to be recovered, as the money was to be repaid only on return of the certificates.

Cottle v. Marine Bank, 166 N. Y. 53, 59 N. E. 736; Armstrong v. Lewis, 14 Minn. 406, Gil. 308.

A relation once shown to have existed is presumed to have continued until the contrary is established.

1 Elliott, Ev. § 109; Jones, Ev. 2d ed. § 58; 16 Cyc. Law & Proc. p. 1053.

A bank may repay a deposit to the person leaving the money deposited with it, although such deposit is made in the name of a third person, if such third person has not been notified that the bank holds the money for him, and the bank has no notice not to repay the money to the person placing the deposit with it, provided that the

person so making the deposit has possession of, and returns to the bank the evidence of, such deposit.

1 Current Law, 303; 5 Current Law, 358; *Nehawka Bank v. Ingersoll*, 2 Neb. (Unof.) 617, 89 N. W. 618; *Woodhouse v. Crandall*, 197 Ill. 104, 58 L.R.A. 385, 64 N. E. 292; *Heath v. New Bedford Safe Deposit & T. Co.* 184 Mass. 481, 69 N. E. 215; *Duckett v. National Mechanics' Bank*, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 515, 38 Atl. 983; *Sayre v. Weil*, 94 Ala. 466, 15 L.R.A. 544, 10 So. 546; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 62, 26 L. ed. 693, 698; *State Nat. Bank v. Riley*, 124 Ill. 464, 14 N. E. 657; *Interstate Nat. Bank v. Claxton*, 97 Tex. 569, 65 L.R.A. 820, 104 Am. St. Rep. 885, 80 S. W. 604; *Brookhouse v. Union Pub. Co.* 73 N. H. 368, 2 L.R.A. (N.S.) 993, 111 Am. St. Rep. 623, 62 Atl. 219, 6 A. & E. Ann. Cas. 675.

The custom of banks to repay a deposit to the person who left the money, on return of the evidence of the deposit, if it has no notice from some other claimant to the fund, sufficiently protects depositors.

Bolles, Modern Law of Banking, p. 482.

Jaggard, J., delivered the opinion of the court:

Bridget McMahon received \$2,000 insurance money on the life of her deceased husband. She instructed one Tomelty, a relative of the deceased, to deposit in the defendant and respondent bank \$500 for her minor son, John, and the same sum for her minor daughter, Mary. Tomelty took certificates of deposit in the names of John McMahon and Mary McMahon (minors), respectively, payable to the order of each, or guardian, on return of this certificate, properly indorsed. New certificates were subsequently issued in the same terms, except that the name of Tomelty was finally added as guardian. The certificates were in Tomelty's charge from the time of issuance until surrendered, and were never in any other person's hands. The only transactions the bank had in respect to the certificates were with Tomelty. The bank finally paid the money to Tomelty, who subsequently became bankrupt. In point of fact, Tomelty had never been appointed guardian by the probate court. Actions were brought by the son and daughter, respectively, through their guardian, to recover \$500 each from the defendant bank. The actions were tried together. The court found as a fact that the money sought to be recovered in these actions had been duly paid by the defendant to said Tomelty, to whom defendant was authorized to make such payment. The actions were accordingly dis-

missed on their merits. This appeal was taken from the order of the trial court refusing plaintiff's motion for a new trial.

1. The first question presented by the record is whether or not the money was an executed gift by the mother to her children. The mother, having insurance money, was asked by Tomelty to give some of it to her minor children. To this she assented. The money she retained she deposited in another bank. She went with Tomelty to deposit this money in the defendant bank, but does not appear to have gone to the deposit window. He made the deposit and received and retained the certificates. The mother parted with all present and future power, control, and dominion over the property. She neither retained the possession of the certificates, nor had them made payable to her order. She delivered the evidences of the deposit, not to the minor children themselves, but to their so-called "guardian." She transferred to him "the present right of property in possession." The "guardian" and bank both accepted the money, not as hers, but as belonging to the children. The acquiescence of the minors is presumed. There was a practical delivery. Tomelty was the mother's agent, in the sense that he was to deposit the money and retain the certificates. Defendant's cashier testified: "Mr. Tomelty brought in this money, and deposited the amount stated in these certificates, and said that he would leave that as the guardian,—guardian for these two people." Defendant itself in its brief urges: "Both parties to the transactions evidenced by the certificates of deposit understood that the guardian meant Tomelty, and acted upon the understanding." The fact of minority appeared upon the face of one of the original certificates. The conclusion necessarily follows that the gift was executed.

2. The question then arises whether the bank discharged its obligation by paying the money to Tomelty on the surrender of the certificates. The learned trial court reasoned: There must be some fact, in addition to the mere possession of the note by the assumed agent, to give validity to such a payment. That "the agent took the security, or negotiated and made the loan for which the security was taken, and was thereafter intrusted by the owner with its possession, is sufficient to render the payment valid. . . . A payee who has given his agent credit with the payor by employing the agent in obtaining the obligation, and then by allowing him to retain its possession, clothes him with apparent authority to receive the payments of interest and principal according to the tenor of the instrument. *Doubleday v.*

Kress, 50 N. Y. 410, 10 Am. Rep. 502; Crane v. Gruenewald, 120 N. Y. 274, 17 Am. St. Rep. 643, 24 N. E. 456; Loizeaux v. Fremder, 123 Wis. 193, 101 N. W. 423; Dwight v. Lenz, 75 Minn. 78, 77 N. W. 546. See also the numerous so-called Kelley Cases, in which payment to the agent was held unauthorized, because the agent was not intrusted with the securities."

Counsel for respondent has called our attention to many other cases to the same effect. Ward v. Smith, 7 Wall. 447, 19 L. ed. 207; 31 Cyc. Law & Proc. p. 1370; 1 Current Law, 54. There is, moreover, a group of cases much more nearly analogous to the case at bar. Thus, in Duckett v. National Mechanics' Bank, 86 Md. 400, 39 L.R.A. 84, 63 Am. St. Rep. 513, 38 Atl. 983, it was held that a check stating it was for deposit to the credit of a person named, without adding the word "trustee" to his name, although it contained a further clause stating that it was the "balance of purchase money due him as trustee," was held not to impress the funds with the trust, so as to prevent a bank in which he deposits the sum from crediting the check to his individual account. The bank was held not to be responsible for the use of trust funds deposited by the trustee unless it knowingly participated in the breach of a trust or profits by the fraud. And see Sayre v. Weil, 94 Ala. 466, 15 L.R.A. 544, 10 So. 546.

The difficulty in the case at bar is not whether the principle involved in these cases is correct, for its soundness is not controverted, but whether it applies to the facts here proved. If the original certificates had read as the latter ones did, "Pay to the order of Tomelty, guardian," the word "guardian" might properly have been regarded as mere *descriptio personæ*, and the bank would have been protected in cashing the certificates over Tomelty's indorsement. See Stumpf v. Halstead Land & Development Co. 59 Misc. 529, 110 N. Y. Supp. 838. In point of fact, however, the bank, we reiterate, originally agreed to pay the money to the order of the minors "or guardian." It is elementary that payment must be made to someone authorized to receive it. Payment to a person having no right to receive the money does not discharge the debt. Lochenmeyer v. Fogarty, 112 Ill. 572. Ostensible authority, attributed to a party to whom is intrusted an instrument to secure the payment of money, permits payment to be received only according to the terms of that instrument. Doubleday v. Kress, 60 Barb. 181. The bank could not pay the money to the minors because of their defect of capacity. It could pay the money only on the order

of the guardian. The burden rested upon the bank to find out whether or not Tomelty was in fact the guardian, deriving his authority from the action of a competent court, evidenced by a proper record. Walker v. State Trust Co. 40 App. Div. 55, 57 N. Y. Supp. 525 (which involved a quite similar, but not identical, state of facts); Gentry v. Bearss, 82 Neb. 787, 118 N. W. 1077; Gillespie v. Crawford (Tex. Civ. App.) 42 S. W. 621; Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Sherman v. Wright, 49 N. Y. 227; Holmes v. Field, 12 Ill. 424; Lochenmeyer v. Fogarty, *supra*. In point of fact, Tomelty had never been appointed guardian, and had no actual authority to receive payment on the certificates.

The fact that subsequently to the original transactions the bank issued different certificates, in which Tomelty's name appeared, did not alter the legal obligations of the parties. In this particular matter the fact that the beneficiaries of the gift were minors is significant. The fact serves to differentiate many cases to which we are referred, because the minors could not be estopped by the subsequent dealings of the parties with the original certificates. Holden v. Curry and Sherman v. Wright, *supra*; Conrad v. Lane, 26 Minn. 389, 37 Am. Rep. 412, 4 N. W. 695; Folds v. Alldardt, 35 Minn. 488, 29 N. W. 201; Barbieri v. Messner, 106 Minn. 102, 118 N. W. 258; 22 Cyc. Law & Proc. p. 610; 12 Current Law, 148. The conclusion follows that the bank paid out its own money to Tomelty, and not the money of the minors (cf. Armstrong v. Pomeroy Nat. Bank, 46 Ohio St. 512, 6 L.R.A. 625, 15 Am. St. Rep. 655, 22 N. E. 866; German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa, 530, 63 Am. St. Rep. 399, 70 N. W. 769; First Nat. Bank v. Pease, 168 Ill. 40, 48 N. E. 160; Harter v. Mechanics' Nat. Bank, 63 N. J. L. 578, 76 Am. St. Rep. 224, 44 Atl. 715, and that plaintiffs were entitled to recover).
Reversed and a new trial granted.

NEW JERSEY COURT OF ERRORS AND APPEALS.

HENRY G. OPDYCKE, Plff. in Err.,
v.

PUBLIC SERVICE RAILWAY COMPANY.

(— N. J. —, 76 Atl. 1032.)

Evidence — nonsuit — contributory negligence — sufficiency.

1. Evidence reviewed, and held not to

Headnotes by PITNEY, C.

warrant a nonsuit for contributory negligence.

Highway — right of public — obstruction.

2. When a highway is laid out of a certain width, the entire width becomes subject to the public easement of passage; if a less width is graded and worked for travel, or if a bridge or culvert does not extend to the entire width, the public rights of passage are not thereby limited in favor of one who places an unauthorized or improper structure within the highway limits.

Same — liability.

3. One who places an unauthorized obstruction within the limits of the highway as laid out is liable to an action at the suit of any person who is specially damaged thereby, and this although the obstruction be outside the traveled way.

Street railway — dangerous bridge in street — right to construct.

4. Consent granted to a traction company under P. L. 1893, p. 302 (Gen. Stat. p. 3235), for the construction, maintenance, and operation of a street railway along certain streets and highways, does not warrant the construction and maintenance, within the limits of the highway, of a bridge for the accommodation of the tracks, that, in design and construction, is dangerous to ordinary travel, and calculated to entrap and kill horses and other animals that may attempt to pass over it.

Highway — obstruction — runaway horse — injury — recovery.

5. The fact that a horse is running beyond control when he is injured because of an unlawful and improper structure in the highway (the runaway not being attributable to plaintiff's negligence) does not debar the plaintiff from his action against the party maintaining the structure.

(June 20, 1910.)

ERROR to the Supreme Court to review a judgement of nonsuit in an action brought to recover damages for the death of a horse, for which defendant was alleged to be responsible. Reversed.

The facts are stated in the opinion.

Mr. Edward P. Johnson, for plaintiff in error:

The maintenance of an open trestle trolley bridge in a public highway constitutes a common nuisance.

Runyon v. Bordine, 14 N. J. L. 472; *Ryerson v. Morris Canal & Bkg. Co.* 69 N. J. L. 507, 55 Atl. 98; *Durant v. Palmer*, 29 N.

Note. — As to obstructions in highway as proximate cause of injury notwithstanding intervening cause, see note to *Louisville Home Teleph. Co. v. Gasper*, 9 L.R.A. (N.S.) 548. See also note to *Harrodsburg v. Abraham*, post, 199.
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J. L. 547; Temperance Hall Asso. v. Giles, 33 N. J. L. 264.

The proximate cause of the damage was the public nuisance maintained by the defendant, notwithstanding the horse was running away.

Ivory v. Deerpark, 116 N. Y. 476, 22 N. E. 1080; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; 29 Cyc. Law & Proc. pp. 496-498; *Wolfe v. Erie Teleg. & Teleph. Co.* 33 Fed. 320; *Verrill v. Minot*, 31 Me. 299; *Wagner v. Jackson Twp.* 133 Pa. 61, 19 Atl. 312; *Yoder v. Amwell Twp.* 172 Pa. 447, 51 Am. St. Rep. 750, 33 Atl. 1017; *Clarke v. Crimmins*, 32 N. Y. S. R. 978, 10 N. Y. Supp. 868; *Glazier v. Hebron*, 62 Hun, 137, 16 N. Y. Supp. 503; *Etna F. Ins. Co. v. Boon*, 95 U. S. 130, 24 L. ed. 398; *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50.

Messrs. Clark & Case, for defendant in error:

The mere fact that the horse ran away was presumptive evidence of negligence in management.

Kokoll v. Brohm & B. Lumber Co. 77 N. J. L. 169, 71 Atl. 120.

Pitney, C., delivered the opinion of the court:

Plaintiff sued to recover damages for the death of his horse, occasioned, as alleged, by the wrongful conduct of the defendant company in maintaining within the limits of a certain public highway in the county of Somerset a certain bridge with its approaches that were improperly constructed and insufficiently guarded, and unfit and unsafe for the use of horses. Plaintiff's horse was running away at night, without a driver, when it went upon the bridge in question, and because the bridge was not suited to the use of horses and vehicles, but was arranged for carrying a trolley railway only, and had open spaces between the cross-ties, the horse's feet got between the ties and his legs were broken, causing his death. Plaintiff was nonsuited at the trial upon two grounds: (1) That the bridge, while within the highway limits, was outside of the traveled way; and (2) that the plaintiff was guilty of contributory negligence. The present writ of error is brought to review the judgment of nonsuit.

We will first dispose of the second ground upon which the decision below was rested. In the view of the trial judge, the plaintiff was indisputably negligent in causing or permitting his horse, on the occasion, with a broken shaft; the consequence in question, to be attached to a car being, as the learned judge thought, that the shaft fell from the tug and excited the horse, causing the runaway. An examina-

tion of the evidence convinces us that there is no other theory upon which a nonsuit for contributory negligence can, with any degree of plausibility, be defended, and we therefore content ourselves with discussing the view adopted by the trial judge.

It appears that plaintiff and his wife were driven in the early part of an evening in March from their residence in Finderne to the house of a friend in Bound Brook, where they dined and spent the evening. Plaintiff's coachman drove them, using a single horse and a carriage belonging to the plaintiff. According to the evidence, the horse was a spirited, but not a vicious, animal. About 10 o'clock in the evening, the coachman, in preparation for the return journey, backed the horse out from the shed under which he had stood tied, and in backing him accidentally broke the plaintiff's carriage, rendering it for the time unfit to be used. The plaintiff, being informed of the mishap, applied at a neighboring livery stable for a carriage to be hired for the occasion. The coachman was present at the time, but plaintiff appears to have personally attended to the arrangements with the livery stableman. He testified that they at first offered him a wagon having no lights, which he rejected; they then offered him another, which had a short piece broken from the end of one shaft, but they said this did not interfere with its efficiency; this wagon likewise he declined to take, telling the men that he wanted a perfectly safe vehicle. At this juncture he returned to the house, where Mrs. Opdycke awaited him, leaving the coachman at the stable to bring the horse and carriage when made ready. The coachman followed him soon afterwards, driving the horse, and, attached to it, a wagon procured from the livery stable, which in fact had a piece 5 to 8 inches in length broken from the end of one of the shafts. According to the plaintiff's testimony, as we understand it, he did not know that the wagon furnished to him was thus broken until after the runaway. The coachman testified that he knew before he took the horse and wagon from the livery stable that the hired carriage had a shaft from the end of which a piece was broken; but that he observed at the same time that 6 inches of the shaft still projected from the tug. When the coachman brought the horse and the hired vehicle to the door of the house where Mr. and Mrs. Opdycke were waiting, the horse appeared so restive that Opdycke's attention was attracted, and he discovered that the shaft had dropped from the tug. By his direction the coachman at once drove back to the livery stable, Opdycke himself hurrying there on foot. He called the stableman and

directed one of them to take hold of the horse's head while the coachman should get out and correct the difficulty. One of the stablemen accordingly took the horse's head, the coachman got out, and he, with the aid of the other stablemen, was endeavoring to right matters; and at this juncture the horse reared slightly, broke loose from the man who was holding him, and ran away towards home, with the result already mentioned.

Of course, if the plaintiff did not knowingly accept the carriage with the broken shaft (and so we interpret his testimony, which is the only evidence upon the subject), he is not personally chargeable with negligence in this regard. It is insisted by counsel for defendant that plaintiff's testimony, properly interpreted, shows that he did accept the carriage in question, knowing that it had a broken shaft. We are not to be understood as either deciding or conceding that, if plaintiff had such knowledge, it would necessarily follow from this that he should have been nonsuited for contributory negligence. It would be necessary to consider, under all the circumstances (some of which we are passing without mention), whether the plaintiff was indisputably lacking in the care that a reasonably prudent man would have exercised, and, if so, then whether his want of care beyond dispute contributed to the runaway.

It is further argued that plaintiff's coachman (who admittedly did know the shaft was broken before the horse was attached to the livery carriage) was guilty of negligence, and that such negligence is attributable to the plaintiff, on the doctrine *respondeat superior*. But, as already mentioned, the coachman observed that although a piece was missing from the end of the shaft, the shaft still projected 6 inches beyond the tug; and besides, he seems to have been present when the stableman assured Mr. Opdycke that the broken shaft did not interfere with the wagon's efficiency. Whether the acceptance of the wagon under these circumstances constituted negligence on the coachman's part is not so free from doubt as to be decided by the court as matter of law. Moreover, it is by no means certain that the plaintiff was chargeable with the consequences of the coachman's conduct in this regard. There is no clear evidence of express authority given at the time by Mr. Opdycke to the man, with respect to the selection or acceptance of a wagon at the livery stable; nor is there anything to show that the performance of such a function was within the scope of his general employment. It would seem that such authority as the coachman possessed, if any, arose for that occasion

only, and merely by implication from the circumstances and the conduct of the parties at the time. The question of the existence and extent of such authority certainly could not be determined against the plaintiff without submission to a jury. From all of which it results that the nonsuit cannot be sustained upon the ground of contributory negligence.

The other ground upon which the decision below was rested is that no negligence or breach of duty on the part of the defendant was shown with respect to the construction or maintenance of the bridge in question; either (a) because the bridge was not within the legal limits of the highway, or (b) because it was outside of the traveled way, and not in its nature a nuisance.

It appears that the runaway horse, following the direct route towards plaintiff's home, proceeded along a public highway formerly known as the Easton turnpike, which, at a point between Bound Brook and Somerville, crosses a stream known as the Middle brook. In and along the same highway the defendant company maintains a street railway line. To the eastward and also to the westward of Middle brook the tracks run alongside the traveled part of the highway, and are ballasted with cracked stone. The tracks are substantially of the same level with the adjacent surface. Upon approaching the brook, the tracks diverge from the wagon way, and are carried over the brook by a separate bridge. The wagon bridge is about 20 feet wide. Parallel to it, and separated from it by a few feet, is the bridge maintained by the defendant company. This has a width of about 12 feet, and is of approximately the same level as the wagon bridge. As already noted, it is not at all designed for use by horses or horse-drawn vehicles. On the contrary, its construction resembles that of a steam railway bridge; the rails rest upon cross-ties 10 feet in length and spaced about 9 inches apart (18 inches between centers); there are no flooring planks. It is readily inferable that a bridge so designed and constructed is not merely unsuited to ordinary travel, but highly dangerous to it, and that a hooped animal attempting to cross upon it could hardly fail to be injured. There was no fence or railing to confine travel to the wagon bridge, and the whole situation was such that the jury might reasonably infer that an uncontrolled animal, going in the dark along the highway, especially if in a state of excitement, might as probably enter upon the trolley bridge as upon the wagon bridge.

The highway in question was laid out in the year 1807 as the "New Jersey turnpike road" (see P. L. 1806, p. 586). Ac-
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ording to the evidence, its width at the place in question is 4 rods, or 66 feet. It appears that in the year 1870 the turnpike company made a deed or deeds purporting to convey the road (or at least this portion of it) to the inhabitants of the township, or to the inhabitants of the county through which it extended. These deeds were introduced in evidence, apparently for the purpose of showing a surrender by the turnpike company to the public of the care of the road and the franchise of taking tolls upon it. The deeds have not been printed with the case as submitted to us, but for present purposes this is of no consequence. It is admitted that the road was a public highway, and, this being so, it makes no difference whether it was a toll road or a free road; in either case the right of a member of the general public as against one maintaining within its limits a nuisance or unauthorized structure should be the same. *Wright v. Carter*, 27 N. J. L. 76, 81 (reversed on error, but upon another point. See *State v. Laverack*, 34 N. J. L. 207, 208); *State v. Parker, Prosecutor, v. New Brunswick*, 32 N. J. L. 548 (affirming 30 N. J. L. 395, and citing with approval *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654). See also *Chambersburg v. Manko*, 39 N. J. L. 496.

According to the evidence, the railway bridge is well within the limits of the highway width of 66 feet. Admittedly it is maintained by the defendant company. It appears to have been built by defendant's predecessor in title, in order to accommodate a line of railroad constructed pursuant to an ordinance adopted by the municipal authorities, giving consent for the construction and maintenance of a street railway "driven by electricity from overhead wires suspended on poles, and commonly called the overhead or trolley system, in, over, and upon certain streets, roads, highways, and public places," etc.

It will be convenient to consider, first, how the case would stand if no consent had been given in behalf of the public for the construction and maintenance of the railway bridge at the place in question; and, secondly, what is the scope and effect of the municipal consent that was given. It is argued that although the bridge in question was located within the limits of the highway as laid out, yet, because ordinary travel was carried over Middle brook by the wagon bridge, and because the space at the side of this bridge was a sort of ravine, approximately 12 feet in depth, and, from the steepness of its sides and the existence of the brook at the bottom, unavailable for passage by ordinary vehicles, therefore this space was not a part of the highway in fact, and it was

lawful for the defendant company to place there a bridge designed for its own purposes exclusively, not only unsuited for use by horses and carriages, but dangerous when used by them. To this argument we cannot give our assent. When a public highway is laid out of a certain width,—as in this instance, of the width of 66 feet,—that entire space becomes devoted to public use for all purposes of a highway. True, the abutting owner ordinarily retains the ownership of the fee, and may use it for purposes not inconsistent with the public travel. So, also, it by no means follows that the turnpike company or the public authorities are required to grade and work every portion of the highway's width, or obliged to remove all obstructions, or to furnish bridges and culverts extending to the entire width, in such manner that the whole may be suitable for purposes of ordinary travel. We are not here concerned with any such questions, but solely with the extent of the public easement of passage. The width of the wagonway or of the bridge bears upon the question whether the highway is more or less adapted to the comfortable accommodation of the traffic upon it; but these conveniences do not limit the public rights of passage. It is a matter of common knowledge that where a highway crosses a stream, and a bridge of lesser width is thrown across, people upon horseback and in vehicles may at times prefer the ford to the bridge; driven cattle may likewise prefer it; at all events, the whole road is open to the public as a way. It is well settled that one who places an authorized obstruction within the limits of a highway as laid out is liable to an action at the suit of any person who is thereby specially damaged, and this although the obstruction or other nuisance may be without the limits of the traveled way.

In *Durant v. Palmer*, 20 N. J. L. 544, 547, Mr. Justice Haines, speaking for this court, said: "The street, and every part of it, by force of the common law, is so far dedicated to the public that any act or obstruction that unnecessarily incommodes or impedes its lawful use by the public is a nuisance." See also *Temperance Hall Asso. v. Giles*, 33 N. J. L. 260; *Meyers v. Birch*, 59 N. J. L. 238, 36 Atl. 95.

In *Tinker v. New York, O. & W. R. Co.* 157 N. Y. 312, 51 N. E. 1031, where defendant, an abutting landowner, had placed two disused timbers, each 10 feet long and 12 inches square, within the highway limits, not in the beaten track, but in a ditch from 1 to 2 feet in depth, they being placed at a distance of about 12 feet from the traveled part of the highway, and about 15 feet from the fence separating the highway from the

defendant's land, and being left there without reasonable necessity in the transaction of its business, it was held there was a liability for damages sustained by the plaintiff through her horses having taken fright at these timbers. And see the recent case of *Sweet v. Perkins*, 196 N. Y. 482, 486, 90 N. E. 50.

In 15 Am. & Eng. Enc. Law. 2d ed. p. 492, the rule is stated as follows: "The right of the public to use a highway extends to the whole breadth thereof, and not merely to the part which is worked or actually traveled; and, consequently, an obstruction upon the untraveled part is a proper subject of complaint by the public or persons specially injured." This, in our judgment, is a correct statement of the law upon the subject. See also *R. v. Wright*, 3 Barn. & Ad. 681, 12 Eng. Rul. Cas. 500; *R. v. United Kingdom Electric Tel. Co.* 3 Fost. & F. 73; 8 Jur. N. S. 1163; 31 L. J. Mag. Cas. N. S. 166, 12 Eng. Rul. Cas. 562; *Dickey v. Maine Tel. Co.* 48 Me. 483; *Com. v. Wilkinson*, 16 Pick. 175, 26 Am. Dec. 654; *Com. v. King*, 13 Met. 115, 118; *Com. v. Boston & L. R. Corp.* 12 Cush. 254, 258. Upon the whole, we deem it entirely clear that, in the absence of authority derived from the law-making power, the bridge now in question would be a nuisance, and we therefore proceed to consider the scope and effect of the municipal consent that was given for its construction and maintenance.

We assume the municipality gave consent, so far as it had power to do so. We make this assumption in favor of defendant in error because the plaintiff in error has failed to submit to us the entire text of the ordinance, and does not specifically make the point that the bridge and its location and style of construction were not within the wording or the fair intentment of the ordinance. Counsel have not referred us to the specific act of the legislature from which the municipality derived the power to give this consent. Presumably it was the so-called "traction companies act" of March 14, 1893 (P. L. 1893, p. 302; Gen. Stat. p. 3235), which authorizes the formation of corporations for constructing, maintaining, and operating such railways "and all necessary turnouts, sidings, and bridges on, along, through, or over any street, road, lane, alley, stream, or highway," with the consent of the board of aldermen, common council, or body having control of streets or highways, or other governing body of the municipality within whose limits the railway is proposed to be constructed or operated. We are unaware that any more ample legislative authority is to be found elsewhere.

We may, for present purposes, concede that this legislation is broad enough to con-

template the construction by a traction company of a separate bridge in the highway for carrying its tracks, when, in the judgment of the municipal authorities, the ordinary highway bridge is not adequate to accommodate such tracks and the cars that are to be operated thereon, in addition to the other traffic of the highway. But, in our opinion, the statute does not permit the construction and maintenance by the traction company, in the highway, of a bridge that, in design and construction, is dangerous to ordinary travel, and calculated to entrap and kill horses and other animals that may attempt to pass over it. For the object of the act of 1893, as expressed in its title and manifest in its enacting clauses, is to provide for the construction and operation of "street railways or railroads operated as street railways," and the regulation of the same. Our decisions render it plain that what is meant by this is a railway so constructed, maintained, and operated as not materially to interfere with the use of the highway by the general public for other and ordinary highway purposes. It was long ago held that a steam railroad was inconsistent with the user of a highway for ordinary purposes. *Starr v. Camden & A. R. Co.* 24 N. J. L. 592. But street railways have been otherwise regarded. Before the introduction of electric traction it was held by Chancellor Green, in *Hinchman v. Pater-son Horse R. Co.* 17 N. J. Eq. 75, 80, 86 Am. Dec. 252, that the building and operation of a horse railroad in the streets of a city, under legislative sanction, was a legitimate use of the highway, and an exercise of the public right of travel, and not a taking of private property for public use within the provision of the Constitution. This was upon the ground that the tracks of the street railway did not practically increase the burden upon the landowner, the learned chancellor saying that such tracks "are ordinarily, as in this case, required to be laid level with the surface of the street, in conformity with existing grades. No excavations or embankments to affect the land are authorized or permitted. The use of the road is nearly identical with that of the ordinary highway." Since the introduction of electricity as a means of propulsion the same rules have been applied to electric street railways that had formerly been applied to horse railroads. *Halsey v. Rapid Transit Street R. Co.* 47 N. J. Eq. 380, 20 Atl. 859; *Van Horne v. Newark Pass. R. Co.* 48 N. J. Eq. 332, 21 Atl. 1034; *West Jersey R. Co. v. Camden, G. & W. R. Co.* 52 N. J. Eq. 31, 29 Atl. 423; *State, Roebling, Prosecutrix, v. Trenton Pass. R. Co.* 58 N. J. L. 666, 671, 673, 33 L.R.A. 129, 34 Atl. 1090; *Consolidated Traction Co. v. South Orange & M.* 29 L.R.A. (N.S.)

Traction Co. 56 N. J. Eq. 509, 581, 40 Atl. 15; *Budd v. Camden Horse R. Co.* 61 N. J. Eq. 543, 553, 48 Atl. 1028; *Newark v. State Bd. of Taxation*, 66 N. J. L. 466, 472, 49 Atl. 525; *Id.*, 67 N. J. L. 246, 51 Atl. 67; *Montclair Military Academy v. North Jersey Street R. Co.* 70 N. J. L. 229, 231, 57 Atl. 1050; *Newark Pass. R. Co. v. Block*, 55 N. J. L. 605, 610, 22 L.R.A. 374, 27 Atl. 1067. It would be quite inconsistent with the grounds upon which these cases were decided to hold that the consent given by a municipality, pursuant to the act referred to, for the construction, maintenance, and operation of a trolley railroad in, upon, and along the streets, furnishes a warrant for the construction and maintenance within the limits of the highway of any bridge or other structure for the accommodation of the tracks that is so constructed as to be not only impassable, but dangerous for ordinary travel, and from its design calculated to entrap and kill horses and other animals that may attempt to pass over it. The grant to the street railway company is necessarily subject to the condition (implied, if not expressed) that its tracks shall be so laid, constructed, and maintained as not to materially interfere with any other lawful use of the highway.

To sum up this matter: The evidence before us justified, if it did not require, a finding that the trolley railway bridge in question (being within a public highway) was so constructed and maintained, with respect to its design and location, as to render dangerous the use of the highway for other lawful purposes. This being found as matter of fact, such a structure would be a nuisance at the common law, and, unless authorized by legislation, would render the defendant responsible to any member of the public specially damnified, as the plaintiff was, by reason of the nuisance. From what we have said, it also appears that no legislative authority has been conferred upon the defendant company to maintain its tracks and bridge in the highway in such manner as to endanger ordinary travel. Consequently, on familiar principles, the company may be held responsible for the damages accruing by reason of the improper and dangerous character of its bridge. 2 *Thomp. Neg.* §§ 1353, 1355; *Fielders v. North Jersey Street R. Co.* 68 N. J. L. 343, 346, 59 L.R.A. 455, 96 Am. St. Rep. 552, 53 Atl. 404, 54 Atl. 822; *Alcott v. Public Service Corp.* (N. J.) —L.R.A. (N.S.) —, 74 Atl. 499. And so we conclude that the nonsuit cannot be sustained upon either of the grounds relied upon by the trial judge.

Finally, it is argued that the defendant is not liable to the plaintiff in the present case, because the horse was running beyond

control. We cannot, however, agree that this circumstance debars the plaintiff of his action, unless the runaway was caused by the negligence of the plaintiff or his agent, and this, as we have already shown, could not, in the state of the evidence, be properly decided against the plaintiff without submission to the jury. So long as horses require to be restrained by bit and bridle, it must inevitably at times occur—with what frequency or infrequency is of no present importance—that horses get beyond the control of the person in charge, and run at will through the streets and highways. An occasional runaway horse must necessarily be anticipated. The owner does not lose his property rights because the horse runs away. On the contrary, he is entitled to the use of the highway as a means to enable the horse to reach its home. And so the fact that the animal was, at the time, beyond the control of the owner, cannot be availed of as a defense by one who has placed and maintained an unauthorized or improper structure in the highway.

In *Baldwin v. Greenwoods Turnp. Co.* 40 Conn. 238, 244, 16 Am. Rep. 33, the plaintiff's horse, while being driven upon a road other than that of the defendant company, became frightened by the breaking of the carriage, due to a defect for which the plaintiff was not at fault; the horse ran away, threw out the driver, and afterwards left the highway, and passed over private property to and upon the turnpike road of the defendant, where he fell over the side of a bridge by reason of a defect in the railing, attributable to the negligence of the turnpike company. The company was held liable, the court declaring the proper rule to be this: "If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the negligence of the defendants, combined with some accidental cause to which the plaintiff has not negligently contributed, the defendants are liable. Nor will the fact that the horse of the plaintiff was uncontrolled for some distance before the injury change or in any way affect the liability of the defendants." To the same effect are *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574; *Yoders v. Amwell Twp.* 172 Pa. 447, 51 Am. St. Rep. 750, 33 Atl. 1017.

The judgment under review should be reversed, and a venire de novo awarded.
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OKLAHOMA SUPREME COURT.

BARTLESVILLE ELECTRIC LIGHT & POWER COMPANY, Plff. in Err.,
v.

BARTLESVILLE INTERURBAN RAILWAY COMPANY.

(— Okla. —, 109 Pac. 228.)

Injunction — owner of street franchise — invasion without right.

1. An ordinance of a municipal corporation granting to a corporation authority to use the streets, alleys, and public grounds of a city for the purpose of constructing and operating an electric light and power plant to furnish light and power to a city and its inhabitants confers privileges which are exclusive in their nature against all persons upon whom similar rights have not been conferred; and any person or corporation attempting to exercise such right without legislative authority or sanction invades the private property rights of the corporation to whom such franchise has been granted, and may be restrained at the instance of the owner of the franchise.

Statute — title — expression of subject of act — rule.

2. The requirement of a statute that the subject of any ordinance enacted by a city council shall be clearly expressed in the title is complied with where the title calls attention to the general subject of the legislation in the ordinance, and does not tend to mislead or deceive the people or council as to the purpose or effect of the legislation, or to conceal or obscure the same.

Same — "construct, maintain, and operate" electric plant — scope.

3. The title of an ordinance reciting that its object was to grant to a certain person "the right to construct, maintain, and operate an electric light and power plant" is sufficient to carry a grant of the right to use the streets and alleys of the city for the construction of lines and poles thereon for the purpose of operating the plant.

(May 10, 1910.)

Headnotes by HAYES, J.

Note. — Right of owner of franchise for public benefit, which is not exclusive, to injunction against its invasion without right.

In accordance with *BARTLESVILLE ELECTRIC LIGHT & P. CO. v. BARTLESVILLE INTERURBAN R. CO.* it has been held in a number of cases that where a person or corporation has been granted a franchise for the purpose of constructing and maintaining a plant to be used for the benefit of the public, he has such a property right as will entitle him, because

ERROR to the District Court for Washington County to review a judgment dismissing an action brought to restrain defendant from erecting on the streets and alleys of the city of Bartlesville a system of poles and wires for the purpose of supplying it and its inhabitants with electric light and power, in alleged violation of plaintiff's franchise. Reversed.

The facts are stated in the opinion.

Messrs. Veasey & Rowland and Kenneth H. Davenport, for plaintiff in error:

Equity has jurisdiction to protect by injunction the possessor of an exclusive franchise from unlawful competition.

Walker v. Armstrong, 2 Kan. 198; Boston & L. R. Corp. v. Salem & L. R. Co. 2 Gray, 1; Patterson v. Wollmann, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83.

Even if the exclusive feature of the franchise is void for want of power in the city government to grant it, that does not affect the other provisions of the grant, or

of its invasion, to restrain any person or corporation from attempting to exercise such right in competition with him without legislative or municipal authority, although his franchise is not exclusive in the sense that the grant of a similar franchise to be exercised and enjoyed at the same place would be void.

Cases so holding, or, at least, recognizing this right, are: Green v. Ivey, 45 Fla. 338, 33 So. 711 (ferry); Hudspeth v. Hall, 111 Ga. 510, 36 S. E. 770 (ferry); McInnis v. Pace, 78 Miss. 550, 29 So. 835 (ferry); Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884 (ferry); Cauble v. Craig, 94 Mo. App. 675, 69 S. W. 49 (ferry); Raritan & D. B. R. Co. v. Delaware & R. Canal Co. 18 N. J. Eq. 546 (railroad); Pennsylvania R. Co. v. National R. Co. 23 N. J. Eq. 441 (railroad); Jersey City Gas Co. v. Dwight, 29 N. J. Eq. 242 (gas plant); Central R. Co. v. Pennsylvania R. Co. 31 N. J. Eq. 475 (railroad); Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83 (ferry and bridge); Patterson v. Wollmann, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040 (ferry); Douglass's Appeal, 118 Pa. 65, 12 Atl. 834 (ferry); Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W. 120, 13 S. W. 654 (ferry); 12 Am. & Eng. Enc. Law, 2d ed. p. 1105.

See also Millville Gaslight Co. v. Vineland Light & P. Co. 72 N. J. Eq. 305, 65 Atl. 504, sufficiently set out in the BARTLESVILLE CASE.

In Patterson v. Wollmann, supra, the court took occasion to say in this connection: "The theory on which the law proceeds is that the defendant, who has no franchise, is acting in violation of law in operating a ferry without authority from the sovereign power, and that the owner of the franchise

operate to deprive the plaintiff of the privileges the city had power to grant. The provisions are clearly separable.

Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884.

The business of distributing electric light and power by means of a system of poles and wires erected and maintained upon the public streets of a city is not one which can be carried on as a matter of common right; it is a franchise, the right to which can only be acquired by express grant from the state, acting through its legislature, or through the municipal government, exercising powers delegated to it by the legislature.

New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. supra; Purnell v. McLane, 98 Md. 589, 56 Atl. 830; Twin Village Water Co. v. Damariscotta Gaslight Co. 98 Me. 325, 56 Atl. 1112; Millville Gaslight Co. v. Vineland Light & P. Co. 72 N. J. Eq. 305, 65 Atl. 504; Carroll v. Campbell, 108 Mo. 550, 17 S. W. 884; Patterson v. Wollmann, supra; Douglass's Appeal, 118 Pa. 65, 12 Atl. 834; Tugwell v. Eagle Pass Ferry Co. 74 Tex. 480, 9 S. W.

may complain of and restrain such illegal acts when they result in injury to his franchise, which, in the eye of the law, is property. As to the one who is invading his rights without legal sanction, the franchise is an exclusive franchise, although the owner of it might not be entitled to any protection as against the granting of a similar franchise to another. There appears to be no controversy on this point."

However, in Geneva-Seneca Electric Co. v. Economic Power & Constr. Co. 136 App. Div. 219, 120 N. Y. Supp. 926, it was held that an electric lighting and power company, not having an exclusive franchise to furnish a certain city light, cannot enjoin an illegally constituted corporation from also furnishing electric light and power to the city. The court said: "We conclude that the whole trend of authority is to the effect that such plaintiff cannot, in an action brought to obtain an injunction, question the authority of the competing corporation or the right of the individual in the premises. If such were not the law, then every corporation could raise the question as to the legality of its competing neighbor. A street railroad company, having a franchise which covered the principal streets in a city, could insist that a corporation which purposed to establish a street surface railroad in certain streets not occupied by the former corporation could be enjoined from such construction upon the ground, alleged by the former corporation, that it (the latter) was not organized under and in pursuance of the provisions of law.

"It seems to me clear that such question should not be left to warring competitors, but that, if an alleged corporation is seeking to exercise corporate rights in violation of

120, 13 S. W. 654; Smith v. Harkins, 38 N. C. (3 Ired. Eq.) 613, 44 Am. Dec. 83; Pom. Eq. Rem. § 584.

Messrs. George, Campbell, & Ray, for defendant in error:

The plaintiff's franchise is not exclusive.

Joyce, Franchise, § 23, note 15; Detroit Citizens' Street R. Co. v. Detroit, 110 Mich. 384, 35 L.R.A. 859, 64 Am. St. Rep. 350, 68 N. W. 304, 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732; Purnell v. McLane, 98 Md. 589, 56 Atl. 830; Grand Rapids Electric Light & P. Co. v. Grand Rapids Edison E. L. & Fuel Gas Co. 33 Fed. 659; Water, Light, & Gas Co. v. Hutchinson, 144 Fed. 256, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; Freeport Water Co. v. Freeport, 180 U. S. 598, 45 L. ed. 688, 21 Sup. Ct. Rep. 493.

Plaintiff is not entitled to an injunction.

California Nav. Co. v. Union Transp. Co. 122 Cal. 641, 55 Pac. 591; Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 173, 40 Pac. 326; Water, Light & Gas Co. v. Hutchinson, 207 U. S. 385, 52 L. ed. 257, 28 Sup. Ct. Rep. 135; People ex rel. Moloney v. General Electric

R. Co. 172 Ill. 129, 50 N. E. 158; Bridge-water Ferry Co. v. Sharon Bridge Co. 145 Pa. 404, 22 Atl. 1039.

Hayes, J., delivered the opinion of the court:

Plaintiff in error instituted this action in the district court of Washington county to obtain a writ of injunction restraining defendant in error from using the streets, lanes, and alleys of the city of Bartlesville for the purpose of erecting thereon a system of poles and wires for the purpose of supplying the said city of Bartlesville and its inhabitants with electric light and power. A temporary injunction was granted. Thereafter a motion to dissolve the temporary injunction and a demurrer to plaintiff's petition were filed. The motion and demurrer were heard and considered jointly by the court without the introduction of any evidence, and were sustained. The temporary injunction was dissolved, and the cause dismissed. The substantial and material facts of the petition, admitted by the demurrer, are: That the assignor of plaintiff did, on the 16th day of November, 1904,

law, in the first instance the attorney general of the state should be asked to take proceedings to prevent the exercise of such alleged power. If the contention of the plaintiff should prevail, it would be competent for every corporation to bring suit against every other alleged corporation competing with it, because of the fact, as alleged, that it had not fully complied with the provisions of law respecting its incorporation. It seems to me that it is the most sensible rule to hold that such action cannot be maintained because of the fact that an alleged competitor may not have been organized in accordance with the provisions of law."

In Empire City Subway Co. v. Broadway & S. A. R. Co. 87 Hun, 279, 33 N. Y. Supp. 1055, affirmed on opinion below in 159 N. Y. 555, 54 N. E. 1092, it was held that a company which did not have the exclusive right to construct and operate subways and conduits for electrical conductors in a street could not enjoin the maintenance of electrical wires in such street, in violation of a statute.

McEwen v. Taylor, 4 G. Greene, 532, also seems to favor the doctrine that the owner of a ferry franchise which is not exclusive cannot, by injunction, restrain other parties from carrying persons across the river by means of skiffs and boats. In this case the court took note of the fact that the petition did not aver that the defendants had not a license to keep a skiff or canoe ferry, and that the petition did not aver that the defendants crossed passengers in their skiff or canoe for pay.

In Levisay v. Delp, 9 Baxt. 415, it was held that one who maintains a ferry under a license has no such exclusive rights as 29 L.R.A. (N.S.)

will be protected in equity against other persons, who, without a license, maintain a ferry in competition with him.

In Butt v. Colbert, 24 Tex. 355, it was also held that one who did not show himself entitled to an exclusive ferry privilege was not entitled to an injunction to restrain others from establishing and keeping a ferry at that place. Nothing was said in this case about the competing ferry being maintained without authority.

And see Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co. 55 Kan. 173, 40 Pac. 326, cited in the BARTLESVILLE CASE, and New England R. Co. v. Central R. & Electric Co. 69 Conn. 47, 36 Atl. 1061, and New Orleans, M. & T. R. Co. v. Ellerman, 105 U. S. 166, 26 L. ed. 1015, sufficiently set out in the note to Burns v. St. Paul City R. Co. 12 L.R.A. (N.S.) 757, where the question is discussed whether the competition with one's business which results from the *ultra vires* act of a corporation entitles him to challenge the power of the corporation to engage therein.

There are several cases in which it did not appear that the complaining owner of the franchise did not have an exclusive franchise, or that the competing owner of the franchise was not authorized to do what he was attempting to do. Although these cases, if all the facts were known, might be directly in point, they have not been included in this note. There are also cases where the complaining corporation and the competing corporation entered into a contract whereby the former, at least, between themselves, was given an exclusive franchise. These cases, of course, have also been excluded. G. V.

obtain from the council of the city of Bartlesville, then a municipal corporation of the Indian territory, a franchise for a period of twenty-one years, granting to plaintiff's assignor the right to put, place, and maintain in any of the streets, alleys, and public places of said city poles, wires, and all other appurtenances necessary to supply and furnish electric light and power to said city and the inhabitants thereof. The franchise was duly accepted by the grantee, and immediately thereafter assigned to plaintiff. Plaintiff has installed in said town, and is operating and maintaining, an electric light and power plant, and is supplying light and power to the town and its inhabitants in accordance with the provisions of the franchise. A copy of the franchise is attached to the petition, and by its terms it attempts to grant to plaintiff's assignor the exclusive right to use the streets and alleys of the city for the purposes therein mentioned. Defendant is now attempting, without authority from the city, to use the streets, lanes, and public places of the city for the purpose of erecting thereon and along same a system of poles and wires for supplying said town and its inhabitants with electric light and power. Plaintiff alleges that such attempted use of the streets by defendant is in conflict with its rights under its franchise, and that it will suffer irreparable injury and damage by reason thereof, and that the violation of its right by defendant will result in a multiplicity of suits, and that it has no plain, speedy, and adequate remedy at law. Defendant contends that the exclusive feature of plaintiff's franchise is void, for the reason that the city council was without authority to grant an exclusive franchise.

Plaintiff does not insist in this court that the exclusive provision of its franchise is valid, but it seeks to maintain its action upon the theory that, notwithstanding it has no exclusive franchise, and the city has authority to grant a similar franchise to other persons, the use of the streets, alleys, and public places of the city by defendant, without legislative authority from the municipal corporation, is such an infringement on plaintiff's rights that it is entitled to injunctive relief. It is not alleged in the petition that the use of the streets by defendant for the purpose of constructing and operating its electric light plant will injure the physical property of plaintiff, or interfere with the operation thereof. The sole injury which it complains will result from defendant's acts is the encroachment upon its rights to maintain or operate its plant and furnish light and power to the inhabitants of the city, re-

sulting from the unlawful competition of defendant by a similar use of the streets, without legislative authority therefor. In support of its contention that plaintiff has no standing in court upon this ground, defendant relies principally upon *Coffeyville Min. & Gas Co. v. Citizens' Natural Gas & Min. Co.* 55 Kan. 173, 40 Pac. 326. In that case the only question involved was whether a corporation organized for the purpose of supplying a city with natural gas, and authorized by ordinance passed by the city council to use the streets and public grounds of the city for the purpose of laying its mains and pipes, had any standing in court to test the validity of an ordinance granting a rival company a similar franchise. The court held that plaintiff could not maintain the action, and it is stated in the opinion that plaintiff could "neither test the validity of the ordinances under which the defendant claims a right to act, nor could it, if no ordinances had been passed, try the right of the defendant to lay pipes in the streets for the purpose of supplying natural gas." The opinion expressed by the court as to the right of plaintiff to maintain the action if no ordinance had been passed is not only obiter, but we believe is supported neither by the better reason nor by the weight of authorities. That an injunction is the appropriate remedy to protect a party who has an exclusive franchise against continuous encroachments is well settled, and such jurisdiction rests upon the ground of its necessity to avoid a ruinous multiplicity of suits, and to give adequate protection to one's property in his franchise. 2 Pom. Eq. Rem. § 583. And the same author states the general doctrine to be that, in order for the owner of a franchise to be entitled to such relief, it is not necessary that the franchise shall be an exclusive franchise in the sense that another similar franchise cannot be granted to other persons, but that, if a defendant who has no franchise is acting in violation of law, he may be restrained by the owner of a valid franchise whose rights are injured by the illegal acts of defendant, and that as to the one invading his rights without authority of law, the franchise is an exclusive franchise, although the owner would be entitled to no protection against one acting under a similar franchise, granted by the proper officers. Section 584. In *Millville Gaslight Co. v. Vineland Light & P. Co.* 72 N. J. Eq. 305, 65 Atl. 504, the facts are somewhat similar to those in the case at bar. In that case it is said: "Legislative grants of franchises of the nature claimed by complainant, whether granted by special charters or under general laws, confer privileges

which are necessarily exclusive in their nature as against all persons upon whom similar rights have not been conferred, for any attempted exercise of such rights, without legislative sanction, is not only an unwarranted usurpation of power, but operates as a direct invasion of the private property rights of those upon whom the franchises have been so conferred [citing authorities]. It follows that if complainant is at this time entitled to exercise in the disputed territory the privileges set forth in the legislative act referred to, and defendant, as claimed, enjoys no legislative sanction for the conduct sought to be enjoined, complainant will be entitled to the relief prayed for." Other cases in point are *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Central R. Co. v. Pennsylvania R. Co.* 31 N. J. Eq. 475; *Central Crosstown R. Co. v. Metropolitan Street R. Co.* 16 App. Div. 229, 44 N. Y. Supp. 752; *Twin Village Water Co. v. Damariscotta Gaslight Co.* 98 Me. 325, 56 Atl. 1112; *Patterson v. Wollmann*, 5 N. D. 608, 33 L.R.A. 536, 67 N. W. 1040; *McInnis v. Pace*, 78 Miss. 550, 29 So. 835; *Tugwell v. Eagle Pass Ferry Co.* 74 Tex. 480, 9 S. W. 120, 13 S. W. 654.

When plaintiff accepted its franchise, it did so subject to the power of the municipality to grant to other persons or corporations similar franchises, and with the knowledge that it might be compelled to exercise its rights under its franchise with others exercising similar rights. If, by the competition of rival companies to whom the use of the streets and public grounds has been granted by the municipality, plaintiff is rendered unable to discharge the obligations of its contract to furnish the city and its inhabitants with light and power at stipulated prices, except at a financial loss to it, plaintiff cannot complain, for it must be held to have contemplated such condition might arise, and to have agreed thereto when it accepted the franchise; but such cannot be said of the defendant, who unlawfully occupies the streets and public grounds of the city in competition with plaintiff.

By its unlawful acts defendant can and will take from plaintiff a portion of its business. At the same time, defendant is under no obligation to the city or its inhabitants, and is all the while maintaining upon the streets and public grounds of the city a public nuisance, and the loss plaintiff sustains is to defendant its fruits from its violation of the law. By these unlawful acts of defendant, plaintiff may be rendered financially unable to comply with the obligations of its contract, and may be subjected to suits for damages, mandamus

proceedings to enforce the performance of its contract, or an action to forfeit its franchise. Defendant does not undertake to compete with plaintiff for the business of the city and its inhabitants by furnishing to them light and power other than by the use of the streets and alleys. Its right to sell light and power is not dependent upon any franchise, but its right to use the streets and public grounds of the city for that purpose does depend upon the consent of the city; and, when it uses the streets without that consent, it is not only guilty of maintaining a public nuisance, but also inflicts upon plaintiff a special injury by its unlawful act, which may be restrained. The ordinance granting to plaintiff its franchise was enacted before the admission of the state, when § 924, *Mansfield's Dig. Stat. (Ark.)* was in force in the Indian territory (*Ind. Terr. Anno. Stat. 1899, § 694*). By that section it is provided that no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title. The title of the ordinance in this case reads: "An Ordinance Granting to Simon J. Smallwood, His Heirs, Associates, and Assigns, the Right to Construct, Maintain, and Operate an Electric Light and Power Plant in the Incorporated City of Bartlesville, Indian Territory."

Defendant insists that this title does not clearly express the subject of the ordinance, in that it fails to state that the grantee is given the right to use the streets and public grounds of the city for the purpose of constructing poles and lines thereon for the operation of its electric light and power plant. The rule of law applicable to this contention is stated as follows: "The requirement of law that the subject of an ordinance shall be 'clearly expressed' in the title has been much mooted in the courts on ordinances of divers kinds, especially those regulating or licensing various acts and occupations, with the result of establishing by general recognition the following rules: (1) The expression of subject in the title of an ordinance is sufficient if it calls attention to the general subject of the legislation. (2) It is not necessary that the title refer to details within the general subject, nor those which may be reasonably considered as appropriately incident thereto. The crucial test of sufficiency of title is generally found in the answer to the question: Does the title tend to mislead or deceive the people or the council as to the purpose or effect of the legislation, or to conceal or obscure the same? If it does, then the ordinance is void; if not, it is valid." 28 Cyc. Law & Proc. p. 379. The foregoing title meets the re-

quirements of all these tests. The general subject of the ordinance is the granting of the franchise to construct, maintain, and operate an electric light and power plant. The statement of this purpose in the language of the title carries with it the suggestion that the ordinance gives to the grantee the right to use the streets and public grounds for that purpose, and it would occur to anyone from the title that such was the object of the ordinance, for the granting of the right to construct and operate a light and power plant in fact conveys no other right than the right to use the streets and public grounds. Unless the grantee desires the use of the streets and public grounds, a franchise is not necessary; but it would be difficult, if not almost impossible, to construct and operate such a plant without the use of the streets and public grounds, and the right to do the former suggests the latter as a necessary incident thereto. The title in no way tends to mislead or deceive the people or council, and neither its effect nor its purpose is obscured or concealed by its terms. The title of an ordinance reciting that its object was to "grant certain rights and privileges to a certain telephone company" has been held sufficient to carry a grant of a right to use the streets and alleys of the city for its lines. *State v. Nebraska Teleph. Co.* 127 Iowa, 194, 103 N. W. 120.

The judgment of the lower court is reversed, and the cause remanded.

Dunn, Ch. J., and Williams, Turner, and Kane, JJ., concur.

SOUTH DAKOTA SUPREME COURT.

REEVES & COMPANY, Resp't.,

v.

W. F. LEWIS, Impleaded, etc., Appt.

(— S. D. —, 125 N. W. 289.)

Principal — unauthorized act of agent — ratification.

Knowledge by an agent for the sale of machinery of his attempt to modify the contract of sale after a tender of delivery, in violation of a provision of the contract depriving him of the power to do so, is not notice to the principal of the change, so that his acting upon the contract will constitute a ratification thereof.

(February 16, 1910.)

APPEAL by defendant Lewis from a judgment of the Circuit Court for Gregory County in plaintiff's favor in an action brought to recover the amount alleged to

be due upon certain promissory notes affirmed.

The facts are stated in the opinion.

Mr. W. J. Hooper, for appellant:

A principal cannot accept and enjoy the benefits of a bargain made by his agent without, at the same time, adopting the instrumentalities by which the agent consummated it.

Parish v. Reeve, 63 Wis. 315, 23 N. W. 568; 1 Am. & Eng. Enc. Law, 2d ed. p. 1209; *Dodge v. Lambert*, 2 Bosw. 570; *Cake's Appeal*, 110 Pa. 65, 20 Atl. 415; *North Brookfield Sav. Bank v. Flanders*, 161 Mass. 335, 37 N. E. 307; *Burke v. Milwaukee, L. S. & W. R. Co.* 83 Wis. 411, 53 N. W. 692; *Elwell v. Chamberlin*, 31 N. Y. 611; *Crans v. Hunter*, 28 N. Y. 386; *Beidman v. Goodell*, 56 Iowa, 592, 9 N. W. 900; *William Deering & Co. v. Grunty County Nat. Bank*, 81 Iowa, 222, 46 N. W. 1117; *Partridge v. White*, 59 Me. 564; *Eaton v. Knowles*, 61 Mich. 625, 28 N. W. 740; *Wells v. Hickox*, 1 Kan. App. 485, 40 Pac. 821; *Busch v. Wilcox*, 82 Mich. 315, 46 N. W. 940; *Joslin v. Miller*, 14 Neb. 91, 15 N. W. 214; *Union Trust Co. v. Phillips*, 7 S. D. 225, 63 N. W. 903; *Farmers' Loan & T. Co. v. Walworth*, 1 N. Y. 433.

Messrs. Charles A. Davis and French & Orvis for respondent.

Whiting, P. J., delivered the opinion of the court:

This action was brought to recover upon

Note. — Knowledge by agent that his own act is in excess of authority as notice to principal.

The dearth of express statements on this point, similar to that found in the reported case, is doubtless due to the fact that the courts tacitly assume the proposition without feeling the necessity of formally stating it. It, of course, underlies all cases in which the principal, because of lack of knowledge of the fact, is held not to have ratified the agent's act in excess of his authority. The necessity of such a rule from the very nature of the point is thus expressed in *Clement v. Young-McShie Amusement Co.* 70 N. J. Eq. 677, 118 Am. St. Rep. 747, 67 Atl. 82: If the agent's "knowledge that he was overstepping the bounds of his authority is to be deemed notice thereof to his principal, no effective limitation can be imposed upon the power of an agent. By the very act of transgressing the limits of his authority the agent would generally, for all practical purposes, enlarge them to the full extent of his transgression. Nothing short of immediate personal investigation on the part of the principal would, in most instances, protect his rights . . . such a doctrine has no place in either legal or equitable jurisprudence."

J. A. C.

two promissory notes, each for \$679, dated October 4, 1905, executed by the defendants to the plaintiff, and to foreclose a chattel mortgage given to secure said notes; said mortgage covering one traction engine and the fixtures thereunto belonging.

Answering said complaint, the defendant W. F. Lewis, for separate answer, alleged, in substance, the following facts: Defendants executed the notes and mortgage, and no part of the indebtedness evidenced thereby had been paid. Defendant opened negotiations with plaintiff for the purchase of a steam engine with plowing attachments. Plaintiff sent its agent, one Speiser, to negotiate with defendants. This agent represented that plaintiff could furnish an engine suitable for the purposes desired, and defendant, relying upon this representation, and believing it to be true, gave a written order for such engine. This order was in the usual form of such orders. It provided that, upon delivery of the engine, the same should be settled for either in cash or notes, and if by notes, there should be three, each for \$679.23, due on December 1st of the years 1904, 1905, and 1906, respectively. There was the usual provision that no agent other than the officers of the company could alter, change, modify, or waive the warranty contained in such order, or make any other or different warranty. There was the usual warranty that the engine was made of good material, and with proper use and management would do as good work as any other engine of same size manufactured for a like purpose. Said warranty was conditioned that if within six days time from the first use of the engine it failed to fulfil the warranty, a written notice was to be given to the plaintiff and local agent, stating wherein the engine failed to fulfil the warranty, a reasonable time was to be given to remedy defects, and, if the engine could not be made to fulfil the warranty, the defective engine or part was to be immediately returned, and the company have the right either to furnish another engine or part, or give defendants credit for the engine or part thereof returned. There was the usual provision that failure to give notice within six days was to be conclusive evidence of the fulfilment of the warranty, and that the furnishing of improvements or repairs after the end of the six-day period should not in any way extend the liability of the plaintiff company, under such warranty. The engine and attachments were shipped to Bonesteel, South Dakota, about May 1, 1904. The defendant and the agent went to Bonesteel to inspect the engine. Defendant discovered that same did not comply with the warranty, in that the pump was defective,

and defendant refused to receive or pay for the same. Thereupon the defendant and the agent entered into a new contract, by which plaintiff was to furnish another pump, and put the engine in proper condition, so that it would do the work for which it was purchased; that defendants would have the privilege of trying the engine, and, if it did not work satisfactorily to the defendant, plaintiff would remedy the engine or furnish another, or defendant might return the engine, if he elected so to do. In consideration of this new contract, defendant, together with his wife, his codefendant, executed the notes provided for by the written order, but with the express understanding that, if the engine did not comply with the conditions agreed upon, and defendants should elect to return the engine, the notes and the mortgage would be returned to defendants.

After executing the notes under said conditions and terms, the defendant took the engine to his farm for trial. The engine did not comply with the terms of the contract nor work satisfactorily to defendant, and many times during the seasons of 1904 and 1905 defendant notified plaintiff that the engine did not comply with the terms and conditions of said contract, and that he would not accept and pay for the same until the defects were remedied, and, unless they were remedied, he would return the engine. Plaintiff several times during said seasons sent agents to remedy the defects in the said engine, but they always failed, for the reason that the engine was not adapted to the purposes for which sold, although the defendants did not know of this latter fact until the year 1906. In October, 1905, at defendant's demand, an expert machinist was sent by plaintiff to remedy the engine so that it would do the work for which it was sold. The expert worked with the engine and started the same. It apparently did good work, and the expert assured defendant that the engine was in perfect order and would do the work for which he had purchased it, which statement was believed by the defendant. Relying on such statement, defendant paid the sum of \$679 and executed the notes in suit, together with the mortgage, and gave to plaintiff a certificate, stating that such engine was working satisfactorily to defendant. That soon after the expert left, although the engine was being properly managed, the defendant discovered that the defects had not been remedied, that the engine was not working satisfactorily, would not do good work under proper management, and was entirely inadequate and unsuitable to do the work for which it was purchased. Defendant thereupon notified plaintiff that said engine was defective and of no use to him, and de-

manded that plaintiff remedy the defects, replace it with a new engine, or that this defendant would return the same. Plaintiff refused to remedy the engine, replace it with another engine, or to receive said engine back. The notes and mortgage sued on were executed under the belief that the engine was adapted for the purpose for which it was purchased, and that it was in perfect running order and would work satisfactorily. Defendant relied upon the statement made to him to the above effect. Plaintiff was either mistaken as to the facts, or represented such false facts, knowing same to be untrue, for the purpose of inducing defendant to execute said notes and mortgage, and plaintiff knew that this defendant would not have paid the money and executed the notes and mortgage and the above-mentioned certificate, if he had not believed the representation of the plaintiff's agent to the effect that such engine was perfect in all respects, and would do the work for which it was purchased. The sole consideration for such notes and mortgage was the said engine. The answer also contained allegations amounting to counterclaims.

The case being called for trial, and it being conceded that defendant had the affirmative, the defendant, being called as a witness to testify, was asked a question. At this time the plaintiff objected to the receipt of any evidence under the answer, except in support of the counterclaim, on the ground that such answer, outside of the counterclaim, does not state facts sufficient to constitute a defense. This objection was sustained, and the defendants excepted. Defendant elected to stand on this ruling, dismissed the counterclaim, and findings and conclusions were prepared on behalf of plaintiff. Judgment was duly entered, and the defendant W. F. Lewis has appealed to this court from such judgment, assigning as error the ruling of said court sustaining the objection to the introduction of any evidence under the answer.

Defendant contends that the original order was not an executed sale, but an agreement for sale, and that, as the engine did not comply with warranty, defendant had a right to rescind such order; that, whether defendant rightfully or wrongfully refused to accept the machinery and settle for it, as provided in the written order, it is conceded that he did so refuse, and that he accepted the machinery under a subsequent contract made about May 1, 1904; that, under this new contract, certain changes were to be made in the engine, and the engine was to be put in proper condition for the work for which intended, defendant to have right to try engine, and if same did not work satisfactorily,

plaintiff was to remedy it so that it would so work, or replace it with new engine, otherwise defendant could return engine if he so elected; that when the new notes were given and money was paid, it was a mere continuance of the above special contract, and not the making of a new one; that, the engine failing to comply with said special contract, defendants have never lost their rights thereunder; and that plaintiff, having refused to accept a return of the engine, cannot recover on the notes, though such engine has never been actually returned.

It is the contention of plaintiff that it cannot be held that there was a new contract entered into between defendant and plaintiff's agent, binding upon plaintiff, for the reason that such agent had no authority, actual or ostensible, to make such a new contract, and did not even have power to modify the written contract; that, without such authority, there could be no contract entered into binding upon plaintiff, unless such contract was ratified, and no ratification was pleaded. This certainly is the law. If the engine was not up to warranty, the defendant had a right to refuse to accept it. He pleads the order he signed, and does not claim to have been ignorant of its contents. He therefore knew that the agent could not let him have the engine under any other conditions than those found in the order, and that therefore, if he undertook to provide for such conditions, such new agreement would be absolutely invalid until ratified, and there could be no ratification by the plaintiff until it had knowledge of the facts. Ordinarily, knowledge of the agent becomes knowledge of the principal; but this cannot apply when the agent is attempting to act beyond his authority, either actual or ostensible, and the party with whom he is dealing knows he is so acting without authority, and where, as in this case, there is absolutely nothing to notify the principal that the agent has attempted to enter into a new or modified agreement. *Shull v. New Birdsall Co.* 15 S. D. 8, 86 N. W. 654; *Larson v. Minneapolis Threshing Mach. Co.* 92 Minn. 62, 99 N. W. 623. It must therefore be held that the defendant took the machinery under the conditions of the warranty found in the written order, and he utterly failed to plead facts showing that he had not lost his right of rescission under the terms of such order. His attempted rescission was a nullity, and the answer interposed no valid defense.

It is further clear that the answer was so defective that the court was justified in excluding testimony thereunder. No request was made to be allowed to amend same, and

it is apparent that it could not be amended so as to state a defense.

The judgment of the trial court is affirmed.

Smith, J., took no part in this decision.

TEXAS SUPREME COURT.

ANNA L. STEVENSON et al., Plffs. in Err.,

v.

J. T. ROGERS.

(— Tex. —, 125 S. W. 1.)

Landlord — suit to establish title — tenant's right to set up title.

A tenant may, after termination of the lease, defend against an action by the landlord to recover possession and establish title, by showing a superior title in himself, without surrendering possession, where the success of the landlord would destroy the title of the tenant.

(February 16, 1910.)

Note. — Right of tenant to dispute landlord's title in action by latter to establish same.

Only cases are included herein which involve the right of a tenant to deny landlord's title, where the title is put in issue in an action by the landlord to establish same. Cases involving ordinary possessory actions and other actions relating merely to the relation of landlord and tenant are excluded.

Few cases have passed upon the specific question raised. These, however, like *STEVENSON v. ROGERS*, sustain the right of a tenant to deny and litigate with the landlord his title to the leased premises, where the title is put in issue by the landlord in an action to establish it, so that a decision favorable to the landlord would establish his title as against any adverse claims by the tenant. *Jochen v. Tibbells*, 50 Mich. 33, 14 N. W. 690; *Hebden v. Bina*, 17 N. D. 235, 116 N. W. 85; *Hamill v. Jalonick*, 3 Okla. 223, 41 Pac. 139; *McKie v. Anderson*, 78 Tex. 207, 14 S. W. 576.

In *Jochen v. Tibbells*, this doctrine was applied where an action to recover possession of certain premises, and an action in ejectment for the same relief and also to try title, were consolidated, and it was held that in the action to recover possession the tenant could not deny the landlord's possessory right to the premises, and to that extent the same rule was applied in the ejectment action, but to the extent that the landlord undertook to litigate with the tenant the title to the premises, it was held that the tenant was not estopped from denying any right claimed by the landlord. The court 29 L.R.A. (N.S.)

ERROR to the Court of Civil Appeals for the Sixth Supreme Judicial District to review a judgment reversing a judgment of the District Court for McLennan County in plaintiffs' favor in an action brought to recover possession of and title to certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. Prendergast & Williamson and John C. West for plaintiffs in error.

Messrs. Taylor & Gallagher and D. A. Kelley for defendant in error.

Brown, J., delivered the opinion of the court:

The application for a writ of error in this case was granted because the decision of the court of civil appeals practically settles the case. Plaintiffs in error, in their application, make this statement: "We concede, in view of the verdict of the jury and judgment of the lower court, that the land in controversy was not, and is not, on the Gholson N. E. $\frac{1}{4}$, but that it is the Clark survey. If the court of appeals' opinion is correct, they should have reversed and rendered the case in favor of Rogers.

said: "Where the landlord seeks to recover the possession, he can do so under the lease, but if he goes farther and claims the premises in fee, the tenant is not estopped from denying any right claimed by the plaintiff farther or greater than that of possession. This fully protects the landlord, who regains his possession, and, the tenant having gained no advantage by taking a lease, the parties then are in proper position to litigate the title, should they desire so to do."

In applying the doctrine to an action of trespass to try title, in *McKie v. Anderson*, the court said: "It has always been held that in the action of ejectment, it is sufficient for a landlord who is suing his tenant to produce his lease, and that estoppel closes the mouth of the defendant to call his title in question. It has been held by this court that as a general rule a tenant cannot dispute his landlord's title. . . . When limited to an action for the possession alone of the land, there can be no question about the application of the doctrine. But when it is the purpose of the suit not only to recover possession, but to establish title or to have partition, where the decree sought will not only give possession of the land, but, by estoppel, settle the title to it, the rule does not apply. The tenant is estopped while he holds that relation, from disputing his landlord's right of possession. . . . As the plaintiff in this case did not so limit his pleading that a judgment in his favor would have been evidence of nothing but his right to the possession of the land, but on the contrary made the issues of title and partition, so that a decree in his favor would have settled the question of title between

No additional or different proof can be offered on a retrial in the district court, even if it is reversed and remanded. It would be a useless expense, and consumption of the time of the court, to retry the case in the district court, if the opinion of the court of civil appeals is the law and is applicable to this case. We therefore urge the supreme court to grant a writ of error herein, and, if the court of appeals' decision is correct, to reverse and render this cause in favor of Rogers, but if not, to reverse the decision of the court of civil appeals and affirm that of the district court."

The facts found by the court of civil appeals are that plaintiffs owned the N. E. $\frac{1}{4}$ of the Samuel Gholson league of land in McLennan county, and in the year 1893, by their agent, made a written lease of said land to defendant Rogers and one Bird, describing the land as the N. E. $\frac{1}{4}$ of the league, in which lease Rogers and Bird agreed to fence a certain part of the land, and to hold possession of the tract leased for their lessors, protecting the land from trespassers. The Gholson grant was the oldest of the six tracts which are connected with this litigation. The particular dates of the different grants are unimportant and will not be given. Grants in the names respectively of Levi Pitts, D. Caldwell, C. Caldwell, and N. H. Hobbs lay to the north of the Gholson survey, and for its south boundary line each called for the north line of the Gholson league. Rogers owned a

part of the Pitts and part of the C. Caldwell surveys, and had rented one of the other surveys; he claimed to control the four tracts. Rogers and Bird had a fence along a part of the south line of the Hobbs, which coincided with the north line of a tract patented in the name of Clark at a time subsequent to the issuing of patents to the surveys named, upon the assumption that there was a vacancy between the Gholson and the other four surveys. The Clark patent covered a strip of land about 200 *varas* wide and extending the length of the N. E. $\frac{1}{4}$ of the Gholson league, embracing the land lying between the latter survey and the four surveys on the north. The land in controversy is a part of the Clark tract. The plaintiffs did not have actual possession of the land when leased to Rogers and Bird, and it was not pointed out to them at the time. There was evidence which tended to show that, at the time the lease was made to Rogers and Bird, the attorney and agent of the plaintiffs believed that the north line of the Gholson league was identical with the south lines of the Pitts, the two Caddells, and the Hobbs surveys. When Rogers and Bird fenced the Gholson land, they continued the fence across the Clark tract and connected with their fence on the south line of the Hobbs tract. Bird testified: "The land Rogers and I took possession of under the lease was the land between the Peoria road and the Fort Graham road,

him and the defendant, we think it was the right of the defendant to prove that he owned the superior title to the land, without regard to the question whether he was in or out of possession when he attorned to plaintiff."

In *Hebden v. Bina*, the doctrine was applied in an action by a landlord to determine adverse claims of his tenant to the leased property, the landlord claiming to own in fee, and it was held that the rule that a tenant is estopped to dispute his landlord's title did not apply in such an action, but only in actions arising out of the relation of landlord and tenant.

In *Hamill v. Jalonick*, the doctrine was also recognized, but not applied, the court holding that the action was not one to try title, but merely to obtain possession of the property.

In *Croacher v. Oesting*, 143 Mass. 195, 9 N. E. 532, it was held that under a plea of *nul disseisin* to a writ of entry, it was permissible for the tenant to show title in himself, since such a plea put the whole title in issue; and it was said that the tenant could maintain the issue either upon the failure of the landlord to show title in himself or by evidence of title in the tenant. To the same effect is *Swan v. Stephens*, 99 Mass. 7.
29 L.R.A. (N.S.)

In *Wilson v. Weathersby*, 1 Nott & MC. 373, a tenant was denied the right to set up a paramount title in himself in an action by the landlord to try title to leased premises, the court holding that the tenant's remedy in such a case was to surrender possession to the landlord, and bring an independent action to try title.

It has been held that, during the relation of landlord and tenant, a landlord cannot maintain an action against his tenant in possession for the purpose of determining the validity of an adverse title set up by the tenant; the theory being that to permit such an action and to apply the doctrine of estoppel against a tenant would be to cut off his adverse title, without giving him an opportunity to be heard. *Van Winkle v. Hinckle*, 21 Cal. 343.

The parties to a lease may stipulate that the lease is not to affect the right of either party to claim under adverse titles, and in such case possession by the tenant does not estop him from claiming adversely to the landlord, neither does it give him any rights which he otherwise would not have. *Philadelphia v. Schuylkill Bridge*, 4 Binn. 283; *Sartwell v. Young*, 126 Mich. 304, 85 N. W. 729.
A. G. S.

ast and west, and running north and south from Mr. Cole's fence north of Mr. Rogers's fence. Cole's fence was on the south part of that quarter and Rogers's fence on the north."

The court of civil appeals states that at the date of the lease Rogers had some claim on the Clark survey, but the character of the claim is not disclosed. Bird testified that he did not know that Rogers claimed the Clark land at that time. In 1901 Rogers acquired title to the Clark land, and in 1905 removed the fence to what he claimed to be the north line of the Gholson and the south line of the Clark surveys.

The district judge instructed the jury as follows: "(2) If you believe from the evidence that J. T. Rogers and George P. Bird took charge of this land and fenced the same as a part of the Samuel Gholson survey, under the lease which they obtained from the plaintiffs on the 12th day of May, 1893, wherein plaintiffs leased to said Rogers and Bird the northeast quarter of the Samuel Gholson league, in McLennan county, then and in that event you will find for the plaintiffs for all of that portion of said land that was included within the said inclosure of said Rogers and Bird, regardless of where you may find the original north line of the Samuel Gholson league to have been located."

The defendant requested this charge, which was refused: "The plaintiffs' title papers call to run to and with the north or northwest boundary line of the Samuel Gholson survey; and the defendant, J. T. Rogers's title papers call to run to and with the north or northwest boundary line of the Samuel Gholson survey on the opposite side from plaintiffs' land. Now you are instructed that, if you believe from the testimony that the land which the defendant, J. T. Rogers, has inclosed under fence built by him, is located on the north or northwest side of the said line of the said Gholson survey, then you are instructed to find a verdict for the defendant, J. T. Rogers."

The jury returned the following verdict: "We, the jury, find for the plaintiffs for all that portion of the land in dispute that was included in the inclosure of Rogers and Bird, under the second paragraph of the charge, and we find for the defendant for that portion of said strip of land lying west of said inclosure and the Towash road."

Judgment was entered in favor of plaintiffs for the title and possession of the land, in conformity with the verdict.

The petition is divided into four counts: The first contains allegations appropriate to trespass to try title, and the petition is indorsed as the petition in such actions is required to be. The second counts sets up the

lease to Rogers and Bird, and the refusal of Rogers to surrender possession, with prayer for general relief. The third and fourth counts set up title in plaintiffs by five and ten years' limitation, and pray for relief as in the preceding counts. The court of civil appeals held that the district court erred in giving the second paragraph of the charge, and erred in refusing the charge requested as above copied. It is the general rule, that in an action by the lessor, after the termination of the lease, for the possession of the leased premises, the tenant cannot dispute his landlord's title or right to possession without first surrendering the possession that he received under the lease. When, however, as in this case, the suit is to recover possession and to establish the title of the plaintiffs, whereby the title of the tenant would be destroyed, the latter may defend by showing a superior title in himself. 18 Am. & Eng. Enc. Law, p. 421; 24 Cyc. Law & Proc. 2 p. 942; McKie v. Anderson, 78 Tex. 209, 14 S. W. 576; Bertram v. Cook, 44 Mich. 397, 6 N. W. 868; Jochen v. Tibbells, 50 Mich. 33, 14 N. W. 690; Dodge v. Phelan, 2 Tex. Civ. App. 448, 21 S. W. 309. In McKie v. Anderson, cited above, Judge Henry said: "It has been held by this court that, as a general rule, a tenant cannot dispute his landlord's title. Tyler v. Davis, 61 Tex. 674. When limited to an action for the possession alone of the land, there can be no question about the application of the doctrine. But when it is the purpose of the suit not only to recover possession, but to establish title or to have partition, where the decree sought will not only give possession of the land, but, by estoppel, settle the title to it, the rule does not apply. The tenant is estopped while he holds that relation, from disputing the landlord's right of possession. Before doing that, he should, in the language of Chief Justice Willie in the case of Juneman v. Franklin, 67 Tex. 411, 3 S. W. 562, 'give up the advantage he derived from the tenancy by being let into possession, in order to remove the estoppel to which he was subjected.' As the plaintiff in this case did not so limit his pleading that a judgment in his favor would have been evidence of nothing but his right to the possession of the land, but on the contrary made the issues of title and partition, so that a decree in his favor would have settled the question of title between him and the defendant, we think it was the right of the defendant to prove that he owned the superior title to the land, without regard to the question whether he was in or out of possession when he attained to plaintiff." Tyler v. Davis, supra, is not in conflict with McKie v. Anderson. In that

case (*Tyler v. Davis*) the court held that the tenant could not set up against his landlord an outstanding title with which he did not connect himself, and that, when the plaintiff established the tenancy of the defendant, he showed a right of recovery which the defendant had not met by proof of a superior title with which he did not connect himself. It is strongly implied that the defense would have been good if defendant had shown that he owned the superior title to the land.

The application for writ of error omits all issues except the right of Rogers, as a lessee of plaintiffs, to defend against this action (to recover possession of and title to the land), by showing a superior title in himself. The application admits that the plaintiffs have no title to the land, and the undisputed evidence shows that Rogers has the title to the Clark survey, the land in controversy. In accordance with the authorities before cited, we hold that Rogers presented and sustained a valid defense to the plaintiffs' action. The court of civil appeals properly held that the trial court erred in refusing to give defendant's special charge. It is therefore ordered that judgment be here entered that plaintiffs take nothing by their suit, and that Rogers go hence without day, and recover all costs.

Petition for rehearing denied.

WASHINGTON SUPREME COURT.

MABEL GORDON, by Guardian *ad Litem*,
Appt.,
v.
SNOQUALMIE LUMBER & SHINGLE
COMPANY, Resp't.

(— Wash. —, 109 Pac. 1044.)

Negligence — attractive nuisance — hot-water barrel.

1. A barrel to receive the exhaust steam from a mill, which is covered, accessible only on one side, and filled with hot water, from which steam continually arises, is not, if it appeared to be safe, an attractive nuisance so as to render the owner liable for the scalding of a child going to it for water, although to his knowledge children had been in the habit of playing near it and taking water from it.

Same — absence of notice of danger.

2. The owner of a mill who maintains a barrel to receive exhaust steam, which is kept full of steaming hot water, is not liable for the scalding of a child who goes

to it for water, by the plug coming out of the bunghole, if the plug was a substantial one, and the owner was not shown to have had notice that it had become loose.

(Dunbar, J., dissents.)

(July 2, 1910.)

APPEAL by plaintiff from a judgment of the Superior Court for Snohomish County dismissing an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. Jackson Silbaugh, for appellant:

The exhaust barrel was an attractive nuisance.

Kinchlow v. Midland Elevator Co. 57 Kan. 374, 46 Pac. 703.

Whether the danger to children was reasonably to be contemplated was for the jury.

McAllister v. Seattle Brewing & Malting Co. 44 Wash. 179, 87 Pac. 68; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745; *Kinchlow v. Midland Elevator Co.* supra; *Pekin v. McMahon*, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; *Edgington v. Burlington, C. R. & N. R. Co.* 116 Iowa, 410, 57 L.R.A. 561, 90 N. W. 95; *Berg v. Minneapolis & St. L. R. Co.* 95 Minn. 404, 104 N. W. 293, 5 A. & E. Ann. Cas. 375; *Ott v. Johnson*, 38 Tex. Civ. App. 491, 86 S. W. 649; *Kansas City v. Siese*, 71 Kan. 283, 80 Pac. 626; *Price v. Atchison Water Co.* 58 Kan. 551, 62 Am. St. Rep. 625, 50 Pac. 450.

Messrs. Brownell & Coleman and Francis H. Brownell, for respondent:

The barrel was not an "attractive nuisance."

Curtis v. Tenino Stone Quarries, 37 Wash. 361, 79 Pac. 955; *Harris v. Cowles*, 38 Wash. 336, 107 Am. St. Rep. 847, 80 Pac. 537; *Clark v. Northern P. R. Co.* 29 Wash. 140, 59 L.R.A. 508, 69 Pac. 636; *Delaware, L. & W. R. Co. v. Reich*, 61 N. J. L. 635, 41 L.R.A. 831, 68 Am. St. Rep. 727, 40 Atl. 682; *Saladay v. Old Dominion Copper Min. & Smelting Co. (Ariz.)* 100 Pac. 441; *Peters v. Bowman*, 115 Cal. 345, 56 Am. St. Rep. 106, 47 Pac. 113, 598; *Klix v. Nieman*, 68 Wis. 271, 60 Am. Rep. 854, 32 N. W. 223; *Richards v. Connell*, 45 Neb. 467, 63 N. W. 915; *Murphy v. Brooklyn*, 118 N. Y. 575, 23 N. E. 887; *Cooper v. Overton*, 102 Tenn. 211, 45 L.R.A. 591, 73 Am. St. Rep. 864, 52 S. W. 183; *Overholt v. Vieths*, 93 Mo. 422, 3 Am. St. Rep. 557, 6 S. W. 74; *Ritz v. Wheeling*, 43 W. Va. 262, 43 L.R.A. 148, 31 S. E. 994.

Mount, J., delivered the opinion of the court:

This action was brought by the plaintiff,

Note. — The general doctrine of attractive nuisance is treated in a note to *Cahill v. Stone*, 19 L.R.A. (N.S.) 1094, 29 L.R.A. (N.S.)

Mabel Gordon, a minor, by her guardian *ad litem*, to recover for personal injuries. At the conclusion of the evidence for the plaintiff, the trial court dismissed the case. The plaintiff has appealed from that order.

The facts are substantially as follows: At the time of the appellant's injury, the respondent operated a shingle mill in the town of Snoqualmie, in this state. The mill was located on the right of way of the Northern Pacific Railway Company, to the east of the main track of that company. The appellant lived with her father and mother about 160 feet west of the mill. The main line of the railway company ran between the mill and her home. The plaintiff was "going on ten years old." The mill company carried an exhaust steam pipe from its dry kiln, a distance of 110 feet, where the pipe emptied into a barrel. This barrel was 60 feet from the nearest building and 48 feet east of the railway track. It was placed at the edge of an old millpond which had become filled up with logs and *débris*. The barrel was accessible from the railroad track. It was full of hot water, from which steam or vapor constantly arose. The men from the mill used the water from the barrel for washing purposes, and people in the vicinity were accustomed to go there for water for domestic purposes. Children sometimes played near the barrel and took water therefrom. A cover was kept on the barrel. About the middle of the barrel a wooden cedar plug was placed in the bung-hole of the barrel. There was no rail or guard around the barrel, and no notice warning people away. It simply stood by the pile of *débris*, and was readily accessible to anyone who desired to go to it from the direction of the railway track. On July 2, 1907, the mother of the appellant started from her home, on the west of the railway track, to go to the barrel for a pail of hot water. While on her way, she was stopped by a neighbor woman, and she placed her bucket down upon the ground. The little girl took up the bucket and ran on to the barrel, and, while in the act of dipping water from the barrel, the plug came out, and hot water poured on her leg, scalding the limb from the knee down. After the child was taken home, the father went over to the barrel and picked up the plug, which he testified was wrapped with some kind of burlap which was rotten. The plug was a solid cedar plug, about 6 inches long, and 2 inches in diameter at one end and 1½ inches in diameter at the other. The little girl had taken water from the barrel before to wash doll clothes and to wet sand with. She had also played around there with other children. The men run-

29 L.R.A. (N.S.)

ning the mill had seen her there often, and she had never been told to keep away.

It is argued by counsel for appellant that the barrel of hot water was an attractive nuisance, and the danger to children should have been contemplated, and that the question of negligence of the respondent was therefore one for the jury. Cases are cited to the effect that appliances not in themselves dangerous may be exposed in such a way as to become dangerous and render the owner liable for injuries caused thereby. *McAllister v. Seattle Brewing & Malting Co.* 44 Wash. 179, 87 Pac. 68, and *Kinchlow v. Midland Elevator Co.* 57 Kan. 374, 46 Pac. 703, are relied upon. The first of these cases was where a sheave wheel over which a cable operated was located in a place where people were accustomed to travel. The wheel was stopped and started at intervals. A boy upon the street saw it and placed his foot upon the slowly moving cable, when it started up rapidly, and the boy's foot was drawn between the cable and the pulley. We held in that case that the question whether the sheave wheel was dangerous or attractive to children, and must have been foreseen, was one for the jury. In that case we said: "Where the dangerous machinery is connected with an ordinary manufacturing plant, and so surrounded with the ordinary safeguards as to legitimately lead to the conclusion that children of immature years unattended will not approach it, the owner or operator owes no such duty of active vigilance to possible trespassing children as requires him to keep a guard over the premises, and hence is not responsible if a child does approach and meet with injury from such machinery. . . . On the other hand, we have held, that where dangerous machinery and dangerous substances, of a character likely to excite the curiosity of children and allure them into danger, have been left unguarded in exposed places close to the highways, or playgrounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner or person leaving the dangerous machinery or substance is liable for such injury."

We think the case at bar falls within the principle of the first rule there stated. The barrel of hot water was connected with an ordinary manufacturing plant. It was so surrounded as to appear absolutely safe. It was a wooden barrel, apparently 3 feet high by about 18 inches in diameter. It was covered with a lid. Steam or vapor was issuing from it at all times, and sometimes water was bubbling over the sides. It was accessible only from one side, while the other sides were surrounded by *débris*. The approach to it was by walking a large,

flat timber, upon one end of which the barrel was standing. The little girl, while of the age of nine years, knew that the water was hot, had used it before, and had been there frequently. Her parents, of course, knew that the water in the barrel was hot. They knew the location and condition of the barrel, and they permitted her to go there, and had never warned her to keep away. This shows conclusively that they did not apprehend any danger, and there is no evidence in the record showing that anyone supposed or considered the barrel dangerous. The inference is that it appeared safe. In other words, the barrel of hot water was so surrounded with ordinary safeguards that it was apparently safe and would not be supposed to be dangerous even for children to play around; not even the parents of the child who went there anticipated danger. Under such circumstances, it cannot be held that the respondent was bound to apprehend danger which was not apparent. It is true that children had upon previous occasions played near the barrel, and that they had taken water from the barrel. It may be conceded that they were lured there, and it may also be conceded that the hot water was dangerous. Still the evidence does not show that the water was unguarded, or exposed in such a way as to render the respondent liable. The barrel was a substantial one, securely placed, and covered in plain view. There was no element of a trap about it. The plug which came out is a substantial one, and, so far as the evidence shows, may have been removed and insecurely replaced by someone a short time before the accident. It is not shown what caused the plug to come out, and there is no showing of notice, or opportunity of notice, to respondent of a defective condition of the barrel or the plug. Under these circumstances, it cannot be held that the case falls within the rule upon which the McAllister Case was based, or upon the rule of safe place, or of a trap, as in the Kansas case. It falls within the rule of *Clark v. Northern P. R. Co.* 29 Wash. 139, 59 L.R.A. 508, 69 Pac. 636; *Curtis v. Tenino Stone Quarries*, 37 Wash. 355, 79 Pac. 955, and *Harris v. Cowles*, 38 Wash. 331, 107 Am. St. Rep. 847, 80 Pac. 537, where the owner would not ordinarily apprehend danger.

The barrel of hot water in this case cannot be held to be an attractive nuisance. It is true the water in it was hot; but this fact caused steam or vapor to arise from it at all times, and consequently was a warning to even a child of the tender age of nine years that the water would burn if she came in contact with it. The fact that the water was hot would tend to prevent chil-

dren playing in it, much more so that if the water were cold or merely warm. If this barrel had contained cold water, it could not be held to be an attractive nuisance. If the barrel of water in this case may be held to be inherently dangerous, so as to belong to that class of cases where owners are liable for accidents to children, then the barrel of rain water, or the pond, or the cherry tree, or a fire on a vacant city lot near where children are accustomed to play, is an attractive nuisance, and if children are drowned or injured therein the owners of such lots are liable. Such, of course, is not the rule. In *Ritz v. Wheeling*, 45 W. Va. 270, 43 L.R.A. 148, 31 S. E. 994, the court said: "Almost everything will attract some child. The pretty horse, or the bright red mowing machine, or the pond in the farmer's field, the millpond, canal, the railroad cars, the moving carriage in the street, electric works, and infinite other things, attract the child, as well as the city's reservoir. To what things is the rule to be limited? And where will not the curiosity, the thoughtlessness, and the agile feet of the truant boy carry him? He climbs into the high barn and the high cherry tree. Are they, too, to be watched and guarded against him? As was well said in *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365, this rule 'would charge the duty of the protection of children upon every member of the community except their parents.' A very onerous duty!"

We think the barrel was not of such a nature as to require the respondent to anticipate danger, and therefore the trial court correctly dismissed the case.

The judgment must be affirmed.

Rudkin, Ch. J., and Crow and Parker, JJ., concur.

Dunbar, J., dissenting:

I dissent. It seems to me, from the statement of the case presented in the majority opinion, that the judgment ought to be reversed. The testimony shows that the children in the neighborhood used this ground for playing purposes; that this fact was known to the operators of the mill, as was also the fact that water from the barrel was used generally by the settlers in the neighborhood. The argument is that the barrel of hot water was so surrounded with ordinary safeguards that it was apparently safe, and that it would not be supposed to be dangerous. Of course, if there had been an apparent danger, then the element of contributory negligence would enter in, and there could be no recovery. But the fact that it was not apparently dangerous, and was dangerous in fact, throws the

burden of ascertaining the danger upon the party who placed it there, was operating it, and was responsible for it. The evidence does not show in what manner the plug was removed. The child was so badly hurt at the time the accident occurred that she was not able to remember anything very definitely about it, except that the water poured out on her and injured her when she was attempting to get water. It may have been that the plug was so loosely maintained there that, in brushing against it, it came out. It may have been that she stepped on it, to aid her in getting to the top of the barrel for the purpose of getting water. But, in any event, it proved to have been dangerous, and a view of the plug is convincing that it was, at least, a very rude and insufficient fastening to a barrel of scalding water in a place which was frequented by the neighborhood, and by the children of the neighborhood, who were known to play around it, who used it to wash their doll clothes in, and to wet sand for the purpose of making sand houses.

The opinion relies largely upon *Ritz v. Wheeling*, 45 W. Va. 262, 43 L.R.A. 148, 31 S. E. 994; but all that is said in that case was the purest *dictum*. That was a case where a child was drowned in a reservoir belonging to the city of Wheeling, and the court decided that, in the absence of a statutory provision, the city was not liable, under the theory that, where a city, under the authority of the general law, undertakes a work for the sole use and benefit of the public, it is not liable for an injury caused by negligent or defective act of its servants, unless some statute, either directly or by implication, gives a private remedy; and, there being no statute in that state giving a private remedy, the court held that the action could not be maintained. So that it was not necessary to discuss the question of liability, so far as the negligence of the city was concerned. The writer of the opinion, though, saw fit to go outside of the necessities of the case, to deliver a discursive, flowery, and poetical dissertation on the allurements in nature which beset children, a portion of which is presented by the majority opinion. If this thought, which was solely the thought of the writer of the opinion and for which the court was in no way responsible, were to be followed, it would logically follow that there could be no recovery for a damage to children where they had been lured into danger. But it would be safer and more satisfactory to practitioners, as well as clients, if this court would follow the principles enunciated in its own decisions, rather than those of courts where the general principles announced by this

court have been repudiated, as in the case just cited. This court has taken the reverse of the view taken by the court in that case on every question discussed; and an examination of that case shows that many of the cases which were severely criticized in the opinion were cases announcing the principles which have been adopted by this court. This case, in my opinion, cannot be distinguished from *McAllister v. Seattle Brewing & Malting Co.* 44 Wash. 179, 87 Pac. 68, where the two rules were announced as set forth in the majority opinion. But certainly the first rule announced: *viz.*, that "where the dangerous machinery is connected with an ordinary manufacturing plant, and so surrounded with the ordinary safeguards as to legitimately lead to the conclusion that children of immature years unattended will not approach it, the owner or operator owes no such duty of active vigilance to possible trespassing children as requires him to keep a guard over the premises,"—is not applicable to this case. There is no question here of leading the owners of this plant to the legitimate conclusion that children of immature years would not approach it; for the testimony is to the effect that they did approach it, that the owners knew that they approached it, that it was an accommodation to the people of the neighborhood generally, which was conferred upon them by the company, and that the use had gone to such an extent that it must be presumed that they were there by invitation of the owners. But, quoting again from the same opinion: "On the other hand, we have held that, where dangerous machinery and dangerous substances, of a character likely to excite the curiosity of children and allure them into danger, have been left unguarded in exposed places close to the highways, or playgrounds of children, even though on the premises of the owner, and children have been attracted to them and met with injury, the owner or person leaving the dangerous machinery or substance is liable for such injury."

This case falls squarely within that announcement. The dangerous place was left. The bubbling and steam of the water were visible and were likely to excite the curiosity of children. It was not safely guarded. If the barrel had been furnished with an ordinary faucet by which to turn the water on and off, it would have been some notice that the water would escape if the faucet were manipulated. But here the exhibit in the case shows that it was simply a bungling device which would naturally, if children were playing around it, result in the casualty which is the subject of this controversy. In discussing this question in

the case just above cited, we further said, after reviewing some prior cases: "The children injured in each case had no special license to be at the place where the injury occurred, nor did the owner of the articles or substance causing the injury owe to the children any special duty of protection or care. But the cases are rested on the principle that it is negligence in itself to leave, exposed and unguarded near the haunts of children, dangerous machinery or compounds which must necessarily result in injury to them if they came in contact with it. It matters not that the dangerous article may be on the premises of its owner, or that the injured person must become technically a trespasser to approach it. It is enough that the thing is dangerous in itself, and is attractive and alluring to children, and has been left exposed and unguarded in a place where it must reasonably have been anticipated that children would be attracted to it, and tempted to play with and handle it,"—an altogether different sentiment from the uncalled for expression of opinion by the judge who wrote the opinion in the Wheeling Case. It seems to me that this is a stronger case in favor of reversal than that case, for there the boy was passing over the plant of the brewing company, and here the child was simply doing what the whole neighborhood had license to do, *viz.*, trying to obtain water from this barrel.

The judgment, in my opinion, should be reversed, and the case allowed to go to the jury.

WISCONSIN SUPREME COURT.

SOUTHWESTERN SLATE COMPANY,
Appt.,
v.

DAVID STEPHENS, Resp't.

(139 Wis. 616, 120 N. W. 408.)

Contract — place of formation.

1. The acceptance, by subscribers, of an offer by a foreign corporation to sell its stock in the state of their residence, completes the contract there.

Foreign corporation — contract — sale of stock.

2. The obligation of a corporation to persons who subscribe to its stock affects its personal liability, within the meaning of a statute invalidating contracts affecting such liability made by any foreign corporation which has not complied with the local laws so as to be entitled to do business within the state, and a foreign corporation which has not complied with the laws cannot therefore enforce, in the courts of the state where the statute was enacted, contracts of

subscription to its capital stock made within such state.

Commerce — sale of corporate stock.

3. The sale by a foreign corporation, within a state, of unissued shares of its capital stock, is not a transaction of interstate commerce.

(March 30, 1909.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Dane County dismissing the complaint in an action brought to recover the balance alleged to be due on a stock subscription contract. Affirmed.

Statement by Barnes, J.:

This action is brought to recover a balance alleged to be due on an unpaid subscription for capital stock of the plaintiff. The plaintiff was incorporated June 16, 1905, with an authorized capital stock of \$500,000. Its principal place of business

Note. — Enforceability of subscription to stock of foreign corporation that has not complied with local laws.

The question left undecided in *SOUTHWESTERN SLATE CO. v. STEPHENS*, whether the taking of a subscription to its capital stock by a foreign corporation constitutes the doing of business in the state within the meaning of a statute forbidding foreign corporations to do business within a state until certain requirements have been complied with, is one which is generally answered in the negative. *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864; *Bartlett v. Chouteau Ins. Co.* 18 Kan. 369; *First Nat. Bank v. Leeper*, 121 Mo. App. 688, 97 S. W. 636; *Union Trust Co. v. Sickles*, 125 App. Div. 105, 109 N. Y. Supp. 262; *Wildwood Pavilion Co. v. Hamilton*, 15 Pa. Super. Ct. 389, reversing 7 Pa. Dist. R. 747; *Galena Min. & Smelting Co. v. Frazier*, 20 Pa. Super. Ct. 394. Though the contrary has been held, *Williams v. Cullin*, 59 Mo. App. 30.

The statute respecting foreign corporations and their agents, under which *Payson v. Withers*, supra, was decided, declared: (1) That the agents before entering upon their duties in the state should deposit a power of attorney, commission, or other authority under which they act as agents; (2) that the agents should file the authority of the board of directors authorizing citizens of the state to maintain actions in the state in relation to any contracts, and authorizing service of process; (3) that service of process on the agents should be sufficient; (4) that foreign corporations should not enforce any contracts made by their agents, before a compliance with provisions 1 and 2; (5) that any person who should directly or indirectly make any contract or transact any business on account of such foreign corporation should be deemed an agent of the corpora-

was Pierre, South Dakota, and outside of South Dakota its principal place of business was the city of Chicago. Its articles of incorporation empowered it to engage in a great many different kinds of business, among them the operation of mines and quarries, and dealing in the capital stock and bonds of the plaintiff or any other corporation. The business in which the company was engaged, in so far as it was engaged in any business, was developing slate quarries in Arkansas. It never complied with the provisions of § 1770b, Stat. 1898. Prior to November, 1905, the company had issued \$232,000 of paid-up stock. At a meeting of the board of directors held in Chicago in August, 1905, it was decided to sell a portion of the authorized and unissued stock of the com-

pany in order to provide the necessary working capital; and a resolution was passed authorizing the secretary to sell such stock at not less than par, and also authorizing him to offer a commission for the sale of the same not exceeding 15 per cent of the amount realized upon such sale. N. B. Van Slyke, of Madison, Wisconsin, was president of the company, and J. M. Van Slyke was its secretary. An arrangement was entered into with one Frank M. Wootton, a broker of Madison, to sell the capital stock of the corporation to the amount of \$100,000. There is some dispute in the testimony as to whether this contract was made on behalf of the company by J. M. Van Slyke or by N. B. Van Slyke. The court found that the contract was made with the latter. Mr. Wootton

tion, subject to the provisions of the statute; and (6) that provision 5 should not apply to persons acting as agents for a special or temporary purpose, and for a purpose not within the ordinary business of the corporation. It was held that soliciting subscriptions to the stock of a foreign corporation is not "such an act or agreement as was contemplated by this law and which it intended to render inoperative unless the agent had complied with its conditions." The court said: "This act relates to the usual business done by a corporation and by its agents, and does not refer to obtaining subscription to its stock. The ordinary business, for instance, done by the corporation in question here, was an insurance business. The obtaining of subscriptions was an act preliminary to the commencement of its business. When the subscriptions were obtained, and the corporation was set in motion and was made to perform its functions, then the ordinary business referred to by this act began,—the issuing of policies of insurance and performing the general and other business connected with such corporations."

In *Bartlett v. Chouteau Ins. Co.* supra, it was held that a statute providing that no foreign insurance "shall directly or indirectly take risks, or transact any business of insurance, without first obtaining a certificate of authority from the auditor of the state," does not, even when the certificate is not obtained, invalidate subscriptions to its capital stock taken within the state, or notes given in payment thereof.

In *Williams v. Scullin*, supra, under a statute providing that foreign corporations must comply with certain requirements before they are permitted to do any business in the state, and that a foreign corporation which fails to comply with its requirements may not maintain any suit or action, either legal or equitable, in any court of the state, upon any demand, whether arising out of contract or tort, it was held that a subscription to the capital stock of a foreign corporation cannot be enforced, either directly by a suit against the

subscriber on the subscription, or indirectly through garnishment of the subscriber on a judgment against the corporation.

But the contrary conclusion was arrived at, without mentioning the former decision, in *First Nat. Bank v. Leeper*, supra, which held under a statute substantially the same, that a note given in payment of a subscription to the capital stock of a foreign insurance company was enforceable though it had not complied with the statutory requirements, and the subscription was taken in the state. This was placed on the ground that taking a subscription to its capital did not constitute doing business within the meaning of the statute. The court said: "The business of the corporation here involved was that of a telegraph and telephone company. That is a well-known business, and the prosecution of such business does not consist in selling some of its stock to an individual. Such a transaction or such transactions, it is true, may occur, but they are not the usual or customary or ordinary business of a telegraph or telephone company, nor is such a corporation organized for the transaction of such business. We therefore hold that selling the stock to defendant for which he gave the note in suit was not transacting or doing business in the sense of the statute to which we have referred."

It was held in *Wildwood Pavilion Co. v. Hamilton*, 15 Pa. Super. Ct. 389, reversing 7 Pa. Dist. R. 747, and in *Galena Min. & Smelting Co. v. Frazier*, 20 Pa. Super. Ct. 394, that a subscription to the capital stock of a foreign corporation is not a doing of business within the commonwealth so as to prevent the enforcement thereof on the ground that the corporation had not complied with necessary preliminaries before doing business. In *Wildwood Pavilion Co. v. Hamilton*, supra, the court said: "Subscription to stock is an incident to the erection of the corporation. It is an act preliminary to the doing of that business for which the incorporation is had."

R. A. E.

commenced soliciting subscriptions in December, 1905, and secured the necessary subscriptions prior to March 6, 1906. The subscribers were all residents of the state of Wisconsin. When the necessary amount of capital stock was subscribed, the subscription paper was taken by Mr. Wootton to N. B. Van Slyke, and the same was checked over by him. The defendant subscribed to the capital stock of the plaintiff to the amount of \$5,000, and paid the first 20 per cent assessment. Thereafter he refused to pay any other or further assessments, and this suit is brought to recover the unpaid balance of his subscription, amounting to \$4,000. The court found that the plaintiff made a contract with Wootton for the sale of its stock on commission; that Wootton secured the subscription of the defendant, a resident of Madison, for \$5,000 of its capital stock; that such subscription was made at Madison, Wisconsin, and the same was accepted there by N. B. Van Slyke as president of the corporation, pursuant to the authority given him by the board of directors. As a conclusion of law the court found that the subscription contract was void under the provisions of § 1770b, Stat. 1898. The trial court in his opinion held that the power to sell carried with it the authority to accept subscriptions, and that therefore the entire contract pertaining to the sale of the stock was made in Wisconsin; that such contract imposed mutual obligations upon the contracting parties which affected the personal liability of the plaintiff corporation; and that the plaintiff was transacting business within the state in violation of the statute referred to. From a judgment dismissing the complaint in the action this appeal is taken.

Mr. Josiah Cratty, with Messrs. Richmond, Jackman, & Swansen, for appellant:

The signing of the subscription by the several subscribers did not complete a binding contract.

10 Cyc. Law & Proc. pp. 384, 385; 1 Machen, Modern Law of Corp. §§ 183, 192, 619; Wallace's Case [1900] 2 Ch. 671; Addinell's Case, L. R. 1 Eq. 225; Jackson v. Turquand, L. R. 4 H. L. 305; Junction R. Co. v. Reeve, 15 Ind. 236; DaPonte v. Breton, 121 La. 454, 46 So. 571.

The conditional subscription being completed in Chicago, makes it an Illinois contract.

9 Cyc. Law & Proc. p. 670; Holder v. Aultman, M. & Co. 169 U. S. 81, 42 L. ed. 669, 18 Sup. Ct. Rep. 269; Milliken v. Pratt, 125 Mass. 374, 28 Am. Rep. 241; 2 Parsons, Contr. p. 712; Perry v. Mt. Hope Iron Co. 15 R. I. 380, 2 Am. St. Rep. 902, 5 29 L.R.A.(N.S.)

Atl. 632; Shuenfeldt v. Junkermann, 20 Fed. 359; Presbyterian Ministers' Fund v. Thomas, 126 Wis. 282, 110 Am. St. Rep. 919, 105 N. W. 801; Emerson Co. v. Proctor, 97 Me. 360, 54 Atl. 851.

The sale of corporate stock for the purpose of raising capital to transact corporate business does not constitute the doing of business within the meaning of the statute requiring a license of a foreign corporation.

Atlas Engine Works v. Parkinson, 161 Fed. 223; Catlin & P. Co. v. Schuppert, 130 Wis. 642, 110 N. W. 818; Green v. Chicago. B. & Q. R. Co. 205 U. S. 530, 51 L. ed. 916, 27 Sup. Ct. Rep. 595; Boardman v. S. S. McClure Co. 123 Fed. 614; Beard v. Union & American Pub. Co. 71 Ala. 60; First Nat. Bank v. Leeper, 121 Mo. App. 688, 97 S. W. 636; Union Trust Co. v. Sickles, 125 App. Div. 105, 109 N. Y. Supp. 262; Mandel v. Swan Land & Cattle Co. 154 Ill. 177, 27 L.R.A. 313, 40 N. E. 462; People ex rel. Stead v. Chicago, I. & L. R. Co. 223 Ill. 581, 79 N. E. 146, 7 A. & E. Ann. Cas. 1; Payson v. Withers, 5 Biss. 269, Fed. Cas. No. 10,864; Bradbury v. Waukegan & W. Min. & Smelting Co. 113 Ill. App. 605; Honeyman v. Colorado Fuel & Iron Co. 133 Fed. 97; Galena Min. & Smelting Co. v. Frazier, 20 Pa. Super. Ct. 397; Wildwood Pavilion Co. v. Hamilton, 15 Pa. Super. Ct. 391; Brown v. Guarantee Sav. Loan & Invest. Co. 46 Tex. Civ. App. 295, 102 S. W. 138; Davis & R. Bldg. & Mfg. Co. v. Div. 64 Fed. 406; Beale, Foreign Corp. §§ 204-209.

The words, "affecting the personal liability," mean a contract which, by its covenant or stipulation, imposes liability upon the corporation.

International Textbook Co. v. Peterson, 133 Wis. 302, 113 N. W. 730, 14 A. & E. Ann. Cas. 965; Da Ponte v. Breton, 121 La. 454, 46 So. 571; 1 Machen, Modern Law of Corp. §§ 182, 232, 619; 1 Cook. Corp. 6th ed. § 61 and notes; Wells v. Green Bay & M. Canal Co. 90 Wis. 453, 64 N. W. 69; Penn Collieries Co. v. McKeever, 183 N. Y. 98, 2 L.R.A.(N.S.) 127, 75 N. E. 935; Com. v. Standard Oil Co. 101 Pa. 148; People ex rel. Paper Mills v. New York Tax Comrs. 23 N. Y. 242; Cooper Mfg. Co. v. Ferguson, 113 U. S. 727, 28 L. ed. 1137, 5 Sup. Ct. Rep. 739.

The sale of corporate stock in a state by a foreign corporation is an act of interstate commerce.

Catlin & P. Co. v. Schuppert, 130 Wis. 650, 110 N. W. 818; Butler Bros. Shoe Co. v. United States Rubber Co. 84 C. C. A. 167, 156 Fed. 17; Gibbons v. Ogden, 9 Wheat. 1, 6 L. ed. 23; Loverin & B. Co. v. Travis, 135 Wis. 322, 115 N. W. 831; Passenger Cases, 7 How. 283, 12 L. ed. 702;

7 Cyc. Law. & Proc. pp. 413, 414, and notes.

Messrs. Olin & Butler, for respondent: The subscription was not a binding contract.

Greer v. Chartiers R. Co. 96 Pa. 391, 42 Am. Rep. 548; McDowell v. Lindsay, 213 Pa. 591, 63 Atl. 130; Bates v. Great Western Teleg. Co. 134 Ill. 536, 25 N. E. 521; 10 Cyc. Law & Proc. p. 384; European & N. A. R. Co. v. McLeod, 16 N. B. 3.

The contract for the purchase of the stock was completed in Wisconsin, the place of its acceptance.

Badger Paper Co. v. Rose, 95 Wis. 145, 37 L.R.A. 162, 70 N. W. 302; Eliason v. Henshaw, 4 Wheat. 225, 4 L. ed. 556; McCulloch v. Eagle Ins. Co. 1 Pick. 278; 1 Morawetz, Priv. Corp. 2d ed. § 48; 1 Cook, Corp. 6th ed. § 72, p. 294; Pratt v. Hudson River R. Co. 21 N. Y. 305; Cohn v. Plumer, 88 Wis. 622, 60 N. W. 1000; Wharton v. Stoutenburgh, 35 N. J. Eq. 266.

The sale did not constitute a transaction of interstate commerce.

Elwell v. Adder Mach. Co. 136 Wis. 82, 116 N. W. 882; 17 Am. & Eng. Enc. Law, 2d ed. p. 75; Adams Exp. Co. v. Com. 124 Ky. 160, 5 L.R.A.(N.S.) 630, 92 S. W. 932; Standard Oil Co. v. State, 117 Tenn. 618, 10 L.R.A.(N.S.) 1015, 100 S. W. 705; State v. Scott, 98 Tenn. 254, 36 L.R.A. 461, 39 S. W. 1; Kidd v. Pearson, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; Plumley v. Massachusetts, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; Paul v. Virginia, 8 Wall. 168, 19 L. ed. 357; Hooper v. California, 155 U. S. 648, 39 L. ed. 297, 5 Inters. Com. Rep. 610, 15 Sup. Ct. Rep. 207; International Textbook Co. v. Peterson, 133 Wis. 302, 113 N. W. 730, 14 A. & E. Ann. Cas. 965; New York L. Ins. Co. v. Cravens, 178 U. S. 389; 44 L. ed. 1116, 20 Sup. Ct. Rep. 962; Northern Securities Co. v. United States, 193 U. S. 197, 333, 48 L. ed. 679, 698, 24 Sup. Ct. Rep. 436; Ware v. Mobile County, 209 U. S. 405, 411-413, 52 L. ed. 855, 858, 859, 28 Sup. Ct. Rep. 526, 14 A. & E. Ann. Cas. 1031; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 161, 162, 51 L. ed. 415, 422, 423, 27 Sup. Ct. Rep. 188, 184 N. Y. 453, 8 L.R.A.(N.S.) 314, 112 Am. St. Rep. 628, 77 N. E. 970, 6 A. & E. Ann. Cas. 515.

Plaintiff cannot enforce the contract, as it has not complied with the statute so as to allow it to do business within the state.

Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 110 Am. St. Rep. 919, 105 N. W. 801; Ashland Lumber Co. v. Detroit Salt Co. 114 Wis. 66, 80 N. W. 904; Loverin & B. Co. v. Travis, 135 Wis. 322, 115 N. W. 829; Catlin & P. Co. v. Schuppert, 29 L.R.A.(N.S.)

130 Wis. 642, 110 N. W. 818; Allen v. Milwaukee, 128 Wis. 678, 5 L.R.A.(N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 A. & E. Ann. Cas. 392; Farrior v. New England Mortg. Secur. Co. 88 Ala. 275, 7 So. 200; Greek-American Sponge Co. v. Richardson Drug Co. 124 Wis. 469, 109 Am. St. Rep. 961, 102 N. W. 888; International Textbook Co. v. Peterson, supra; Atlas Engine Works v. Parkinson, 161 Fed. 223; Diamond Glue Co. v. United States Glue Co. 187 U. S. 611, 613, 47 L. ed. 328, 331, 23 Sup. Ct. Rep. 206; Rose v. Kimberly & C. Co. 89 Wis. 550, 27 L.R.A. 556, 46 Am. St. Rep. 855, 62 N. W. 526.

Barnes, J., delivered the opinion of the court:

Section 1770b, Stat. 1898, as amended by chapter 500, p. 932, Laws 1905, was in force when the transactions out of which this action arose took place. The law forbade any foreign corporation to "transact business or acquire, hold, or dispose of property in this state until such corporation" complied with the law. It also provided that "every contract made by or on behalf of any such foreign corporation, affecting the personal liability thereof or relating to property within the state," before it complied with the law, should be wholly void and unenforceable by the corporation, but might be enforced against it.

The defendant seeks to defeat this action on two grounds: (1) That plaintiff was transacting business in this state in violation of law; and (2) that the contract upon which the suit is brought was made in Wisconsin, and affected the personal liability of the defendant, and was therefore void. The trial court found as a matter of fact that the subscription contract was made in Wisconsin, and that it affected the personal liability of the plaintiff. If there is sufficient evidence in the record to sustain this finding, the judgment must be affirmed. This result must follow regardless of whether the plaintiff was or was not transacting business in this state within the meaning of subd. 2, § 1, of the 1905 law. We do not think the contracts inhibited by subd. 10 of § 1 of the act are limited to those made by a corporation doing business within the meaning of subdiv. 2. Such a construction would render the quoted portion of subdiv. 10 superfluous. The important question, therefore, becomes almost wholly one of fact and of legal inferences to be drawn therefrom.

In July of 1905 the secretary of the corporation was authorized to negotiate the sale of a portion of the unsubscribed stock of the company. In December Mr. Wootton was employed as a broker, by either the

president or the secretary of the corporation, to make the sale. The court found that he was employed by the president. He was assisted in securing subscribers by Mr. N. B. Van Slyke, the president of the company, and by Mr. Higham; it being understood that the latter should be employed as manager of the company if \$100,000 of the capital stock were disposed of so as to insure the necessary working capital to finance the enterprise. Mr. Higham submitted his proposition to the board of directors of the corporation, at Chicago, at a meeting held on January 29, 1906. Mr. N. B. Van Slyke was authorized by the directors at such meeting to offer for sale, in accordance with a subscription form agreed upon, and to sell a sufficient amount of the treasury stock of the company to insure the permanent financing of it. He was also authorized to enter a contract with Higham whenever the subscription was completed as provided in the form of subscription proposed. Such subscription form contained two conditions, by one of which it was provided that not less than \$100,000 should be subscribed, and by the other, that Mr. Higham was to undertake the management of the business under a five-year contract. As we read the subscription contract, it would not be binding on the subscribers unless both conditions were fulfilled. N. B. Van Slyke, Higham, and Wootton all resided at Madison. All of the subscriptions were obtained in Wisconsin. The requisite amount was subscribed about March 1st. The subscriptions were apparently approved by Van Slyke. The stock issued was sent him, and collections therefor were made through the bank in which he was interested. After the requisite subscriptions were obtained, Mr. Van Slyke apparently exercised his authority to hire Higham. At a meeting of the directors held at Chicago March 16th a resolution was passed approving of the contract made by Mr. Van Slyke with Mr. Higham on March 6th. It appears that the formal contract with Higham was actually signed after the meeting of March 16th. We think this testimony clearly shows an offer made by the plaintiff to sell its stock, and to sell it in Wisconsin. When this offer was accepted by the subscribers, and the requisite \$100,000 was subscribed, a completed contract was made, and it was made in this state. It might be avoided by failure or refusal to employ Higham, but as a matter of fact he was employed at Madison, and the contract became complete in every particular. *Greer v. Chartiers R. Co.* 96 Pa. 391, 42 Am. Rep. 548; *European & N. A. R. Co. v. McLeod*, 16 N. B. 3; 10 Cyc. Law. & Proc. p. 384. 29 L.R.A. (N.S.)

The plaintiff was an organized corporation, and as such had the right to offer its unsubscribed stock for sale, and to make a valid sale of the same. *Blunt v. Walker*, 11 Wis. 335, 350, 78 Am. Dec. 709. Having offered to sell its stock at a stipulated figure, no good reason is apparent why an acceptance of the offer would not make a binding contract, subject to repudiation by the purchaser if the manager stipulated for was not employed. The case before us is unlike *Badger Paper Co. v. Rose*, 95 Wis. 145, 37 L.R.A. 102, 70 N. W. 302, and *Smith v. Burns Boiler & Mfg. Co.* 132 Wis. 177, 111 N. W. 1123, and *Franey v. Warner*, 96 Wis. 222, 71 N. W. 81, where the corporations were not organized when the subscriptions were made; nor like *Rehbein v. Rahr*, 109 Wis. 136, 85 N. W. 315, where the statute required the subscriptions to be a part of the articles of organization as filed; nor like *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885, where the transaction between the corporation and the prospective stockholder took the form of an offer to purchase by the latter, and there was no acceptance by the former. We know of no case in this court holding that where a corporation offers for sale its unsold stock, and such offer is accepted, there must be an acceptance of the acceptance to make a binding contract. Moreover, if acceptance of the subscriptions by the corporation were necessary to make a binding contract, we think the evidence is sufficient to sustain the finding of the trial court that such acceptance was made in Wisconsin by the duly authorized officer of the corporation, Mr. Van Slyke.

The contract having been made in Wisconsin, the subscribers became members of the corporation, and the plaintiff was bound to deliver the muniments of title, showing the interest they had acquired in the corporation, and, in the event of its failure so to do, delivery might be compelled by appropriate proceedings in the courts. Furthermore, by virtue of such contract of purchase, the subscribers became entitled to enforce the ordinary rights of stockholders against the corporation. 1 *Cook, Corp.* § 192, and cases cited. A single contract falls within the ban of the statute. *Allen v. Milwaukee*, 128 Wis. 678, 5 L.R.A. (N.S.) 680, 116 Am. St. Rep. 54, 106 N. W. 1099, 8 A. & E. Ann. Cas. 392. It follows, therefore, that the contract was not only made within the state, but that it affected the personal liability of the plaintiff, and was void under our statute. What was really sold was a fractional interest in the corporation, and we do not think the transaction involved any question of interstate commerce. *International Textbook Co. v.*

Peterson, 133 Wis. 302, 113 N. W. 730, 14 A. & E. Ann. Cas. 965. Neither do we think that the act of 1905 was intended to amend the law as it existed, so as to relieve all foreign corporations that did not have a portion of their capital invested in Wisconsin from complying with the act, if such corporations actually transacted business within the state or made contracts therein upon which they assumed a personal liability.

Judgment affirmed.

Winslow, Ch. J., took no part.

Petition for rehearing denied June 3, 1909.

NEBRASKA SUPREME COURT.

L. C. MADSEN, Trustee,
v.

FARMERS' & MERCHANTS' INSURANCE
COMPANY, Appt.

(— Neb. —, 126 N. W. 1086.)

Insurance — unfiled chattel mortgage — materiality.

1. The existence in the hands of the mortgagee of an outstanding unfiled chattel mortgage upon a stock of goods, given as security for a guaranty of a debt of the mortgagor, is a fact material to the risk in a contract of insurance of the goods, even though the instrument contains a clause that it "shall not be valid until and unless filed."

Same — concealment — effect.

2. If such a mortgage exists, and the applicant for insurance, when inquired of whether the property "is mortgaged or otherwise encumbered," answers in the negative, this is the concealment of a fact material to the risk, which, under the conditions of the policy that "this entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any 'material fact' or circumstance concerning this insurance or the subject thereof," and "this entire policy shall be void . . . if the subject of insurance be personal property and be or become encumbered by a chattel mortgage," avoids the contract.

(June 10, 1910.)

Headnotes by LETTON, J.

Note. — The above decision seems to be one of first impression as to the effect of an unfiled chattel mortgage the existence of which is not disclosed to the insurer, upon a policy of insurance, since an extended search has failed to disclose any other case involving that specific question.

29 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the District Court for Howard County entered upon a directed verdict for plaintiff in an action brought to recover the amount alleged to be due on a certain fire insurance policy. Affirmed on condition.

The facts are stated in the opinion.

Messrs. A. L. Chase and Charles A. Robbins, for appellant:

The instrument executed and delivered by the insured to Nadolinski was, to all intents and purposes, a legal mortgage when so delivered.

Blair State Bank v. Stewart, 57 Neb. 58, 77 N. W. 370; Bush v. Bank of Commerce, 38 Neb. 403, 56 N. W. 989; Fitzgerald v. Andrews, 15 Neb. 52, 17 N. W. 370; Folsom v. Peru Plow & Implement Co. 69 Neb. 316, 111 Am. St. Rep. 537, 95 N. W. 635; Sanford v. Munford, 31 Neb. 792, 48 N. W. 876; Fuller v. Brownell, 48 Neb. 145, 67 N. W. 6.

An unfiled chattel mortgage is a violation of a condition in an insurance policy against encumbrance by mortgage or otherwise.

Secrest v. Hartford F. Ins. Co. 68 S. C. 378, 47 S. E. 680; Mulville v. Adams, 19 Fed. 887; Rhea v. Planters' Mut. Ins. Co. 77 Ark. 57, 90 S. W. 850; Hutchins v. Cleveland Mut. Ins. Co. 11 Ohio St. 477; Lee v. Agricultural Ins. Co. 79 Iowa, 379, 44 N. W. 683.

A completed instrument is not an escrow when delivered directly to the obligee.

East Texas F. Ins. Co. v. Clarke, 1 Tex. Civ. App. 238, 21 S. W. 277; Jordan v. Pollock, 14 Ga. 154; Adler v. Germania F. Ins. Co. 17 Misc. 347, 39 N. Y. Supp. 1070; Cincinnati, W. & Z. R. Co. v. Iliff, 13 Ohio St. 235; Tiedeman, Real Prop. 2d ed. § 815.

The instrument was at best a mortgage in equity.

Sporer v. McDermott, 69 Neb. 533, 96 N. W. 232, 659, 5 A. & E. Ann. Cas. 396; Morrow v. Turney, 35 Ala. 131; Glover v. McGilvray, 63 Ala. 508; Dunman v. Coleman, 59 Tex. 190.

The instrument is an "encumbrance" within the meaning of the application and policy of insurance.

22 Cyc. Law & Proc. p. 72; Secrest v. Hartford F. Ins. Co. supra; Treadway v. Hamilton Mut. Ins. Co. 29 Conn. 68.

The policy is void for fraudulent concealment on the part of the insured.

Connecticut F. Ins. Co. v. Manning, 87 C. C. A. 334, 160 Fed. 382, 15 A. & E. Ann. Cas. 338; Seal v. Farmers' & M. Ins. Co. 59 Neb. 253, 80 N. W. 807; Mascott v. First Nat. F. Ins. Co. 69 Vt. 116, 37 Atl. 255; American Artistic Gold Stamping Co. v. Glens Falls Ins. Co. 1 Misc. 114, 20 N. Y. Supp. 646; Planters' Ins. Co. v. Myers, 55 Miss. 479, 30 Am. Rep. 521; Planters' Mut.

Ins. Co. v. Lloyd, 67 Ark. 584, 77 Am. St. Rep. 136, 56 S. W. 44; Daniels v. Hudson River F. Ins. Co. 12 Cush. 425, 59 Am. Dec. 192; Moore v. Virginia F. & M. Ins. Co. 28 Gratt. 508, 26 Am. Rep. 373; Ackerman v. Ackerman, 50 Neb. 54, 69 N. W. 388; 6 Cyc. Law & Proc. pp. 1069, 1070.

Messrs. Charles B. Keller and T. T. Bell, for appellee:

Forfeitures are looked upon by the courts with ill-favor, and will be enforced only when the strict letter of the contract requires it.

Connecticut F. Ins. Co. v. Jeary, 60 Neb. 338, 51 L.R.A. 698, 83 N. W. 78; Connecticut F. Ins. Co. v. Waugh, 60 Neb. 353, 83 N. W. 1118.

Filing of the chattel mortgage was a condition precedent to its validity as such.

Jarvis v. Rogers, 3 Vt. 339; Johnson v. Warren, 74 Mich. 497, 42 N. W. 74; Thomas v. Eckard, 88 Ill. 593; Vanhorne v. Dorrance, 2 Dall. 317; Winthrop v. McKim, 51 How. Pr. 324; Tilley v. King, 109 N. C. 461, 13 S. E. 936; Doe ex dem. Shockley v. Roe, 4 Houst. (Del.) 569; Nevius v. Gourley, 95 Ill. 213.

Letton, J., delivered the opinion of the court:

This is an action upon an insurance policy. The policy was dated October 15, 1907. It provided for \$4,700 insurance upon merchandise, \$300 upon furniture and fixtures, and \$100 upon a piano, all contained in a store building in Cotesfield, Nebraska, the property of Joseph Jarosz. On the 1st of December, 1907, the property was destroyed by fire. The petition alleges that a few days afterward defendant offered to pay the full amount of the policy within sixty days, as provided by the policy, or to pay the same immediately, less a discount of 2 per cent; that the plaintiff, who is the trustee in bankruptcy of Jarosz, accepted the discount proposition, but that afterwards the defendant refused to pay the loss, upon the ground that there was a chattel mortgage on the property when the policy was written. The defendant denies the settlement, pleads concealment of material facts, and fraud and misrepresentation in the written application, in that, on or about the 27th of February, 1907, Jarosz executed a chattel mortgage to one St. Nadolinski covering all of the insured goods; that by collusion this mortgage was kept secret and concealed and the defendant was thereby induced to execute a policy, which it would not have done, had it been informed of the encumbrance. It further alleged that, when proofs of loss were prepared and received, defendant had no knowledge of the existence of the mortgage, and that when it ascertained this fact 29 L.R.A. (N.S.)

it tendered back to the assured the full amount of the premium, which it still profers. The reply is a general denial. At the conclusion of the trial, both parties moved for a directed verdict. The court instructed the jury to return a verdict for the full amount claimed by the plaintiff.

The only material question presented is: Was the policy void at its inception by reason of the execution of the instrument, Exhibit 6, which defendant contends is a chattel mortgage, and was such at the time it was executed, but which plaintiff claims did not become a mortgage under its terms until filed in the office of the county clerk. Jarosz purchased this stock of merchandise from T. T. Bell, of St. Paul, Nebraska. Mr. Bell testifies that at the time he sold the stock of goods he went to Cotesfield for the purpose of closing the transaction; that he had a contract of sale drawn, which contained a guaranty of the payments to be made by Jarosz; and that Mr. St. Nadolinski, who was Jarosz's father-in-law, agreed to sign the guaranty, but insisted that he should have some security from Jarosz, so "that he could have some rights in the property if Jarosz should not pay as he agreed, or if he should feel insecure in any other way." Mr. Bell further testified: That he had no chattel mortgage blank with him, but that he did have a real-estate mortgage blank, which he changed so as to cover the chattel property. Jarosz then said "that he was afraid that if he gave a chattel mortgage on the stock it would make him trouble in getting credit, as well as getting insurance." Mr. Bell then said: "There was one way it could be done; that if Mr. Nadolinski would agree that this paper should not be a lien, or should not be valid until he felt unsafe and then filed it, it could be fixed in that way so it would be a lien after it was filed." St. Nadolinski then said: "All he wanted was something so that if he should feel insecure, that he could get hold upon the property and protect himself against his guaranty on this bond." That after a few more words Mr. Bell inserted the words, "And shall not be valid until filed." That he "told them . . . that would enable him to get a lien on the property when it was filed, and until that time it would not be a valid mortgage;" and, the instrument then being read to Jarosz and Nadolinski, the contract of purchase was signed by Nadolinski, and the mortgage by Jarosz. On cross-examination Mr. Bell testified that he told them that if Jarosz gave a chattel mortgage on the property he could not get insurance, and that he might have told them that if the paper was put upon record then it would be a lien, and would invalidate any insurance they might

have. Exhibit 6, the instrument referred to, is in form a mortgage upon the stock of goods, furniture, and fixtures. It contains the following provisions: "This mortgage is given to secure said St. Nadolinski against loss and liability by reason of his guarantying the contract of Jos. B. Jarosz in the purchase of said stock from T. T. Bell, and shall not be valid until and unless filed." Jarosz was then given possession of the stock of goods. The mortgage was filed by St. Nadolinski the day after the fire.

The defendant contends that the instrument executed and delivered by Jarosz to St. Nadolinski was a chattel mortgage on the property, that it was an "encumbrance" within the meaning of the application and policy, and further contends that the policy is void for fraudulent concealment by the insured of the character of his title and interest in the property. The plaintiff insists that the express condition in the instrument, "and shall not be valid until and unless filed," is a condition precedent, which had never been complied with before the destruction of the property by fire, and that consequently the mortgage never took effect or became valid; that, this being the case, there was no misrepresentation or concealment in the application; that, there being then no chattel mortgage in existence, the negative answer to the question whether the property was "mortgaged or otherwise encumbered" was true. We are of opinion that at the time the insurance was procured Jarosz concealed from the insurer a material fact concerning the subject of insurance. He knew, at the time that the instrument, Exhibit 6, was executed, that if the fact were known that a chattel mortgage existed on the stock it would be impossible to procure insurance, and therefore knew that this fact was material to the risk; yet at the time of applying for the insurance he stated that the property was not "mortgaged or otherwise encumbered." The existence of this instrument was a fact which the insurance company was entitled to know, so that it might decide whether to enter into the insurance contract or not. In all insurance contracts there is a moral hazard, and it is necessary to the safe operation of the business, and entirely proper and right, that an insurer should require information from the applicant which will allow it to determine from the facts the extent of this hazard and of the risk which it is assuming. The instrument affected the rights of the insured in the property. His interest in it was not the same as it was before it was executed, being subject to the will of the mortgagee. It was not the property itself that was in reality the subject of the insurance contract, but it was the

interest of the insured therein; and an instrument which affected such interest to such an extent as did this mortgage most certainly affected the moral hazard. *Stanisics v. Hartford F. Ins. Co.* 83 Neb. 768, 120 N. W. 435.

A clear discussion of this subject is found in the opinion of Judge Sanborn in *Connecticut F. Ins. Co. v. Manning*, 87 C. C. A. 334, 160 Fed. 382, 15 A. & E. Ann. Cas. 338, from which we quote: "The property insured against fire in this policy, and in like policies of insurance ordinarily, is not the real or personal property described therein, but it is the interest of the assured in that property. The extent of his interest is therefore necessarily material to the risk which the underwriter assumes. The moral hazard is one of the main elements, if not the chief element, of an insurance risk, and it is never negligible. It is always material to the risk. Moral hazard is but another name for a pecuniary interest in the assured to permit the property to burn. Statistics, experience, and observation all teach alike that the moral hazard . . . is greatest when the assured may gain the most by the burning of the property. The extent of the interest of the assured in the property insured measures the moral hazard, and hence is always material to the risk of the insurance. But any encumbrance upon the interest of the assured diminishes that interest by the amount of the encumbrance, and thus becomes itself material to the risk. The responsibility of the assured, his ability to pay the premiums upon his policy, is another important consideration to the underwriter, and the extent of his interest in the insured property, the encumbrance upon it, and his indebtedness on account of that encumbrance, tend clearly to show his responsibility, and in that way are material to the risk." See also *Secrest v. Hartford F. Ins. Co.* 68 S. C. 378, 47 S. E. 680; *Hutchins v. Cleveland Mut. Ins. Co.* 11 Ohio St. 477; *Lee v. Agricultural Ins. Co.* 79 Iowa, 379, 44 N. W. 683. The instrument, although written upon a real-estate mortgage blank, was a valid mortgage upon the property. The consideration had passed, the mortgagor had lost all control over the instrument, and its entire possession and control had vested in the mortgagee. He might file the same at any time. It is apparent from the testimony that the parties understood it was to be kept from the records for the express purpose of obtaining credit and insurance. The object, so far as concerned the defendant here, was to deceive the insurer into believing that no one, other than Jarosz, had any interest in the property. Such proceedings are not favored.

Ackerman v. Ackerman, 50 Neb. 54, 69 N. W. 388.

While, as the plaintiff contends, forfeitures are looked upon by courts with ill-favor, and will be enforced only when the strict letter of the contract requires it, it is equally true that good faith and fair dealing are required in insurance contracts as much as in any other contract, and that courts are as reluctant to countenance deceiving an insurance company by the concealment of material facts as deceiving any other individual or corporation. We have heretofore said: "When the insurer makes inquiry about facts material to the risk, he is justified in acting on the assumption that the information imparted by the applicant for insurance is correct. He is entitled to know whether the property to be insured is encumbered, and, if so, to what extent, so that he may act intelligently in determining whether he will accept or decline the risk. The representations of the applicant become the basis of insurance, and, if they be false touching matters material to the risk, the contract obtained through their influence cannot be enforced; and it is, in such case, quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance,"—citing cases. *Seal v. Farmers' & M. Ins. Co.* 59 Neb. 253, 80 N. W. 807.

The policy contains the following provision: "This policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof. . . . This entire policy shall be void . . . if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage." It was the duty of Jarosz to be candid and fair in his dealing with the insurance company, and to state the facts with reference to the execution and delivery of this instrument, so that the company might determine for itself whether it was willing to assume the risk. The concealment by him of these facts was a violation of the foregoing condition of the policy, and his negative answer to the question, "Is the property mortgaged or otherwise encumbered?" was untrue. Whether the instrument in question was a mortgage or not, it constituted an "encumbrance" upon the property, presently effective or not, at the option of Nadolinski. It was a lien, as defined by Bouvier: "A hold or claim which one person has upon the property of another as a security for some debt or charge." 2 Bouvier, Law Dict. 226; Sessions v. Irwin, 8 Neb. 5. See also Black, Law Dict., p. 613, defining "encumbrance."

For these reasons, we think the district 29 L.R.A. (N.S.)

court erred in directing a verdict for full amount of the policy. The plaintiff, however, was entitled to a verdict for amount of the insurance upon the policy which was not included in the mortgage. The judgment of the district court therefore be affirmed, if plaintiff files a mittitur of the verdict in excess of \$ with interest at 7 per cent from the 1 day of December, 1907, within forty days; otherwise, the judgment will be reversed and the cause remanded for further proceedings. Costs in this court taxed against plaintiff.

NEBRASKA SUPREME COURT.

STATE BANK OF CHICAGO

v.

FIRST NATIONAL BANK OF OMAHA
App't.

(— Neb. —, 127 N. W. 244.)

Bank — forged draft — payment — recovery.

1. Where the payee of an unaccepted draft, to which the drawer's name has been forged and purporting to have been drawn by a bank in South Dakota upon a bank in Illinois, indorses the instrument generally and sells it for its face value to a Nebraska banker with whom the payee is acquainted, the drawee, after paying the bill, cannot recover back the money.

Headnotes by Root, J.

Note. — Right of drawee of forged check or draft to recover money paid thereon.

For the earlier cases involving this question, see note to First Nat. Bank v. I of Wyndmere, 10 L.R.A. (N.S.) 49. At that note, the cases here are limited to those involving forgery of the instrument itself, and do not include forgery of endorsements or alteration of genuine instruments.

The later cases support the rule that drawee cannot recover money paid to bona fide holder on a forged check or draft, and in most of the cases the decision is based on the ground of estoppel, as set forth in subdivision II. of the earlier cases. *National Bank v. First Nat. Bank*, 141 App. 719, 125 S. W. 513; *Trust Co. of America v. Hamilton Bank*, 127 App. 515, 112 N. Y. Supp. 84; *National Bank of Mechanics' Nat. Bank* (Mo. App.) 117 W. 429; *National Bank v. German-American Bank* (Mo. App.) 127 S. W. 434; *of Williamson v. McDowell County*, 66 W. Va. 545, — L.R.A. (N.S.) —, E. 761.

In *Pennington County Bank v. State Bank*, 110 Minn. 263, 26 L.R.A. (N.S.) 849, 125 N. W. 119, and *Polizzotto v.*

unless it pleads and proves that the holder was negligent in purchasing the instrument or in indorsing it, or withheld from the drawee, at the time the bill was paid, some information or grounds for suspicion within his knowledge concerning the genuineness of the bill.

Same — bona fide purchaser.

2. In such a case the cashing bank, if it acted in good faith in the transaction, is not required, in order to acquit itself of a charge of negligence in purchasing the bill, to prove that, before such purchase, it inquired of the drawer whether the instrument was genuine, or communicated with the drawee to learn whether the bill would be accepted.

Draft — forged — indorsement — warranty of drawer's signature.

3. Where such a draft, by reason of the payee's indorsement, is negotiable by delivery, an indorsement by the holder is not a warranty to the drawee that the drawer's signature is genuine.

(June 29, 1910.)

APPEAL by defendant from a judgment of the District Court for Douglas County overruling a demurrer to the petition in an action brought to recover the amount paid on a certain forged draft. Reversed.

The facts are stated in the opinion.

Mr. Isaac E. Congdon, for appellant:

As between the drawee and a good-faith holder of a check, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled once for all; and if overlooked, and payment is made, it must be deemed final.

Ellis v. Ohio L. Ins. & T. Co. 4 Ohio St. 628, 64 Am. Dec. 610; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 207, 41 L.R.A. 584, 65 Am. St. Rep. 748, 50 N. E. 723; *Germania Bank v. Boutell*, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327; *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 327, 44 L.R.A. 131, 77 N. W. 1045; *Price v. Neal*, 3 Burr.

ple's Bank, 125 La. 770, — L.R.A.(N.S.) —, 51 So. 843, the refusal to permit a recovery is based on the ground of negligence. In the former it was held that a bank paying to a bona fide holder a forged check purporting to be drawn by one of its depositors could not recover from an innocent holder; and the mere fact that the party presenting the check is a stranger to the one who becomes a bona fide holder is not sufficient evidence of negligence to prevent it from becoming a bona fide holder. In the latter, where the signature to a check was not the same as that agreed upon between the bank and the depositor, though part of it was

1355; *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *First Nat. Bank v. Ricker*, 71 Ill. 439, 22 Am. Rep. 104; *First Nat. Bank v. Northwestern Nat. Bank*, 152 Ill. 296, 26 L.R.A. 289, 43 Am. St. Rep. 247, 38 N. E. 739; *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 10, 7 L.R.A. 849, 13 S. W. 339; *Commercial & F. Nat. Bank v. First Nat. Bank*, 30 Md. 11, 96 Am. Dec. 554; *Star F. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442; *Iron City Nat. Bank v. Peyton*, 15 Tex. Civ. App. 184, 39 S. W. 223; *Bank of St. Albans v. Farmers' & M. Bank*, 10 Vt. 141, 33 Am. Dec. 188; *National Park Bank v. Ninth Nat. Bank*, 46 N. Y. 77, 7 Am. Rep. 310; *Farmers' & M. Bank v. Bank of Rutherford*, 115 Tenn. 64, 112 Am. St. Rep. 817, 88 S. W. 939; 2 *Bolles*, *Modern Law of Banking*, pp. 720, 721; *Neal v. Coburn*, 92 Me. 139, 69 Am. St. Rep. 495, 42 Atl. 348; *Gloucester Bank v. Salem Bank*, 17 Mass. 33; *First Nat. Bank v. First Nat. Bank*, 151 Mass. 282, 21 Am. St. Rep. 450, 24 N. E. 44; *Deigham Nat. Bank v. Everett Nat. Bank*, 177 Mass. 362, 83 Am. St. Rep. 286, 59 N. E. 62; *Goddard v. Merchants' Bank*, 4 N. Y. 147; *Woods v. Colony Bank*, 114 Ga. 683, 56 L.R.A. 929, 40 S. E. 720; *National Bank v. Berfall*, 70 N. J. L. 757, 66 L.R.A. 599, 103 Am. St. Rep. 821, 58 Atl. 189, 1 A. & E. Ann. Cas. 630; *Morris v. Beaumont Nat. Bank*, 37 Tex. Civ. App. 97, 83 S. W. 36.

Mr. M. L. Learned for appellee.

Root, J., delivered the opinion of the court:

This is an action by the drawee of a forged draft to recover from a holder thereof money paid to satisfy that instrument. The plaintiff prevailed upon the defendant's demurrer to the petition. The defendant appeals.

The plaintiff alleges in its petition that the defendant, through its agent, the Continental National Bank of Chicago, on November 29, 1907, caused to be presented to the plaintiff, through the Chicago clearing

genuine and obtained on the paper for another purpose, the whole being such as to arouse suspicion of forgery, it was held that the bank could not be protected in paying it without inquiry.

Canadian Bank v. Bingham, 46 Wash. 657, 91 Pac. 185, adopts the change of situation rule, and holds that where a drawee bank pays a forged check to another bank, which cashes it, it may recover the amount, in the absence of a showing that the defendant was not in as good a position as if the drawee had immediately detected the forgery and given notice thereof.

R. L. S.

house, a certain draft of which the following is a copy:

\$800. The German Bank. No. 9,638.

Eureka, South Dakota, Nov. 23, 1907.

Pay to the order of Chas. Viterna, \$800.-00 eight hundred dollars.

E. Moog, A. Cashier.

To the State Bank of Chicago, Chicago, Ill.

The instrument was indorsed: "Chas. Viterna. Pay to the order of Continental National Bank Chicago, Ill., First National Bank, Omaha, Nebr. L. L. Kountze, Cashier."

The plaintiff further alleges that, believing the instrument to be the genuine draft of said E. Moog, it accepted the same and paid it to the defendant through the Continental National Bank; "that the defendant, prior to the presentation, acceptance, and payment of said draft as hereinbefore alleged, paid to Charles Viterna, named in said draft as payee, knowing him to be said Viterna, eight hundred dollars (\$800), the amount named in said draft; without any knowledge or information as to whether said draft would be accepted or paid by the plaintiff, and without taking any steps to ascertain whether or not said draft was a genuine draft of the above-named E. Moog, assistant cashier of the German Bank of Eureka, South Dakota." The plaintiff also alleges the draft was forged, but its true character did not become known until December 12, 1907. Immediately thereafter the plaintiff advised the defendant of said fact and demanded repayment of the \$800, which demand was refused. Counsel for the respective litigants stated at the bar that the negotiable instruments statute does not control this case, and we shall treat their statement as correct for the purposes of this case.

1. The great weight of authority sustains the proposition that as between the drawee and a good faith holder of a draft, the drawee bank is to be deemed the place of final settlement, where all prior mistakes and forgeries shall be corrected and settled once for all; and if not noticed, and payment is made, the money cannot be recovered back. *Price v. Neal*, 3 Burr. 1355. *Germania Bank v. Boutell*, 60 Minn. 189, 27 L.R.A. 635, 51 Am. St. Rep. 519, 62 N. W. 327. The cases are annotated in a note to *First Nat. Bank v. Bank of Wyndmere* 10 L.R.A.(N.S.) 49. Courts and text-writers generally recognize that the preponderance of authority is in favor of the rule, but it seems to conflict with a well-established principle of law that money paid by mistake may be recovered back, and has not been accepted without qualification by all

of the American courts. *North Dakota* refuses to follow *Price v. Neal*, supra, and has held that the principles of equity should control a transaction between the drawee and a holder of a forged check or draft. *First Nat. Bank v. Bank of Wyndmere*, supra. The position assumed by *North Dakota* is in harmony with suggestions made by many text-writers but, far as we are advised, is not sustained by the opinion of any other court. Intermediate the cases adhering to the ancient rule and *First Nat. Bank v. Bank of Wyndmere* one may find cases qualifying the broad rule promulgated in *Price v. Neal*, supra.

The Massachusetts supreme court holds that the failure of the drawee to detect the forgery at the time the draft is presented and paid will not preclude it from recovering the money from a holder "who took the check under circumstances of suspicion without proper precaution, or whose conduct has been such as to mislead the drawee or induce him to pay the check without the usual security against fraud." *First Nat. Bank v. First Nat. Bank*, 151 Mass. 280, 21 Am. St. Rep. 450, 24 N. E. 44, 45. In the cited case the cashing bank received the check from an unknown person, payable to bearer, and without requiring him to identify himself, although there was a local custom requiring identification in such cases. It was held that the negligence of the cashing bank lulled the drawee into a false sense of security, and the latter could not recover back the money paid. In *National Bank v. Bangs*, 106 Mass. 441, 444, 8 Am. Rep. 3 the court holds the drawee should be permitted to recover if the party receiving the money in any manner contributed to the success of the fraud, or to the mistake fact under which the payment was made.

The plaintiff relies upon our decision in *First Nat. Bank of Orleans v. State Bank of Alma*, 22 Neb. 769, 3 Am. St. Rep. 236 N. W. 289. That case was decided upon a statement of facts to the effect that B. Claypool maintained a deposit in each of said banks. A stranger presented to the Orleans bank a check upon the Alma bank bearing the name of Claypool as drawer and payable to A. J. Gype or bearer. The Orleans cashier compared the signature on the check with Claypool's genuine signature upon the bank's book, and, without requiring the holder to identify himself or to account for the manner in which he secured possession of the check, paid it. In due course, through a bank where in the litigants each maintained a deposit, the check was paid and charged to the account of the Alma bank and later delivered to Claypool, who denounced the instrument as a forgery. We held that

drawee should recover the money paid. Some remarks in the argument of our late chief justice, taken apart from the facts of the case, lend color to the plaintiff's argument in the instant one. At the bar it was argued that since the check on the Alma bank was payable to bearer, identification of the holder was an immaterial fact, and the entire argument in the opinion should be considered with relation to the obligation of the cashing bank to ascertain at its peril that the check was a genuine instrument. The principle underlying the opinion is that the cashing bank was negligent in not availing itself of all means at its command to ascertain whether the check was genuine. Business men and courts alike recognize that ordinary prudence forbids the purchase of a check from a stranger, regardless of whether the paper was payable to order or bearer. The instrument considered in the Alma Case was an ordinary check, not designed for circulation, but for immediate presentment. First Nat. Bank v. Miller, 37 Neb. 500, 40 Am. St. Rep. 499, 55 N. W. 1064. As stated by Judge Maxwell, the Alma bank did not know but that Claypool had been present when the check was presented by the holder to the Orleans bank, and had the cashing bank made inquiries concerning the identity of the holder or the manner in which he became possessed of the instrument, the probabilities are that he would not have withstood the ordeal, but the fraud would have been discovered. In *Germania Bank v. Boutell*, supra, the duty of the cashing bank to require the holder to identify himself is recognized. The rule stated in the Orleans Case has been adopted in Massachusetts, in *People's Bank v. Franklin Bank*, 88 Tenn. 299, 6 L.R.A. 724, 17 Am. St. Rep. 884, 12 S. W. 716; *Canadian Bank v. Bingham*, 30 Wash. 484, 60 L.R.A. 955, 71 Pac. 43, and has been recognized in *First Nat. Bank v. Marshalltown State Bank*, 107 Iowa, 327, 44 L.R.A. 131, 77 N. W. 1045.

In *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628, 64 Am. Dec. 610, a local custom obtained among the banks of Cincinnati requiring the cashing bank, before purchasing a check presented by a stranger and drawn upon another bank, to make careful inquiry concerning his identity, and to ascertain whether the paper was genuine and the holder was the owner thereof. The opinion turns upon the bank's negligence in failing to comply with this local custom.

In the case at bar, Viterna was payee of the forged draft, and was known to the defendant at the time it purchased the bill. The draft purports to be a foreign bill of exchange, an instrument that for 29 L.R.A. (N.S.)

many purposes is intended to circulate as money for a limited period of time; the forgery consisted in forging the name of the drawer, and not in raising the amount of a genuine bill, and the drawer maintains its place of business in a neighboring state. The plaintiff does not plead that any suspicious circumstances surrounded the purchase of the bill by the defendant, that Viterna was not a man of fair character or so situated that the possession and presentation by him of a draft for \$800 would excite suspicion in the mind of any prudent banker; nor does the plaintiff charge that at any time prior to the presentation of said instrument, the defendant acquired any knowledge or entertained a suspicion concerning the forgery, which it withheld from the plaintiff. The plaintiff does charge that the defendant did not take any steps to ascertain whether the draft was genuine or would be paid; but the statement, admitted by the demurrer to be true, must be taken into consideration in connection with the fact that the drawer was in South Dakota, the drawee in Chicago, and the payee was known to the defendant, a resident of Nebraska. It is not pleaded that there was an agreement between the litigants that drafts drawn on each other should not be cashed if presented for sale by a payee known to the cashing bank, unless it first made inquiry concerning the instrument, or that any such custom obtained in Omaha or Chicago; or that the defendant had any means at hand whereby it could have ascertained the genuineness of Moog's signature. In fact, so skillfully was that signature forged that it deceived the drawee, so that had Viterna been acquainted with the paying teller or other employee or officer charged by the plaintiff with the duty of identifying signatures to its customers' drafts, it is more than probable that it would have cashed the draft if the payee had presented the instrument for payment.

In the Orleans Case the cashing bank had the drawer's genuine signature to compare with the name attached to the check, and it also had the power to demand that the holder should identify himself; it availed itself of but one safeguard against fraud, and we are entirely satisfied with our opinion holding that under the circumstances the Orleans bank was guilty of negligence. But in the case at bar it is not alleged that the defendant had any means other than the identity of the payee to prove the genuineness of the draft. Until the legislature shall provide that a bank is guilty of negligence in purchasing a foreign draft, fair on its face, from a known payee, unless it first communicates

with the drawer and the drawee to learn whether the draft is genuine, we do not feel justified in extending the rule announced in the Orleans Case, *supra*. Drafts aggregating many billions of dollars in value have been issued, negotiated, accepted and paid by merchants and bankers in reliance upon the rule announced in *Price v. Neal*, 3 Burr, 1355, and to the general satisfaction of the commercial world. So far as we are advised, in but one state of the Union, Pennsylvania, has the legislature modified that rule. Merchants and bankers in the great centers of the English speaking world have not moved the legislatures to modify this principle of the law merchant, and the courts should hesitate before substituting the philosophy of logicians for a practical rule evolved from the necessities of commerce.

The plaintiff also cites *First Nat. Bank v. First Nat. Bank*, 4 Ind. App. 355, 51 Am. St. Rep. 221, 30 N. E. 808, but it should not be seriously considered as an authority in the case at bar, because it refers to a forged school order which the learned judge writing that opinion states, at page 303 of 4 Ind. App., is not negotiable according to the law merchant. The court also holds the indorsement "for collection" by the holder of the order tended to divert scrutiny by the drawee of the drawer's signature, because such an indorsement would indicate the instrument was not circulating as negotiable paper.

The plaintiff further cites *First Nat. Bank v. Northwestern Nat. Bank*, 40 Ill. App. 640. This case was appealed to the supreme court of that state and is reported in 152 Ill. 296, 26 L.R.A. 289, 43 Am. St. Rep. 247, 38 N. E. 739. In that case checks purporting to have been drawn by the Central Union Telephone Company upon the Northwestern National Bank of Chicago, payable in four instances to "F. P. Ross, Manager" and in one case to "C. H. Wilson, A. G. Supt.," were received by the First National Bank through the clearing house. The proof established that the payees were employees of the telephone company, but were not entitled to the checks, knew nothing about them, and their indorsements, as well as the signature of the drawer, had been forged. The court holds that while the drawee by paying a draft is estopped from thereafter denying the drawer's signature, it does not warrant the signature of any indorser, but the indorser warrants the genuineness of all preceding indorsements; that the parties stood as though the bills were genuine but the indorsements of the payees forged, and the drawee for that reason could recover the money paid by it to the holder 29 L.R.A. (N.S.)

of the paper. The opinion is sound but has no application to the instant case, because there were no forged indorsements upon the bill in question.

Ford v. People's Bank, 74 S. C. 180, 10 L.R.A. (N.S.) 63, 114 Am. St. Rep. 986, 54 S. E. 204, 7 A. & E. Ann. Cas. 744, is cited by the plaintiff. In that case the plaintiff's drawee paid a forged draft, and charged, in his petition to recover back the money, "that the plaintiffs paid the said draft upon presentation, upon the faith and credit of the indorsement of the said defendant." A general demurrer to the petition was sustained, and the supreme court of that state holds that a general indorsement of a forged bill by the holder thereof is a representation that the drawer's signature is genuine, upon which the drawee may rely, and, in case the instrument is forged, may recover back money paid the holder. The opinion is against the weight of authority, and is not supported by any of the cases cited by that court upon this point, except the case of *Woods v. Colony Bank*, 114 Ga. 683, 56 L.R.A. 929, 40 S. E. 720, and the opinion filed in the last-named case cites *National Bank v. Bangs*, 106 Mass. 441, 444, 8 Am. Rep. 349, in support of the principle announced by it and later by the South Carolina court.

In the Massachusetts case the cashing bank was named as payee in a forged check payable to its order, so the instrument could not become current except by the bank's indorsement. The court holds that the payee was negligent in taking the check from a stranger without proof of his identity, and, by indorsing the check, gave it currency and standing. In the Georgia case the draft was payable to bearer, and the opinion is sound, based upon the negligence of the cashing bank in not requiring the party from whom it purchased the instrument to identify himself; but so far as it holds upon the reported facts, that the indorsement by the holder was a warranty to the drawee that the drawer's signature was genuine, it is unsound in principle, and will not be accepted as a correct statement of the law.

First Nat. Bank v. Bank of Wyndmere, cited by plaintiff, *supra*, does sustain its argument; but we are of opinion that the Orleans Case, *supra*, commits this court to the doctrine that the drawee must establish the cashing bank's negligence, or bad faith, to justify a recovery. Since the drawee should only recover in this suit in case the cashing bank was negligent or has acted in bad faith, the burden is upon the former to plead such negligence or *mala fides*. The pleader in the instant

case, in our opinion, has not stated in his petition facts sufficient to establish that the defendant was negligent, or that it acted in bad faith in purchasing from Viterna the forged draft in question.

The judgment of the District Court, therefore, is reversed, and the cause remanded for further proceedings.

WASHINGTON SUPREME COURT.

NORTH AMERICAN DREDGING COMPANY, Appt.,

v.

C. J. TAYLOR, County Treasurer, Respnt.

(56 Wash. 565, 106 Pac. 162.)

Tax — ship — steam dredge.

A self-propelling seagoing steam dredge engaged for a long period of time on government work in a particular county of the state where it is located on the day when taxes are assessed is taxable there regardless of where its owner resides or its home port is located.

(January 8, 1910.)

Note. — Where ships are taxable.

The general rule stated in the foregoing opinion, that the situs for taxation of a vessel engaged in foreign or interstate commerce and merely touching at local ports, regularly or otherwise, as an incident of such commerce, is at the home port of the vessel, or at the domicile of the owner, and the exception to that general rule in case a vessel is so used within a particular state, other than that of the home port or domicile of the owner, as to impress her with a local character, are both well sustained, as is shown by the cases cited in the opinion and in the note to *Johnson v. De Bary-Baya Merchants' Line*, 37 L.R.A. 518, which covers the earlier cases on the subject, and also by the later cases cited in this note.

The general rule was recently applied by the United States Supreme Court in *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205, reversing 117 Ky. 161, 171, 77 S. W. 686, 79 S. W. 290, on second appeal 27 Ky. L. Rep. 585, 85 S. W. 1096, holding that a vessel engaged in interstate commerce between ports of different states, including Illinois and Kentucky, owned by an Illinois corporation, which had its chief office and place of business in Chicago, was not subject to taxation in Kentucky although the vessel was registered at Paducah, Kentucky, and that name was painted on the stern as her home port. This case is subsequently discussed so far as it bears on the question what is deemed to be the home port for the purposes of taxation).

29 L.R.A.(N.S.)

APPEAL by plaintiff from a judgment of the Superior Court for Chehalis County in defendant's favor in an action brought to restrain the collection of taxes alleged to have been wrongfully assessed against certain personal property. Affirmed.

The facts are stated in the opinion.

Mr. W. H. Abel, for appellant:

The domicile of the owner is the place where vessels are to be taxed, unless they have acquired an actual permanent situs elsewhere.

Ayer & L. Tie Co. v. Kentucky, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205.

Presumptively, the home port is the place where vessels are taxable.

Com. v. American Dredging Co. 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 9 Am. St. Rep. 116, 15 Atl. 443; *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 490, 37 L.R.A. 518, 19 So. 640; *People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs.* 58 N. Y. 242; *North Western Lumber Co. v. Chehalis County*, 25 Wash. 95, 54 L.R.A. 212, 87 Am. St. Rep. 747, 64 Pac. 909.

Messrs. William E. Campbell, J. L.

In *Yost v. Lake Erie Transp. Co.* 50 C. C. A. 511, 112 Fed. 746, Judge Lurton, now of the United States Supreme Court, in an opinion discussing the cases at considerable length, declares that the rule is now settled in the courts of the United States, and by the weight of opinion in the state courts, that registered water craft engaged actually in interstate or foreign commerce are only subject to property taxation at their home port, which under the act of Congress is that port nearest to the domicile of the owner. The principle thus declared by him was specifically applied by holding that vessels owned by a Michigan corporation, registered at Detroit, hailing from the port of Monroe in the same district as Detroit (their names and home port being painted on the stern), and engaged chiefly in navigating between Toledo and Buffalo, though sometimes between Buffalo and Lake Superior points and between Toledo and Erie (a Pennsylvania port), were not subject to local taxation in Ohio, notwithstanding that a majority of the directors and officers of the corporation resided at Toledo; that the general manager had his office and a force of clerks there, that none of the steamers had ever been in the home port, in Michigan, and could not get nearer than 4 or 5 miles of that port; that the only property of the company at Monroe was a sign on the office door of a lumber company, and that for several years no meeting of the company had ever been held at Monroe.

So, upon the ground that the home port of the vessel was San Francisco, where her managing owner was domiciled, it was held

McMurray, and H. G. Rowland for respondent.

Chadwick, J., delivered the opinion of the court:

The steam dredger *Pacific* was built at Tacoma, in Pierce county, Washington, in the year 1903, and was from that time until about April 7, 1905, almost continuously engaged in dredging or was lying in the harbors of Pierce county. In the year 1904, appellant listed the dredger and its equipment for taxation in Pierce county, and thereafter paid the taxes for that year. The property was also listed by the superintendent in charge for the year 1905. On April 1, 1905, and for some time prior thereto, appellant had been engaged in the

performance of a government contract the harbor at Tacoma. This contract expired on March 1, 1905, and was completed under an extension agreement. On April 9, 1905, the *Pacific* was taken, with its equipment and appliances, to Honolulu in the Hawaiian Islands, by way of San Francisco, California, there to be engaged for a definite period. The dredger was a seagoing, self-propelling vessel. On about November 2, 1907, the dredger was brought from without the state of Washington to Grays Harbor, in Chehalis county, and was there engaged in dredging the harbor, under a contract with the United States government, expiring on or before the 15th day of October, 1908. On about March 5, 1908, the respondent,

in *Olson v. San Francisco*, 148 Cal. 80, 2 L.R.A.(N.S.) 197, 113 Am. St. Rep. 191, 82 Pac. 850, 7 A. & E. Ann. Cas. 443, that a vessel was subject to assessment for taxation at San Francisco, notwithstanding that she had been constructed in the state of Washington and temporarily registered there and, having been engaged from the time of her construction in commerce on the high seas between a port in Washington and foreign ports, had not received permanent registration at San Francisco.

In *California Shipping Co. v. San Francisco*, 150 Cal. 145, 88 Pac. 704, vessels employed in foreign and interstate commerce owned by a California corporation and registered under the laws of the United States at the port of San Francisco were held properly assessable for taxation at San Francisco, notwithstanding that some of them had never been within the waters of that state and others were not there at the time fixed for assessment and had not been there since; there being no facts alleged showing that they had acquired an actual situs outside of the state of California, or that they were not engaged solely in foreign or interstate business, or that the city and county of San Francisco was not the domicile or place of residence of the owner.

The exception above stated has also been applied by late cases.

Thus, vessels which, though engaged in interstate commerce, are employed in such commerce wholly within the limits of a state, are subject to taxation in that state, although they may have been registered or enrolled at a port outside its limits. *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, affirming, 102 Va. 576, 102 Am. St. Rep. 855, 46 S. E. 783. The vessels which in this case were held subject to taxation in Virginia belonged to a nonresident corporation, and were regularly enrolled under United States laws outside of the state of Virginia. They were employed in transportation of passengers and freight wholly in that state, as an adjunct or branch, however, of the main line 29 L.R.A.(N.S.)

of the company between New York and Norfolk. The court said that it is true that § 4141 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 2808, there is created what may be called the home port of the vessel, an actual situs which may control the place of taxation in the absence of an actual situs elsewhere.

In *McRae v. Bowers Dredging Co.* 90 F. 360, steam dredges owned by an Illinois corporation, but which were employed in executing a large contract in the harbor of the city of Seattle, which would in the ordinary course of such work require several years for its completion, were held subject to taxation in Washington. In view of the decisions of the United States Supreme Court that the fact that a vessel is engaged in interstate or foreign commerce does not necessarily prevent it from acquiring a local situs for purposes of taxation if it is used wholly within the limits of the state, it would be hardly necessary for the court in this case to put its decision, as it did, upon the ground that the dredges, though employed to do work in aid of navigation, were instruments of interstate or foreign commerce, and for that reason were not exempt from local taxation.

So, ocean-going tug boats are not exempt from taxation by the state in whose waters they are exclusively employed, by the fact that they are registered and taxed at a port in another state where the owner is domiciled. *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 54 L.R. 212, 87 Am. St. Rep. 747, 64 Pac. 909.

That vessels may acquire an actual situs is a proposition too well settled to be questioned, and the place of actual enrollment and registration is not controlling if the actual situs is elsewhere. *Galveston v. M. Guffey Petroleum Co.* (Tex. Civ. App. 113 S. W. 585. The vessels in this case were owned by a Texas corporation domiciled in Jefferson county, and plied between Port Arthur, in that county, and Philadelphia and other points along the Atlantic seaboard. They were registered at the port of Galveston (the nearest port to the domicile of the corporation, Port Arthur not being

treasurer of Chehalis county, was about to seize and sell the Pacific, with all equipment, appurtenances, and appliances, under a writ issued by the treasurer of Pierce county, when he was restrained by an order of the superior court of Chehalis county. The fact is further stipulated that the person who signed the detail list for 1905 was the superintendent of the dredger, having authority to purchase supplies, contract for repairs, to employ labor, and issue time checks for the payment of labor; and that, if the officers of appellant were present, they would testify that the superintendent had no authority to list the said property for taxation. It also appears that in 1903 the dredger was temporarily enrolled in the office of the col-

lector of customs at Tacoma under a carpenter's certificate; that the home port of the dredger was given at that time as Camden, New Jersey; that the name and port were painted on the stern of the dredger, as required by law, just prior to her sailing for San Francisco. This was done under an order of the shipping commissioner. The fact is also stipulated that, at all times during the performance of the government contract in Tacoma harbor, it was the intention of the appellant to remove the dredger from Tacoma, and from the state of Washington, as soon as the government contract should be completed. Upon the hearing in the court below, the prayer of appellant for a restrain-

port of entry at which vessels could be registered or enrolled), and none of them had ever entered the port of Galveston. The appellate court said that the trial court, having determined by a finding, which was not disputed, that the actual situs of the vessels was at Port Arthur, the city of Galveston had no jurisdiction to assess them for taxation. Upon a substantially similar state of facts, except that in the latter case it appeared that some of the vessels involved had been at Galveston, a contrary result was reached, upon the original hearing in *State v. Higgins Oil & Fuel Co.* (Tex. Civ. App.) 116 S. W. 617. But upon a rehearing the decision in the former case was followed, it appearing that the supreme court had in the meantime refused a writ of error in that case. Apparently the court in the last case would not, as an independent proposition, have found that the vessels had an actual situs in Jefferson county, but said that if the finding to that effect in the former case was an admissible one on the undisputed facts, it did not see how a contrary finding would be proper. It therefore evidently regarded such finding, in view of the action of the supreme court, as binding upon it in the latter case.

Tugs and barges owned by a Virginia corporation engaged in carrying coal from Lambert's Point, in the county of Norfolk, to New York, New Haven, Providence, and Boston, and which, though registered in Philadelphia, never go to that point, are properly taxable in Virginia, and in the county of Norfolk. The court said that the place of enrolment or registration of vessels does not fix their situs for taxation, but it is a circumstance to be considered. *Norfolk & W. R. Co. v. Board of Public Works*, 97 Va. 23, 32 S. E. 779.

Both the general principle and the exception are also recognized in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 23, 35 L. ed. 616, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, where the court, in discussing the liability of cars used in interstate commerce to local taxation, said *arguendo*: "Ships or vessels, indeed, engaged in interstate or foreign commerce upon the high 29 L.R.A. (N.S.)

seas or other waters which are a common highway, and having their home port, at which they are registered under the laws of the United States at the domicile of their owners in one state, are not subject to taxation in another state at whose ports they incidentally and temporarily touch for the purpose of delivering or receiving passengers or freight. But that is because they are not, in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, and therefore can be taxed only at their legal situs,—their home port and the domicile of their owners."

In *American Mail S. S. Co. v. Crowell*, 70 N. J. L. 54, 68 Atl. 752, the court held that vessels owned by a New Jersey corporation, but engaged in trade between ports of Philadelphia and Boston and the West Indies, and having never been in New Jersey waters, the state had no authority to authorize their assessment (citing *Union Refrigerator Transit Co. v. Kentucky*, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 136, 4 A. & E. Ann. Cas. 493). Upon the facts as stated in the opinion in this case, the result seems opposed to the weight of authority, including decisions of the United States Supreme Court. The case cited in support of the decision merely holds that the home state of a railroad corporation has no authority to impose a tax upon rolling stock permanently located in other states and employed there in the prosecution of its business. That decision, however, apparently rested upon the ground that, under the decision in *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876, the rolling stock there involved had acquired a situs elsewhere, whereas the Supreme Court decisions themselves seem to negative the acquisition by a vessel of a situs for taxation apart from the domicile of the owner or the home port of the vessel, upon the state of facts that appear in the *Crowell* Case. Indeed, in the *Pullman's Palace Car Company* Case the court expressly calls attention to the distinction in this respect between vessels having their situs fixed by act of Congress

ing order was denied, and judgment was entered in favor of respondent.

Error is assigned as follows: "(1) It was error to hold that the Pacific had a situs in 1905, for purposes of taxation, within the state of Washington. (2) Appellant was deprived of its property without due process of law, contrary to article 14 of the Federal Constitution. (3) It was error to render judgment, denying an injunction, and sustaining the validity of said tax."

If the trial court was right in holding the state of Washington to be the situs of the property, that fact is decisive of the

case, as the second and third assignments are only incidental thereto. It is the general rule that vessels engaged in state or interstate traffic, with no established situs, but going in and out of a port upon a fixed run, or as the necessities of the business engaged upon may demand, or when engaged upon no fixed schedule, but sailing from one port to another as a carrier of state, interstate, or international traffic, shall be assessed at the home port, or at the domicile of the owner. *Northwestern Lumber Co. v. Chehalis County*, 25 Wash. 95, 54 L.R.A. 212, 87 Am. St. Rep. 747, 64 Pac. 909; *Ayer & L. Tie Co. v.*

and their course over navigable waters and touching land only incidentally and temporarily, and cars or vehicles of any kind having no situs so fixed and traversing the land only.

The decision of the United States Supreme Court in *Ayer & L. Tie Co. v. Kentucky*, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205, has already been referred to so far as it negated a local situs apart from the domicile of the owner, or at least apart from that domicile and the home port of the vessel, by reason of the waters in which the vessel was employed and the ports between which she plied.

As pointed out in the note to *Olson v. San Francisco*, 2 L.R.A. (N.S.) 197, however, the decision of the Kentucky court (which is reversed), that the vessel had a local situs for the purpose of taxation in Kentucky, was not based upon the ground that the vessel was used partly in Kentucky waters and touched Kentucky ports, but upon the ground that the registering of the vessel at Paducah and the painting of that name on her stern had the effect to make that place her home port, and consequently her situs for taxation, notwithstanding that the corporation was domiciled in Illinois, and that, but for the supposed effect of the act of Congress of 1884, Chicago would be regarded as her home port under § 4141 of U. S. Rev. Stat., U. S. Comp. Stat. 1901, p. 2808. It is not entirely clear, from the opinion of the United States Supreme Court, whether the reversal of that decision was upon the ground that the situs of a vessel for the purposes of taxation, assuming that she has not acquired an actual situs elsewhere, is at the domicile of the owner irrespective of the state where the true home port may be located, or upon the ground that since, as well as before, the act of 1884, the home port of a vessel for the purposes of taxation at least, is that defined in § 4141, namely, the port "at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides." In the latter view, the error of the Kentucky court was in holding that the home port of the vessel for the purposes of taxation was at Paducah, and not at Chicago, where the owner (a

corporation) was domiciled. The language of the opinion, however, taken by itself, seems to support the former view, as the court says that, with certain exceptions, the rule is well established that the "domicil of the owner is the situs of a vessel for the purposes of taxation, wholly irrespective of the place of enrolment." Again: "But if enrolment at that place [Paducah] was within the statutes it is wholly immaterial, since the previous decision to which we have referred decisively establish that enrolment is irrelevant to the question of taxation, because the power of taxation of vessels depends either upon the actual domicile of the owner or the permanent situs of the property within the taxing jurisdiction." In spite of this language, however, it is probable that the court did not mean to decide that the situs of the vessel for taxation would be at the domicile of the owner, rather than at the home port of the vessel, as defined in U. S. Rev. Stat. § 4141, if these places should be in different states. As already intimated the court was not called upon to pass on that point, if it was of the opinion, contrary to the view of the Kentucky court, that the home port of a vessel for the purposes of taxation is that defined in § 4141, irrespective of the act of 1884 or of anything done under that act. That point would only be presented upon the assumption that the court agreed with the Kentucky court in holding that the home port was at Paducah, and meant to place its decision upon the ground that the domicile would prevail over the home port in this respect. The statement above quoted, to the effect that the situs for taxation is at the domicile of the owner, may have been made in that form, because the home port, as defined in § 4141, was at Chicago, and that was also the domicile of the corporation. As a matter of fact, it seldom happens that the domicile and the home port, as defined in § 4141 (namely "the port at or nearest to which the owner, if there be but one, or if more than one, the husband or acting and managing owner of such vessel, usually resides"), are in different states, though that is, of course, possible under this definition. Owing, therefore, to the fact that for practical purposes it is generally immaterial whether the domicile or the home

Kentucky, 202 U. S. 409, 50 L. ed. 1082, 26 Sup. Ct. Rep. 679, 6 A. & E. Ann. Cas. 205; *Com. v. American Dredging Co.* 122 Pa. 386, 1 L.R.A. 237, 2 Inters. Com. Rep. 221, 237, 9 Am. St. Rep. 116, 15 Atl. 443; *California Shipping Co. v. San Francisco*, 150 Cal. 145, 88 Pac. 704; *Olson v. San Francisco*, 148 Cal. 80, 2 L.R.A. (N.S.) 197, 113 Am. St. Rep. 191, 82 Pac. 850, 7 A. & E. Ann. Cas. 443; *Johnson v. De Bary-Baya Merchants' Line*, 37 Fla. 499, 37 L.R.A. 518; *American Mail S. S. Co. v. Crowell*, 76 N. J. L. 54, 68 Atl. 752; *People ex rel. Pacific Mail S. S. Co. v. Tax & A. Comrs.* 58 N. Y. 242. How-

ever, a vessel may be assessed without reference to the home port or the residence of the principal owner or agent, when it is put to such use as to impress it with a local character. *National Dredging Co. v. State*, 99 Ala. 462, 12 So. 720; *McRae v. Bowers Dredging Co. (C. C.)* 90 Fed. 380; *Galveston v. J. M. Guffey Petroleum Co. (Tex. Civ. App.)* 113 S. W. 585; *State v. Higgins Oil & Fuel Co. (Tex. Civ. App.)* 116 S. W. 617; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, Id., 102 Va. 576, 102 Am. St. Rep. 855, 46 S. E. 783. It has been held that the de-

port, in this sense, is regarded as the situs for the purposes of taxation, it is not always clear whether the courts mean to refer the situs to the domicile or to the home port. For example, in *Morgan v. Parham*, 16 Wall. 471, 21 L. ed. 303, the statement is that the vessel had its situs at the "home port of New York, where it belonged and where its owner was liable to be taxed for its value." There is a similar ambiguity on this point in the statement of the general rule in the *Pullman Palace Car Company Case*, above quoted.

In *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100, which is one of the cases relied on in the *Ayer Case*, however, the statement is that "it is true by § 4141 there is created what may be called the home port of the vessel, an artificial situs, which may control the place of taxation in the absence of an actual situs elsewhere."

The specific statements in the opinion in the *Ayer Case* that the place of registering or enrolment is immaterial on the situs for taxation may have had reference merely to actual registration or enrolment at points other than the home port as defined in § 4141. As a matter of fact the enrolment in that case was at another point, namely Paducah. It may be remarked in passing that important consequences, other than those in relation to taxation, may depend upon which of the two views above indicated is to be taken of the ground of the decision in the *Ayer Case*.

In *American Mail S. S. Co. v. Crowell*, 76 N. J. L. 54, 68 Atl. 752, the court, upon the supposed authority of the *Ayer Case*, held that vessels engaged in trade between ports of Philadelphia and Boston and the West Indies, owned by a New Jersey corporation having its principal office in one county, were not taxable in another county, although registered pursuant to the act of Congress in the latter municipality. And *Steadsbury Twp. v. Merchants' S. B. Co.* 76 N. J. L. 407, 69 Atl. 958, is to the same effect. As already shown the court in the *Crowell Case* held, apparently as an independent ground for its decision, that New Jersey had no authority to authorize the assessment of the vessel at all.

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Coastwise and seagoing vessels which at the time of the assessment were in the state of Pennsylvania were held, in *Wheaton v. Mickel*, 63 N. J. L. 525, 42 Atl. 843, to be taxable in the township, ward, or taxing district where the owner resides, under a statute declaring that a tax on visible personal property shall be assessed in the township, ward, or taxing district where the property is found, but that the "tax on other personal estate shall be assessed on each individual in the township, ward, or taxing district where he resides." The decision is that tangible personal property of a resident which is not within the state falls within the latter, not the former, clause.

But whether in general and as between different states the constructive situs of the vessel for taxation, assuming that it has no actual situs elsewhere, is to be regarded as at the home port or at the domicile, it would doubtless be competent for a particular state, assuming that it had power to tax the vessel at all, to designate the place within the state at which it should be subject to taxation. These New Jersey cases are, therefore, perhaps not to be regarded as authority upon the question as between different states in which the domicile and the home port may be located. The court in the *Crowell Case*, however, seems to have assumed that the supreme court in the *Ayer Case* meant to locate the constructive situs of the vessel at the domicile, rather than at the home port, in case the two were in different jurisdictions.

The decision in *Teagan Transp. Co. v. Board of Assessors*, 139 Mich. 1, 69 L.R.A. 431, 111 Am. St. Rep. 391, 102 N. W. 273, is merely to the effect that a statute purporting to make all the property of corporations engaged in maritime commerce or navigation taxable only at the place designated in their charters as their general office for business, whereas the property of other corporations is taxable at the place where it actually transacts its principal business, irrespective of the place where its office is located in its articles of incorporation,—is in violation of the constitutional requirement of uniformity in taxation.

G. H. P.

clared intention of the owner concerning the future use or removal of personal property will not exempt it from taxation. *Stoddert v. Ward*, 31 Md. 562, 100 Am. Dec. 83.

The Pacific was built in Pierce county, and never had any other situs. The character of its use was not such as to bring it within the rule allowing taxation at the home port or at the home of the owner or agent. That rule applies only when the use is transitory. The true rule is stated in *National Dredging Co. v. State*, supra, wherein the court said: "It is here as any other property is, or would be here in use upon the public works in Mobile bay. Its use in that work is the same as that of the other property originally embraced in this assessment, and formerly owned by a citizen of Alabama, and by him devoted to this work during previous years, the same as that of the scow which was built in Mobile for this work and has never been beyond the state, and the same as that of another scow built outside of the state for this work. All this other property is property of the state or in the state for the purposes of taxation, though it may at some uncertain future time cease to be property taxable here in consequence of its removal to other jurisdictions, as the property in controversy may some time be carried out of the state. Until that happens, however, both classes of property enjoy the same protection of our laws; both classes are devoted to the same use; the continuation of each class within the state is alike indefinite — the one class cannot, in short, be distinguished from the other in any characteristic which is of importance in determining the question of taxability *vel non*; and hence our conclusion that the property in controversy had become so incorporated with, and a part of, the tangible property of this state, for revenue purposes, as that its taxable situs is here notwithstanding the fact that the domicile of its owner is in another state. *Mobile v. Baldwin*, 57 Ala. 61, 29 Am. Rep. 712; *Boyd v. Selma*, 96 Ala. 144, 16 L.R.A. 729, 11 So. 393; *Burroughs, Taxn.* pp. 40, 41; *Trammell v. Connor*, 91 Ala. 398, 8 So. 495. There is nothing in the nature of this particular property to take it out of the general principle. The fact that it is floating property, and may be moved from place to place and port to port by water, furnishes no more reason for exempting it from taxation here than would exist for the exemption of property which did not float, and could be moved from place to place only over land."

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There must be some reasonable limit to the rule that overcomes the ordinary rule of situs when applied to such property, as we think it must be found in the answer to the question whether the presence in Pierce county of the dredger was temporary or merely indefinite. If the former it would probably not be taxable. If the latter, it would be, so long as it was there at a time when the levy was made as the lien attached. Otherwise, the property might remain an indefinite time running over the period of a dozen contracts or so long as it found profitable employment, and yet be exempt from taxation, though during the whole time the property would receive the protection of the local laws. If the intention merely were allowed to control, we opine that property of this character would never be taxed, unless the conscience of the owner moved him to do it at the home port or at his domicile, which under the facts of this case he would not be bound to do. *American Mail S. S. Co. v. Crowell*, supra. The exceptions to the precept that property shall be assessed at the place where found either depends upon a statute, or results as a rule of necessity to the state and of protection to the owner. Otherwise property would escape taxation altogether, or be subject to taxation wherever it might be found, thus leading to double taxation. No statute is relied upon in this case, and we find none of the elements of necessity which moved the courts in pronouncing the decisions announced in the cases first cited in the opinion. While the Pacific was a seagoing vessel in the sense of being seaworthy and having sufficient power to propel itself on the high seas, it is not engaged, and was never intended that it should be engaged, in commerce on the high seas, to sail from port to port as a carrier on inland waters. The purpose for which it was constructed demands that it remain for indefinite periods in whichsoever labor it may be engaged. Its character and its use give it a situs, and that situs must be held to follow its physical presence and the power to tax cannot be overcome by any intention to remove it at a future time, be it greater or less, or because of its seagoing qualities. It comes within the same category as a pile driver or switch engine, or other property of this character and use.

The judgment is affirmed.

Rudkin, Ch. J., and Fullerton, Morris, and Gose, JJ., concur.

NEW HAMPSHIRE SUPREME COURT.

JOHN F. CRONIN

v.

COLUMBIAN MANUFACTURING COMPANY.

(75 N. H. 319, 74 Atl. 180.)

Master — infant servant — duty to instruct.

1. A master is not bound to instruct a fourteen-year-old boy of average intelligence of the danger of allowing a portion of his

Note. — Duty to warn minor servant of dangers of which he is already aware.

Upon the general subject of the duty of a master to instruct and warn his servants as to perils of the employment, see note to *James v. Rapides Lumber Co.* 44 L.R.A. 33. The earlier cases involving the effect of knowledge of the minor servant upon the master's duty to warn and instruct him are gathered and discussed at page 66 of that note, and this note is supplementary thereto.

Upon the general question whether the duty of the master to instruct or warn servants is delegable, see note to *Anderson v. Pittsburg Coal Co.* 26 L.R.A. (N.S.) 624. As to instructing minor who is of insufficient age or capacity to comprehend dangers of employment, as affecting the master's responsibility, see note to *Bare v. Crane Creek Coal & Coke Co.* 8 L.R.A. (N.S.) 244. As to presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger, see note to *Ewing v. Lenark Fuel Co.* post, p. —.

Cases in which it appears that the servant in fact did not know of the danger are, of course, not within the scope of this note. So, cases in which the servant was not acting with due care for his own safety have not been included.

General rule.

The rule laid down in *CRONIN v. COLUMBIAN MFG. CO.*, that a master is not bound to instruct a minor servant of dangers of the service of which he is already aware, is followed by practically every case in which the question is raised.

The sole purpose of the rule requiring a master to warn and instruct a minor servant is to give information of unknown and unappreciated dangers. Therefore, the reason for the rule does not exist where the minor knows and appreciates all of the hazards of his employment, and the law will not require of the master such an idle thing as his warning and instruction. *Wiggins v. E. Z. Waist Co. (Vt.)* 76 Atl. 38.

The rule requiring a master to instruct his servant and to inform him of danger is only for the purpose of supplying him with information which he is not presumed to have; and if it is shown that the servant

body to project beyond the sides of an elevator on which his duties require him to ride, where he already knows that if he does so he is likely to be caught between the elevator and passing floors and injured.

Same — servant's carelessness — liability.

2. A minor injured by being caught between an elevator on which his duties require him to ride and a passing floor cannot hold his master liable for the injury, where his only explanation of the injury was that he did not think.

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did in fact possess the knowledge, the failure to warn could in no sense be said to be the proximate cause of the injury, and if not the proximate cause of the injury, of course, it could not be actionable negligence. *Ewing v. Lanark Fuel Co.* 65 W. Va. 726, post, —, 65 S. E. 201.

And in *Davis v. Augusta Factory*, 92 Ga. 712, 18 S. E. 974, the court said: "Without doubt, in some cases even minors are not necessarily entitled to any warning at all as to the character of the machinery about which they are at work, or as to the proper method of operating it and avoiding obvious dangers."

So, in *Northern Alabama Coal, Iron, & R. Co. v. Beacham*, 140 Ala. 422, 37 So. 227, it was held that the master is not liable for failure to instruct a servant, where he could not be further instructed by word of mouth or by experience as to the manner of doing the work. The court said: "Longer experience, or rather more practice in handling, tamping, and exploding the cartridges, might have given him a greater muscular deftness in the operation, but the employer is not responsible to the servant for the consequences of the servant's own awkwardness."

The master is not liable for failure properly to instruct and warn a minor servant as to the danger of his employment, where, with respect to the particular peril from which injury resulted, the servant knew all that the most experienced person could have told him. *Beghold v. Auto Body Co.* 149 Mich. 14, 14 L.R.A. (N.S.) 609, 112 N. W. 691.

Even if abstractly there was a duty to instruct or warn the minor servant of dangers incident to the work, its nonperformance is wholly innocuous where he already knew everything in connection with the service, which the discharge of the duty would have brought to his knowledge. *Worthington v. Goforth*, 124 Ala. 656, 28 So. 531.

So, in speaking of the master's duty to inform a servant about thirteen years of age, in regard to the dangers of her work in a cork factory, the court in *Welsh v. Vutz*, 202 Pa. 59, 51 Atl. 591, said: "If her experience had been sufficient to give her the knowledge she would have acquired from proper instructions by the defendant, then there would have been no necessity for such instructions, and no negligence could be

TRANSFER upon exception to the denial of a motion for nonsuit by the Superior Court for Hillsborough County for the opinion of the Supreme Court of an action brought to recover damages for personal injuries for which defendant was alleged to be responsible, which resulted in a verdict for plaintiff. Exception sustained.

Plaintiff was injured by having his foot caught between the elevator on which he was riding in the course of his duties, and a passing floor.

Further facts sufficiently appear in the opinion.

Messrs. Burnham, Brown, Jones, & Warren, for defendant:

The test is whether plaintiff appreciated, or should have appreciated, the danger of

permitting his foot to project beyond the platform of the moving elevator, and if he did, he cannot recover, whether his inability be stated in terms of contributory negligence or assumed risk.

Hamel v. Burgess Sulphite Fibre Co. 74 N. H. 378, 68 Atl. 191; *Kelland v. Jos. Noone's Sons Co.* 75 N. H. 168, 71 Atl. 947; *Hicks v. Claremont Paper Co.* 74 N. H. 154, 65 Atl. 1075.

It was the plaintiff's duty to think about the situation and exercise due care for his own safety.

O'Hare v. Coheco Mfg. Co. 71 N. H. 104, 93 Am. St. Rep. 499, 51 Atl. 257; *Gahagan v. Boston & M. R. Co.* 70 N. H. 446, 55 L.R.A. 426, 50 Atl. 146; *Hamel v. Burgess Sulphite Fibre Co.* supra.

imputed to the defendant for not giving them. Unless, however, her experience went to that extent, it did not relieve the defendant from the imposed obligation to instruct the girl as to her duties and the danger in operating the machine."

Where a minor, although not quite seventeen years of age, is a man in experience, and appears from his own testimony fully to have appreciated the danger, he comes within the rule that the court can say, as a matter of law, that a failure to warn him of the open and apparent dangers is not negligence. *Ryan v. Northern P. R. Co.* 53 Wash. 279, 100 Pac. 880.

So, in *Emma Cotton Seed Oil Co. v. Hale*, 56 Ark. 232, 19 S. W. 600, the court said that if a minor servant receives the information and caution from any source, and undertakes the work, he assumes the risk ordinarily incidental thereto.

So, in the following cases, the general rule that a master is not bound to warn a minor servant of dangers of which he already knows is followed, or at least recognized: *Andersen v. Berlin Mills Co.* 32 C. C. A. 143, 50 U. S. App. 413, 88 Fed. 944; *Worthington v. Goforth and Northern Alabama Coal, Iron, & R. Co. v. Beacham*, supra; *Walton v. Lindsey Lumber Co.* 145 Ala. 661, 39 So. 670; *Richards v. Sloss-Sheffield Steel & I. Co.* 146 Ala. 254, 41 So. 288; *Brammer v. Pettyjohn*, 154 Ala. 616, 45 So. 646; *Ford v. Bodcaw Lumber Co.* 73 Ark. 49, 83 S. W. 346; *East & West R. Co. v. Sims*, 80 Ga. 807, 0 S. E. 595, second appeal 84 Ga. 152, 10 S. E. 513; 20 Am. St. Rep. 352; *Ryan v. Armour*, 166 Ill. 568, 47 N. E. 60; *McCarthy v. Mulgren*, 107 Iowa, 76, 77 N. W. 527; *Bollington v. Louisville & N. R. Co.* 30 Ky. L. Rep. 1260, 8 L.R.A.(N.S.) 1045, 100 S. W. 850; *Cunningham v. Bath Iron Works*, 92 Me. 501, 43 Atl. 196; *Bessey v. Newich-awanick Co.* 94 Me. 61, 46 Atl. 806; *Hettchen v. Chipman*, 87 Md. 729, 41 Atl. 65; *Coullard v. Tecumseh Mills*, 151 Mass. 85, 23 N. E. 731; *Daniels v. New England Cotton Yarn Co.* 188 Mass. 260, 74 N. E. 332; *Doole v. Dane*, 203 Mass. 524, 89 N. E. 917; 29 L.R.A.(N.S.)

Cote v. D. W. Pingree Co. 205 Mass. 286, 91 N. E. 300; *Dompier v. Lewis*, 131 Mich. 144, 91 N. W. 152; *McDonald v. Champion Iron & Steel Co.* 140 Mich. 401, 103 N. W. 829; *Stegmann v. Gerber (Mo. App.)* 123 S. W. 1041; *Mitchell v. Boston & M. Consol. Copper & S. Min. Co.* 37 Mont. 575, 97 Pac. 1033; *Omaha Bottling Co. v. Theiler*, 50 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821; *Ogley v. Miles*, 139 N. Y. 458, 34 N. E. 1059; *Stitzel v. A. Wilhelm Co.* 220 Pa. 564, 69 Atl. 996; *Wood v. Texas Cotton Product Co. (Tex. Civ. App.)* 88 S. W. 496; *Ryan v. Northern P. R. Co.* 53 Wash. 279, 101 Pac. 880.

Where it is incumbent upon the plaintiff to prove not only his age, but also the necessity of explanations and instructions as to how to avoid danger, it would seem to follow that he must, in his complaint, make allegations sufficient to form a basis for such evidence. *Forquer v. Slater Brick Co.* 37 Mont. 426, 97 Pac. 843.

Ordinarily, it is for the jury to say whether a minor comprehended the danger to which he has been exposed in such a sense as to absolve the employer from the obligation to instruct him. It is only when the proper inference from the testimony is so clear as to be free from doubt that it becomes a matter of law for the court. *Kerker v. Bettendorf Metal Wheel Co.* 140 Iowa, 209, 118 N. W. 306.

Whether a boy eighteen years of age employed for two years in a steel plant should have known of the danger of spalls flying off from hammers while being used in testing metal wheels was held, in *Kerker v. Bettendorf Metal Wheel Co.* supra, to be a question for the jury, where his regular place of work was about 125 feet away from where the testing was done, and he had occasion to pass that place but occasionally during the time of his employment.

If a boy twelve years of age possesses less than average intelligence, which the master ought to have known, and is sent on an errand requiring haste to a dimly lighted place between machinery with gearing so arranged that it is likely to catch his clothing and draw him into it and in-

Lack of attention or forgetfulness of what one knows concerning a danger is not equivalent to the nonappreciation of a danger or risk.

Goodale v. York, 74 N. H. 454, 69 Atl. 525; *St. Jean v. Tolles*, 72 N. H. 587, 58 Atl. 506.

Messrs. Doyle & Lucier, for plaintiff:
That the plaintiff failed to think is not necessarily fatal to recovery.

Goodale v. York, 74 N. H. 454, 69 Atl. 525; *Demars v. Glen Mfg. Co.* 67 N. H. 404, 40 Atl. 902.

Walker, J., delivered the opinion of the court:

That the plaintiff admitted in his testimony that he knew at the time of his injury that,

jure him, and there has been nothing in his previous employment to cause him to consider the danger of an accident happening in that way, there is evidence which will justify a jury in finding the master negligent in failing to give him warning, in an action to recover damages for injuries received in that way. *Ciriack v. Merchants' Woolen Co.* 151 Mass. 152, 6 L.R.A. 733, 21 Am. St. Rep. 438, 23 N. E. 829.

Particular circumstances excusing warning.

It is not necessary to give a minor servant any special instructions, where he gives assurances that he understands the duties of the position. *King v. Woodstock Iron Co.* 143 Ala. 632, 42 So. 27, second appeal, 149 Ala. 391, 43 So. 362.

It is not negligence to fail to warn a minor servant, where no danger would be lessened thereby. *Brown v. J. A. Adams & Sons Co.* 120 La. 119, 44 So. 1005.

It is not the duty of a master to warn even an inexperienced or minor servant of the dangers liable to be encountered by him in the performance of his duties, where experience and instruction are not necessary to enable him to do with safety the work he is required to perform. *Ford v. Bodcaw Lumber Co.* supra.

When the work being done by a minor is free from all complexity or complication, and by universal experience is stamped as a harmless act, such as the use of a hammer or ax in taking off a box cover the master owes the minor no duty of instruction. *Whalen v. Rosnosky*, 195 Mass. 545, 122 Am. St. Rep. 271, 81 N. E. 282.

So, a master is under no obligation to warn or instruct a minor servant of the dangers involved in working at a loom, where the servant, nearly fifteen years old, came to the defendant not as an inexperienced person, but as one who, after four months' tuition under a chosen instructor, had acquired the art of weaving, and was capable of running four looms. *Harrington v. Union Cotton Mfg. Co.* 182 Mass. 506, 66 N. E. 414.

An employee eighteen years of age, who

if he allowed his foot to extend beyond the guard, it would hit the floor above when the elevator went up through, but he testified that he was not thinking of the situation at that time. He was a boy of average intelligence, and about fourteen years of age, who it appears understood the situation and appreciated the danger. It was unnecessary, therefore, for the defendant to instruct him that it would be dangerous for him to allow any part of his person to extend beyond the guard when the elevator was in motion. *Hicks v. Claremont Paper Co.* 74 N. H. 154, 157, 65 Atl. 1075. Knowing the situation and appreciating the danger, he must be held to have assumed the risk he incurred. His only excuse is that he "did not think." But it was his duty to

has had seven months' experience and two months' special instructions in her particular line of work and in connection with the special kind of machinery used in such work, is not an inexperienced child of tender years, so as to impose upon her employer any exceptional degree of care. *Vinson v. Willingham Cotton Mills*, 2 Ga. App. 53, 58 S. E. 413.

Of course, a master has no duty to warn a servant of dangers which have no relation to his employment. *Landis v. Curtis & J. Co.* 224 Pa. 400, 73 Atl. 424; *St. Louis Southwestern R. Co. v. Spivey*, 97 Tex. 143, 76 S. W. 748.

Where the danger is patent or obvious.

Even in the absence of actual knowledge of the danger, the master is under no obligation to warn the minor servant of it, if it is so obvious that one of his age and experience should know of it.

As to the distinction between the duty to instruct adults and minors, the court, in *Saller v. Friedman Bros Shoe Co.* 130 Mo. App. 712, 109 S. W. 794, said: "Generally an employee assumes such risks as are open and obvious, or which he would have observed had he used ordinary caution; but children are not expected to observe closely the construction of machines at which they are put to work, or to appreciate the ordinary risks incident to their operation, and, for this reason, are not held to assume the ordinary risks of their operation, or such risks as they do not perceive and apprehend, and of which they are not informed and warned against."

So, in *Westman v. Wind River Lumber Co.* 50 Or. 137, 91 Pac. 478, it was held that where the plaintiff was not only a minor between fifteen and sixteen years of age, but was inexperienced in the work at which he was employed, it was defendant's duty to point out, or give him notice of, the danger incident to his employment in a sawmill, and the risks attending the same, unless they were so open and apparent that one of his age and experience and capacity, in the exercise of ordinary care and pru-

think, and, in view of his knowledge, to use such care, including the mental operation of some thought, as a boy of his intelligence would exercise under the circumstances. It was not the defendant's duty to tell him to think. *Gorman v. Odell Mfg. Co.* 75 N. H. 123, 71 Atl. 215. He was confessedly "thoughtless and careless, when his duty to the" defendant, "as well as to himself, required him to be thoughtful and careful." *Gahagan v. Boston & M. R. Co.* 70 N. H. 441, 446, 55 L.R.A. 426, 50 Atl. 146, 149. "The obligation to exercise care is not satisfied by unexplained absence of action and thought in a situation of known

danger." *O'Hare v. Cochecho Mfg. Co.* 71 H. 104, 107, 93 Am. St. Rep. 499, 51 257, 258. The jury were not warranted finding that he performed the duty of care imposed upon him; for it does not appear that he used any care with reference to position in the elevator, which he knew if he had thought about it, was attended with the special danger which caused injury.

Exception sustained. Judgment for defendant.

All concur.

dence, should know them and appreciate them to the same extent as an adult, and that was a question for the jury.

If the record does not disclose that a minor servant is less intelligent than the average youth of his age, then the master was under no obligations to warn him of obvious dangers which would be appreciated by a boy of average intelligence. *Brammer v. Pettyjohn*, 154 Ala. 616, 45 So. 646.

Even an inexperienced minor is not entitled to instruction and warning against dangers that are perfectly obvious. *Wood v. Texas Cotton Product Co.* (Tex. Civ. App.) 88 S. W. 486.

And in *Omaha Bottling Co. v. Theiler*, 59 Neb. 257, 80 Am. St. Rep. 673, 80 N. W. 821, the court said: "The danger that cider bottles would explode while being filled was not, to say the least, one obviously beyond the comprehension of a boy of average intelligence, nineteen or twenty years old, who had worked at the business for years, and had recently been charged with the control and supervision of the bottling department of defendant's establishment. It would, indeed, be an exceptionally prudent and cautious master who would deem it necessary to give cautionary instructions to his servant in such a case."

A master is under no obligation to instruct a nineteen-year-old employee of ordinary capacity and intelligence, of the danger attendant upon the mixing of lime and water for the making of whitewash. *Bollington v. Louisville & N. R. Co.* 30 Ky. L. Rep. 1260, 8 L.R.A. (N.S.) 1045, 100 S. W. 850.

A master is not negligent in failing to warn a minor servant of the danger of replacing a box covering on shafting while the machinery is in motion, as the danger is entirely obvious. *Hess v. Escanaba Woodenware Co.* 146 Mich. 566, 109 N. W. 1058.

A master is not negligent in failing to instruct a boy seventeen years old in regard to the dangers of polishing a circular bicycle chain on a brushing machine, where the boy had polished many other articles on it and had become entirely familiar with it, although he did not know the number of revolutions which the brush made every

minute. *Lennon v. Goodrich*, 192 Mass. 78 N. E. 421.

By the common experiences of life, it is impossible to say that a person eight years of age can approach and stand up to the edge of a vat of melted metal without learning that it is intensely hot. *Corn Steel Co. v. Pohlplatz*, 29 Ind. App. 64 N. E. 476.

Certain dangers are so obvious and within the ordinary experience of every one that even a young servant is deemed to have a knowledge of them, and the master is under no obligation to warn him against them.

Thus, it has been held that it is not actionable negligence on the part of the master to fail to instruct an intelligent minor of fifteen years or upwards, of the danger of having the hands drawn in by inward revolving rollers (*Marsden Co. v. Johnson*, 89 Ill. App. 100; *Crowley v. Pacific Mfg. Co.*, 148 Mass. 228, 19 N. E. 344; *Lowcock v. Franklin Paper Co.* 169 Mass. 313, 47 E. 1000; *Shine v. Cochecho Mfg. Co.*, 171 Mass. 558, 54 N. E. 245; *Sullivan v. Springfield Electrical Co.* 178 Mass. 35, 59 N. E. 645; *Mueller v. La Prelle Shoe Co.*, 180 Mo. App. 506, 84 S. W. 1010; *Lyndel v. Shanley Co.* 112 App. Div. 305, 98 N. Y. Supp. 406, affirmed in 188 N. Y. 634, 13 N. E. 1169; *Millerick v. Wing*, 133 App. Div. 453, 117 N. Y. Supp. 1070; *Wigginton v. E. Z. Waist Co.* [Vt.] 76 Atl. 36); or of the danger of the fingers being caught while feeding bags into a printing machine (*Kuich v. Milwaukee Bag Co.* 139 Wis. 120 N. W. 261); or of the danger of putting the hands against revolving rollers (*Beghold v. Auto Body Co.* 149 Mich. 14 L.R.A. (N.S.) 609, 112 N. W. 691; *Quier v. Slater Brick Co.* 37 Mont. 426, 100 Pac. 843; *Crown v. Orr*, 140 N. Y. 450, 13 N. E. 648); or of the danger of putting the hands against circular or other rollers (*Hettchen v. Chipman*, 87 Md. 729, 41 E. 65; *Mathis v. Magnolia Mfg. Co.* 140 N. E. 530, 53 S. E. 349; *Sheetan v. Trexler & L. Co.* 13 Pa. Super. Ct. 213); or of having the hands caught in cogwheel gearing that is exposed or obvious (*Citizens v. Merchants' Woolen Co.* 151 Mass. 14 L.R.A. 733, 21 Am. St. Rep. 438, 23 N.

829; *Silvia v. Sagamore Mfg. Co.* 177 Mass. 476, 59 N. E. 73; *Harrington v. Union Cotton Mfg. Co.* 182 Mass. 506, 66 N. E. 414; *Berlin v. William B. Merston & Co.* 132 Mich. 183, 93 N. W. 248; *Stevens v. Gair*, 109 App. Div. 621, 96 N. Y. Supp. 303; *Mundhenke v. Oregon City Mfg. Co.* 47 Or. 127, 1 L.R.A.(N.S.) 278, 81 Pac. 977; or of coming in contact in any way with moving shafting (*Mitchell v. Comanche Cotton Oil Co.* [Tex. Civ. App.] 113 S. W. 158); or of having the hand caught under the die of a stamping machine (*Wahl v. Chatillon*, 56 App. Div. 554, 67 N. Y. Supp. 504); or of the danger of having the hand caught in a planing machine (*Kiser v. Hot Springs Baryes Co.* 131 N. C. 595, 42 S. E. 986; *Gulf Cooperation Co. v. Abernathy* [Tex. Civ. App.] 116 S. W. 869); or of the danger of placing his hand under a joiner used for cutting veneer (*Knight v. Paducah Box & Basket Co.* 31 Ky. L. Rep. 629, 102 S. W. 1185); or of the danger of sheaves of oats slipping off a load (*Tucker v. National Loan & Invest. Co.* 35 Tex. Civ. App. 474, 80 S. W. 879); or of the danger of a grain binder falling over while it was being raised to place trucks under it (*Wagner v. Plano Mfg. Co.* 110 Wis. 48, 85 N. W. 643).

And the fact that inward revolving rollers were covered with candy, and so more sticky than ordinarily, does not impose upon the master the duty of warning the servant of that fact. *Millerick v. Wing*, *supra*.

A boy sixteen years old of ordinary intelligence is possessed of sufficient discretion to avoid obvious and apparent danger, and certainly must know that if he puts his fingers into inward revolving rollers, he cannot escape injury. *Marsden Co. v. Johnson*, *supra*.

A youth sixteen years old, upon taking employment in a mill, assumes the risk of injury which is plainly apparent, from coming in contact with exposed gears upon machines adjoining a passageway, notwithstanding he is not expressly warned as to such dangers. *Mundhenke v. Oregon City Mfg. Co.* *supra*.

It is not the duty of a master to warn a servant that it is dangerous for him to permit his fingers to be caught between die heads when they come together, and its failure to so warn him is not negligence. *American Brake Shoe & Foundry Co. v. Toluszie*, 125 Ill. App. 622.

Obvious dangers not appreciated because of youth and inexperience.

But even if the danger of the employment is patent, and the servant, by reason of his inexperience and youth, does not know or appreciate the danger incident to the service, it is the duty of the master to warn him of it, and instruct him how to avoid it, so far as it can be, before exposing him to it. *Ford v. Bodcaw Lumber Co.* 73 Ark. 49, 83 S. W. 346; *Arkadelphia Lumber Co. v. Henderson*, 84 Ark. 382, 105 S. W. 882; *Arkansas C. R. Co. v. Workman*, 87 Ark. 471, 112 S. W. 1082; *Arkansas* 29 L.R.A.(N.S.)

Midland R. Co. v. Worden, 90 Ark. 407, 119 S. W. 828; *Giebell v. Collins Co.* 54 W. Va. 518, 46 S. E. 569.

So, in *Chambers v. Woodbury Mfg. Co.* 106 Md. 496, 14 L.R.A.(N.S.) 383, 68 Atl. 290, the court said: "When an employer places a young and inexperienced person at work in an exposed and dangerous situation, he is bound to give him due caution and instruction, and his failure to do so is not excused by the fact that the servant, by the use of his eyesight, might have seen the peril and avoided it. It is the duty of one who employs young persons in his service, to take notice of their apparent age and ability, and to use ordinary care to protect them from risks which they cannot properly appreciate, and to which they ought not to be exposed."

In the case of a servant of immature age and inexperience, it is the duty of the master to instruct as to patent, as well as to latent, defects, if, by reason of youth and inexperience, the servant does not know or appreciate the danger incident to his employment. *Louisiana & A. R. Co. v. Miles*, 82 Ark. 535, 11 L.R.A.(N.S.) 720, 103 S. W. 158.

The duty of warning an inexperienced employee is incumbent upon the employer, though the danger be open to observation, if the employer knows that the employee, because of his inexperience or other cause, is unable without instruction to understand the risk and to avoid the danger. *Fletcher Bros. Co. v. Hyde*, 36 Ind. App. 96, 75 N. E. 9.

If the minor, by reason of immature age, inexperience, or want of comprehension, does not appreciate the danger, although it is open and apparent, then it is the duty of the master to caution him of it, and to instruct him how to avoid it. *Magone v. Portland Mfg. Co.* 51 Or. 21, 93 Pac. 450.

Knowledge without appreciation of the danger.

Although the minor may know of the danger in a general way, yet, if he does not fully understand it, or does not know of a safe way of doing the work, the master is guilty of actionable negligence in failing to instruct him.

Thus, in *Fries v. American Lead Pencil Co.* 2 Cal. App. 148, 83 Pac. 173, the court held that a master was liable for injuries to a child nine years of age placed at work near circular saws, where no one had warned him that he would have to be careful when he was near the saws, and in moving around them. Although the child may have known of the danger of coming in contact with a saw, yet, in view of the age of the child, the jury would be justified in holding that he did not appreciate the dangers surrounding him. Upon a former appeal (141 Cal. 610, 75 Pac. 164) a judgment for the plaintiff was reversed for errors upon the trial.

So, in *Lehto v. Atlantic Min. Co.* 152

Mich. 412, 116 N. W. 405, a boy of fifteen, unusually intelligent, was injured by throwing a belt off a pulley by means of a stick. The court said that, although the boy knew that the work was dangerous, yet, in the absence of instructions, he had a right to suppose that he was doing the work in a proper manner. There was a conflict of evidence, however, as to whether he had received instruction, and it was held that the case was properly submitted to the jury upon this point.

Knowledge that it was dangerous to come in contact with saws is not necessarily equivalent to knowledge that the servant's hands were in danger from the saws while he was performing the act of winding thread about a screw to tie it in. *Greenville Oil & Cotton Co. v. Harkey*, 20 Tex. Civ. App. 225, 48 S. W. 1005.

Although a minor may know that a machine is dangerous, so that no recovery could be based upon a failure of the master to warn him of that fact, yet, if there was a way that the machine might have been operated in safety and he did not know of that, then the master is negligent in not giving such instructions. *Ertz v. Pierson*, 130 Mich. 160, 89 N. W. 680.

Although a child may understand the dangers in working at a machine, so that the master is under no obligations to give him special warning thereof, still he may not appreciate the dangers incurred while attempting to make repairs at the back of the machine. *Foley v. California Horseshoe Co.* 115 Cal. 192, 56 Am. St. Rep. 87, 47 Pac. 44.

Simply warning a minor servant of danger generally does not excuse a master from pointing out the particular danger of the employment, and from instructing the servant so as to enable him to avoid the danger. *American Strawboard Co. v. Foust*, 12 Ind. App. 421, 59 N. E. 891.

If a servant sixteen years of age is expected to perform the dangerous service of replacing a belt on a moving wheel, or of shifting it from one moving wheel to another, so as to change the speed, his instructions should not be limited merely to seeing the act done by a person skilled in the work. *Noden v. Verlenden Bros.* 211 Pa. 135, 60 Atl. 505, 3 A. & E. Ann. Cas. 367.

W. M. G.

INDIANA SUPREME COURT.

W. B. CONKEY COMPANY, Appt.,
v.

JOHN LARSEN, by Next Friend.

(— Ind. —, 91 N. E. 163.)

Master — duty to warn — absence of injury.

1. A master is not negligent in failing to caution a minor employee against the danger of the cutter of a machine under which he is required to hold work to be cut, 29 L.R.A.(N.S.)

swerving the work so as to throw his hands against the cutter, if he has no knowledge and there is nothing in the history construction, or proper operation of the machine from which the law will impute knowledge that the danger exists.

Servant — assumption of risk — knowledge of danger.

2. A sixteen-year old employee required to hold work under a cutting tool on a machine assumes the risk of the tool causing work to swerve so as to bring his hands in contact with the cutting edge, if, to knowledge, the swerving occurs frequently or occasionally, and he continues to perform the service without notice to his master and a promise to repair.

Appeal — reversal — bad pleading.

3. A retrial must be granted where demurrer to a bad paragraph of complaint is overruled, and the paragraph left in complaint, and it is not shown that judgment for plaintiff rested wholly upon the paragraph which was good.

(March 10, 1910.)

APPEAL by defendant from a judgment of the Superior Court for Laporte County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Mr. William J. Whinery, with Messrs. John B. Elam, J. W. Fesler, and Harvey J. Elam, for appellant:

There is no allegation that the defendant knew or could have known of any defect or dangers in the situation, and hence allegations are insufficient to show that defendant was guilty of any negligence.

Creamery Package Mfg. Co. v. Hotpiller, 24 Ind. App. 122, 56 N. E. 250; *2 Kentucky Coal Co. v. Albani*, 12 Ind. 497, 40 N. E. 702; *Evansville & T. H. Co. v. Duell*, 134 Ind. 156, 33 N. E. 3; *Chicago, St. L. & P. R. Co. v. Fry*, Ind. 319, 28 N. E. 989; *Malott v. Sam* 164 Ind. 645, 74 N. E. 245; *Standard Co. v. Fordeck*, 34 Ind. App. 181, 71 N. 163.

The plaintiff assumed all the known obvious risks involved in the situation.

Vigo Cooperage Co. v. Kennedy, 42 App. 433, 85 N. E. 986; *Guedelhofer v.isting*, 23 Ind. App. 188, 55 N. E. 1; *Hattaway v. Atlanta Steel & Tin-Plate* 155 Ind. 507, 58 N. E. 718; *Wabash P. Co. v. Webb*, 146 Ind. 303, 45 N. E. 1; *Corning Steel Co. v. Pohlplatz*, 29 Ind. 250, 64 N. E. 476.

Note. — As to duty to warn minor servant of dangers of which he is already aware see note to *Cronin v. Columbian Mfg. ante*, 111.

As it does not appear from the record that the verdict was not rested on the first paragraph of the complaint, a reversal must follow.

Norton-Reed Stone Co. v. Steele, 32 Ind. App. 48, 69 N. E. 198; Belt R. & Stock Yard Co. v. Mann, 107 Ind. 80, 7 N. E. 893; Baltimore & O. S. W. R. Co. v. Jones, 158 Ind. 87, 62 N. E. 994; Ervin v. State, 150 Ind. 332, 48 N. E. 249; Ohio Farmers' Ins. Co. v. Vogel, 30 Ind. App. 281, 65 N. E. 1056; Terre Haute & L. R. Co. v. Sherwood, 132 Ind. 129, 17 L.R.A. 339, 32 Am. St. Rep. 239, 31 N. E. 781.

An employer is not required to guard against remote contingencies.

Robertson v. Ford, 164 Ind. 538, 74 N. E. 1; Grace v. Globe Stove & Range Co. 40 Ind. App. 326, 82 N. E. 99; Robbins v. Ft. Wayne, Iron & Steel Co. 41 Ind. App. 557, 84 N. E. 514; Vigo Cooperage Co. v. Kennedy, supra.

Messrs. J. E. Westfall, Le Grand T. Meyer, and F. N. Gavit for appellee.

Hadley, Ch. J., delivered the opinion of the court:

This was an action for an injury to the hand received by an employee while operating a mortising machine in the appellant's electrotyping plant. The complaint is in two paragraphs, to each of which a demurrer for an insufficiency of facts was overruled. An answer in general denial was then filed, trial by jury, and verdict for the plaintiff for \$6,500, for which amount judgment was rendered over a motion for judgment on answers to interrogatories and a motion for a new trial.

The errors relied on for reversal are: First. The overruling of the demurrer to the first paragraph of the complaint. Second. The overruling of the motion for judgment in its favor on the answers to interrogatories. Third. Overruling appellant's motion for a new trial.

The pertinent parts of the first paragraph are, in substance, as follows: That appellant maintained and operated a lithographing plant and factory within the city of Hammond; that among other machinery it used and operated a mortising machine supplied with knives, or chisels, attached to a shaft, which shaft and chisels, when the machine was operated, revolved rapidly, bringing said chisels in contact with a certain cut, or piece to be cut or mortised, composed of a hardwood base with a metal top; that such cut, in order to be brought in contact with said chisels was placed upon a table which was a part of said machine and which was underneath said shaft, and said table was so arranged that the same could be raised or lowered to any desired

position by the use of a pedal operated by the foot of the operator of such machine; that while said cut was being raised with said table to such point that it could come in contact with said chisels, and while the same was being cut by said chisels revolving against it, the same was required to be held firmly in place on said table by the hand of the operator; that it was practice of the operator; that it was practice of the operator; that it was practice of the operator which could hold the cut in place while the same was being cut thereby, making it unnecessary that the operator should hold the same with his hands, and defendant carelessly and negligently caused said machine to be operated by plaintiff without said clamp or spring; that in the operation of said machine without said clamp or spring it was extremely hazardous, and there was great danger that the force of said chisels cutting into said cut should, while plaintiff was so holding said cut with his hand, cause said cut to swerve from the position in which it was held, and throw the plaintiff's hand against said chisels, and defendant carelessly and negligently set plaintiff to work at said machine, and required him to so operate it while in said condition, without in any way warning him of the danger of his hand so being thrown in contact with said chisels, or instructing him as to the manner of preventing such contact of his hand with said chisels; that defendant carelessly and negligently failed to warn plaintiff of said danger from the operation of said machine, or to instruct him in the manner of doing said work at any time before his said injury; that at the time plaintiff received his said injury he was under the age of sixteen years, and wholly inexperienced in the use of machinery, and defendant then and at all times prior thereto had full notice and knowledge of plaintiff's said youth and inexperience; that plaintiff did not at the time of receiving his said injury know or appreciate the danger to his hands from the operation of said machine in said manner in said condition; that, if the plaintiff had been so instructed of said dangers, and as to the method of preventing his hands from being thrown in contact with said chisels while in action, he would have avoided the injury to himself in the operation of said machine; that on the 30th day of November, 1906, the plaintiff was required to, and did, in the course of his said employment, start said machine in motion, and said shaft and chisels attached thereto to revolving rapidly by applying the electric power thereto, and did then in the course of his said employment place a certain piece of cut upon said table, and then hold the same firmly with his hand upon

said table, and did then raise said table by the use of such foot pedal until the said cut came in contact with the said chisels; that the said cut was sufficiently large that the space on which his hand so rested by holding the same in place did not come within a distance of 4 inches from said chisels, and the point on said cut which was being cut by said chisels, and when the said cut came in contact with said chisels, at the point where it was intended by the plaintiff it should be cut, the said chisels threw said cut from the position in which plaintiff was so holding the same, and, by the force of such throwing of such cut, did throw plaintiff's right hand against and under said chisels while the same were revolving, and by reason thereof the first three fingers of his right hand were cut off at the knuckle joints. Appellee claims nothing more for the first paragraph of his complaint than that it rests upon the common law, and in bringing the case within the old law he counts upon the master's failure to warn and instruct the plaintiff in the use of said machine, and how to avoid the dangers arising from its operation, at the time knowing the plaintiff to be inexperienced in the use of the machine and ignorant of the dangers to his hand from the swerving of the cut.

Appellant submits that the paragraph is bad, for failure to charge that the master had knowledge, either actual or constructive, of the dangerous character of the machine complained of, and for failure to show that the master possessed any superior knowledge of how such danger might be avoided. It is elementary that the old law requires the master to furnish his servant with a working place and appliances that are reasonably safe, and to keep them so, except as to such dangers as are open, ordinary, and common to such place or instrumentality which the servant is held to know and assume under his contract of employment, and except, further, such new dangers as arise and are voluntarily encountered by the servant after knowledge and comprehension of the same. The master is only liable for the neglect or omission of some duty owing to the injured party; in other words, to render the master liable, it must be shown that the injury complained of was the direct result of some fault of the master. Another well-recognized duty of the master is not to assign a servant who, from youth or other cause, is deficient in experience, to the operation of a dangerous machine, without giving him such warning and instruction in regard to avoiding injury as may, from the age or want of experience of the servant, bring the danger and means of its avoidance within

his comprehension. When, however, in operating a machine, the danger and means of escape are open and visible to the operator, and within his knowledge and appreciation when exercising his faculties with care and caution, the master is not required to give either warning or instruction. *Atlas Engine Works v. Randall*, 100 Ind. 296, 50 Am. Rep. 798; *Republic Iron & Steel Co. v. Ohler*, 161 Ind. 402, 68 N. E. 901; 26 Cyc. Law & Proc. p. 1171, and many cases collated in note. The law does not require the master to give warning and instruction to one who is already fully informed. The servant must keep his eye open and look out for himself. If he comes injured from want of proper care and attention to obvious and known dangers, he cannot find a right of recovery against the master under the cloak that he was not warned and instructed.

The vital question, therefore, is: Was the danger to which the plaintiff was exposed, as shown by his complaint, of such character as was not open and apparent to the observation and apprehension of appellee upon the proper exercise of his faculties, assuming that he was giving due care and attention to the work in which he was engaged? The contrary not being averred it will be presumed that the plaintiff was endowed with all the natural faculties, and that his judgment and powers of reason were developed to the extent usual to one of his age. It is alleged that he was sixteen years of age when hurt, and was at the time engaged in the work he was employed to perform; that he had operated the injuring machine at intervals daily since his employment. It is not averred how long he had been so employed and had operated the machine, and, in the absence of such averment, we may presume that his use of the machine had covered a period of time which, if alleged, would at least have aided his cause of action, under the firmly established rule that a party's pleading is presumed to be as strongly in his favor as the facts will warrant. *Wabash R. Co. v. Engleman*, 160 Ind. 329-334, 68 N. E. 892; *Wabash R. Co. v. Beedle* (Ind. 90 N. E. 761, 763). It is not averred that the machine or any of its parts was out of repair, or was defective. Neither is it averred that the defendant knew, or had opportunity and should have known, that the impact of the chisels upon the cut even had caused, or was liable to cause, a cut that was being operated upon to swerve and be cast off in the manner described in the complaint as having caused the plaintiff injury. An averment that the plaintiff "was inexperienced in the use of machinery" is not equivalent to an averment that

was inexperienced in the use of the particular machine that hurt him, and that he had used at intervals daily during his employment. It is shown that the full scope of the danger in operating the machine was directly in front of the operator, about 2 feet away, waist high, of simple nature, and fully open and visible to one who was duly careful and attentive to the work he was doing. Before a cause of action can be said to be stated, it must appear affirmatively that the plaintiff's injury was the direct result of some fault or negligence of the defendant in respect to the particular cause of the injury. Wherein can it be said from the averments of the first paragraph of the complaint that it was the defendant's negligence that caused the plaintiff to be hurt? The master is not required to caution or instruct against unexpected, improbable, and unusual occurrences. *Atlas Engine Works v. Randall*, supra, 4 *Thomp. Neg.* § 4099, and illustrative cases collated in note. He is only required to instruct and caution against the usual and probable consequences that may flow from the exercise of proper care and attention while performing the duties of the employment. Without some fact or averment showing that the cause that produced the injury had previously presented itself, either frequently or occasionally, or that the character of the machine, or work it was designed to perform, when properly handled, was calculated to produce the injuring cause, it cannot be said that such occurrence should be regarded as usual or probable, or reasonably to be anticipated. And in such case it is clear that the law will not impute to the master knowledge of the extraordinary and unexpected danger, and hold him liable for a failure to warn the servant against it. If appellant had no actual knowledge of the injuring danger, and there was nothing in the history, construction, or in the proper and attentive operation of the machine, from which the law would impute knowledge, it is not perceived how he could be counted at fault, or guilty of negligence, in failure to give warning of that of which he himself was ignorant and unsuspecting. For want of an averment of knowledge of the master that the mortiser contained the danger complained of, we think the first paragraph of the complaint fails to state a cause of action. *Evansville & T. H. R. Co. v. Duel*, 134 *Ind.* 156, 33 *N. E.* 355; *Chicago, St. L. & P. R. Co. v. Fry*, 131 *Ind.* 319, 28 *N. E.* 989; *Malott v. Sample*, 164 *Ind.* 645, 74 *N. E.* 245; *Creamery Package Mfg. Co. v. Hotsenpiller*, 24 *Ind. App.* 122, 56 *N. E.* 250; *Standard Oil Co. v. Fordeek*, 34 *Ind. App.* 181, 71 *N. E.* 163. Furthermore, if the kicking or cast-

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ing off of the block by the impact of the chisel or knife, as alleged, had occurred frequently, or occasionally, to the plaintiff's knowledge, and he had continued in employment without notice to the master and his promise to repair, the plaintiff should be held to have assumed the risk. *Hattaway v. Atlanta Steel & Tin-Plate Co.* 155 *Ind.* 507, 58 *N. E.* 718; *Wolf v. Big Creek Stone Co.* 148 *Ind.* 317, 47 *N. E.* 664; *Diamond Plate Glass Co. v. DeHority*, 143 *Ind.* 381, 40 *N. E.* 681; 4 *Thomp. Neg.* § 4657. The paragraph is silent as to these matters. We think the demurrer should have been sustained to the first paragraph of the complaint.

No question is presented here as to the sufficiency of the second paragraph of the complaint.

It is not shown by the record that the judgment rests wholly upon the second paragraph. In fact, it appears from interrogatories and answers that the plaintiff's age, experience, and unwarned condition were prominently before the jury, and we can by no means say that the judgment does not fully rest upon the first paragraph. At most, it is not shown by the record that it rests exclusively upon the second paragraph, and there should therefore be a retrial. *Cleveland C. C. & St. L. R. Co. v. Perkins*, 171 *Ind.* 307, 86 *N. E.* 405; *Baltimore, & O. S. W. R. Co. v. Jones*, 158 *Ind.* 87, 62 *N. E.* 994; *Ervin v. State*, 150 *Ind.* 332, 48 *N. E.* 249; *Norton-Reed Stone Co. v. Steele*, 32 *Ind. App.* 48, 69 *N. E.* 198.

There are other questions presented relating to the interrogatories, the evidence, and instructions to the jury, which are not likely to arise again, and we therefore pass their consideration.

Judgment reversed, and cause remanded, with instructions to sustain the demurrer to the first paragraph of the complaint, with leave to amend, if desired, and to grant appellant a new trial.

NEW YORK COURT OF APPEALS.

WILLIAM LIGHTFOOT, Appt.,
v.

FITCH M. DAVIS, Admr., etc., of William
Bowen, Deceased, Resp't.

(198 *N. Y.* 261, 91 *N. E.* 582.)

Adverse possession — stolen property — securing title.

1. One who steals personal property and conceals his possession of it cannot, while the concealment continues, acquire title by lapse of time.

Limitation of actions — recovery of personalty — title not lost.

2. An action to recover possession of personal property is not barred by the statute of limitations if the title to the property has not been lost by lapse of time.

Equity — suit for proceeds of stolen property.

3. Equity has jurisdiction of a suit to reach the proceeds of property which a thief has turned into cash, since he holds them in trust for the true owner.

Limitation of actions — fraud — concealment — stolen property.

4. A statute permitting a suit based on fraud to be commenced within six years after the discovery of the fraud applies to a suit to recover the proceeds of stolen property which the thief sold, where he concealed the transaction from the true owner.

(April 5, 1910.)

Note. — When does statute of limitations commence to run against action to recover stolen or lost property.

In *Conditt v. Holden*, 92 Ark. 618, 123 S. W. 765, it was held that one who takes up an estray, without advertising it, as required by statute, and wrongfully claims the animal as his own, is guilty of such fraudulent concealment as will prevent the statute of limitations from running against an action by the owner to recover the animal, until the owner discovers the fraud. It appears that there was a statutory provision that if any person, by any improper act, prevents the commencement of the action, such action may be commenced within the time limited after the commencement of the action ceases to be so prevented.

In *Quimby v. Blackey*, 63 N. H. 77, it was held that the wilful silence maintained by one who found money belonging to another was such a fraudulent concealment of the true owner's cause of action, as would prevent the running of the statute of limitations.

However, in *Blount v. Parker*, 78 N. C. 128, where certain bonds had been stolen by Federal troops, and it appeared that the defendant afterwards found several in the street, it was held that the contention that the statute of limitations against an action for their conversion did not begin to run until the date of discovery could not be sustained, and the action, therefore, not having been brought until more than ten years after the finding of them in the street, came too late. The decision is put upon the ground that in actions of law the force and effect given by the statute to the lapse of time cannot be defeated by proof that the plaintiff did not know of the defendants' act of conversion or fraud.

So, in *Howk v. Minnick*, 19 Ohio St. 462, 2 Am. Rep. 413, it was held that where the gist of the action was the taking of a certain amount of money by force, the statute 29 L.R.A. (N.S.)

A PPEAL by plaintiff from an order of the Appellate Division of the Supreme Court, Fourth Department, reversing a judgment of a Special Term for Livingston County entered on a referee's report in plaintiff's favor in an action brought to recover the amount of certain bonds alleged to have been stolen from plaintiff by defendant's testator, and the income therefrom. Reversed.

The facts are stated in the opinion.

Mr. Fletcher C. Peck, with Mr. Charles Ward, for appellant:

No title to personal property can be acquired by theft, no matter how long a time elapses after the theft, or by reason of the transfer of the property through many hands.

Anderson v. Nicholas, 28 N. Y. 600.
The judgment entered upon the decision

of limitations against an action for the conversion thereof began to run immediately and a statute was of no avail which provided that an action "for relief on the ground of fraud" shall not be deemed to have accrued until the discovery of the fraud.

The question when the statute of limitations begins to run against an action to recover stolen or lost property has arisen frequently in cases where it appeared that the property subsequently fell into the hands of innocent purchasers. In these cases it seems to have been uniformly held that where such property has been in the open and notorious possession of the purchaser or other purchasers under whom he claims, for more than the statutory period, the original owner cannot recover the property although he did not in fact know of its whereabouts until within the statutory period before action was brought.

In *Dragroo v. Cooper*, 9 Bush, 629, it was held that five years continued adverse possession of a stolen horse by innocent holder invests the last holder with a good legal title, and an action brought thereafter by the owner for the recovery of the horse is barred by limitations.

So, in *Gaillard v. Hudson*, 81 Ga. 73, 8 S. E. 534, it was held that adverse possession for more than four years by bona fide purchasers of a horse hired out by a livery-stable keeper, but never returned to him, constituted sufficient title in the purchasers to prevent the true owner from recovering the horse by possessory warranty.

In *Leavitt v. Shook*, 47 Or. 239, 83 Pac. 391, the open, notorious, and undisputed possession by a bona fide purchaser of an estray was held to bar an action by the original owner to recover his property.

To the same effect is *Dee v. Hyland*, Utah, 308, 3 Pac. 388, where a horse disappeared from its pasture, and was found several years thereafter in the hands of a bona fide purchaser, who had been in open and notorious possession.

of the appellate division deprives the plaintiff of a property right without due process of law, and is in violation of his constitutional rights.

Williams v. Port Chester, 97 App. Div. 84, 89 N. Y. Supp. 671; *Saranac Land & Timber Co. v. Roberts*, 125 App. Div. 333, 169 N. Y. Supp. 547; *Parmenter v. State*, 135 N. Y. 154, 31 N. E. 1035; *Sanford v. Sanford*, 62 N. Y. 553; *Buffalo v. State*, 116 App. Div. 539, 101 N. Y. Supp. 595; *Walden v. Jamestown*, 178 N. Y. 213, 70 N. E. 466; *Harmony v. Bingham*, 12 N. Y. 99, 62 Am. Dec. 142; *Matthews v. American Cent. Ins. Co.* 154 N. Y. 449, 39 L.R.A. 423, 61 Am. St. Rep. 627, 48 N. E. 751; *Hester v. Mullen*, 159 N. Y. 39, 44 L.R.A. 703, 70 Am. St. Rep. 517, 53 N. E. 700; *Buffalo & L. Land Co. v. Bellevue Land*

& Improv. Co. 165 N. Y. 247, 51 L.R.A. 951, 59 N. E. 5.

Mr. Edwin A. Nash, with Mr. George W. Atwell, for respondent:

The six-year statute of limitations is a bar to a recovery by the plaintiff.

Allen v. Mille, 17 Wend. 202; *Burt v. Myers*, 37 Hun, 277.

Cullen, Ch. J., delivered the opinion of the court:

This is a singular case. In March, 1875, and for some years previous, the plaintiff had been the owner of several school bonds issued by various counties in the state of Kansas, aggregating in amount the sum of \$4,000. These, together with a memorandum stating the numbers and other details of the bonds, he kept locked in a bureau drawer. At the time mentioned, dur-

Wells v. Halpin, 59 Mo. 92, holds to the same effect the mule which had been stolen, having been in the hands of the defendant and those under whom he claimed longer than the statutory period, although in the hands of the defendant himself less than the statutory period.

In *Luter v. Hutchinson*, 30 Tex. Civ. App. 511, 70 S. W. 1013, it was held that as soon as a stolen horse passed into the hands of an innocent purchaser, who openly used it, the statute of limitations was put in motion, although the court recognized that as long as the horse was in possession of the thief the statute did not begin to run.

In *Carr v. Barnett*, 21 Ill. App. 137, it was held that the statute of limitations commenced to run against an action of replevin to recover a horse after it had been irregularly sold as an estray, from the time of the unlawful appropriation of the property by the defendant and therefore an action brought more than five years thereafter was barred.

So, in *Smith v. Newby*, 13 Mo. 159, it was held that an action to recover children of a negro slave, who had been stolen and sold outside the state, accrued at the time the purchaser returned to the state, and an action brought against a subsequent bona fide purchaser more than five years thereafter was barred by the statute of limitations. In this case it appeared that the owner of the slave lived outside of the state of the forum, but the court held that the absence or nonresidence of the plaintiff did not prevent the running of the statute of limitations.

In *Gatlin v. Vaut*, 6 Ind. Terr. 254, 91 S. W. 38, it was held that under a statute providing that if any person, by any improper act of his own, prevent the commencement of an action, such action may be commenced within the time limited after the commencement of the action shall have ceased to be so prevented, a stolen horse may be recovered from a purchaser who had possession less than the statutory period, where it appears that the thief had taken the prop-

erty to another jurisdiction, and had done nothing to start the statute of limitations by returning the property to the vicinity, or holding it openly and notoriously, so that the owner might assert his title thereto. The court said: "We therefore hold that the statute of limitations as to personal property in the hands of a thief who has removed it from the vicinity of the owner or secreted it from him does not begin to run until he returns the property to that vicinity, or openly and notoriously holds it, so that the owner may have a reasonable opportunity of knowing its whereabouts and of asserting his title. And when he does this, the statute begins to run, although the proof may show it to have been stolen property, not on the theory that the thief is to be protected, but because of the laches of the owner in not asserting his title for so long a period as the statute gives him. A grantor can convey no better title than he has himself; and if the statute has not begun to run, his grantee can claim nothing by virtue of his possession. If the thief, after having concealed the property, has done nothing in relation to it to start the statute in his favor, his grantee cannot tack the thief's possession or any part of it, to fill out his unexpired time. It is otherwise if the statute began to run while the property was in the hands of the thief. Then the purchaser may tack to his unexpired time, the time the property was in the thief's possession after the statute began to run. If the statute did not begin to run while the property was in the possession of the thief, and if it were bought by an innocent purchaser, it commenced at the time the purchaser took possession by virtue of the sale. And if the buyer be not an innocent purchaser,—if he knew it to be stolen property,—he was but the receiver of stolen property, and the statute would not begin to run as to him until he should have done with it what a thief is required to do in order to bring it within the operation of the statute."

G. V.

ing the plaintiff's absence, the drawer was broken open, and the bonds abstracted by the defendant's testator, the plaintiff's father-in-law and a banker in the village of Lima, in this state. No suspicion seems ever to have attached to the deceased during his life. The plaintiff made every effort to discover the bonds, and who had purloined them. The only record of their numbers was the memorandum taken with the bonds. He was therefore unable to stop their payment or to trace them. He had bought these bonds originally through the deceased, and immediately after their loss gave him notice of that fact. In response the deceased wrote him: "I am going to Hamilton Station to-morrow. If you will bring over all the records you have of the lost bonds I will look at them and will try and notify the districts of the loss, and stop payment." The plaintiff was never able to obtain any further information as to the bonds. They matured within a few years, and the interest as it accrued and the principal was collected by the deceased. Upon his death in 1899 there was found among his papers the memorandum which had been stolen from the plaintiff, and an examination of his books showed that he had collected the bonds. Upon the discovery of these facts the plaintiff brought this suit against the defendant, as administrator with the will annexed of the deceased, praying judgment that the defendant "may account and pay over to him the amount of said bonds, and the income thereof if it can be traced, and, if it cannot be traced, that he may have judgment against" the defendant as administrator for the sum of \$16,000. The answer denied any knowledge or belief as to the facts charged, and interposed both the six and ten years' statute of limitations. The referee before whom the case was tried found all the facts as hitherto recited, and awarded judgment to the plaintiff for the principal of said bonds and the interest thereon. The learned appellate division reversed the judgment on questions of law alone, leaving undisturbed the facts as found by the referee. It held, on the authority of *Allen v. Mille*, 17 Wend. 202, and *Burt v. Myers*, 37 Hun, 277, that the plaintiff's claim was barred by the statute of limitations, despite his ignorance of the fact that the deceased had purloined the bonds.

The principle involved in this case is a far-reaching one. During the last thirty years there have been a number of bank robberies where by burglary very large amounts of securities have been stolen, and it has frequently proved impossible to detect the thieves or secure a return of the stolen property, except in some cases by

negotiations through "fences" or agents of the criminals. These securities are often, if not generally, long-time bonds not maturing until after the expiration of the six-year statutory period for bringing actions for conversion. If it be the law that a thief, by avoiding detection and concealing the stolen property during that period, may acquire title to the property, or secure immunity from suit for its proceeds in case he has sold it, certainly we should call the attention of the legislature to the defect in the law, in order that it might be remedied. In my opinion, however, since the adoption of the Code of Civil Procedure in 1876 the law is in no such unfortunate condition, and appeal for legislative relief is unnecessary.

The first question to be considered is whether the lapse of time would have vested a good title in the defendant's testator had he remained in possession of the bonds until the time of his decease; for if such were the law, it is clear that he did not become liable, because, instead of retaining the bonds, he collected the money due thereon. The law is settled in this state that while the statute of limitations may bar the remedy, it does not cancel or discharge the debt. *Hulbert v. Clark*, 128 N. Y. 295, 14 L.R.A. 59, 28 N. E. 638. This general doctrine is subject to the qualification that the statute may operate to transfer title to property. Thus, in the case of our statutory provisions as to the adverse possession of real property, the statute not only bars the remedy, but confers title on the party who has held the land adversely during the prescribed period. *Baker v. Oakwood*, 123 N. Y. 16, 10 L.R.A. 387, 25 N. E. 312. We have in our state, however, no statute relating to the adverse possession of chattels or personal property, nor do I know of any in any other state. Nevertheless it seems to be the generally accepted doctrine that by adverse possession title to chattels may be acquired which will be paramount to that of the true owner. Though there are no decisions in our court on the question, they are numerous in other jurisdictions. *Brent v. Chapman*, 1 Cranch, 358, 3 L. ed. 125; *Layne v. Norris*, 16 Gratt. 236; *Newby v. Blakey*, 3 Her. & M. 57; *Dragoo v. Cooper*, 9 Bush. 629; *Carr v. Barnett*, 21 Ill. App. 137; *Gaillard v. Hudson*, 81 Ga. 738, 8 S. E. 534; *Conno v. Hawkins*, 71 Tex. 582, 9 S. W. 684; *Chapin v. Freeland*, 142 Mass. 383, 56 Am. Rep. 701, 8 N. E. 128.

In *Campbell v. Holt*, 115 U. S. 620, 629, 29 L. ed. 483, 485, 6 Sup. Ct. Rep. 206, 210, in discussing the power of the legislature to revive an outlawed debt by repeal of the statute of limitations, Judge

Miller wrote: "Possession has always been a means of acquiring title to property. It was the earliest mode recognized by mankind of the appropriation of anything tangible by one person to his own use, to the exclusion of others, and legislators and publicists have always acknowledged its efficacy in confirming or creating title. The English and American statutes of limitation have in many cases the same effect; and, if there is any conflict of decisions on the subject, the weight of authority is in favor of the proposition that, where one has had the peaceable, undisturbed, open possession of real or personal property, with an assertion of his ownership, for the period which, under the law, would bar an action for its recovery by the real owner, the former has acquired a good title,—a title superior to that of the latter, whose neglect to avail himself of his legal rights has lost him his title. This doctrine has been repeatedly asserted in this court. *Lefingwell v. Warren*, 2 Black, 599, 17 L. ed. 261; *Croxall v. Shererd*, 5 Wall. 268, 289, 18 L. ed. 572, 580; *Dickerson v. Colgrove*, 100 U. S. 578, 583, 25 L. ed. 618, 620; *Bicknell v. Comstock*, 113 U. S. 149, 152, 28 L. ed. 962, 963, 5 Sup. Ct. Rep. 399. It is the doctrine of the English courts, and has been often asserted in the highest courts of the states of the Union." (p. 623). This statement is cited in the opinion rendered in *Baker v. Oakwood*, supra; and, though that case involved only the title to real property, we accepted it as a correct exposition of the law. But none of the cases involved the power of a thief to acquire title by lapse of time where he had concealed the property. Judge Miller speaks of a case where the possession is "peaceable, undisturbed, open, . . . with an assertion of his ownership," and it is apparent that, if title to personal property may be acquired by possession in analogy to the acquisition of that to real property, that possession must have the qualifications stated. From the earliest period in our state it has been uniformly held that mere possession of real estate, continued however long, will not divest the owner of his property unless the possession is under a claim of title. Otherwise the possession will be presumed to be in subordination to the true legal title, *Jackson ex dem. Gansevoort v. Parker*, 3 Johns. Cas. 124; *Poor v. Horton*, 15 Barb. 485; *Doherty v. Matzell*, 119 N. Y. 646, 23 N. E. 994. The nature of the possession required by the statute necessarily makes it open and public.

In many of the cases cited from other states the fact that the defendant was a purchaser in good faith, and his posses-

sion open and public, is emphasized in the opinions of the courts. In *Dragoo v. Cooper*, supra, it was admitted that the defendants, who were purchasers of the property, acted in good faith. Judge Lindsay said: "Dragoo does not acquire title to the horse in controversy by reason of Lewis's purchase from the thief, who could have no title, but by virtue of the possession under claim of title, continuing in himself and Lewis for more than five years before the institution of the action." In *Newby v. Blakey*, supra, the judgment of the court was that the long and peaceable possession of the slaves in question, acquired without force or fraud, gave to Oswald Newby a legal title to them. In *Carr v. Barnett*, supra, the court said: "There was no concealment, fraudulent or otherwise, of his possession and claim, but the facts were unknown to the plaintiff until a short time before the suit was brought." In *Connor v. Hawkins*, supra, it was said: "Her [defendant's] possession was adverse, public, and continuous." In *Gaillard v. Hudson*, supra, the court said: "The defendant to the possessory warrant, and those under whom he claimed, had been in the peaceable, quiet, and honest possession of this property for more than four years next immediately preceding the issuing of the warrant. They had bought the property and paid a fair price for it."

At the same time it is declared, and the declaration constantly reiterated in textbooks and decisions, that a thief can acquire no title to the stolen property. *Silsbury v. McCoon*, 3 N. Y. 379, 53 Am. Dec. 307; *Bassett v. Spofford*, 45 N. Y. 387, 6 Am. Rep. 101. If the acquisition of personal property by adverse possession rests on analogy to the law relating to real property—and that is the ground on which it seems to rest—it is clear that the possession must be under claim of right, and open, public, and notorious. Where a person obtains possession of property secretly by a common-law larceny, and conceals that possession, no lapse of time should confer title on the thief. The contrary doctrine seems to me shocking, both in morals and to common sense. Had the bonds remained in the possession of the defendant's testator, the plaintiff, on discovering that fact, might have recovered possession of them by legal process. *Chapin v. Freeland*, supra, was an action of replevin for two counters which had been affixed to the floor of a shop. Afterwards, through the foreclosure of a mortgage, the premises were sold, the counters removed therefrom, and subsequently sold to the plaintiff. The defendant claimed to be their original owner, and took them from

the plaintiff. Before the defendant regained possession the statute of limitations had run. There was no question of the plaintiff's good faith, or of his possession being public and known to the defendant. It was there held that, where the statute would be a bar to a direct proceeding by the original owner, it could not be defeated by indirection. "If he cannot replevy, he cannot take with his own hand. A title which will not sustain a declaration will not sustain a plea." Under the authorities we have cited it was properly held, I think, that as the defendant could not have regained it by legal process, he could not resort to force to reclaim his property. The converse of the proposition seems to me equally true that, if the original owner has not by lapse of time lost title to the property, he is not barred from maintaining legal proceedings to recover possession of it.

We must now consider whether the plaintiff has lost his right to redress by the fact that the defendant's testator collected the money due on the bonds more than six years prior to the plaintiff's discovery of that fact and the institution of this action. That an action of conversion for the original taking of the bonds was barred by the statute is settled by authority. It was so held in *Allen v. Mille*, 17 Wend. 202, which has never been overruled. Whether, on discovery of the possession of the bonds by the defendant's testator, the plaintiff might not have made a demand for their surrender, and predicated a new conversion on that refusal, it is unnecessary to consider. But though a party may have lost one remedy by lapse of time, it is entirely possible that others may be open to him. In *Ganley v. Troy City Nat. Bank*, 98 N. Y. 487, a married woman had deposited with the defendant two treasury notes under the following receipt:

Troy, N. Y.,
3d April, 1865.

Received this day of Margaret Ganley for safe-keeping for her account two U. S. 7-30 treasury notes, \$500 each, Nos. 160, 338 and 9, to be delivered on surrender of this receipt.

G. F. Sims,
Cashier.

The notes matured in August, 1866, and at the request of the husband of Margaret Ganley, plaintiff's intestate, the bank sold the notes and paid the proceeds to him. In August, 1879, Margaret Ganley having died, her administrator brought the action to recover of the bank the amount collected on the notes. One defense was the statute of limitations. The court held that, though the action for trover was barred, the plaintiff could rely on the contract un-

der which the bonds were deposited, that the cause of action thereon did not arise until demand made and the tender of the receipt to the defendant, though long subsequent to the conversion, and that that claim was not barred. As to the prior conversion, the court said: "In such a case, a tortfeasor cannot allege his own wrong for the purpose of defeating an action upon the contract. In *Angell on Limitations*, 5th ed. § 72 it is said: 'An action of assumpsit may not be barred by the statute, when to an action for a tort upon the same demand, the statute may be pleaded.' Again: 'Where there has been a tortious taking of his property, the injured party may bring trespass or trover, or he may waive both and bring assumpsit for the proceeds when it shall have been converted into money; and, if he choose the latter mode of redress, the tortfeasor cannot allege his own wrong for the purpose of carrying back the injury to a time which will let in the statute.'" P. 494.

Under the old Code (§ 91, subd. 6) it was prescribed: "An action for relief on the ground of fraud, in cases which heretofore were solely cognizable by the court of chancery, the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud." Under this provision it was held that the only cases in which the running of the statute was postponed to the discovery of the fact constituting the fraud were those in which equity had exclusive jurisdiction. Foot v. Farrington, 41 N. Y. 164. The rule seems to have been the same under the Revised Statutes, where it was held that in action to enforce constructive trusts the statute ran from the time of the fraud. *Decoueu v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478; *Wood*, Limitations, 413. The case of *Burt v. Myers*, 37 Hun, 277, *supra*, arose under the old Code, and it was therefor properly decided. But by the enactment of § 382, subd. 5, of the present Code the law has been radically changed, and since then an action in equity, based on fraud, even where the jurisdiction in equity is only concurrent with that of law, may be brought at any time within six years after the discovery of the fraud. Nor does the fact that the ultimate relief sought is a money judgment take the case without the statutory provision. *Carr v. Thompson*, 87 N. Y. 160; *Bosley v. National Mach. Co.*, 123 N. Y. 550, 25 N. E. 990. Therefore the question is: Was the plaintiff entitled to recover in an equitable action the relief which was awarded him by the referee? Had the plaintiff been able to trace the proceeds of his bonds to the estate of

the deceased, the right to recover would be clear.

In *Newton v. Porter*, 69 N. Y. 133, 138, 139, 25 Am. Rep. 152, where negotiable securities were stolen and sold by the thief, it was held that the owner might follow and claim the proceeds in the hands of the felonious taker or his assignee with notice, that the law would raise a trust *in invitum* out of the transaction, and that the owner's right continued to attach to any securities or property in which the securities were invested, so long as they could be traced and identified. Judge Andrews, after stating: "When a person, standing in a fiduciary relation, misapplies or converts a trust fund into another species of property, the beneficiary will be entitled to the property thus acquired,"—thus answers the argument that the thief stood in no fiduciary relation to the property: "It is insisted by the counsel for the defendants that the doctrine which subjects property acquired by the fraudulent misuse of trust moneys by a trustee to the influence of the trust, and converts it into trust property and the wrongdoer into a trustee at the election of the beneficiary, has no application to a case where money or property acquired by felony has been converted into other property. There is, it is said, in such cases, no trust relation between the owner of the stolen property and the thief, and the law will not imply one for the purpose of subjecting the avails of the stolen property to the claim of the owner. It would seem to be an anomaly in the law if the owner who has been deprived of his property by larceny should be less favorably situated in a court of equity, in respect to his remedy to recover it, or the property into which it had been converted, than one who, by an abuse of trust, has been injured by the wrongful act of a trustee to whom the possession of trust property has been confided. The law in such a case will raise a trust *in invitum* out of the transaction, for the very purpose of subjecting the substituted property to the purposes of indemnity and recompense" (pp. 138, 139). The same learned judge said, in *American Sugar Ref. Co. v. Fancher*, 145 N. Y. 552, 558, 27 L.R.A. 757, 40 N. E. 208, 207: "The jurisdiction of courts of equity in cases of trust or agency, or cases of like character, it is insisted, is founded upon the ancient jurisdiction of these courts over trusts and fiduciary relations, and has not been, and ought not to be, extended beyond these cases. It is very true that trusts and trust relations are peculiarly cognizable in equity, and have been so cognizable from the earliest period of equitable jurisprudence. But it is to be

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said that these are but branches of the larger jurisdiction over frauds, which equity abhors, and of which it has cognizance admittedly in many cases not connected with technical trusts or agency."

Holmes v. Gilman, 138 N. Y. 369, 378, 20 L.R.A. 566, 34 Am. St. Rep. 403, 34 N. E. 205, 207, is to the same effect. There a partner had embezzled funds of the firm, and had taken out with such funds insurance policies on his life in favor of his wife, and had abstracted further funds to continue the payments of the annual premiums. The partner having died, it was held that all the moneys payable under the insurance policies, though in excess of the amount abstracted, in equity belonged to the firm. Judge Peckham there said: "In case the trustee took a thousand dollars of trust funds and five hundred of his own, and purchased property which advanced in value to twice its original sum, I have seen no case where the point has been determined that the whole increased value belongs to the trustee, and that only the original sum taken and interest can be given to the *cestui que trust*, although it was by reason of the wrongful use of the trust funds that the trustee was enabled to realize such value." (P. 378). The method by which equity proceeds in all these cases is to turn the wrongdoer into a trustee. If it may do so for the purpose of subjecting identified funds to the claim of the defrauded party, I do not see why it should not pursue the same method wherever it is necessary to protect the rights of the original owner. In the case of an actual trustee the *cestui que trust* may not only reclaim the trust property, if he is able to trace it, but, failing to trace it, he is entitled to an accounting and personal judgment against the trustee. 3 Pom. Eq. Jur. § 1058. If in the *Holmes* Case the insurance moneys had been squandered or lost before the action was commenced, I cannot see why the plaintiffs could be deprived of remedy, or why equity should not retain the case for the award of a personal judgment. It is true that while equity has a most comprehensive jurisdiction over cases of fraud, it is not in every such case that it will exercise that jurisdiction. 1 Pom. Eq. Jur. § 188; 2 Pom. Eq. Jur. §§ 914 et seq.; Bisham, Eq. § 200. So, ordinarily a party would be remitted to his action at law to recover damages for deceit or fraudulent representations, though even in such a case he might obtain relief in an action in equity to rescind. *Gould v. Cayuga County Nat. Bank*, 86 N. Y. 75. Not ordinarily will equity entertain an action to recover damages for trespass or trover. *United States v. Bitter Root Development Co.* 200 U. S.

451, 50 L. ed. 550, 26 Sup. Ct. Rep. 318. In the case cited, however, the court took occasion to say that, while there were found in the bill general characterizations of the defendant's acts as fraudulent, no specific allegations of fraud were stated, and the case was merely a common one of trover or trespass.

In cases like the one before us there are two distinct elements of fraud: First, the original larceny; second, the subsequent concealment of the stolen property and of its sale and the receipt of its proceeds. Assuming (but only for the argument) that under the first no bill in equity could be maintained, I think the second affords a good ground for the interposition of equity, and, as already stated, though the plaintiff failed to identify in the estate of the deceased the proceeds of his bonds, he was still entitled to what would be a personal judgment were the original wrongdoer still living; for in equity it is the general rule "that the relief to be administered will be adapted to the exigencies of the case as they exist at the close of the trial." *Spears v. New York*, 87 N. Y. 359, 370; *Dammert v. Osborn*, 140 N. Y. 30, 43, 35 N. E. 407; *Sanders v. Soutter*, 126 N. Y. 193, 201, 27 N. E. 203. Cases of the character of the one before us are to be distinguished from that large class, often those of principal and agent, in which it is held that an accounting in equity will not lie, and that the accounting must be had in an action at law. In such cases there exists merely a debt from one party to the other, while in those of the former class, the property or fund itself belonging to the claimant, he is entitled to follow the proceeds as long as he may be able to identify them, or, failing that, to recover, not only the amount of the fund, but also any profits acquired by its wrongful appropriation.

There remain to be considered certain authorities which may be cited in opposition to the views which I have expressed. In *Cavin v. Gleason*, 105 N. Y. 256, 11 N. E. 504, and *Re Hicks*, 170 N. Y. 195, 63 N. E. 276, the claimants were defeated, having failed to identify their funds in the estate. One was the case of the estate of an insolvent, and the other that of a deceased person. In both of these cases the sole attempt was to gain a preference over other creditors, not to establish a claim against the estate. This is the vital distinction between those cases and the one before us. *Bosley v. National Mach. Co.* 123 N. Y. 550, 25 N. E. 990, was an action against a corporation and its promoters to cancel a subscription for the stock of the corporation, on the ground that it was obtained through fraud and misrepresentation, and 29 L.R.A. (N.S.)

to recover the money paid thereon, not only from the corporation, but from the agents of the company who made the fraudulent representations. This court said that no equitable cause of action was set forth against the individual defendant; but, as the exception taken to the decision of the trial court was a joint one by the corporation and the individual defendant, the latter could not avail himself of that exception on appeal. The statement that no equitable action lay against the individual defendant was therefore in reality *obiter*, and must be considered as overruled by the decision in *Mack v. Latta*, 178 N. Y. 525, 6 L.R.A. 126, 71 N. E. 97, where this court expressly held that an equitable action would lie against the agents and promoters of a corporation, as well as the corporation itself. In this connection attention may be called to *Bosworth v. Allen*, 168 N. Y. 157, 55 L.R.A. 751, 85 Am. St. Rep. 667, 61 N. E. 163, where it was held that the directors of a corporation, while not technically trustees, were liable in equity to account, the same as ordinary trustees, for their conduct in the management of the corporation and for the moneys they had received as consideration for the turning over the control of the corporation to third parties. The case seems to be a clear authority for the proposition that a constructive trustee may be compelled to account in equity in the same manner as an actual trustee.

I think the order of the Appellate Division should be reversed, and the judgment of the trial court affirmed, with costs in both courts.

Haight, Vann, Werner, Willard Barlett, Hiscock, and Chase, JJ., concur.

IOWA SUPREME COURT.

ANGIE H. HUME, Appt.,
v.
CITY OF DES MOINES.

(—Iowa, —, 125 N. W. 846.)

Municipal corporation — damming back surface water — liability.

A municipal corporation which, in bringing a street to grade, negligently obstructs the entrances to drains carrying surface

Note. — Liability of municipal corporation for damming back surface water by grading of street.

The earlier cases on this question are included in a note to *Johnson v. White*, 1 L.R.A. 250. The above note fully discusses the difference between the civil-law rule and the so-called common-law rule referring

water from abutting property, without notice to the owner, or giving him opportunity to bring his property to grade, so as to avoid injury by such water, will be liable in damages for the injuries done by backing the water up upon his property.

(April 5, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Polk County in defendant's favor in an action brought to recover damages for injuries to plaintiff's property, caused by the alleged negligent accumulating and casting thereon of surface water. Reversed.

Statement by Deemer, Ch. J.:

Action at law to recover damages due to backing up of surface water in such a manner as to injure plaintiff's premises. The

injuries are alleged to have been due to the carelessness and negligence of the city in casting cinders and refuse of different kinds into a culvert and drain in such a manner as to impede the flow of surface water, and dam it up so that it flowed back upon plaintiff's premises, and produced the injuries of which she complains. At the conclusion of plaintiff's evidence, the trial court directed a verdict for defendant, and plaintiff appeals.

Messrs. Hume & Hamilton, for appellant:

A city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the natural drainage is destroyed, and no adequate means is provided for the escape of surface waters.

to in *HUME v. DES MOINES*, and how these rules have been applied to cases dealing with the question at hand. For other notes discussing the difference between these two rules, and how they have been applied to various phases of the law in regard to surface water, see those referred to at the end of this note.

But few cases have been found decided since the date of the above note which deal with the question of the liability of a municipal corporation for damming back surface water by the grading of a street, and with the exception of the *HUME CASE*, none of any importance.

In *Wilber v. Ft. Dodge*, 120 Iowa, 555, 95 N. W. 186, it would seem to have been recognized that a city may be liable for damages caused by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the natural drainage is destroyed, and no adequate means is provided for the escape of surface water.

However, in *Darlington v. Cloud County*, 75 Kan. 810, 88 Pac. 529, it was held that a suit to enjoin county commissioners from making a highway embankment could not be maintained, where the evidence showed that the embankment tended to hold back only water which overflowed the banks of a river: the court in this case calling such water surface water.

In *Sharp v. Cincinnati*, 4 Ohio C. C. N. S. 19, it was held that a municipal corporation cannot be held liable for property damaged by the backing up of surface water, simply because such property lies lower than the grade of the street. The court took occasion to say: "When the city built and improved East Third street, if it changed and raised the grade, thereby making plaintiff's property low, plaintiff was entitled to compensation, and either recovered compensation from the city or waived the same. When that matter was closed, either by payment or waiver, and the street was built, the reciprocal relations again became as though the topog-
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raphy was natural, and plaintiff thereafter could not complain of the burdens incident to the low location of her property."

In *Gleason v. Kirksville*, 136 Mo. App. 521, 118 S. W. 120, it was held that when it was neither alleged nor shown that the municipality was authorized by ordinance to do the work, or, assuming that a nuisance had been created, that its abatement had been requested, the municipality was not liable for damages resulting from the construction of an embankment across a drain, which caused water to overflow adjoining property.

In *Taylor v. Houston & T. C. R. Co.* (Tex. Civ. App.) 80 S. W. 260, it was held that only if the city were negligent with reference to the sufficiency of a drain to serve the purpose intended could it be held liable for damages because of the banking up of surface water and filth, resulting from the insufficiency of the drain.

The cases dealing with the general question of obstruction of surface water in a city are gathered in a note to *Levy v. Nash*, 20 L.R.A.(N.S.) 155.

The general question of the right of the owner of the lower tenement, as against the rights of the upper landowner, to obstruct surface water in a natural drainage channel, is discussed in a note to *Quinn v. Chicago, M. & St. P. R. Co.* 22 L.R.A.(N.S.) 789.

The liability of a municipal corporation for changing the course of surface drainage is discussed in a note to *Roe v. Howard County*, 5 L.R.A.(N.S.) 831.

As to liability of municipal corporation for damage to abutting property by water percolating through soil of highway by reason of defect therein, see note to *Salzman v. New Haven*, 22 L.R.A.(N.S.) 333.

For cases on liability of municipality for confining flood water within banks of stream, to injury of riparian owner, see note to *Walters v. Marshalltown*, 26 L.R.A.(N.S.) 199. G. V.

Wilber v. Ft. Dodge, 120 Iowa, 558, 95 N. W. 186; Ellis v. Iowa City, 29 Iowa, 229; Ross v. Clinton, 46 Iowa, 606, 26 Am. Rep. 169; Morris v. Council Bluffs, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274.

As between adjacent landowners, the right to drain surface waters is governed by the law of nature; and the proprietor of the lower land is bound to receive the surface waters which naturally flow from the higher land, and can do nothing to prevent such flow which will cast it back upon the land above.

Livingston v. McDonald, 21 Iowa, 160, 89 Am. Dec. 563; Collins v. Keokuk, 91 Iowa, 293, 59 N. W. 200; Holmes v. Calhoun County, 97 Iowa, 360, 66 N. W. 145; Brown v. Armstrong, 127 Iowa, 175, 102 N. W. 1047; 30 Am. & Eng. Enc. Law, 2d ed. p. 328; Matteson v. Tucker, 131 Iowa, 516, 107 N. W. 600.

The maxim, *Sic utere tuo ut alienum non laedas*, is a maxim of the common law as well as of the civil; and the rule that the right to throw surface water back upon higher ground cannot be exercised wantonly, unnecessarily, or carelessly is a common-law as well as a civil-law rule.

Chicago, R. I. & P. R. Co. v. Groves, 20 Okla. 101, 22 L.R.A.(N.S.) 802, 93 Pac. 755.

Where damage is caused by negligence in guttering, grading, or otherwise improving its streets, whereby surface water is dammed up and backed upon, or is made to flow upon, adjacent property, the city is liable.

Wallace v. Muscatine, 4 G. Greene, 373, 61 Am. Dec. 131; Cotes v. Davenport, 9 Iowa, 227; Templin v. Iowa City, 14 Iowa, 60, 81 Am. Dec. 455; Ellis v. Iowa City, supra; Van Pelt v. Davenport, 42 Iowa, 308, 20 Am. Rep. 622; Damour v. Lyons City, 44 Iowa, 276; Ross v. Clinton, supra; Freburg v. Davenport, 63 Iowa, 119, 50 Am. Rep. 737, 18 N. W. 705.

The failure of a city, when grading or filling its streets, to provide at least temporary means of escape for the surface waters, is prima facie evidence of negligence on its part, for the direct and natural consequences of which it is liable, whether the property injured is above or below the established grade of the street.

Cotes v. Davenport; Ellis v. Iowa City, and Ross v. Clinton,—supra.

Messrs. R. O. Brennan and J. M. Parsons, for appellee:

A municipal corporation is not liable for a failure to provide gutters and culverts sufficient to keep the surface water from the street from overflowing lots below the established grade.

Freburg v. Davenport, 63 Iowa, 119, 50 Am. Rep. 737, 18 N. W. 705; 2 Dill. Mun. 29 L.R.A.(N.S.)

Corp. 3d ed. § 1051; Gilfeather v. Council Bluffs, 69 Iowa, 310, 28 N. W. 610; Knostman & P. Furniture Co. v. Davenport, 94 Iowa, 589, 68 N. W. 887.

Decmer, Ch. J., delivered the opinion of the court:

Plaintiff is the owner of what is known as lot 7 of the official plot of lots 1, 2, 3, and 4 in block 42 of J. Lyons' addition to Ft. Des Moines, now within the corporate limit of the city of Des Moines. This lot is 3 feet in width east and west and 68 feet in depth north and south. It faces north on West Walnut street, and between it and West Fifteenth street are six lots of equal width and an alley. On the south is an elevated embankment and the right of way of the Des Moines Union Railway Company. Toward the west, and the width of another lot of equal dimensions, is West Sixteenth street. All these streets are regular public highways of the city. Plaintiff's premises slope from the northeast to the southwest; the southwest corner of the lot being from 10 to 15 feet lower than the northeast corner. Prior to the injuries complained of, surface water falling upon said lots and upon parts of West Walnut and West Fifteenth streets flowed naturally and uninterruptedly across plaintiff's lots, as found exit at the southwest corner thereof, and, by means of a ditch along the railway embankment running westward, the surface water coming from the lot ran westward until it came to a drain tile or pipe passing through the railroad embankment, from whence it ran across the right of way and upon the bottoms south of said right of way into the Raccoon river. Where West Sixteenth street, running south, met the railway embankment, there was a plank bridge under which the water coming westward along the railway embankment flowed, and just west of this bridge and in Sixteenth street was the opening of the drain tile which passed under and through the railway embankment. This ditch along the railway embankment also extended westward from the opening of the drain tile so that it carried away any excess of water which could not get through the 18-inch tile. The surface of plaintiff's lot was something like 10 or 15 feet lower than the top of the pavement at Fifteenth and Walnut streets, and no part of the same had ever been brought to grade. Surface water on Walnut street flowed westward from Fifteenth to Sixteenth street, and when it reached Sixteenth flowed southward to the railway tracks and into the ditch before described. In the year 1872, the defendant city established a grade for West Walnut street from point 99 feet east of Fifteenth street to

point 66 feet west of Fifteenth street; the former point being 43 feet and the latter 26.40 feet above the datum point. The grade at the intersection of West Walnut and Sixteenth streets was not established until the year 1897, when it was fixed at 24 feet above the datum line, and in the same year the grade of West Sixteenth street at its intersection with the Des Moines Union Railway tracks was fixed at 23 feet above the datum line. Plaintiff's lot is so located that no grade was established either of Walnut street to the north, or of West Sixteenth street, to the west, until the year 1897. The house on plaintiff's premises was erected in the year 1895, as were other houses both east and west thereof.

In the spring or summer of the year 1907, the defendant city undertook to bring the surface of West Walnut, to the north of plaintiff's property, and of West Sixteenth, to the west thereof, to the established grade, and, pursuant thereto, hauled in and dumped dirt, ashes, street sweepings, and other refuse, raising the middle of the street something like 4 or 5 feet, but leaving hollows or ditches some 10 or 12 feet in width around the block in which plaintiff's premises are located between the fill in the street and the lot lines. In so doing, it filled up the space under the bridge crossing the ditch along the railway embankment, and the opening to the tile drain was buried several feet with ashes, cinders, and refuse. This left lot 7, as well as other lots in the same block, surrounded by embankments several feet higher than the surface of the ground, and no method was preserved, either temporary or permanent, for the escape of surface water. In July and August of the year 1907 there were several heavy rainfalls, and there being no escape for the water as it accumulated upon the streets and the lots in the block in which plaintiff's property is located, it made a large pond, which covered the surface of plaintiff's lot and of lots adjoining to the depth of 2 or 3 feet, causing the injuries of which plaintiff complains. These injuries were shown to be serious and substantial, and no question is now made but that plaintiff, if entitled to anything, has shown a situation which entitles her to something more than nominal damages. The petition charges that "said embankment was negligently and carelessly constructed, in that it hindered, obstructed, and prevented access to plaintiff's property aforesaid and to the alley thereto adjacent; in that it cut off and destroyed the natural drainage and outlet to the surface water aforesaid; in that it dammed up the ditch and filled the drain pipe or tile above described, and created a reservoir or large pond of stagnant water

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on and about the plaintiff's premises; and in that the defendant made no provision of any kind, either temporary or permanent, for the escape of said water, or for diverting the flow thereof before the same entered plaintiff's property, although the defendant at the time well knew, or, in the exercise of reasonable care, should have known, the topography of the land, the elevation of said lot, the outlet of said natural water course and drainage, and the damage to plaintiff's property that would inevitably result from its failure to provide an escape for said water."

The case presents the old, yet ever new, question of the liability of a city or municipal corporation for damming up or otherwise obstructing the flow of surface water, to the injury and damage of abutting property, especially where that property is below the established grade. There is a hopeless conflict in the cases upon this proposition, and our own decisions upon the subject are not as harmonious as we might wish. It has been broadly asserted in many cases that, as surface water is a common enemy, a city may bring its streets to grade by filling or excavating, and thus obstruct or impede the flow of surface water, damming it back, and causing it to collect upon abutting property without liability for damages, particularly where the abutting or adjoining property is below the established grade. In jurisdictions where this doctrine prevails, the common-law rule obtains, which is to the effect that, as to surface water pure and simple, there is no such thing as dominant and servient estates. See, as sustaining this rule, the following, among other, cases: *Corcoran v. Benicia*, 96 Cal. 1, 31 Am. St. Rep. 171, 30 Pac. 798; *Henderson v. Minneapolis*, 32 Minn. 319, 20 N. W. 322; *Stewart v. Clinton*, 79 Mo. 612; *Clark v. Wilmington*, 5 Harr. (Del.) 244; *Pettigrew v. Evansville*, 25 Wis. 223, 3 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 656, 9 Am. Rep. 473; *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271; *Bowlsby v. Spear*, 31 N. J. L. 351, 86 Am. Dec. 216; *Jessup v. Bamford Bros. Silk Mfg. Co.* 66 N. J. L. 641, 58 L.R.A. 329, 88 Am. St. Rep. 502, 51 Atl. 147; *Dickinson v. Worcester*, 7 Allen, 19; *Chatfield v. Wilson*, 28 Vt. 49; *Waffle v. New York C. R. Co.* 68 Barb. 413; *Lampe v. San Francisco*, 124 Cal. 546, 57 Pac. 461, 1001.

The rule in England, as will be hereafter observed, is somewhat in doubt. *Vide Earl v. De Hart*, 12 N. J. Eq. 280, 72 Am. Dec. 395. In other jurisdictions where the civil law obtains, the rule as to individuals is exactly the opposite, and the lower proprietor is held liable for damming back and obstructing the natural flow of surface water.

Nevins v. Peoria, 41 Ill. 502, 89 Am. Dec. 392; *Kaufman v. Griesemer*, 26 Pa. 407, 67 Am. Dec. 437; *Martin v. Riddle*, 20 Pa. 415; *Gillham v. Madison County R. Co.* 49 Ill. 484, 95 Am. Dec. 627; *Laumier v. Francis*, 23 Mo. 181; *Dixon v. Baker*, 65 Ill. 518, 16 Am. Rep. 591; *Butler v. Peck*, 16 Ohio St. 334, 88 Am. Dec. 452; *Livingston v. McDonald*, 21 Iowa, 160, 89 Am. Dec. 563; *Aurora v. Reed*, 57 Ill. 29, 11 Am. Rep. 1. But in some of these jurisdictions adopting the rule of the civil law, an exception has been made in cities and towns. There both the lot owner and the city have been permitted to obstruct or repel surface water without liability for injury. See *Bentz v. Armstrong*, 8 Watts & S. 40, 42 Am. Dec. 265; *Livingston v. McDonald and Stewart v. Clinton*, supra; *Los Angeles Cemetery Asso. v. Los Angeles*, 103 Cal. 461, 37 Pac. 377. But even where the common-law rule obtains, individuals, railway companies, and cities have been held liable for the obstruction and damming up of surface water. Thus, in *Waterman v. Connecticut & P. River R. Co.* 30 Vt. 610, 73 Am. Dec. 326, it is said: "That a railroad company may, as a question of prudence and care, as well be required to have regard to the prevention of damage to a landowner, by the accumulation of surface water merely, as of a running stream, when the geographical formation and surrounding circumstances are such as to make it apparent to reasonable men that such precautions are necessary, and that ordinarily what would be a reasonable performance of their duty under a given state of circumstances would be a question of fact, and not a question of law, for the court." See also *West Orange Twp. v. Field*, 37 N. J. Eq. 600, 45 Am. Rep. 670.

In *Sheehan v. Flynn*, 59 Minn. 436, 26 L.R.A. 632, 61 N. W. 402, a Minnesota case, it was held that, although the common-law doctrine obtained in that state, one could not unnecessarily or unreasonably use his own property to the injury of another, and that, while at common law surface water is a common enemy which each owner may get rid of as best he may, he cannot carelessly, negligently, and unnecessarily injure his neighbor in so doing. From that case we make the following quotation:

"The common-law rule as to liability for the diversion of surface water has been modified in this and other states by the rule that a person must so use his own as not unnecessarily or unreasonably to injure his neighbor. A circumstance to be considered in determining what is reasonable use of one's own land is the amount of benefit to the estate drained or improved, as compared with the amount of injury to the estate on which the burden of the surface water is

cast. *Hughes v. Anderson*, 68 Ala. 280, 4 Am. Rep. 147. 'But the extent to which an proprietor may go in these and other way in incidentally, while improving his own land, turning the surface water of his own land off on the lands of others, must, in each case, be determined by the degree of comparative injury it may produce and relief. *Ray, Negligence of Imposed Duties*, 30. The benefit in this case will be the rediverting of 20 acres of fine agricultural land and the restoring of this highway, while the injury will be the submerging, for some time in the spring, of an acre or two of such land as is found along the shore of such a lake. It seems to us that the extent which the common law is thus modified well expressed in the case of *O'Brien v. Paul*, 25 Minn. 335, 33 Am. Rep. 470, where it is said: "It [surface water] has been called a common enemy, which each owner may get rid of as best he may; and in such cases—and not a few, indeed—maintain the owner's right to adopt any means he may choose to prevent it coming on his land, to turn it off from his land, without regard to the consequences which may ensue to others. These cases are founded on an owner's assumed right to do absolutely what will with his own. This right, however, somewhat restricted by the maxim that man must so use his own as not unnecessarily to do injury to another,"—a maxim which grows out of the necessities of society and without which society would be hardly possible. A man's right to use his property is restricted, for instance, to the manner in which such property is ordinarily used. Again, on page 336, it is said: 'Although we are not prepared to say that in no case an owner lawfully improve his own land in such way as to cause the surface water to flow off in streams upon the land of another, we do not hesitate to say that he may not turn the water in destructive current upon the adjoining land. . . . From the complaint, there does not appear necessity, in grading the avenue, to collect the water at the point indicated, any difficulty in conducting it off without injury to private property.' This is a reasonable doctrine that takes into consideration all the circumstances of each case. It gives each man the common right to improve and enjoy his own property to its fullest extent, but limited by the requirement that he use reasonable care in disposing of surface water, which the common law did not always require him to. When he has used such reasonable care, he can generally stand on his common rights, whether such surface water injures his neighbor or not. . . .

"But in *Hogenson v. St. Paul, M. & N. W. Ry.*, 103 Minn. 436, 26 L.R.A. 632, 61 N. W. 402, it was held that, although the common-law doctrine obtained in that state, one could not unnecessarily or unreasonably use his own property to the injury of another, and that, while at common law surface water is a common enemy which each owner may get rid of as best he may, he cannot carelessly, negligently, and unnecessarily injure his neighbor in so doing. From that case we make the following quotation:

to. 31 Minn. 224, 17 N. W. 374, the defendant not only collected and deposited on the flat prairie the water which was necessarily collected and deposited in draining its roadbed, but also the water in the swamp or 3 miles away from the roadbed. It did not do so for the purpose of improving the swamp, or making any use of it, but merely because it was somewhat more convenient to deposit the swamp water and the roadbed water all together on the prairie than to construct a ditch, so that it would deposit only the roadbed water. It not only collected the water that was necessary in raising its road, but also the water in the swamp. It collected more than was necessary to drain its land, and was not acting in a reasonable manner; and for this should be held liable. The criterion of reasonable necessity should be held controlling in the law of surface water, both for and against the owner of the estate improved; and if the railroad company could reasonably have constructed its ditch leading away from its road, so as to collect less water from the swamp, it was its duty to do so. But in our opinion it should not have been held liable for collecting and discharging on the flat prairie the water necessary to be discharged in draining its roadbed. It must discharge this water somewhere. If there was a natural drain within some reasonable distance, into which it could have discharged it, then it was its duty so to do. But if there was no such natural drain, it became a question of necessity. It was not obliged to abandon its road. The water must be discharged, and must necessarily become the common enemy which the common law calls it. In such a case every man has the right to get rid of it as best he can, and the only remedy is a public system of drainage, which the public, and not the individual owner, must inaugurate. . . .

"We hold that one has a right to drain his land for any legitimate use, whether for a railroad track, a wheat field, or a pasture, and whether the improvement is directly and wholly for the purpose of drainage, or whether it is for some other purpose, and such drainage is a mere incidental result. But, if he collect and convey the surface water off his own land, he shall do what is reasonable, under all the circumstances, to run it into some natural drain, or into some course in which it will do the least injury to his neighbor; and, if he would prevent it from coming upon his land, he must not do so by obstructing some natural drain, and thereby hold back the water and flood the land of his neighbor, at least, if such natural drain is an important one."

One of the clearest statements of the rules so announced by the authorities is found in 2 L.R.A.(N.S.)

Jordan v. Benwood, 42 W. Va. 312, 36 L.R.A. 519, 57 Am. St. Rep. 859, 26 S. E. 266, from which we quote the following:

"Another question is: Suppose the change of grade of a street prevents the surface water from flowing away from the land—dams it up, even—is the municipal corporation liable for damages to the landowner? Answering this question, we meet with a volume of legal authority, and apparently very variant. There are two rules,—one called the 'civil-law rule,' and the other the 'common-law rule,' though it seems it did not originate in England. Most of our states have adopted, as the basis of decision in the main, the common-law rule, but some have adopted the civil-law rule as the more just and logical. The civil-law rule is expressed in the Code Napoleon thus: 'The owner of the lower ground is bound to receive from the higher ground the water which naturally flows down without the human hand contributing to its course. The owner of the lower ground is not permitted to make a dike to prevent such flowing. The owner of the higher ground can do nothing to aggravate the servitude or easement of the lower ground.' [§ 640.] Under this law, neither of these owners can stop surface water. Very different is the common-law rule. It says each owner may fight surface water as he chooses. He may use it all, divert it away from the lower land, may prevent its invasion of his own land, and thus dam it up on his neighbor's land. He may, in the use of his land, cause it to flow differently upon his neighbor's from what it did before. Gould, Waters, § 263, very clearly states the basic principle thus: 'Water spread over the surface of land, or gathering in natural depressions, or into swamps or bayous, or percolating the soil beneath the surface, if flowing in no definite channel, does not constitute a water course, and is not subject to the law regulating rights of the riparian owners. By the common law no rights can be claimed *jure naturæ* in the flow of surface water, and its detention, expulsion, or diversion is not an actionable injury, even when injury results to others.' 24 Am. & Eng. Enc. Law, pp. 907, 917; extended note to Gray v. McWilliams, 21 L.R.A. 593; 2 Dill. Mun. Corp. § 1039; 3 Minor, Inst. 18; Bowlsby v. Speer, 31 N. J. L. 351, 86 Am. Dec. 216; Washb. Easements, 489, 495, 499; Martin v. Jett, 32 Am. Dec. 120 and valuable full note on page 123, (12 La. 501); Albany v. Sikes, 94 Ga. 30, 26 L.R.A. 653, 47 Am. St. Rep. 132, 20 S. E. 257. The common-law rule recognizes the old maxim respecting ownership of real property, and is based on it: *Cujus est solum, ejus est usque ad cælum*. Any other rule would be a re-

straint upon ownership. Without it a man building houses, wall, or fences, or even in works of agriculture, would be open to constant assault. Of course, it is to be so applied as not to violate reason. The common-law rule has been recognized as applicable to the mother state of Virginia in *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 22 S. E. 517. There is no point West Virginia case, [but] *Gillison v. Charleston*, 10 W. Va. 282, 37 Am. Rep. 763, and *Knight v. Brown*, 25 W. Va. 808, recognize the general rule inferentially. By some cases it has been more rigidly applied to the exemption of the lot owner using his lot as he pleases, and municipal corporations, than as to country lands; but the better thought is that the rule is the same in both cases. Therefore the city of Benwood would not be liable for obstructing the flow of surface water from this lot in raising the street grade, if the work was done without negligence, and doing its work with reasonable skill, in the usual way of doing such work, and the damage a mere incident of the work. 2 Dill. Mun. Corp. § 1051, cl. 1.

"Another question is: Is the city liable for surface water which its work for the first time brought upon the plaintiff's lot from other premises than hers? Here we meet with some trouble. There are various and variant decisions, even where the common or civil-law rule prevails. The city is engaged in lawful work on its own ground, and it happens that from it some surface water is changed in its course, and thrown on another's lot, thus increasing the quantity on that lot. This is not actionable, but *damnum absque injuria*, where the common-law rule holds just the contrary to the civil-law rule, which, as above quoted, says that 'the owner of the higher ground can do nothing to aggravate the servitude or easement of the lower ground.' If you logically apply the common-law rule, you must say that if, in the use of his land, one stops surface water in its natural course, and turns it in another direction, whereby it goes upon land of another as it never had done before, yet there is no right of action for this, because the letter of the common-law rule is that surface water is, like waters of the sea, an enemy, which each may fight, and which he may consume, repel, or expel, without regard to any injury thereby occasioned to another proprietor. *Albany v. Sikes*, supra; note in *Kansas City, M. & B. R. Co. v. Smith*, 48 Am. St. Rep. 588; S. C. 72 Miss. 677, 27 L.R.A. 762, 17 So. 78; *Missouri P. R. Co. v. Keys*, 49 Am. St. Rep. 249, and note, 253 (55 Kan. 205, 40 Pac. 275). Here we meet two fundamental maxims of the law, old as the centuries, in regarding which the courts have given a wilderness of

conflicting decisions, often governed by particular cases before them, and, indeed, presence of these maxims, courts can do little better. The effect of one of these maxims is: 'He who owns the soil owns it down to the center of the earth and up to the skies.' That is, he has complete and perfect dominion. The effect of the other maxim is: 'So use thine own that thou dost not injure another.' I repeat that if one, using his own land, diverts surface water from its usual course, and it turns upon another's land, where it never before has gone, no action lies, where the common-law rule prevails. He has the right to shut out surface water, thus casting it back on his immediate neighbor, and, if it goes from him to visit another whom it never knew before, it is no matter. 24 Am. & Eng. Enc. L. pp. 907, 917; authorities last above cited. *Gould, Waters*, §§ 267, 268; Washb. Ements, 4th ed. 494; *Angell, Watercourse* 108a; *Lynch v. New York*, 76 N. Y. 60, Am. Rep. 271; *Gannon v. Hargadon*, 87 N. Dec. 625, and note (10 Allen, 106); *Atson, T. & S. F. R. Co. v. Hammer*, 22 N. 763, 31 Am. Rep. 216; *O'Connor v. Fond Lac, A. & P. R. Co.* 52 Wis. 526, 38 Am. 1754, 9 N. W. 287. But this rule seems harsh, applied without limitation, and where the common-law rule was the basic standard of decision, an exception was recognized. While recognizing the right of owner of the higher field or lot to throw surface water upon the lower, even if, in use of his land, it changed or increased flow upon the lower field or lot, yet it must not be collected in a body, and in such a body or mass cast upon that lower field or lot. So say our cases of *Gillison v. Charleston* and *Knight v. Brown*, supra. So says civil law, as we have seen. So say our authorities even where the common-law rule has been adopted. *Norfolk & W. R. Co. v. Carter*, supra (opinion), and cases cited. If, in one's own use of his land, surface water naturally flows in different direction quantity upon another's land, as a mere sequence or result of such use, no action for injury is done; but he has no right to collect the water in artificial channels, discharge it on an adjoining property. This is alike the rule of the common civil law; and a municipal corporation has no greater right in this respect than a private landowner,—is the rule stated in *Gould, Waters*, § 271. In *Field v. Orange Twp.* 36 N. J. Eq. 118, admitting the general common-law rule as to surface water, it was held that 'a town cannot charge water drainage from the surface of its streets on private lands in such quantities as to impair value and use of them. There they conducted the water by

channels in unusual quantity. 'Cities and towns have no greater rights than individuals to collect in artificial channels upon their streets and highways mere surface water, distributed in rain and snow over large districts, and precipitate it upon the premises of a private owner, or construct ditches upon private lands for public use without compensation. A municipal corporation is liable for throwing water, collected in large quantities in a street, or in the gutter of a street, upon the land of a private owner,'—says Gould, Waters, § 272, on the authority of many cases. Judge Cooley, in his work on Torts (page 580), cited in *Gillison v. Charleston*, 16 W. Va. 302, 37 Am. Rep. 763, says the same,—that while towns are not compelled to make gutters to protect owners against surface water from public ways, yet if they actually construct such as must carry water on adjacent lands, they are as much liable as if they had sent their servants upon them. 'One proprietor has no right to cause a flow of surface water from his own land over that of his neighbor by collecting it in drains, culverts, or artificial channels,'—says Angell, Watercourses, § 108. 24 Am. & Eng. Enc. Law, p. 549; 2 Dill. Mun. Corp. § 1042, and note; opinion in *Lynch v. New York*, 76 N. Y. 60, 32 Am. Rep. 271. See especially, 2 Dill. Mun. Corp. § 1051, cl. 3. This exception needs to be emphasized, because it is a logical exception to the generality of its application, and essential to bar it from sheltering many instances of injustice. These doctrines apply where the water goes to other land where it did not go before, as will be seen from some of the authorities. Angell, Watercourses, §§ 108 et seq. I do not understand this case as falling under this exception. The same rules apply to a municipal or railroad corporation as to an individual. Opinion in *Norfolk & W. R. Co. v. Carter*, 91 Va. 587, 592, 22 S. E. 517; Gould, Waters, § 272; *Lynch v. New York*, supra. 2 Dill. Mun. Corp. § 1051, cl. 3. If a city, in changing grade, causes water collecting on its streets, flowing therefrom merely as surface water, to go on adjoining land, it is not liable for damages. Gould, Waters, § 269."

From what has been said, it is apparent that some courts have adopted what is called the "modified common-law doctrine," while others, professing to adhere to the rule of the civil law, have modified it in its application to cities and towns, and for all practical purposes have established the modified common-enemy doctrine of the common law. But it is not strictly true that at common law one may do what he will with surface water. The maxim, *Sic utere tuo ut alienum non lædas*, has been held applicable to such cases. Thus, in the *Livingston* case, 29 L.R.A. (N.S.)

which established the law of this state as to rights of individuals to obstruct the flow of surface water, it is said, after referring to the maxim already quoted: "We recognize the fact (to use Lord Tenterden's expression) that surface water or slough water is a common enemy which each landowner may reasonably get rid of in the best manner possible; but, in relieving himself, he must respect the rights of his neighbor, and cannot be justified by an act having the direct tendency and effect to make that enemy less dangerous to himself and more dangerous to his neighbor. He cannot make his estate more valuable by an act which unnecessarily renders his neighbor's less valuable."

Again in *Beatrice v. Leary*, 45 Neb. 149, 50 Am. St. Rep. 546, 63 N. W. 370, the supreme court of Nebraska, while announcing the common-enemy doctrine of the common law, said that this rule is also subject to another common-law rule that a proprietor must so use his own property as not to unnecessarily and negligently injure his neighbor. We quote the following from that opinion: "And therefore every proprietor may lawfully improve his property by doing what is reasonably necessary for that purpose, and, unless guilty of some act of negligence in the manner of its execution, will not be answerable to an adjoining proprietor, although he may thereby cause the surface water to flow on the premises of the latter, to his damage. But if, in the execution of such enterprise, he is guilty of negligence which is the natural and proximate cause of injury to his neighbor, he is accountable therefor. *Lincoln & B. H. R. Co. v. Sutherland*, 44 Neb. 526, 62 N. W. 859, and cases there cited. The city had the right to grade and pave Court street. It had the undoubted right to fill the ditch therein, and to dike or dam the draw that emptied into said ditch. In other words, it had the right to take such steps and perform such acts as, in its judgment, were necessary to protect its street from surface waters; but, while it had this right, it was charged with the duty of exercising it with ordinary care. It knew, and was bound to know, that this draw was the natural conduit from which the surface waters from a large area of surrounding country were wont to find their way to the Blue river; and when it diked this draw at Court street, and filled up the ditch in said street, it was charged with the duty of constructing sufficient ditches and outlets to carry the surface waters coming down said draw to the river."

The supreme court of Virginia, in *Norfolk v. Carter*, 91 Va. 587, 22 S. E. 517, said: "This right in regard to surface water may not be exercised wantonly, unnecessarily, or carelessly, but is modified by that

golden maxim of the law that one must so use his own property as not to injure the rights of another. It must be a reasonable use of the land for its improvement or better enjoyment; and the right must be exercised in good faith, with no purpose to abridge or interfere with the rights of others, and with such care with respect to the property that may be affected by the use or improvement as not to inflict any injury beyond what is necessary. Where the exercise of the right is thus guarded, although injury may result to the land of another, he is without remedy. *Lewis, Em. Dom. § 585; Washb. Easements, 3d ed. p. 455; Swett v. Cutts, 50 N. H. 439, 9 Am. Rep. 276; Raleigh & A. Air Line R. Co. v. Wicker, 74 N. C. 220; Beard v. Murphy, 37 Vt. 99, 86 Am. Dec. 693; Little Rock & Ft. S. R. Co. v. Chapman, 39 Ark. 463, 43 Am. Rep. 280; Abbott v. Kansas City, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581; Taylor v. Fickas, 64 Ind. 167, 31 Am. Rep. 114; Atchison, T. & S. F. R. Co. v. Hammer, 22 Kan. 763, 31 Am. Rep. 216; 24 Am. & Eng. Enc. Law, p. 920. The right, thus modified, has also its exceptions. One exception is that the owner of the land cannot collect the water into an artificial channel or volume, and pour it upon the land of another, to his injury. The right to fend off surface water does not extend that far. *Davis v. Crawfordsville, 119 Ind. 1, 12 Am. St. Rep. 361, 21 N. E. 449; Evansville v. Decker, 84 Ind. 325, 43 Am. Rep. 86; Cairo & V. R. Co. v. Stevens, 73 Ind. 278, 38 Am. Rep. 139; Patoka Twp. v. Hopkins, 131 Ind. 142, 31 Am. St. Rep. 417, 30 N. E. 896; Rychlicki v. St. Louis, 98 Mo. 497, 4 L.R.A. 594, 14 Am. St. Rep. 651, 11 S. W. 1001; Fremont, E. & M. Valley R. Co. v. Marley, 25 Neb. 138, 13 Am. St. Rep. 482, 40 N. W. 948; Chalkley v. Richmond, 88 Va. 402, 29 Am. St. Rep. 730, 14 S. E. 339; 2 Dill. Mun. Corp. § 1051; Gould, Waters, § 271. Another exception to the right, which pertinently applies to this case, is that the owner of the land cannot interfere with the flow of surface water in a natural channel or water course. Where the water has been accustomed to gather and flow along a well-defined channel, which, by frequent running, it has worn or cut into the soil, he may not obstruct or divert it to the injury of another. *Earl v. De Hart, 12 N. J. Eq. 280, 72 Am. Dec. 395; Little Rock & Ft. S. R. Co. v. Chapman, supra; Gibbs v. Williams, 25 Kan. 214, 37 Am. Rep. 241; Palmer v. Waddell, 22 Kan. 355; Rowe v. St. Paul, M. & M. R. Co. 41 Minn. 384, 16 Am. St. Rep. 706, 43 N. W. 76; 24 Am. & Eng. Enc. Law, pp. 900-902."***

In *Baker v. Allen, 68 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511*, the supreme court 29 L.R.A. (N.S.)

of Arkansas said: "At the common law, each proprietor had the right to protect his land against surface water flowing upon his soil; and, under the strict rules of that law, plaintiff would have no right of action. But this court, after what seems to have been a full consideration of the question, adopted a rule materially different from that of the common law. In the case of *Little Rock & Ft. S. R. Co. v. Chapman, supra*, it held that the right of a landowner to obstruct the natural drainage or flow of surface waters was not absolute, and that if such proprietor unnecessarily injure the land of upper proprietors by the erection of an embankment or levee, when, by reasonable care and expense, he might have avoided the injury, he becomes liable for damages thus occasioned. The rule as declared by this court is similar to that followed by the courts of several of the states."

In *Priest v. Boston & M. R. Co. 71 N. H. 114, 51 Atl. 667*, it is said: "The owner may put his land or other property to any use not unlawful which, in view of his own interest and that of all persons affected by it, is a reasonable use. For the consequences to others of such use he is not responsible. The question of reasonableness is a question of fact. . . . It is found that the defendants' use of their land, which is the substance of the complaint, was reasonable. If when the side track was built a drain had been put in, there would have been no trouble. Whether the defendants ought to have foreseen the injury to the plaintiff if the drain were omitted is a question of fact, considered upon the general question whether what they did was reasonable. *Swett v. Cutts, 50 N. H. 439, 446, 9 Am. Rep. 276."*

Another exception is noticed by the California courts. Thus, in *Los Angeles Cemetery Asso. v. Los Angeles, 103 Cal. 461, 37 Pac. 377*, it is said: "The doctrine of the civil law, in reference to a servitude in the lower tenement in favor of the upper or dominant tenement, for the flow of surface water, had no application to lots held in cities and towns, where changes and alterations in the surface were essential to the enjoyment of such lots; and this rule has been very generally adopted in this country. *Ogburn v. Connor, 46 Cal. 347, 13 Am. Rep. 213*, and cases there cited; *Corcoran v. Benicia, 96 Cal. 1, 31 Am. St. Rep. 171, 30 Pac. 798; 2 Dill. Mun. Corp. §§ 1039-1044*. An apparent exception to the general rule that municipal corporations, in the grading and improvement of streets, are not bound to provide for the escape of mere surface water, has been hinted at in some of the cases, and established in others, in that class of cases where the surface water, owing to the conformation of the adjacent country, has

formed for itself a definite channel in which it is accustomed to flow, in which cases it is held, as in *Conniff v. San Francisco*, 67 Cal. 45, 7 Pac. 41, that the municipal corporation has no right, pursuant to a general plan for the grading and improvement of Montgomery avenue, to erect a solid embankment, without a culvert or water way, so as to obstruct the flow of a water course which flowed in a well-defined channel, although it served only to discharge the drainage or surface water from the adjacent hills, and, according to the statement of the case, did not come within the common-law definition of a water course. *Hoyt v. Hudson*, 27 Wis. 663, 664, 9 Am. Rep. 473; *Dill. Mun. Corp.* §§ 1051, 1051a; subd. 3; *Lehn v. San Francisco*, 66 Cal. 76, 4 Pac. 965; *Corcoran v. Benicia* and *Gibbs v. Williams*, supra; *Palmer v. Waddell*, 22 Kan. 352. In the case last quoted it was said: "The rule that the owner of a tract of land may obstruct the flow of surface water across his land appears to and does have an exception, which is where surface water having no definite source is supplied by the falling rains and melting snow from a hilly region or high bluffs, and, owing to the natural formation of the surface of the ground, is forced to seek an outlet through a gorge or ravine, and by its flow assumes a definite or natural channel, and escapes through such channel regularly during the spring months of every year, and in season of heavy rains; and such has always been the case, so long as the memory of man runs." It was held that such channel so far possessed the attributes of a water course that the owner of lands through which such water course ran could not lawfully turn the flow upon adjacent lands, to their injury and damage."

Enough has been said to indicate the general trend of the authorities, and perhaps, in view of one of our own cases, more has been stated than is necessary to present the proposition involved, for in *Willitts v. Chicago*, B. & K. C. R. Co. 88 Iowa, 281, 21 L.R.A. 608, 55 N. W. 313, in speaking to this question, we said:

"The appellant cites the rule of the common law, namely, 'that surface water is a common enemy which every landowner may repel at pleasure and refuse to receive on his land'; and contends that this is the rule in Iowa as between individual landowners, and alike applicable to individuals and railroad companies. Several cases are cited wherein this rule has been so applied, notably *Cairo v. V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139; *O'Connor v. Fond du Lac A. & P. R. Co.* 62 Wis. 526, 38 Am. Rep. 753, 9 N. W. 287. The rule of the civil law is that the lower land owes to

the higher land the service or servitude of being bound to receive all of the water which naturally, without the hand of man, flows down upon it. The following extract from the case of *Sullens v. Chicago*, R. I. & P. R. Co. 74 Iowa, 659, 7 Am. St. Rep. 501, 38 N. W. 545, will show that neither of these rules has been adopted in Iowa by statute, as in some of the states, nor followed without qualification by this court. It is there said, in speaking of the case of *Abbott v. Kansas City*, St. J. & C. B. R. Co. 83 Mo. 271, 53 Am. Rep. 581, as follows: "That case adheres to the common-law rule, and seems to depend in part upon the fact that by the statutes of Missouri the common law is made the rule of action and decision in that state. In this state there is no requirement of that kind, and we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable. The difficulty which must sometimes arise from attempts to apply the strict rule of the common law to all cases is illustrated by the fact that the supreme court of Missouri was constrained to abandon it in two cases, which were overruled in the one cited above. Each case must, of necessity, depend largely upon its facts. Even in those states where the common law prevails, the courts hold that the landowner must improve his property in a reasonable manner. *Hosher v. Kansas City*, St. J. & C. B. R. Co. 60 Mo. 329; *Abbott v. Kansas City*, St. J. & C. B. R. Co. supra; *Pettigrew v. Evansville*, 25 Wis. 229, 3 Am. Rep. 50. "But persons exercising this right to improve and ameliorate the condition of their own land must exercise it in a careful and prudent way. Each proprietor, in such case, is left to protect his own lands against the common enemy of all, so as to occasion no unnecessary inconvenience or damage to plaintiff." *McCormick v. Kansas City*, St. J. & C. B. R. Co. 57 Mo. 433. See also *Benson v. Chicago & A. R. Co.* 78 Mo. 504. This court said, in *Livingston v. McDonald*, 21 Iowa, 172, 89 Am. Dec. 574 that "the rules of the civil law, so far as they deny to the upper owner the right to collect the water in a body, or precipitate it in greatly increased or unnatural quantities upon his neighbor, to the substantial injury of the latter, we deem to be just and equitable; and to this extent it is supported by the weight of authority in the common-law courts." It also said: "We recognize the general rule that each may do with his own as he pleases; but we also recognize the qualification that each should so use his own as not to injure his neighbor." *Id.* 173. The same principles, as applied to the obstruction of a flow of surface water from the dominant to the servient estate, was recognized in *Drake v.*

Chicago, R. I. & P. R. Co. 63 Iowa, 302, 50 Am. Rep. 746, 19 N. W. 215. The rule thus far adhered to by this court seems to be just, and we do not think there is sufficient cause to abandon it. The reasons for requiring that improvements on land be so made as to do no unnecessary injury to other lands apply with especial force to the construction of railways.'

"It will be seen from this case and Livingston v. McDonald, 21 Iowa, 161, 89 Am. Dec. 563, that neither of the rules above stated has been adopted in its entirety in this state, but that, in common with the courts of many of the states, 'we are free to determine the questions involved according to such rules of law as shall seem to us to be applicable.' It is clearly the rule in this state that persons exercising the right to improve the condition of their own land must exercise it in a careful and prudent manner, so as to occasion no unnecessary inconvenience or damage to the servient owner; or, in other words, while each may do with his own as he pleases, he must do so in a manner not to unnecessarily injure his neighbor. There being evidence tending to show that the defendant and its predecessor could have relieved the plaintiff's lands from the surface water by keeping open the ditch that was cut for that purpose, there was no error in overruling the defendant's motion for a verdict, nor in the giving and refusing instructions as to the rule in respect to surface water. The case being so exactly within the rule announced in Sullens v. Chicago, R. I. & P. R. Co. supra, it is hardly necessary that we refer to other authorities. See, as relating to the subject, the following cases: Drake v. Chicago, R. I. & P. R. Co. 63 Iowa, 303, 50 Am. Rep. 746, 19 N. W. 215, Id., 70 Iowa, 59, 29 N. W. 804; Moore v. Chicago, B. & Q. R. Co. 75 Iowa, 263, 39 N. W. 390; Noe v. Chicago, B. & Q. R. Co. 76 Iowa, 360, 41 N. W. 42; Wharton v. Stevens, 84 Iowa, 107, 15 L. R. A. 630, 35 Am. St. Rep. 296, 50 N. W. 562; Hunt v. Iowa C. R. Co. 86 Iowa, 15, 41 Am. St. Rep. 473, 52 N. W. 668."

It is argued, however, that no matter what rule may be adopted for individuals or railway companies, a city having power to grade and gutter its streets, to establish drains and sewers, cannot be held liable for obstructing or damming surface water. In the Livingston-McDonald Case, in which we established the civil-law rule for the state, it is said: "And in so holding we add that we do not lay down any rule applicable to town or city property;" and in the recent case of Wilber v. Ft. Dodge, 120 Iowa, 555, 95 N. W. 186, we said: "We have held that a city may be liable for damages caused

by the grading of a street, even though done in accordance with the provisions of a grade ordinance, if thereby the natural drainage is destroyed, and no adequate means is provided for the escape of surface water. Ellis v. Iowa City, 29 Iowa, 229; Ross v. Clinton, 46 Iowa, 606, 26 Am. Rep. 169; Morris v. Council Bluffs, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274."

This latter statement is perhaps a little broader than was intended. The true rule here, as we understand it, is that, as the city had power to grade and gutter its streets, it is not liable for defective plans, for in adopting them it acts in a judicial capacity. But it is liable if it negligently carries out such plans, or if, without the adoption of any plans, it proceeds in a negligent manner to make embankments or fills, to the injury of an abutting or adjoining proprietor. As applied to the facts of the case, the city was not liable because of its establishment of grades for West Walnut and West Sixteenth streets, because its act in so doing was either legislative or judicial in character; but in bringing the streets to these grades established, it was bound to the exercise of ordinary care and prudence, and if it unnecessarily or negligently filled ditches and drains in West Sixteenth street, and thus cast surface water back upon plaintiff's lots, without notice to her, and without her knowledge, and without giving her a reasonable time to bring her lots to grade, the city is liable, not because of defective plans, but by reason of negligence in doing a purely ministerial act; that is, of bringing the streets to the established grade, and, in so doing, filling the ditches and drains for the escape of surface water without providing an escape, either temporary or permanent, for the surface water. Moreover, there was evidence tending to show that it so filled the streets as to collect surface water and discharge it upon plaintiff's lot. As plaintiff had the right to fill her lot by bringing it to the established grade, doubtless defendant was not obliged to provide permanent culverts, drains, or bridges, although that point we do not now decide. If, after her property is brought to grade, such culverts, ditches, or drains should be constructed, a question may then arise as to defendant's duty in the premises.

The foregoing rule, adopted for the decision of this case, has direct support in the following cases:

In Cotes v. Davenport, 9 Iowa, 227, it is said: "The duty of the city to construct temporary drains, if practicable, in such cases, is expressly recognized in some of

the cases cited, and seems to us to be unquestionable. The corporation may not have been liable for a failure to enter upon the work, but, having elected to act, or to proceed with the grading under the power granted, they must be held responsible for its proper and prudent execution. *New York v. Furze*, 3 Hill, 612; *People v. Albany*, 11 Wend. 543, 27 Am. Dec. 95; *Rochester White Lead Co. v. Rochester*, 3 N. Y. 463, 53 Am. Dec. 316, approved in *Radcliff v. Brooklyn*, 4 N. Y. 199, 200, 53 Am. Dec. 357; *Lacour v. New York*, 3 Duer, 406. How far it would be the duty to keep up such drains or culverts permanently, and after the plaintiffs had had a reasonable opportunity or time to raise their lot to correspond with the grade, we do not undertake to say, for no such question is made."

In *Ellis v. Iowa City*, supra, the following instructions were approved: "The city, as a public corporation, has a right to establish grades for the streets, and to fill up the streets to correspond with the grade established; and if the work is done in a careful and skilful manner, the city will not be liable for injuries to property which are the necessary results of the careful and skilful grading of the streets. On the other hand, if the city, in grading the streets, did the work in an unskilful and improper manner, by making improper or insufficient gutters, by reason of which the water was caused to flow from the street upon the premises of plaintiff, she will be entitled to recover, if you find the injuries complained of resulted from such alleged unskilful construction of the street."

In *Russell v. Burlington*, 30 Iowa, 262, in speaking to this point, we said: "That the city had authority to grade its streets and change the grade is not denied. If, in the exercise of his authority, the appellant's property was consequently injured, he will have no right to compensation, unless such compensation is given by statute, or his property has been injured by the negligence or unskilfulness of the city in doing the work. *Creal v. Keokuk*, 4 G. Greene, 47; *Cotes v. Davenport*, supra. It was immaterial, therefore, whether appellant had erected his residence by the grade thus furnished him or not, for the city might lawfully change the grade subsequently, and if it did so in a careful and skilful manner it would not be liable. If it did so negligently or unskilfully, whereby the plaintiff's property was injured, it would be liable for such injuries, whether appellant had erected his house to the existing grade or not. Thus, if a material portion of the

plaintiff's lot had been washed away, or the building had been undermined, walls cracked, etc., and these were the result of negligence or unskilfulness on the part of the defendant, the plaintiff's right to recover would not be affected by the fact that he had or had not built according to the grade furnished by the city engineer."

Again, in *McGregor v. Boyle*, 34 Iowa, 268, the court, speaking through Miller, J., said: "The city having exclusive control over the streets and alleys of the city, to grade, gutter, and improve the same according to its own judgment, the defendant could not lawfully interfere to change or undo improvements made by the city authorities. The city, as a public corporation, had the right to construct the sewer in question, and, unless the work has been negligently or unskilfully performed, the defendant would have no right of action for consequential injuries to his property; but if the city authorities constructed the sewer in an unskilful or improper manner, whereby the property of the defendant was injured, he may recover damages for injuries to his property caused by such negligence or unskilfulness. *Creal v. Keokuk*; *Cotes v. Davenport*; *Ellis v. Iowa City*; and *Russell v. Burlington*,—supra. But while the defendant may have his action against the city for injuries to his property, resulting from the careless or unskilful construction of improvements upon the streets, yet even such carelessness or unskilfulness will not authorize the defendant to interfere with the work upon the streets. He has no such authority. The authority is vested exclusively in the city. The improvement being authorized by law, and constructed by the agents on whom the law conferred the authority, such improvement, though carelessly or unskilfully made, did not constitute a nuisance so that the defendant could lawfully interpose and remove the same. His remedy, in case of injury to his property in consequence of such careless or unskilful construction, is by action for damages."

Another case almost exactly in point is *Ross v. Clinton*, 46 Iowa, 606, 26 Am. Rep. 169. In that case, Beck, Judge, writing the opinion, said: "The act of defendant complained of is the negligent causing of the surface water to run upon and accumulate on plaintiff's property, and the failure to provide means to conduct it therefrom. The paragraph clearly charges that, by the negligent act of defendant, surface water was collected upon plaintiff's premises, and no provision was made for carrying it away. The demurrer assails the petition on the ground that the defendant is not liable for such negligent act. The question of defendant's liability thus raised must be now con-

sidered and determined. The identical question here presented has been passed upon by this court, and a city has been held liable in an action by a lot owner for a negligent act of the precise character of the one alleged in the petition. See *Cotes v. Davenport*, *supra*. The act complained of in that case was the construction of a street and alley by erecting embankments, whereby the surface water was caused to run upon the premises of the plaintiff and there accumulate. It was claimed, and in fact was held by the court, that the city was not liable for the act under any statute. The liability of the city, as found by the court, rested solely upon the common law. . . . It is said in the opinion that 'the duty of the city to construct temporary drains, if practicable, in such cases, is expressly recognized in some of the cases cited, and seems to us to be unquestionable. The corporation may not have been liable for failure to enter upon the work, but having elected to act, or to proceed with the grading under the power granted, they must be held responsible for its proper and prudent execution. *New York v. Furze*; *People v. Albany*; *Rochester White Lead Co. v. Rochester*; *Lacour v. New York*, *supra*. How far it would be the duty to keep up such drains or culverts permanently, and after the plaintiffs had had a reasonable opportunity or time to raise their lot to correspond with the grade, we do not undertake to say, for no such question is made.' The doctrines of this case are approved in *Templin v. Iowa City*, 14 Iowa, 59, 81 Am. Dec. 455. See *Ellis v. Iowa City*, 29 Iowa, 229. They are also supported by the decisions of other courts. But the contrary rules are not without the support of authority. See *Dillon's Municipal Corporations*, § 800, and notes, for references to cases upon this question. The doctrines recognized by this court, as above stated, meet our approval, and they have the authority of precedents which we cannot disturb. We do not feel called upon to further vindicate them. . . ."

In *Templin v. Iowa City*, *supra*, the court said: "The court, in its charge to the jury, recognized the rule of law as adopted by this court in the case of *Cotes v. Davenport*, 9 Iowa, 227, 'that a municipal corporation is liable for the carelessness or neglect of its agents in the construction of public works, on the same principle that a natural person is liable for damages resulting from his carelessness, unskillfulness, or wrongdoing.'"

In *Morris v. Council Bluffs*, 67 Iowa, 343, 56 Am. Rep. 343, 25 N. W. 274, the doctrine of the *Cotes* and *Ross* Cases is approved; but it is also said that plaintiff

must exercise reasonable diligence to protect himself by bringing his lot to grade.

In *Van Pelt v. Davenport*, 42 Iowa, 308, 20 Am. Rep. 622, we said: "By projecting its street across the ravine, the defendant rendered necessary the construction of a culvert to admit of the discharge of accumulating surface water. Before the street was extended, the water in this ravine passed freely and unobstructedly and without damage to plaintiff's property. As the improvement made by the city created a necessity for a culvert, which the city could not neglect to construct without being derelict in its duty, it was incumbent upon it to exercise reasonable care, judgment, and skill in its construction. *Ellis v. Iowa City* and *McGregor v. Boyle*, *supra*."

We have already quoted from *Wilber v. Ft. Dodge*, 120 Iowa, 555, 95 N. W. 186, which is one of the latest pronouncements upon this subject. In *Freburg v. Davenport*, 63 Iowa, 119, 50 Am. Rep. 737, 18 N. W. 705, it is held, in effect: A city has the right to bring its streets to the duly established grade in such a way, time, and manner as it sees fit; and it has the same right as the owners of the abutting lots to protect itself against surface waters. When, therefore, a city brings its streets to grade, but does not construct culverts or adequate gutters to carry off the surface water, which flows from the graded streets and damages abutting lots which are below the established grade, the city is not liable, provided the work is done without negligence on the part of the city.

Appellee relies upon three cases from this court in support of the ruling of the trial court. The first is the *Freburg* Case, just cited. The controlling feature of that case was plaintiff's failure to allege or prove that the work was negligently done, or that its effect was to collect surface water into a pond or reservoir which was discharged or thrown over plaintiff's premises. The second is *Gilfeather v. Council Bluffs*, 69 Iowa, 310, 28 N. W. 610. That case contains some language which supports defendant's contention; but it does not overrule the cases heretofore cited in this opinion. Moreover, it was an action to recover damages from the city by reason of its failure to provide sluiceways or culverts under one of its streets to carry off backwater from a neighboring stream. Plaintiff's lots were below grade, and the case holds that defendant was not required to construct culverts or sluiceways to keep overflow waters from plaintiff's property. The case is distinguishable from the one now before us in that no negligence was charged, and the question of providing for the temporary escape of surface waters was not involved. The

third case is Knostman & P. Furniture Co. v. Davenport, 99 Iowa, 589, 68 N. W. 887. That case is manifestly not in point, as an examination will show.

This opinion has already outgrown proper limits. But it has seemed necessary, in view of the conflict in the authorities and the apparently diverse holdings of this court, to go into the matter at some length. Much of the discussion might well have been omitted, and yet, in view of the nature of the case, it seems to be necessary to a correct solution of the exact question involved. The opinion is not to be regarded as an authority for anything more than is actually decided, and we are not to be understood as extending the rule of nonliability of cities and towns for obstructing or diverting surface water.

Liability, if any, in this case, is predicated upon the negligence of the city in doing the work. Whether or not it was negligent in the performance thereof, or in failing to take precautions for the temporary flow of surface water, was, as we think, a question for the jury under proper instructions. While appellant argues the rules as to measure of damages, we do not consider the point, for the reason that appellee has not responded to appellant's argument. We do not hold that defendant is liable, as a matter of law. That question is one for a jury, after all the testimony is adduced.

But, for the error pointed out, the judgment must be, and it is, reversed.

MICHIGAN SUPREME COURT.

REMY, SCHMIDT, & PLEISSNER

v.

DANIEL J. HEALY, Appt.

(161 Mich. 266, 126 N. W. 202.)

Sale — sample — unsalable goods — warranty.

1. That the embroidery on ladies' garments bought by sample from a jobber for resale was put on to run with the woof of the goods instead of the warp, which made them unsalable, could have been ascertained only by the most minute examination, does not raise a warranty that the garments were rightly made, and justify a purchaser in rejecting them when the fact was discovered; and it is immaterial that the garments were made to correspond to the sample upon the order of the jobber.

Same — custom — sample — duty to inspect.

2. A merchant in ordering ladies' garments by sample cannot rely on a custom to have the warp run lengthwise of the 29 L.R.A. (N.S.)

garment, to raise a warranty that it will do so, if it does not do so in the sample which he inspects.

Same — warranty of fitness.

3. There is no warranty by jobbers that ladies' garments which they sell by sample to a retailer for resale are fit for the purpose for which they are made.

Same — jobber — manufacturers.

4. Jobbers who sell by sample garments which are made by others, but which they carry in stock or order after sales are made, are not themselves manufacturers, within the rule that a manufacturer warrants the quality of the goods manufactured by him.

(May 7, 1910.)

Note. — Does sale by sample exclude implied warranty other than that goods shall conform to sample.

The cases included herein are limited to those which assume that a sale by sample implies that the goods sold shall be equal to the sample in quality, the question being whether, if there is a latent defect in the sample itself, the buyer can require more of the seller than to furnish goods of the same quality as the sample.

Where sale is by manufacturer.

In a sale of goods by sample by the manufacturer thereof, the law implies a warranty on his part that the article is merchantable, where, by reason of a latent defect therein,—a defect which was also in the sample,—the goods are unmerchantable, and the unmerchantable character cannot be discovered by the exercise of reasonable diligence by the purchaser. *Heilbutt v. Hickson*, L. R. 7 C. P. 438; *Mody v. Gregson*, L. R. 4 Exch. 49; *Drummond v. Van Ingen*, L. R. 12 App. Cas. 284; *Leggett v. Young*, 29 N. B. 675; *Price v. Kohn*, 99 Ill. App. 115; *Nixa Canning Co. v. Lehmann-Higginson Grocer Co.* 70 Kan. 664, 70 L.R.A. 653, 79 Pac. 141; *Bierman v. City Mills Co.* 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 850.

This question received able consideration by *Selborne, J.*, in *Drummond v. Van Ingen*, supra, wherein he said that, if the defect in the article was latent, knowledge of which could not properly under the circumstances be imputed to the purchaser, the doctrine against extending an implied warranty of quality where a sale is by sample, to defects common both to the sample and to the bulk, ought to be restricted to those qualities which were patent or discoverable from examination and inspection of the samples, which, under the circumstances, the purchaser might reasonably be expected to make; and added: "It cannot be extended to defects in the texture of the samples rendering the cloth so manufactured unmerchantable for the purposes for which the order was given, of

A PPEAL by defendant from a judgment of the Circuit Court for Wayne County affirming a judgment of the Justice's Court of Detroit in plaintiff's favor in an action brought to recover the purchase price of certain goods alleged to have been sold and delivered. Affirmed.

The facts are stated in the opinion.

Messrs. Navin, Sheahan, & Bourke, for appellant:

The term "manufacturer" includes not alone those who own and operate their own plants or factories, but those as well who have the work done for them by or under their direction.

26 Cyc. Law & Proc. p. 526, § 1 C; State v. Clarke, 64 Minn. 556, 67 N. W. 1144; William Rogers Mfg. Co. v. Simpson H. M.

which such examination and inspection would give the merchants practically no notice . . . while the doctrine of implied warranty ought not to be unreasonably extended so as to require manufacturers to be conversant with all the specialties of all trades and businesses which they do not carry on, but for the purposes of which goods may be ordered from them, yet, I think it does extend to such a case as at present, if the goods, being of a class known and understood by the merchant and manufacturer as in demand for particular trade or business, and being ordered with a view to that market, are found to have in them, when supplied, a defect practically new, not disclosed by the samples, but depending upon the method of manufacture, which renders them unfit for the market for which they were intended."

This rule was applied in Heilbutt v. Hickson, to latent defects in shoes to be manufactured according to sample, where the soles both of the sample and of the shoes manufactured contained paper, which rendered them unfit for the purpose for which they were purchased, the manufacturer having knowledge of the purpose for which they were intended.

In Drummond v. Van Ingen, supra, and Bierman v. City Mills Co. supra, it was applied to latent defects in the quality of cloth sold by sample by a manufacturer, such defects existing both in the sample and in the bulk, and being of a character which could not be discovered by due diligence, but which rendered the cloth unmerchantable for the purpose intended.

And in Leggett v. Young and Nixa Canning Co. v. Lehmann-Higginson Grocer Co., it was applied to defects in canned goods which rendered the goods unfit for use, the defect existing both in the sample and in the bulk.

In Price v. Kohn, supra, the court said: "That when a manufacturer sells goods by sample, he impliedly warrants that the goods contain no latent defect not discoverable by ordinary examination."

But where a known, described, and definite article, a sample of which is exhibit-

& Co. 54 Conn. 527, 9 Atl. 395; Meridan Britannia Co. v. Parker, 39 Conn. 456, 12 Am. Rep. 401; Hendy v. Soule, Deady, 400, Fed. Cas. No. 6359; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163; Radebaugh v. Plain City, 11 Ohio Dec. Reprint, 613.

Where the vendor is the manufacturer, even in a sale by sample, there is an implied warranty that the goods which he furnishes will be merchantable.

Brenton v. Davis, 8 Blackf. 317, 44 Am. Dec. 769; Hoe v. Sanborn, supra; Kellogg Bridge Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86, 3 Sup. Ct. Rep. 537; Carleton v. Lombard, A. & Co. 149 N. Y. 137, 43 N. E. 422; Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 856; Gould v. Stein, 149 Mass.

ed, is ordered of a manufacturer, there is no implied warranty that it will answer the particular purpose for which the buyer intended it, even though the manufacturer knew that it was being purchased for that purpose. Frederick Mfg. Co. v. Devlin, 62 C. C. A. 53, 127 Fed. 71.

An express warranty that a machine, when manufactured, shall be like a sample exhibited at the time of sale, precludes an implied warranty that it is fit for a certain purpose, especially where the manufacturer refused expressly to warrant that it would be fit for such purpose. Monroe v. Hickox, M. & H. Co. 144 Mich. 30, 107 N. W. 719.

There is no implied warranty of the strength of yarn to be manufactured according to sample, where the seller expressly refused to guarantee it in that respect, and where in quality it corresponds with the sample, even though, because of a latent defect both in the sample and the bulk, it is of so little strength as to be unfit for the purpose for which it was purchased. Hardt v. Western Electric Co. 84 App. Div. 249, 82 N. Y. Supp. 835.

There is no implied warranty that machines to be constructed according to a model shall be fit for the purpose for which they are constructed, although they are unfit for such purpose because of a latent defect in the goods manufactured and also in the model. Durbrow & H. Mfg. Co. v. Cumming, 35 App. Div. 376, 54 N. Y. Supp. 818.

The manufacturer of woolen cloth selling same to a woolen manufacturer by sample does not impliedly warrant that it is fit for a particular use of which he is ignorant at the time of the sale, where the cloth is equal to sample and is merchantable, although because of a latent defect therein, and also in the sample, it is unfit for the purpose for which it was intended. Jones v. Padgett, L. R. 24 Q. B. Div. 650.

Where a manufacturer exhibits a sample merely to indicate the quality, but not the form or fitness for the intended use, there is no implied warranty that the article is fit for the use for which it is purchased.

570, 5 L.R.A. 213, 14 Am. St. Rep. 455, 22 N. E. 47; Nixa Canning Co. v. Lehmann-Higginson Grocer Co. 70 Kan. 664, 70 L.R.A. 653, 79 Pac. 141; Drummond v. Van Ingen, L. R. 12 App. Cas. 284; Mody v. Gregson, L. R. 4 Exch. 49; Price v. Kohn, 99 Ill. App. 115; Leggett v. Young, 29 N. B. 675; Snowden v. Waterman, 100 Ga. 588, 28 S. E. 121; Hoover v. Peters, 18 Mich. 51; Copas v. Anglo-American Provision Co. 73 Mich. 549, 41 N. W. 690; 15 Am. & Eng. Enc. Law, 2d. p. 1227.

Where a contract is silent upon any essential feature, and a known, certain, notorious, and uniform custom prevails in relation thereto, the parties are presumed to have contracted with reference to such custom.

Crocker-Wheeler Electric Co. v. Johns-Pratt Co. 29 App. Div. 300, 51 N. Y. Supp. 793, affirmed without opinion in 164 N. Y. 593, 58 N. E. 1090.

Where there is no warranty, express or implied, as to the quality of goods sold by sample, except that they are similar to the sample, evidence is incompetent to show that the goods purchased were not suitable for the purchaser's trade because of a latent defect therein, common to the goods and to the sample. Pratt v. Metzger, 78 Ark. 177, 95 S. W. 451.

There is no implied warranty of quality of material to be used or the character of work to be done in the manufacture of paper to be lithographed in colors, which survives acceptance of the property, even as to defects subsequently discovered therein, where the goods in quality correspond to the sample. Studer v. Bleistein, 115 N. Y. 316, 5 L.R.A. 702, 22 N. E. 243.

In Pennsylvania, until changed by statutory provision, the doctrine prevailed that, in the absence of fraud or special circumstances, a sale by sample only implied that the goods sold should correspond to the sample in kind, and be merchantable as that kind, and did not imply a general warranty of quality. Sidney School Furniture Co. v. School Dist. 4 Sadler (Pa.) 35, 7 Atl. 65; Selser v. Roberts, 105 Pa. 242; Boyd v. Wilson, 83 Pa. 319, 24 Am. Rep. 176.

Where not by manufacturer.

The doctrine of REMY v. HEALY, that where a sale of goods is by sample, and is not made by the manufacturer thereof, there is no implied warranty of the quality, fitness, etc., even as to latent defects common to the sample and to the bulk, not discoverable by reasonable diligence, is supported by the weight of authority. Parkinson v. Lee, 2 East, 314; Price v. Kohn, 99 Ill. App. 115; Dickinson v. Gay, 7 Allen, 29, 83 Am. Dec. 656.

In Parkinson v. Lee, where there was a sale of hops by sample, which, unknown both to the buyer and the seller, had been

12 Cyc. Law & Proc. pp. 1075-1077; Black v. Ashley, 80 Mich. 90, 44 N. W. 1120; McDonnell v. Ford, 87 Mich. 198, 49 N. W. 545; Pennell v. Delta Transp. Co. 94 Mich. 248, 53 N. W. 1049; Kermott v. Ayer, 11 Mich. 184; Merick v. McNally, 26 Mich. 374; Sager v. Tupper, 38 Mich. 264; Ledyard v. Hibbard, 48 Mich. 427, 42 Am. Rep. 474, 12 N. W. 637; Kieldsen v. Wilson, 77 Mich. 45, 43 N. W. 1054; Leo Austrian & Co. v. Springer, 94 Mich. 351, 34 Am. St. Rep. 350, 54 N. W. 50; Eaton v. Gladwell, 108 Mich. 678, 66 N. W. 598; Walker v. Syms, 118 Mich. 183, 76 N. W. 320; Henkel v. Welsh, 41 Mich. 664, 3 N. W. 171; Fatman v. Thompson, 2 Disney (Ohio) 482; Sumner v. Tyson, 20 N. H. 384; Boorman v. Jenkins, 12 Wend. 566, 27 Am. Dec.

watered, causing them to heat and rendering them of but little value, and the fact that the hops had been watered could not be discovered by the most careful inspection either of the sample or of the bulk, Lawrence, J., said: "Here was a commodity offered to sale which might or might not have a latent defect. This was well known in the trade, and the plaintiff might, if he pleased, have provided against the risk by requiring a special warranty; instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it; and knowing, as he must have known as a dealer in the commodity, that it was subject to the latent defect which afterwards appeared, he bought it at his own risk, I know of no authority which makes the seller liable for a latent defect, where there is no fraud, and no representation was made by him on the subject to induce the buyer to take the thing."

Dickinson v. Gay, holds that no implied warranty exists against a latent defect in cloth sold by sample, where the defect is common both to the bulk and to the sample, even though such defect could not be discovered by the use of ordinary care on the part of the purchaser, and the defect renders the goods unmerchantable except as damaged goods.

Price v. Kohn, recognized the rule that there is an implied warranty of quality upon a sale by sample of goods to be manufactured, but that rule was held not to apply where the sale was not made by the manufacturer.

In Baker v. Frobisher, Quincy (Mass.) 4, the rule that every man is bound to see that his goods are merchantable at the time of sale was held to have no application where the purchaser saw a sample prior to the sale. It is not entirely clear that the sample was defective in the same respects as the bulk, but this seems to have been the assumption upon which the decision was based.

Where a contract by its terms secures to the purchaser the right to have the bulk of the goods correspond as to quality and appearance to a sample upon which the

158; *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321; *Gunther v. Atwell*, 19 Md. 157.

Where the vendor sells an article which he knows the vendee intends to use for a specified purpose, by sample or otherwise, there is an implied warranty of fitness, and the chattel may be returned to the seller if unsatisfactory therefor.

Hudson v. Roos, 72 Mich. 363, 40 N. W. 467; *Little v. C. E. Van Syckle & Co.* 115 Mich. 480, 73 N. W. 554; *American Glue Co. v. Rayburn*, 150 Mich. 616, 114 N. W. 395; *Blodget v. Detroit Safe Co.* 76 Mich. 541, 43 N. W. 451; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 269, 41 Am. St. Rep. 599, 58 N. W. 320; *McKinnon Mfg. Co. v. Alpena Fish Co.* 102 Mich. 225, 60 N. W. 472; *Buick Motor Co. v. Reid Mfg. Co.* 150 Mich. 119, 113 N. W. 591; *Bierman v. City Mills Co. supra*; *Hoe v. Sanborn*, 21 N. Y. 561; *Carleton v. Lombard, A. & Co. supra*; *Downing v. Dearborn*, 77 Me. 457, 1 Atl. 407; *Randall v. Newson*, L. R. 2 Q. B. Div. 102; *Jones v. Bright*, 5 Bing. 533; *Kellogg Bridge Co. v. Hamilton*, *supra*; *Beers v. Williams*, 16 Ill. 69; *Rodgers v. Niles*, 11 Ohio St. 48, 78 Am. Dec. 290; *Tennessee River Compress Co. v. Leeds*, 97 Tenn. 574, 37 S. W. 389; *Pease v. Sabin*, 38 Vt. 432, 91 Am. Dec. 364; *Brenton v. Davis*, *supra*.

Mr. Edward F. Wunsch, with Messrs. Bowen, Douglas, Whiting, & Eaman, for appellees:

A manufacturer is one who is engaged in

the business of working raw materials into wares suitable for use.

People v. New York Floating Dry Dock Co. 11 Abb. N. C. 40; *Consumers' Brewing Co. v. Norfolk*, 101 Va. 171, 43 S. E. 336; *State v. Dupre*, 42 La. Ann. 561, 7 So. 727.

A dealer is one who makes successive sales as a business.

Norris Bros. v. Com. 27 Pa. 494; *Overall v. Bepeau*, 37 Mich. 506; *Com. v. Brinton*, 3 Pa. Dist. R. 783; *New Orleans v. Le Blanc*, 34 La. Ann. 596; *Delaware & H. Canal Co's Case*, 8 Pa. Co. Ct. 496.

When a contract for the sale of goods is made by sample, it amounts to an undertaking on the part of the seller with the purchaser that all the goods shall correspond in kind and character and quality to those exhibited.

15 Am. & Eng. Enc. Law, 2d ed. p. 1225; *Parkinson v. Lee*, 2 East, 314; *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656; *Sands v. Taylor*, 5 Johns. 404, 4 Am. Dec. 374; *Bradford v. Manly*, 13 Mass. 139, 7 Am. Dec. 122; *Kupfer v. Michigan Clothing Co.* 141 Mich. 325, 104 N. W. 582; *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46.

Where a known, described, and definite article is ordered of a manufacturer, although it is stated by the purchaser to be required for a particular purpose, still, if the known, described, and definite thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

sale was based, the purchaser is precluded from showing by parol a more enlarged or different contract, by evidence of representations that the mustard seed, the subject matter of the contract, was clean and free from dirt and impurity, where both the bulk and the sample were defective in this respect, which could not be discovered by inspection; such evidence, however, is admissible to prove fraud on the part of the seller. *Mayer v. Dean*, 115 N. Y. 556, 5 L.R.A. 540, 22 N. E. 261.

In *Carnochan v. Gould*, 1 Bail, L. 179, 19 Am. Dec. 668, it was held that there was no implied warranty of quality or fitness arising from the sale of cotton by a grower, where the purchaser examined samples thereof which contained the same defect as the bulk, the defect being the existence of hair throughout the cotton, which rendered it unfit for the purpose for which it was intended, and caused it to be worth much less than the price paid for it. It was held, however, that the purchaser, by the exercise of reasonable diligence in examining the sample, might have discovered the existence of the hair in the cotton, if, as a matter of fact, he did not do so.

But in a sale of foreign refined rape oil, warranted only equal to sample, the sam-

ple relates to the quality only, and hence the oil tendered, although the same as the sample, does not comply with the contract if it is not foreign refined rape oil, but a mixture of foreign refined rape oil and another oil. *Nichol v. Godts*, 10 Exch. 191.

So, upon a sale of oxalic acid, quality of which was approved after examination of samples and inspection of the bulk, where the bulk upon trial proved to be an inferior article, and upon a chemical test appeared to have been adulterated to an extent, that, in commercial language, it did not properly come under the denomination of oxalic acid, the seller was held liable, although he had no knowledge of the adulteration. *Josling v. Kingsford*, 13 C. B. N. S. 447. The court said that neither inspection of the bulk nor use of the sample absolutely excluded inquiry whether the thing supplied was otherwise in accordance with the contract.

Both the *Nichol* and *Josling Cases* may be distinguished on the ground that, in addition to the implied warranty of quality arising from the sale by sample, there was a description of the article amounting to an express warranty. Cases of this character are not within the scope of this note and are not included herein. A. G. S.

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Seitz v. Brewers' Refrigerating Mach. Co. supra; *Davis Calyx Drill Co. v. Mallory*, 69 L.R.A. 973, 69 C. C. A. 662, 137 Fed. 335; *Grand Ave. Hotel Co. v. Wharton*, 24 C. C. A. 441, 49 U. S. App. 108, 79 Fed. 43; *Milwaukee Boiler Co. v. Duncan*, 87 Wia. 120, 41 Am. St. Rep. 33, 58 N. W. 232; *Gachet v. Warren*, 72 Ala. 288; *Bancroft v. San Francisco Tool Co.* 120 Cal. 228, 52 Pac. 496; *Peoria Grape Sugar Co. v. Turney*, 175 Ill. 631, 51 N. E. 587; *Walker v. Pue*, 57 Md. 155; *Cafre v. Lockwood*, 22 App. Div. 11, 47 N. Y. Supp. 916; *Jarecki Mfg. Co. v. Kerr*, 165 Pa. 529, 44 Am. St. Rep. 674, 30 Atl. 1019; *Gunther v. Atwell*, 19 Md. 157; *Wisconsin Red Pressed Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165.

In a sale by sample by one not a manufacturer, evidence of such usage as offered by the defendant is inadmissible.

Strong v. Grand Trunk R. Co. 15 Mich. 223, 93 Am. Dec. 184; *Seitz v. Brewers' Refrigerating Mach. Co. supra*; *Van Hoesen v. Cameron*, 54 Mich. 609, 20 N. W. 609; *Harvey v. Cady*, 3 Mich. 431.

The alleged usage should not be permitted to change the rights of the parties under the contract of sale by sample, inasmuch as it would imply a warranty which the law does not imply in a sale by sample by one not a manufacturer.

Dickinson v. Gay and Van Hoesen v. Cameron, supra; *Pennell v. Delta Transp. Co.* 94 Mich. 251, 53 N. W. 1049; *Calvert v. Schultz*, 143 Mich. 441, 106 N. W. 1123.

If there was a defect in the bulk, and in the sample itself as a part thereof, and the defect was unknown and could not have been discovered by examination, there was no implied warranty against this defect, and the seller is not responsible.

Story, Sales, 376; *Coxe v. Heisley*, 19 Pa. 243; *Wetherill v. Neilson*, 20 Pa. 448, 59 Am. Dec. 741; *Thompson v. Ashton*, 14 Johns. 316; *Wheeler v. Newbould*, 16 N. Y. 392; *Eager v. Atlas Ins. Co.* 14 Pick. 141, 25 Am. Dec. 363; *Richardson v. Copeland*, 6 Gray, 536, 66 Am. Dec. 424; *Bryant v. Commonwealth Ins. Co.* 6 Pick. 131; *Van Hoesen v. Cameron*; *Pennell v. Delta Transp. Co.*, *Calvert v. Schultz*; and *Kupfer v. Michigan Clothing Co.*,—*supra*.

In a sale by sample, no warranty of fitness can be implied with regard to the goods sold.

Hudson v. Roos, 72 Mich. 363, 40 N. W. 467; *Kupfer v. Michigan Clothing Co. and Seitz v. Brewers' Refrigerating Mach. Co. supra*; *Pratt v. Metzger*, 78 Ark. 177, 95 S. W. 451; *Gachet v. Warren, supra*; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 334; *Wisconsin Red Pressed Brick Co. v. Hood, supra*.
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Hooker, J., delivered the opinion of the court:

The plaintiffs were commission merchants in the city of New York. They were engaged in selling ladies' wearing apparel, manufactured in Europe. They were wholesalers, and had samples of the lines of the manufacturer's goods sold by them, from which their purchasers gave orders, and from which they gave their own orders to the manufacturer in Europe. The defendant was shown samples of a line of ladies' shirt waists, and ordered a quantity. On their receipt, he paid a part of the purchase price and sold some of them, but afterwards discovered that they were unsalable for the reason that the embroidery was put on to run with the woof of the goods, instead of the warp. He returned the remainder to the plaintiffs, who returned them to defendant and he has since held them subject to his order. Defendant is unable to state that the goods received were not identical with the sample, but contends that it is difficult for an expert to tell without the most minute examination which way the warp and woof runs in a garment, and that therefore the defect was latent, that it is the general custom to embroider ladies' waists with the warp, and that, being made-up goods, the vendor necessarily knew the use to be made of them. Defendant denied his liability for the goods returned, and sought to recoup damages. A verdict was directed for the plaintiffs, and defendant has appealed.

It is a settled rule that one who buys an article which is present and subject to his inspection cannot afterwards assert an implied warranty of fitness, quality, or condition, in the absence of fraud, except possibly where the seller is the manufacturer or grower or the vendor of articles intended for consumption as food. "*Caveat emptor* is the invariable maxim." Mr. Mechem states that the rule of the common law is practically without exception that the buyer purchases at his own risk. Mechem, *Sales*, § 1311. A note contains a long list of authorities supporting text. "The rule is not altered by the fact that the examination or inspection will consume time, or is attended with labor and inconvenience. No exception to it can be admitted . . . except where the examination at the time of the sale is, morally speaking, impracticable. . . . The mere fact of the inspection being attended with inconvenience or labor is not equivalent to its impracticability. If the purchaser desire to avoid it, and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality." *Hyatt v. Boyle*, 5 Gill & J. 110, 25 Am. Dec. 276;

Barnard v. Kellogg, 10 Wall. 383, 19 L. ed. 987; Mechem, Sales, 1311-1318. Where the sale is by sample there is a warranty—sometimes called express and sometimes implied—that the goods to be furnished shall be equal to the sample, and that is the extent of the warranty. The purchaser is under the same obligation to examine and inspect the sample as we have seen that he is to examine and inspect the goods when present at the sale. Mechem, Sales, § 1320, and note. It stands to reason, and the authorities agree that ordinarily this is the extent of the warranty, where the sale is by a dealer. We held in Kupfer v. Michigan Clothing Co. 141 Mich. 325, 104 N. W. 582, in an opinion by Mr. Justice Blair, that, "where an order for goods from samples is filled by the delivery of goods equal to the sample, the buyer is bound to be satisfied, and cannot reject them for defects in quality."

In making their case the plaintiffs called their business manager, who testified:

I reside in New York. I conduct a fancy linen department for Remy, Schmidt, & Pleissner, commission merchants. As I picked up one sample, I would show it to Mr. Healy. He would take the goods in his hands, look at them, say, "All right, give me so many of these, so many of those," and so forth. This is the way Mr. Healy bought those goods. The goods which were shipped corresponded with the samples in every detail. The goods which were sold to Mr. Healy were manufactured in foreign countries, and imported by Remy, Schmidt, & Pleissner. I am the manager of the linen department of Remy, Schmidt, & Pleissner.

Q. When an order comes to you for goods purchased of you by sample, what is the course that you take,—I mean with reference to the manufacture of the goods? Mr. Healy comes to you, for example, gives you an order, what do you do then?

A. It is all up to me. I am the man that runs the business.

Q. Who is it that makes the goods for you?

A. Manufactured on the other side by my direction.

Q. What do you mean, across the ocean?

A. Across the ocean, yes; imported stuff.

Q. You give directions to them as to their manufacture, don't you?

A. Yes.

Q. Mr. Healy came to New York and selected these goods from you by sample?

A. Yes, sir.

This was substantially all of the testimony on the subject.

Upon this testimony, it is now contended that the plaintiffs were manufacturers; i. e., that "according to Mr. Ollendorff's testi-
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mony the waists were made according to his own directions, so that his principals, the plaintiffs, stand in the place of the manufacturer." The term "manufacturer," in its ordinary acceptation, describes one who, through his skill and labor, shapes or combines material into a new product. Under various statutes, such as tax laws, the term may be extended and made to include others, for the purposes of such laws. Such cases are the following relied on by defendant's counsel: State v. Clarke, 64 Minn. 556, 67 N. W. 1144, where the statute defined the term "manufacturer" for the purpose of taxation. Hendy v. Soule, Deady, 400, Fed. Cas. No. 6,359, which held that one having the entire control of the manufacture and sale of a patented machine was a manufacturer, within a certain tax statute. Com. v. Thackara Mfg. Co. 156 Pa. 510, 27 Atl. 13.

These cases are not in point on the question before us, which must be settled by the common-law rule as to what the distinction is between a manufacturer and a dealer. The theory upon which the warranty as to quality is to be implied against the manufacturer, and not against the dealer, is that the former must know his own methods of manufacture, and the purpose for which his product is designed, and may properly be held to have contracted to produce a merchantable article for such purposes. See Brenton v. Davis, 8 Blackf. 317, 44 Am. Dec. 769; Hoe v. Sanborn, 21 N. Y. 552, 78 Am. Dec. 163. But a dealer—i. e., one who merely buys to sell again (see Norris Bros. v. Com. 27 Pa. 494; Overall v. Bezeau, 37 Mich. 506)—is not presumed to possess such knowledge. He is an intermediary between the manufacturer and the consumer. "He is not dependent for his profits on the labor he bestows upon his commodities, but on his labor and skill and foresight in watching the market."

The contention that these plaintiffs were manufacturers appears to rest upon the claim that they directed and dictated the method of manufacture, and rests on no more substantial foundation than the answer, "Yes," made by Ollendorff to the question, "You give directions to them as to their manufacture, don't you?" When this is read in the light of the other testimony, it cannot reasonably be inferred that he did more than to order from the foreign manufacturer a given quantity of waists of a certain pattern, a sample of which had been previously furnished them by the manufacturer, and shown to the defendant. The learned circuit judge did not err in instructing the jury that plaintiffs were merely dealers, and not manufacturers.

Custom: Counsel for defendant allege er-

ror upon the refusal of the court to permit evidence to prove that this sale was made with reference to a fixed custom of manufacture,—i. e., for the warp to run lengthwise and not crosswise of the garment,—and that it was the practice of all merchants dealing in New York in relation to such goods to select only with a view to design, relying upon the custom of the manufacturers in regard to weave and texture. We understand this to mean that, in buying these waists, defendant merely examined the pattern of the garment, relying upon the alleged common custom of manufacturers to have the warp run up and down instead of around the garment, and therefore a warranty that they should be so made should be found, and, incidentally, that defendant should be excused for not examining the sample as to quality and merchantability. In other words, that this contract should not be construed as the law ordinarily construes it, but at variance with the usual rule of law applicable. Such a contention was made in the case of *Barnard v. Kellogg*, supra, where it was claimed that, by the custom of merchants and dealers in foreign wool, there was an implied warranty that the same is not falsely or deceitfully packed. This claim was sustained in the trial court, but was reversed on review. The court, speaking through the late Mr. Justice Davis, said: "It is to be regretted that the decisions of the courts defining what local usages may or may not do have not been uniform. In some judicial tribunals there has been a disposition to narrow the limits of this species of evidence, in others to extend them, and on this account mainly the conflict in decision arises. But if it is hard to reconcile all the cases, it may be safely said they do not differ so much in principle as in the application of the rules of law. The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. . . . Usage, says Lord Lyndhurst, 'may be ad-

missible to explain what is doubtful; it is never admissible to contradict what is plain.' . . . And it is well settled that usage cannot be allowed to subvert the settled rules of law. Whatever tends to unsettle the law, and make it different in the different communities into which the state is divided, leads to mischievous consequences, embarrasses trade, and is against public policy. If, therefore, on a given state of facts, the rights and liabilities of the parties to a contract are fixed by the general principles of the common law, they cannot be changed by any local custom of the place where the contract was made. In this case the common law did not, on the admitted facts, imply a warranty of the good quality of the wool, and no custom in the sale of this article can be admitted to imply one. A contrary doctrine, says the court in *Thompson v. Ashton*, 14 Johns. 317, would be extremely pernicious in its consequences, and render vague and uncertain all the rules of law on the sales of chattels.'

"In Massachusetts, where this contract was made, the more recent decisions on the subject are against the validity of the custom set up in this case. In *Dickinson v. Gay*, 7 Allen, 29, 83 Am. Dec. 656, which was a sale of cases of satinets made by samples, there were in both the samples and the goods a latent defect not discoverable by inspection, nor until the goods were printed, so that they were unmerchantable. It was contended that, by custom, there was in such a case a warranty implied from the sale that the goods were merchantable. But the court, after a full review of all the authorities, decided that the custom that a warranty was implied, when by law it was not implied, was contrary to the rule of the common law on the subject, and therefore void. If anything, the case of *Dodd v. Farlow*, 11 Allen, 426, 87 Am. Dec. 726, is more conclusive on the point. There forty bales of goat skins were sold by a broker, who put into the memorandum of sale, without authority, the words 'to be of merchantable quality and in good order.'

"It was contended that, by custom, in all sales of such skins, there was an implied warranty that they were of merchantable quality, and therefore the broker was authorized to insert the words, but the court held the custom itself invalid. They say: 'It contravenes the principle which has been sanctioned and adopted by this court upon full and deliberate consideration, that no usage will be held legal or binding on parties, which not only relates to and regulates a particular course or mode of dealing, but

which also ingrafts on a contract of sale a stipulation or obligation which is inconsistent with the rule of the common law on the subject.' It is clear, therefore, that in Massachusetts, where the wool was sold and the seller lived, the usage in question would not have been sanctioned.

"In New York there are some cases which would seem to have adopted a contrary view, but the earlier and later cases agree with the Massachusetts decisions. The question in *Frith v. Barker*, 2 Johns. 327, was whether a custom was valid that freight must be paid on goods lost by peril of the sea, and Chief Justice Kent, in deciding that the custom was invalid, says: 'Though usage is often resorted to for explanation of commercial instruments, it never is, or ought to be, received to contradict a settled rule of commercial law.' In *Woodruff v. Merchants' Bank*, 25 Wend. 673, a usage in the city of New York that days of grace were not allowed on a certain description of commercial paper was held to be illegal. Nelson, Chief Justice, on giving the opinion of that court, says: 'The effect of the proof of usage in this case, if sanctioned, would be to overturn the whole law on the subject of bills of exchange in the city of New York;' and adds: 'If the usage prevails there, as testified to, it cannot be allowed to control the settled and acknowledged law of the state in respect to this description of paper.' And in *Beirne v. Dord*, 5 N. Y. 95, 55 Am. Dec. 321, the evidence of a custom that, in the sale of blankets in bales, where there was no express warranty, the seller impliedly warranted them all equal to a sample shown, was held inadmissible, because contrary to the settled rule of law on the subject of chattels. But the latest authority in that state on the subject is the case of *Simmons v. Law*, 3 Keyes, 219. That was an action to recover the value of a quantity of gold dust shipped by Simmons from San Francisco to New York on Law's line of steamers, which was not delivered. An attempt was made to limit the liability of the common carrier beyond the terms of the contract in the bill of lading, by proof of the usage of the trade, which was well known to the shipper, but the evidence was rejected. The court, in commenting on the question, say: 'A clear, certain, and distinct contract is not subject to modification by proof of usage. Such a contract disposes of all customs by its own terms, and by its terms alone is the conduct of the parties to be regulated, and their liability to be determined.'

"In Pennsylvania this subject has been much discussed, and not always with the 29 L.R.A. (N.S.)

same result. At an early day the supreme court of the state allowed evidence of usage that, in the city of Philadelphia, the seller of cotton warranted against latent defects, though there was neither fraud on his part nor actual warranty. . . . Chief Justice Gibson, at the time, dissented from the doctrine, and the same court, in later cases, has disapproved of it, . . . and now holds that a usage, to be admissible, 'must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract.'

"It would unnecessarily lengthen this opinion to review any further the American authorities on this subject. It is enough to say, as a general thing, that they are in harmony with the decisions already noticed. See the American note to *Wigglesworth v. Dallison*, 1 Smith, Lead. Cas. 8th ed. 928, where the cases are collected and distinctions noticed."

As said by Mr. Mechem, § 1326, and shown by the above-cited case: "How far usage may affect the question is not, perhaps, entirely settled. It is clear, however, that local usages cannot defeat the express terms of the contract, nor can they contravene the settled principles of the law. If, therefore, the sale was made under such circumstances that the law does not impute a warranty, usage will be ineffectual to add one; if, under the circumstances, the law does raise a warranty, usage will not be permitted to defeat it."

It is also urged that there was a warranty of fitness of the waists for the purpose for which they were made,—i. e., for use as wearing apparel,—which use plaintiffs must have known to have been intended. We are of the opinion that this contention should not prevail.

In *Hudson v. Roos*, 72 Mich. 363, 40 N. W. 467, the mirror furnished had a latent defect. The court said that the particular purpose for which she purchased was made known. This cause might apparently have been and probably was decided upon the points, first, that the glass furnished did not equal the sample; and second, that it was or was not replaced within an agreed time, within which plaintiff undertook to remove the latent defect through resilvering the mirror.

In the present case, while it cannot be denied that the vendor must have understood that waists were made for wear, that was not the particular purpose for which defendant purchased, if his purpose should make any difference. The waists were evidently purchased for sale, and while it is

manifest that unfitness for wear would also militate against their sale, just as unfitness of any article for the use that it was designed for would necessarily impair its value in the market, and perhaps to the extent of making it unsalable, the fact that a vendor who sells by sample must know that the goods are bought for the purpose of resale has not been considered sufficient to raise an implied warranty of fitness for use or sale, where the purchase is from a dealer. The cases cited, including our own later case of *Kupfer v. Michigan Clothing Co.* 141 Mich. 325, 104 N. W. 582, indicates this. It would be hard to find a case closer in point than the one last cited. A dealer sold corduroy by sample. Its obvious purpose was to sell for clothing. Owing to a latent defect, it was worthless for this or any other purpose, and necessarily unmerchantable, but we held that equality to the sample was the extent of the warranty. See also the following cases cited by counsel: *Seitz v. Brewers' Refrigerating Mach. Co.* 141 U. S. 510, 35 L. ed. 837, 12 Sup. Ct. Rep. 46; *Pratt v. Metzger*, 78 Ark. 177, 95 S. W. 451; *Gossler v. Eagle Sugar Refinery*, 103 Mass. 334; *Wisconsin Red Pressed-Brick Co. v. Hood*, 54 Minn. 543, 56 N. W. 165.

We understand that the defendant bases his claim upon the proposition that the plaintiffs are to be considered the manufacturers of the waists. As a fact, it is self-evident that they have nothing to do with the manufacturing. They are nothing more than dealers, who, receiving lines of samples of goods which the manufacturer makes, sell them by sample, and either carry them in stock, or order after sales are made. We think that such dealers cannot be called "manufacturers" in any sense, and we are aware of no case which would justify such a holding. We find nothing in the record that would justify the inference that the contract was one made with the foreign concern, through agents. It appears to have been an order given to dealers in this country, who obtain and import their goods to fill their orders from a foreign manufacturer or dealer.

To recapitulate, we find: First. That these plaintiffs were dealers, and not manufacturers. Second. That the sale was by sample, and no error is assigned upon the proposition that the goods furnished equaled the sample. Third. Under the proofs, there was no warranty that the goods should be merchantable, or of their fitness for use by defendant's customers. Fourth. No error was committed in rejecting the offered testimony or usage.

The judgment is affirmed.

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NEBRASKA SUPREME COURT.

CORA MAY BUCHANAN, by Guardian
ad Litem, Impleaded, etc., Appt.,
v.

WILLIAM N. HUNTER.

(— Neb. —, 127 N. W. 166.)

Ward — sale of real estate by guardian — nature.

1. A sale of real estate by a guardian of an insane ward, under license, for the purpose of paying debts due from the ward, is a proceeding *in rem*, and not adverse to the interests of the ward.

Same — notice to — necessity for.

2. In such cases the provisions of § 49, chap. 23, Comp. Stat. 1909, do not require the service of the notice of the application for a license to be made upon the insane ward.

Same — approval of guardian's bond — necessity for.

3. Where a license was legally issued for the sale of the real estate of an insane ward, the property sold for its value, the sale confirmed, deed made, and the proceeds duly accounted for by the guardian, the sale will not be held void upon collateral attack for the sole reason that the guardian's bond, required by § 54, chap. 23, Comp. Stat. 1909, made to the judge of the district court, was not formally approved by such judge.

Guardian *ad litem* of insane person — right to appeal.

4. The duties of a guardian *ad litem*, duly appointed by a court to defend the interests of an insane ward, do not necessarily terminate with the decision of the case in which he was appointed, but he has authority, in a proper case, to appeal said cause to the court of last resort.

(Fawcett, J., dissents from proposition 3.)

(June 29, 1910.)

Headnotes by REESE, Ch. J.

Note. — Necessity of notice to insane person of application for sale of his property to pay debts.

The few reported cases upon this subject agree with *BUCHANAN v. HUNTER* that it is not necessary that a notice of an application for the sale of a lunatic's real estate to pay his debts should be served upon him.

Such was the rule laid down in *Mohr v. Manierre*, 101 U. S. 417, 25 L. ed. 1052, which is cited and sufficiently set out in the foregoing opinion. To the contrary was the decision in *Mohr v. Tulip*, 40 Wis. 67, a case involving the same lunatic, but which was decided prior to the decision of the case in the United States Supreme Court. But in a subsequent case, also involving the same lunatic, *Mohr v. Porter*,

APPEAL by the guardian *ad litem* of Cora May Buchanan from a judgment of the District Court for Otoe County in plaintiff's favor in an action brought to quiet title to certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. W. F. Moran, guardian *ad litem*, in *propria persona*:

It is essential that the ward have notice of the application of the guardian to sell her real estate to pay debts. No notice having been given her, the sale is absolutely void.

Myers v. McGavock, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522; Bennett v. Hayden, 145 Pa. 586, 23 Atl. 255.

Unless the sale is made by the authority of a court having jurisdiction, the sale is void.

Griswold v. Butler, 3 Conn. 231; Rannella v. Gerner, 80 Mo. 474; New England Loan & T. Co. v. Spittler, 54 Kan. 570, 38 Pac. 799.

The provisions of the statutes requiring a guardian licensed to sell the real estate of his ward, to give bond to the judge of the district court, to be approved by such judge, is mandatory; and if the bond is not approved by the judge, the sale is void.

Bachelor v. Korb, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485; Weld v. Johnson Mfg. Co. 84 Wis. 537, 54 N. W. 335, 998; Holden v. Curry, 85 Wis. 504, 55 N. W. 965; Currie v. Stewart, 26 Miss. 646; Babcock v. Cobb, 11 Minn. 347, Gil. 247; Rucker v. Dyer, 44 Miss. 591; Williams v. Morton, 38 Me. 47, 61 Am. Dec. 229; Barnett v. Bull, 81 Ky. 127; Stewart v. Bailey, 28 Mich. 251; Ryder v. Flanders, 30 Mich. 336.

A court of equity has no power, directly or indirectly, to confirm a private sale made by an unauthorized person of an infant's land.

Kinslow v. Grove, 98 Ky. 266, 32 S. W. 933.

Courts have no inherent power to make sales of infant's lands, but the power to do so rests solely upon statute.

Hoback v. Miller, 44 W. Va. 635, 29 S. E. 1014.

Receipts of purchase money by the committee, for a lunatic's interest in real es-

tate irregularly sold by the sheriff, do not estop a later committee from recovering possession of such property, notwithstanding valuable improvements have been made by the purchaser.

Warden v. Eichbaum, 14 Pa. 121; Bachelor v. Korb, supra; Wilkinson v. Filby, 24 Wis. 441; Requa v. Holmes, 26 N. Y. 338; Rowe v. Griffiths, 57 Neb. 488, 78 N. W. 20.

The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward.

Bachelor v. Korb, supra.

Mr. Paul Jessen, for appellee William N. Hunter:

The doctrine of *caveat emptor* cannot be invoked by Mrs. Buchanan.

Tarnow v. Carmichael, 82 Neb. 1, 116 N. W. 1032.

Mr. Edward F. Warren for the general guardians, Warren D. and Emery D. Tibbits.

Reese. Ch. J., delivered the opinion of the court:

The facts in this case, as shown by the pleadings and evidence, may be briefly stated as follows: In 1891 Cora May Buchanan was the owner in fee of lots 1 and 2, in block 3, in Gray's addition to the village of Syracuse, Otoe county, in this state, and was managing and controlling her own property. There was a small house on lot 2. Lot 1, a corner lot, was vacant. Desiring to build a house on lot 1, she applied to W. E. Page, a lumber dealer in Syracuse, for the loan of sufficient money for the construction of the house, or that she be furnished with the material necessary for that purpose and for which she could pay a part of the purchase price. A contract was entered into and the material furnished, and for which she made a partial payment, but much less in amount than what she had promised and doubtless thought she could pay. The material was furnished and the house partly constructed. Mechanics' and laborers' liens accumulated, which were canceled by Page until he had invested in the property between \$880 and \$900, and which were claims

51 Wis. 487, 8 N. W. 364, Mohr v. Tulip was overruled, and the decision was in line with the United States Supreme Court.

So, in Agricultural Ins. Co. v. Barnard, 96 N. Y. 525, the court, citing Mohr v. Manierre, supra, said: "The committee is the proper person upon whom all notices intended for the lunatic or affecting his rights of property are required to be served, and in applying to the court for leave to dispose of the property of the lunatic, he represents that person, and is not required to give notice of his proceedings to him." 29 L.R.A. (N.S.)

A sale of the real property by the guardian of a lunatic will not be set aside because no notice of the proceedings to have him declared a lunatic or of the petition for the sale of the property was given to him. Smith v. Burnham, 1 Aik. (Vt.) 84.

So, also, in Dutcher v. Hill, 29 Mo. 271, 77 Am. Dec. 572, it was held that the validity of the sale of the lands of a lunatic could not be attacked upon the ground that no notice of the inquisition had been served upon him.

W. M. G.

against Mrs. Buchanan and largely, if not entirely, against the property. In the meantime Mrs. Buchanan had become insane, and not competent to transact her own business or manage her property or affairs, nor had she the means whereby the indebtedness could be paid or her house completed. Her mother, Mary A. Tibbits, and her three brothers, Emery D. Tibbits, Arthur D. Tibbits, and Warren D. Tibbits, were residents of Otoe county, and were her only prospective heirs and the only persons interested in her personal or financial welfare, she being a widow and childless. Her father was deceased, and she had no near relatives save those above named. She was placed in the hospital for the insane near the city of Lincoln, where she now is, with no prospect of recovery. Soon after her failure to complete her house on lot 1, and on the 30th day of July, 1902, Emery D. Tibbits, one of the brothers above referred to, was duly appointed her guardian by the county court of Otoe county, he having qualified as required by law, and entered upon the discharge of his duties as such guardian. Subsequent thereto he made his application to the judge of the district court of Otoe county for license to sell lot 1 for the purpose of paying the liens upon the property, alleging that its value was \$800. The county commissioners gave their approval of the proposed sale, the license was granted, bond was given by the guardian, and the lot sold to W. E. Page for the sum of \$725, the sale confirmed and deed executed. The price for which the lot was sold was applied to the payment, in part, of Page's claims; the unpaid remainder was canceled by him, so that the real results of the sale were more than the value of the property. The only alleged defect in this proceeding was the failure to serve notice on Mrs. Buchanan, and it is claimed that for that reason the sale was void. This presents the question as to whether such notice was essential to the jurisdiction of the court granting the license.

In support of the contention that such notice was necessary to confer jurisdiction and that the sale without it was void, we are cited to *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N. W. 522. In that case the guardian applied for a license to sell the real estate of his minor wards for the purpose of raising funds to be used in their maintenance and education, and the contention was made that the sale was void for the reason that the notice of the application was not served upon the wards. That contention was based on § 49, chap. 23, Comp. Stat. 1909 (Cobbey's Anno. Stat. 1909, § 5418), which is as follows: "A copy of such order shall be personally served on the next of kin of such

ward, and on all persons interested in the estate, at least fourteen days before the hearing of the petition, or shall be published at least three successive weeks in such newspaper circulating in the county as the court shall specify in the order." The court, by a commissioner, held that, as the proceeding had for its object the maintenance and education of the wards, and therefore was for their benefit, it was not adversary, and no notice as to them was necessary. It is true that the commissioner held in the opinion, by way of argument, but not deciding any question involved in the case, that, had the application been for any other purpose than the maintenance and education of the wards, a different rule would have been applied, and a notice would have been necessary. But this was purely *dictum*, and such holding was in no sense necessary to the decision of the case then pending.

We have searched the statute in vain for any intimation of a rule different in one case from the other. It is provided in § 22, chap. 34, Comp. Stat. 1909 (Cobbey's Anno. Stat. § 5302), that guardians, whether for minors or other persons, shall pay all just debts due from the ward out of his personal estate and the income of his real estate, if sufficient; or if not, then out of his real estate upon obtaining a license for the sale thereof, and disposing of the same in the manner provided by law. The statutes confer jurisdiction upon the district court and the judge thereof to grant licenses to guardians to sell the real estate of their wards. If it is proper and legal to issue the license in a case brought for one purpose, it must be equally so in all, for the statutes make no distinction. As bearing upon the question upon whom the notice must be served, under the provisions of § 49, above quoted, reference might be made to § 109 of the same chapter, which provides: "All those who are next of kin and heirs, apparent or presumptive, of the ward, shall be considered as interested in the estate, and may appear and answer to the petition of the guardian, and when personal notice of the time and place of hearing the petition is required to be given, they shall be notified as persons interested according to the provisions respecting similar sales by executors and administrators, contained in this subdivision." Such are the "persons interested in the estate," referred to in § 49. We think it must be conceded that there is no direct provision of the statute requiring notice of the application to be served upon the ward.

In *Mohr v. Manierre*, 101 U. S. 417, 25 L. ed. 1052, a question quite similar to this was under consideration by the Supreme Court of the United States. In that case

the contention arose upon the alleged failure of the guardian of an insane ward to publish notice in the manner provided by the statutes of Wisconsin, some claiming that the notice was, and others that it was not, published for the full period required by the statute. In writing the opinion Mr. Justice Field said: "We shall assume, however, that the notice was not published for the full period prescribed, and the question for consideration is whether such omission, all other requisites of the statute having been complied with, rendered the order of the court invalid as against the plaintiff Mohr, the then lunatic; or, in other words, whether such publication was essential to the jurisdiction of the court to grant the license to sell." After stating the statute and discussing the subject at some length, it is said: "It is apparent from these sections that the publication of notice of the hearing is only intended for the protection of parties having adversary interests in the property, and is not essential to the jurisdiction of the court. It may be dispensed with if the parties having such interests consent to the sale. The consent could not be signed by the lunatic, for he, by his condition, would be incapable of giving a consent, and yet, upon the others' consent, the court could proceed to act without notice to him. Nor, indeed, was there any reason why publication of notice should be made for other parties than those who held adversary interests. The lunatic could not be affected by such publication any more than by his consent. The application of the guardian to the county court was required by the law only as a check against any improvident action by him. There was nothing in the nature of the proceedings which required a notice of any kind, so far as the rights of the lunatic were concerned. The law would have been free from objection had it simply authorized, upon the consent of the court, a sale of the lunatic's property for the payment of his debts. The authority of the court in that case, as in this, would have existed to license the sale whenever it appeared that the personal estate of the lunatic was insufficient to pay his debts, and that a sale of his real property was necessary for that purpose. There is no charge of fraud in the action of the guardian, nor is it suggested that the property sold did not bring a fair price. The simple question is whether, as against the lunatic, the license to sell was invalid for insufficient publication of notice of the hearing, the same being, as already stated, required only for the protection of other parties interested in the estate. The decision of this court in *Grignon v. Astor*, 2 How. 319, 11 L. ed. 283, to which we have already 29 L.R.A. (N.S.)

referred, would seem to be decisive on this point. Indeed, it goes beyond what is required for the affirmance of the judgment here."

The case of *Mickel v. Hicks*, 19 Kan. 578, 27 Am. Rep. 161, cited in *Myers v. McGavock*, supra, is not in point in that case nor in this, to the extent that the question there was as to the proceedings of an administrator in the sale of real estate, under the statutes of that state, in the matter of giving notice. The question arose as to whether the sale of real estate by an administrator was not a proceeding *in rem*. Judge Brewer, in writing the opinion, says: "An examination of the authorities discloses a wonderful disagreement." (Citing a number of cases holding that they do.) He, however, gives his adherence to the opposite view, apparently, that upon the death of the owner of real estate, the title and possession pass immediately to his heirs; that it is not sold as of course, but only when necessary to pay the debts of the deceased; that until that fact is judicially established the heirs may not be divested of their title, and before one is divested of title to property, he ought to have his day in court.

In *Scarf v. Aldrich*, 97 Cal. 360, 33 Am. St. Rep. 190, 32 Pac. 324, the statute required the order of the sale of the ward's real estate to be "personally served on the next of the kin of the ward, and upon all persons interested in the estate," etc. (which is identical with the statute in this state), or the publication thereof for three successive weeks. It was contended that, by reason of a defective notice, the sale was void. It was also contended that proceedings by a guardian for the sale of his ward's land were adverse to the ward, and that a substantial compliance with the statute was a prerequisite for obtaining authority to proceed. Upon this part of the case, the court said: "Respondent's principal error lies in the first part of his contention, *viz.*, that the proceedings are adverse to the ward, for in fact the proceedings are by the ward and for his benefit. Our statute does not require that notice shall be given to or served upon the ward, thus emphasizing what is apparent from the nature and object of the proceeding, and clearly distinguishing it from a proceeding by an administrator to sell the real estate of the intestate to pay debts, which is clearly adverse to the heir, and therefore a valid and sufficient notice to the heir is essential to give the court jurisdiction over him as a party to the proceeding. But in the case of guardians' sales, the minor is in court by the filing of the petition, and submits his property to the jurisdiction and order of the court. An order

for the sale of the property is not an order against or adverse to the minor, but is a granting of his request. It is not a judgment *in personam*, but operates only on the property, and is therefore *in rem*." See also *Agricultural Ins. Co. v. Barnard*, 96 N. Y. 525.

In 21 Cyc. Law & Proc. p. 125, it is said in the text that "in many jurisdictions it is held that, in the absence of a statutory requirement, notice is not required to be given upon application for the sale of the land of minors," citing cases from a number of states. It must be conceded that, aside from the holdings of the court in this state, there is, to use the language of Judge Brewer in *Mickel v. Hicks*, supra, "a wonderful disagreement" of authorities. It is true, we think, that practically all agree that if a proceeding by a guardian to sell real estate of his ward is not adversary, but in the nature of a proceeding *in rem*, and the statute does not in terms require the notice to be served upon the ward, the failure to cause such notice to be served will not render the sale invalid. Many of the courts have held that the application to sell real estate by an administrator is an adverse proceeding, while a similar application by a guardian to sell the land of his ward is not; but we do not call to mind any case holding the reverse, the reasons given being substantially as stated in *Mohr v. Manierre*, 101 U. S. 424, 25 L. ed. 1053, hereinabove referred to. In this state it has been heretofore held in at least two cases that an application by an administrator to sell real estate belonging to the estate of which he is such administrator is not an adversary proceeding, but *in rem*. *McClay v. Foxworthy*, 18 Neb. 295, 25 N. W. 86, and *Schroeder v. Wilcox*, 39 Neb. 136, 57 N. W. 1031, which are followed and approved in *Brusha v. Phipps*, 86 Neb. 822, 126 N. W. 856. Such being the rule adopted in this jurisdiction, it follows with the stronger reason that it must be held to apply to the sale in question, and that it was not void. We therefore hold that the sale of the lot referred to as lot 1 was valid and transferred the title thereto to the purchaser.

The attack made upon plaintiff's title to lot 2 is upon the ground that the bond of the guardian given to the judge of the district court in connection with the application for license to sell said lot 2 was approved by the clerk of the district court, and not by the judge, as required by § 5423, *Cobbey's Anno. Stat.* 1909, and that for that reason the sale of said lot was void. In support of this contention the case of *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 73 N. W. 435, in connection with a number of L.R.A. (N.S.)

cases, is cited. So far as the record shows, every essential step in the proceeding, except as to the approval of the bond, was regular and in strict accordance with the requirements of the statute.

With the exception of the testimony of E. F. Warren, Esq., who was the attorney for the guardian in the application for license to sell, the record is bare of any facts in connection with what occurred at the time the bond was approved. Mr. Warren stated frankly upon the witness stand that, as the transaction occurred some three or four years before the giving of his testimony, his memory was not clear upon the subject. He was asked to give his best recollection of the transaction. His answer was: "As I recollect this proceeding, I came into court when Judge Jessen (the judge of the district court) was on the bench. It was in the morning. I then presented to him the papers in the case, together with the bond, for signature, and that he was busy hearing some other matters, and he said to take it to the clerk of the court. Now, that's my recollection of the way that was. Of course, as I said before, I wouldn't swear to it, because that was about three or four years ago;" and that he then took the bond to the clerk. There is no showing in the record that the district court was not in session on the date of the approval of the bond, and we must assume that Mr. Warren's recollection in that particular was correct. Had he been mistaken, the attorney representing the opposite side of the case would certainly have shown it, the records being at hand at the time. This being true, the act of the judge and clerk must be held to have been the action of the court, and the question arises, Would this slight deviation render the whole proceeding void? The bond was made payable to the judge or the district court, as required by law.

In *Bachelor v. Korb*, supra, it is said, quoting from the opinion: "This bond was never presented to, nor in any manner approved by, the judge of said district court. It was, however, filed in the court and approved by the clerk thereof." So far as is shown by the decision, the court was not in session and the bond was filed in vacation, without the knowledge or acquiescence of the judge, and wholly without his direction or approval, and the sale was held void. In this respect that case is to be distinguished from this, and is no authority for holding the sale in this case void. In the course of the opinion, the writer, at page 127 of 58 Neb., refers to the opinion written by himself in *Myers v. McGavock*, 39 Neb. 843, 42 Am. St. Rep. 627, 58 N.

W. 522, and quotes from what is said at page 865 of 39 Neb., a part of which is as follows: "On the trial of the case at bar the defendants proved, by the attorney who conducted the proceeding on behalf of the guardian, that the bond was in fact presented to and approved by the presiding judge. The fact of the approval of the bond, like any other fact, might be proved by the best evidence attainable. We are of opinion, however, that in this collateral proceeding the guardian's deed could not be declared void because the bond filed for the purpose of obtaining the license to sell the real estate was not formally approved. *Emery v. Vroman*, 19 Wis. 689, 88 Am. Dec. 726; *Pursley v. Hayes*, 22 Iowa, 11, 92 Am. Dec. 350; *Hamiel v. Donnelly*, 75 Iowa, 93, 39 N. W. 210."

We have examined the cases cited and find that they fully, and without reservation, sustain the reasoning of the commissioner in both the *Bachelor v. Korb* and *Myers v. McGavock* Cases, supra, and that, by the reasoning and logic of both cases, the sale in this case should be held valid. It may not be amiss to here state that the record and proofs, as touching both sales involved in this inquiry, show that the utmost good faith has characterized every step taken by the two guardians (brothers of Mrs. Buchanan) and by the purchasers of the lots in question. In each case the property was sold for its full value, and her estate has received full and due credit, and actually received the benefits of the amounts for which the lots were sold. There is no semblance of fraud on the part of anyone connected with either of the transactions, and we the more readily affirm the decision of the district court.

After the suit was commenced the defendants, the Tibbits, having failed to answer, a default was entered against them, including Warren D. Tibbits, the guardian of Mrs. Buchanan. The court then appointed Mr. W. F. Moran guardian *ad litem*, who filed his answer consisting of a general denial and alleging a number of affirmative defenses. Subsequently the guardian and other members of the family obtained leave and answered, setting up the facts and in substance admitting plaintiff's equities. The guardian *ad litem* remained in the case, seeking to support the title of the ward, and when the cause was determined in favor of plaintiff took this appeal. Practically from the date of the filing of the answers by the general guardian and other presumptive heirs of Mrs. Buchanan, there arose something of a contention between the general guardian and the guardian *ad litem*, as to the right of the latter to maintain control of the defense and take this appeal. 29 L.R.A. (N.S.)

A motion to dismiss the appeal was filed in this court and overruled. At each step of the proceeding the authority of the guardian *ad litem* has been questioned, as matter of law, and we are asked to decide the question as to the continued powers of such guardian. In 22 Cyc. Law & Proc. p. 706, the subject of the powers of guardians *ad litem* is discussed and cases cited in support of the text, but of which the limited time at our disposal will not permit a review. It must be sufficient to say that it is there shown that such guardian does not become *functus officio* by the rendition of a judgment or decree in the cause in which he has been appointed, but that he may take and prosecute an appeal therefrom. In all cases he should exercise care to subserve and conserve the interests of his ward alone. *Wirth v. Weigand*, 85 Neb. 115,—L.R.A. (N.S.)—122 N. W. 714.

The judgment of the District Court is in all things affirmed.

Letton and Sedgwick, JJ., concurring:

We concur in the conclusion, but express no opinion as to the third point in the syllabus and the second point discussed in the opinion.

Fawcett, J., dissenting:

I am unable to reconcile the majority opinion with § 54, chap. 23, Comp. Stat. 1909, or with the construction of that statute so clearly and distinctly made in *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485. The section of the statute reads: "Every guardian licensed to sell real estate, as aforesaid, shall, before the sale, give bond to the judge of the district court, with sufficient surety or sureties, to be approved by such judge, with condition to sell the same in the manner prescribed by law for sales of real estate by executors and administrators, and to account for and dispose of the proceeds of the sale in the manner provided by law."

In construing that statute in *Bachelor v. Korb*, the first three paragraphs of the syllabus read as follows: "1. The provision of the statute (Comp. Stat. 1897, chap. 23, § 54) requiring a guardian licensed to sell the real estate of his wards, to give a bond to the judge of the district court, to be approved by such judge, is mandatory. 2. The district courts are not invested with discretion to require or not a guardian appointed in this state, when licensed to sell lands in this state of his wards, to give the bond required by said § 54. 3. Such a guardian's sale of the lands of his ward is void unless, before such sale, the guardian executes the bond required by said § 54. The judge of the district court granting the

license must be the obligee in the bond, and it must be approved by such judge."

It is not disputed that the district judge did not approve the bond. The uncontradicted evidence shows that the attorney for the guardian tendered the bond to the district judge while he was upon the bench hearing a case, and that the judge, without even looking at the bond, directed counsel to take it to the clerk. The bond was taken to the clerk and by him approved. In my judgment and under the rule announced in *Bachelor v. Korb*, the bond was absolutely void. It will not do to say that the action of the judge while upon the bench, in directing the attorney to take the bond to the clerk, was an approval by the judge. If the statute permitted the approval of such bond by the court, I think it is clear that that would have been sufficient. But the court is not given the power to approve such bond. The bond must run to the district judge, and must be approved by him as judge, and not when sitting as a court. Such a proceeding is purely statutory and the statute must be literally complied with. The fact that the purchaser acted in good faith and paid a full consideration for the property cannot avail him anything. He was bound to know that the guardian had no authority to make the sale. In the eighth paragraph of the syllabus in *Bachelor v. Korb*, we held: "The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward."

In *Veeder v. McKinley-Lanning Loan & T. Co.* 61 Neb. 892, 907, 86 N. W. 982, *Bachelor v. Korb*, supra, is cited with approval and quoted from as follows: "The rule of *caveat emptor* applies to a purchaser at a guardian's sale of the real estate of his ward. . . . But the defendants in error, though they may have paid a valuable consideration for this real estate, are not innocent purchasers of it. One who purchases real estate at a guardian's sale, or purchases from the vendee of that sale, must take notice at his peril of the authority of the guardian to make the sale. The doctrine of *caveat emptor* applies to purchasers at guardian's sales."

In *Neary v. Neary*, 70 Neb. 319, 324, 97 N. W. 302, 304, we again put the seal of our approval upon *Bachelor v. Korb*, in the following language: "The cases of *Bachelor v. Korb*, 58 Neb. 122, 76 Am. St. Rep. 70, 78 N. W. 485, and of *Veeder v. McKinley-Lanning Loan & T. Co.* 61 Neb. 892, 86 N. W. 982, are instructive cases upon the doctrine followed in this state."

If I could see any way to affirm the judgment in the case at bar, without doing violence to the statute and to our former holdings, I would be glad to do so. But, how-
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ever unfortunate the situation of the purchaser at the guardian's sale may be, the court, in my judgment, is powerless to give him any relief in this case.

NEBRASKA SUPREME COURT.

LAURA DRAPER et al.

v.

SAMUEL T. CLAYTON et al., Appts.

(— Neb. —, 127 N. W. 369.)

Homestead — power of county court to decree.

1. A decree of the county court assuming to vest in a widow the absolute title to a homestead selected from the lands of her deceased husband is void, as an exertion of power not granted by the Constitution or laws of the state.

Same — ex parte order — estoppel.

2. An *ex parte* order made upon a widow's application, setting apart to her a homestead interest in the lands of her deceased husband, will not estop his children, residing at that time in the county where the homestead is situated, and who have not subsequently ratified the order, or otherwise waived their right, to object thereto.

Constitutional law — due process — curative act.

3. Chapter 32, § 1, Laws Neb. 1895

Headnotes by Root, J.

Note. — Right of life tenant who pays off liens or encumbrances, as against remainderman.

This note does not cover the general question as to the duty of the life tenant to keep down the interest or to pay off encumbrances. Nor does it cover the broad question of the apportionment of the burden of encumbrances between life tenants and remainderman.

The cases are agreed that where a life tenant pays off a mortgage outstanding against the estate, he is entitled to reimbursement from the remainderman; *Jones v. Gilbert*, 135 Ill. 27, 25 N. E. 566; *Boue v. Kelsey*, 53 Ill. App. 295; *Whitney v. Salter*, 36 Minn. 103, 1 Am. St. Rep. 656, 30 N. W. 755; *Tindall v. Peterson*, 71 Neb. 160, 98 N. W. 688, 6 A. & E. Ann. Cas. 721 modified as to amount, 71 Neb. 166, 99 N. W. 659, 8 A. & E. Ann. Cas. 724; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Kocher v. Kocher*, 56 N. J. Eq. 545, 39 Atl. 535; *Shrewsbury v. Shrewsbury*, 1 Ves. Jr. 227.

And he is likewise entitled to reimbursement where he pays other debts and encumbrances outstanding against the estate. *Barnum v. Barnum*, 42 Md. 253; *Peck v. Glass*, 6 How. (Miss.) 195; *Callcott v. Parks*, 58 Miss. 528; *Hunt v. Watkins*, 1 Humph. 498.

And where a life tenant pays a mortgage

(Comp. Stat. 1900, chap. 23 § 29a) contravenes § 3, art. 1, of the Constitution of the state of Nebraska, and is null and void.

Guardian—receipt for money not received—estoppel of ward.

4. An infant's guardian, by giving a receipt for money not received by her, but purporting to have been received in satisfaction of the ward's share of a surplus over and above the appraised value of the infant's ancestor's homestead, in proceedings prosecuted under the "Baker act" (Laws 1889, chap. 57), will not estop the ward from asserting his estate in said homestead.

Limitation of action—infant remainderman—assertion of fee by life tenant.

5. If a widow asserts, by virtue of a void order of the county court, a title in fee simple to a homestead selected from her late husband's lands, an infant child of the decedent ordinarily may, at any time within ten years after attaining his majority, maintain an action, under §§ 57-59, chap. 73, Comp. Stat. 1909, for the purpose of quieting his title in said land.

Life tenant—satisfaction of lien—right to contribution from remainderman.

6. Where a life tenant of real estate pays off a past-due encumbrance which is a lien upon the entire estate, he is entitled to contribution from the remainderman, and should recover from him the difference be-

tween the principal debt and the present value of an annuity equal to the annual interest charge running during the years which constitute the life tenant's expectancy of life.

(Reese, Ch. J., and Sedgwick, J., dissent from proposition 2.)

(July 9, 1910.)

APPEAL by defendants from a decree of the District Court for Hamilton County in favor of certain plaintiffs in a suit to confirm plaintiffs' alleged title to certain lands. Modified.

The facts are stated in the opinion.

Messrs. Hainer & Smith, for appellants:

The county court had jurisdiction to assign a homestead to Mary J. Foster out of the lands of her deceased husband that had been occupied by the family.

Barrick v. Horner, 78 Md. 253, 44 Am. St. Rep. 283, 27 Atl. 1111; Guthman v. Guthman, 18 Neb. 98, 24 N. W. 435; Ackerson v. Orchard, 7 Wash. 381, 34 Pac. 1106, 35 Pac. 605; Cockey v. Cole, 28 Md. 276, 92 Am. Dec. 683; Brandhoefer v. Bain, 45 Neb. 78, 64 N. W. 213; Spencer v. McGonagle, 107 Ind. 410, 8 N. E. 266; Re Graham, 74 Wis. 450, 17 Am. St. Rep. 174, 43 N. W. 148.

debt, he is entitled to a lien against the property for the remainderman's share. Jones v. Gilbert; Tindall v. Peterson; Kocher v. Kocher; and Whitney v. Salter;—supra; Bonhoff v. Wiehorst, 57 Misc. 456, 108 N. Y. Supp. 437; Warner v. York, 25 Ohio C. C. 310; Wilder v. Wilder, 75 Vt. 178, 53 Atl. 1072; Gifford v. Fitzhardinge, [1899] 2 Ch. 32.

So, where a life tenant purchases at an execution sale of slaves in which a life estate and a reversion exist, the reversioner is bound to contribute his proportion, and the life tenant has a lien therefor upon the estate. Daviess v. Myers, 13 B. Mon. 511.

And where slaves, without the life tenant's fault, ran away to a free state, and, in order to restore them to herself and the remainderman, the life tenant expended more than their value, it was held in Blount v. Hawkins, 57 N. C. (4 Jones, Eq.) 161, that the remainderman was bound to contribute to the expense in proportion to the value of his interest in the slaves.

So, it was held in Jones v. Gilbert, supra, that a life tenant who paid a certain amount to release the homestead from a mortgage should contribute ratably to the discharge, the extinguishment of the lien being equally necessary to protect her interest.

The general rule that where a life tenant pays off a mortgage or other charge upon the entire estate, he is presumed to do so for his own benefit, and may preserve and enforce a lien for reimbursement, was approved in Downing v. Hartshorn, 69 Neb. 29 L.R.A. (N.S.)

364, 111 Am. St. Rep. 555, 95 N. W. 801; but the question involved there was whether the life tenant's wife's right of homestead had been defeated by the husband's reassignment of a mortgage which had been an encumbrance upon the estate and which he had paid.

And the general rule as to a life tenant's right to reimbursement was recognized in Melms v. Pabst Brewing Co. 93 Wis. 149, 66 N. W. 244, but in that case it was held that grantees of the life tenant who supposed that they were purchasing a fee, and assumed a mortgage as part of the consideration, could not recover the amount paid on the mortgage from the remainderman, upon discovering that they had only obtained a life estate.

A second life tenant who purchases at a tax sale resulting from the first life tenant's failure to pay the taxes is entitled to a lien for contribution from the remainderman, but he cannot set up his tax title against the remainderman. Defreese v. Lake, 109 Mich. 415, 32 L.R.A. 744, 63 Am. St. Rep. 584, 67 N. W. 505; Phelan v. Boylan, 25 Wis. 679.

So, in Fidelity Ins. T. & S. D. Co. v. Dietz, 132 Pa. 36, 18 Atl. 1090, the fact that a life tenant allowed the interest to remain unpaid, and that the foreclosure of a mortgage resulted, was held not to prevent him from purchasing at the sale, or to affect the title of his mortgagees as against the remainderman.

But where property in which a life

The act of the legislature which confirms and legalizes judgments and decrees rendered by county courts under the Baker act is not inimical to any of the provisions of the state Constitution, and the legislature has full and plenary power with respect to such legislation.

Coles v. Madison County, Breese, 115, 12 Am. Dec. 161; *Goshen v. Stonington*, 4 Conn. 209, 10 Am. Dec. 121; *Mechanics' & Bank v. Union Bank*, 22 Wall. 276, 22 L. ed. 871; *Iowa R. Land Co. v. Soper*, 39 Iowa, 112; *Bennett v. Fisher*, 26 Iowa, 497.

The plaintiffs are estopped from maintaining their alleged cause of action.

Hawley v. Von Lanken, 75 Neb. 597, 106 N. W. 456; *Mote v. Kleen*, 83 Neb. 585, 31 Am. St. Rep. 654, 119 N. W. 1125.

Messrs. *J. J. Sullivan*, *John C. Martin*, and *George W. Ayres*, for appellees:

The decree of the county court which purported to give *Mary J. Foster* a fee-simple title to the premises in controversy was null and void, in so far as it assumed to confer any more than a life estate in the premises upon *Mrs. Foster*.

Finders v. Bodle, 58 Neb. 57, 78 N. W. 180.

The decree assuming to vest an absolute title to the premises in controversy in the

widow of *Jasper A. Foster* being void, it was not necessary to institute proceedings for a reversal or modification of such decree.

Freeman, Judgm. 4th ed. § 117; *Black*, Judgm. §§ 170, 278.

The act of the legislature which attempted to validate decrees previously rendered under the so-called Baker act is inimical to the constitutional provision that "no person shall be deprived of life, liberty, or property without due process of law."

Maxwell v. Goetschius, 40 N. J. L. 383, 29 Am. Rep. 242; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *McDaniel v. Correll*, 19 Ill. 226, 68 Am. Dec. 591; *Nelson v. Rountree*, 23 Wis. 368; *Powers v. Bergen*, 6 N. Y. 358; *Jones v. Perry*, 10 Yerg. 59, 30 Am. Dec. 430; *Shonk v. Brown*, 61 Pa. 320; *Alter's Appeal*, 67 Pa. 341, 5 Am. Rep. 433; *Denny v. Mattoon*, 2 Allen, 361, 79 Am. Dec. 784.

Root, J., delivered the opinion of the court:

This is an action in equity to confirm plaintiff's title to a tract of land. Two of the plaintiffs were given partial relief, and the defendants appeal.

In 1880, *Jasper Foster* received a patent,

which was subject to a mortgage which was a lien thereon, and the duty of paying the interest rested upon the life tenant. The grantee of the life tenant was held not entitled to enforce contribution from the remainderman for the sum paid upon an invalid sale of the property, which was had because of the alleged failure of the life tenant to pay the interest. *Bowen v. Bregan*, 119 Mich. 218, 75 Am. St. Rep. 337, 77 N. W. 942.

And where the intention of a widow in paying off an encumbrance was to benefit her daughter and grandson, and there was apparently no intention on her part to keep the mortgage alive, she will not be subrogated to the mortgagee's rights. *Kinthead v. Ryan*, 65 N. J. Eq. 726, 55 Atl. 730.

Since life tenants are bound to keep the interest down, they will not be allowed a claim therefor against the remainderman. *Callicott v. Parks*, 58 Miss. 528; *Thomas v. Thomas*, 17 N. J. Eq. 356; *Hunt v. Watkins*, supra.

The simple payment of a mortgage which is a charge upon the estate without more has been held sufficient to establish the right of the tenant for life making such payment to have the charge raised out of the estate. *Re Harvey* [1896] 1 Ch. 137; *Burrell v. Egremont*, 7 Beav. 205, 18 Eng. Rul. Cas. 540.

So, where a life tenant purchases a debt which is a charge against the estate, the presumption is that he has purchased for his benefit, and that he did not intend to

exonerate the estate in remainder, and he is entitled to contribution from the remainderman. *Barnum v. Barnum*, 42 Md. 253.

In *Adams v. Angell*, L. R. 5 Ch. Div. 645, where the question involved was as to the extinguishment of the priority of a first mortgage encumbrance by its payment, the court said: "In a court of equity it has always been held that the mere fact of a charge having been paid off does not decide the question whether it is extinguished. If a charge is paid off by a tenant for life, without any expression of his intention, it is well established that he retains the benefit of it against the inheritance."

This statement was approved in *Re Pride* [1891], 2 Ch. 135, where the owner of an equity of redemption, whose title to a part of the equity was disputed, paid off the mortgage.

And the fact that the life tenant paying the encumbrance is the parent of those entitled to the remainder is not sufficient of itself to rebut the presumption that he intends to keep the charge alive for his own benefit. *Re Harvey*, supra.

And the fact that the mortgage was inadvertently canceled will not prevent the operation of this rule where no rights have been affected thereby. *Kocher v. Kocher*, supra.

So, the entry of an absolute discharge will not defeat the tenant's right to have the charge kept alive. *Gifford v. Fitzhardinge* [1899] 2 Ch. 32. J. T. W.

under the Federal homestead law, for the northeast quarter of section 30, in township 13, range 5 west, in Hamilton county. Foster occupied said real estate as his home until 1889, during which year he died intestate, leaving him surviving six children and his widow. At that time Foster held an executory contract for the purchase of the southwest quarter of the southeast quarter of section 19, in said town and range, and owed thereon about \$100. An administrator was duly appointed for Foster's estate. Subsequently, Foster's widow made application according to the provisions of chapter 57, Laws Neb. 1889, to have the 40 acres of land above described and the north half of said northeast quarter of section 30 appraised as the homestead of her late husband and herself. The county court proceeded in conformity with the terms of said act, found that said 120 acres of land had been selected by Jasper Foster as his homestead, and that the petitioner was entitled to select said land as her homestead. Appraisers were appointed and their appraisal was confirmed by the county court. The widow elected to accept the land at its appraised value, and paid to her adult children their proportion of two thirds of such value, over and above a mortgage lien thereon and the \$1,000 interest therein, which said act purports to grant a widow in her deceased husband's homestead; she also receipted as guardian for the plaintiffs, her minor children, for their share of such surplus. The court then confirmed said proceedings. The widow thereafter claimed to own said real estate in fee simple. The defendants assert title thereto as her grantees. The appellees each represent a one-sixth interest in said land. The district court charged the land with the value of permanent improvements made thereon subsequent to Mr. Foster's decease, subrogated the appellants to the rights of the mortgagee for the amount due upon the mortgage at the time Foster died, and subsequently satisfied by appellants' grantor, confirmed the appellants in the right to occupy and enjoy the north half of the northeast quarter of section 30 during the natural life of the widow, gave them credit for taxes paid upon the 40 acres in section 19, charged them with the rents and profits of said tract, and decreed that, upon the payment by each appellee of a sixth part of the difference between the taxes paid upon said 40 acres and the value of said improvements, on the one hand, and the rental value of the 40 acres on the other, the appellees should severally have a writ of assistance to place them in possession of their interest in said land; and upon the death of Mrs. Foster, each appellee, upon payment of one sixth of the amount due upon said mortgage

at the date Foster died, and chargeable against the 80 acres, should have a like writ to place him in possession of his interest in said real estate.

1. The appellants argue that the county court had authority independently of chapter 57, Laws Neb. 1889, to assign to the widow a homestead estate in the lands of her deceased husband, and, by decreeing an estate in fee simple instead of a life estate, the court merely committed an error, but its judgment is not void. The act of the legislature under which the county court assumed to set apart a homestead to Mrs. Foster was held unconstitutional and void subsequent to the proceedings herein considered. *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 869.

Section 16, art. 6, of the Constitution provides, among other things, that "county courts shall be courts of record, and shall have original jurisdiction in all matters of probate, settlements of estates of deceased persons, . . . and such other jurisdiction as may be given by general law. But they shall not have jurisdiction . . . in actions in which title to real estate is sought to be recovered, or may be drawn in question." At the time the county court of Hamilton county assumed to confirm in Mrs. Foster a title in fee simple to the land described in this action, there was no statute independently of the invalid act above referred to, purporting to give that court authority to set off or determine the boundaries or value of a homestead. Section 22, chap. 20, art. 1, Comp. Stat. 1909, was then in force and provided, as it does not, that all writs, notices, orders, citations, and other process issued out of the county court, should be served in like manner as a summons in a civil action in the district court, and authorized that court to direct the service of a writ by publication, where personal service could not be made in the state, and in the cases specifically provided by law.

By the terms of chapter 36, Comp. Stat. 1909, the head of a family is authorized to select a homestead not to exceed 160 acres in extent and \$2,000 in value, which shall be exempt from sale upon attachment or an ordinary execution. Section 17 of said chapter provides that the homestead, if selected during the lifetime of the owner of the fee, shall, upon his or her death, vest for life in the surviving spouse; remainder, if not otherwise devised, in the heirs of the fee-holding spouse, and the quality of exemption is continued as against the creditors of the deceased. It has ever been the policy of the legislature to exempt a homestead from forced sale upon attachment or ordinary execution.

At the time the present Constitution was

prepared by the constitutional convention and adopted by the people, an act entitled 'An Act to Exempt the Homestead of Families from Attachment, Levy, or Sale upon Execution or Other Process Issuing out of Any Court in the State of Nebraska,' approved February 25, 1875 (Laws, 1875, p. 15), was in force. By the provisions thereof the homestead exemption was extended to the head of a family, to his widow, to his infant children, and to any unmarried child occupying the homestead after his decease. In case it became necessary to ascertain the extent of the homestead, the district court, upon application by any person interested, appointed appraisers to view the premises and report concerning its value. The appraisal was conclusive unless complaint was made, and in that event, the court had power to order the premises reappraised. Upon an application to the district court by an executor or administrator, to sell the decedent's land for the payment of his debts, the court had authority to appoint appraisers to set apart the homestead. The Constitution of 1866 (art. 4, § 4) provided that probate courts should not have authority to "order or decree the sale or partition of real estate," otherwise they were to exercise such jurisdiction as might be provided by law. The Constitution of 1875 is more positive in its restraint upon the jurisdiction of that court. The course of legislation and the decisions of this court up to and including 1875 give no indication that the county court was vested with power to hear and determine an application to establish the existence, limits, or value of a homestead, but the district court was the forum wherein all proceedings were prosecuted for the protection of that estate.

In 1885, in *Guthman v. Guthman*, 18 Neb. 93, 24 N. W. 435, this court held that a county court has authority upon a widow's application to set apart from her deceased husband's lands the homestead, if none of the facts essential to create that estate are controverted. The reasoning is plain that the central fact to justify and support such an order is that the designated land, or some part thereof, constituted the homestead of the petitioner and her husband at the time of his death. This fact being made to appear, the law determines the estate of the widow and the interest of the remaindermen. The opinion in *Guthman v. Guthman* has never been overruled or questioned by this court, but, on the contrary, has been approved and reaffirmed. *Tyson v. Tyson*, 71 Neb. 438, 98 N. W. 1076; *Re Robertson*, 86 Neb. 490, 125 N. W. 1093. The principle announced in *Guthman v. Guthman* is now a rule of property in Nebraska, and ought not to be doubted by practitioners or the courts. Grand-
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jean v. Beyl, 78 Neb. 354, 110 N. W. 1108, 114 N. W. 414, 15 A. & E. Ann. Cas. 577. At the same time the rule should not be extended so as to justify the county courts in assuming to try and determine questions of title connected with an assertion of a homestead estate in the lands of a decedent. The jurisdiction of the probate court to cause a homestead to be appraised and set apart to the widow does not include the right to determine that the homestead estate is one in fee. In entering such a judgment, the court would determine title, the very subject withheld from its jurisdiction by the fundamental law. We cannot therefore accept the argument of defendants' counsel that the order confirming in the widow a title in fee simple was one the court had jurisdiction to make.

2. It is contended that the county court had jurisdiction independent of the Baker act, to cause Foster's homestead to be assigned to his widow, and that since that court assigned the whole 120-acre tract, the district court should have respected the order in so far as it confirmed the appellants in an estate during the natural lifetime of the widow. The record shows that no notice was given to these appellants, who were then minors, except by publication for one week in a local newspaper. In the absence of a statute providing for such method of notice, this was unavailing to affect their title to the property. The testimony is undisputed that the 40 acres described in the contract were used for pasture and were not included within the fence that inclosed Foster's Federal homestead, and that the last-described tract was improved and occupied by the decedent as his home at the time of his death. The district court committed no error in ignoring the proceedings in the county court.

3. It is contended that chapter 32 § 1, Laws Neb. 1895, § 29a, chap. 23, Comp. Stat. 1909, cured all defects inhering in the proceedings in the county court. The act purports to validate all proceedings prosecuted to judgment under the "Baker act," before it was held invalid by this court. The appellees assail this curative act on the ground that it contravenes § 3, art. 1, of the Constitution, which provides: "No person shall be deprived of life, liberty, or property without due process of law." It will be remembered that § 17, chap. 36, Comp. Stat. 1909, provides that in all cases where the owner of a homestead shall die intestate, the surviving spouse shall succeed to but a life estate therein, with remainder to his heirs; this statute was in force during the time the Baker act appeared upon the statutes, and still is the law in Nebraska, and the county courts have at all times been without power to transfer the remainderman's

estate to the widow. If the curative act gave vitality to proceedings prosecuted under the invalid act, it amends the homestead law without mentioning or repealing it, or vests the county courts with jurisdiction prohibited by the Constitution, and, without giving remaindermen their day in court, transfers their estates to their ancestor's widow. None of these things may the legislature lawfully do. The curative act is therefore void. *Maxwell v. Goetschius*, 40 N. J. L. 383, 29 Am. Rep. 242; *Pryor v. Downey*, 50 Cal. 388, 19 Am. Rep. 656; *Nelson v. Rountree*, 23 Wis. 367; *McCord v. Sullivan*, 85 Minn. 344, 89 Am. St. Rep. 561, 88 N. W. 989; *Finlayson v. Peterson*, 5 N. D. 587, 33 L.R.A. 532, 57 Am. St. Rep. 584, 67 N. W. 953; *Maguiar v. Henry*, 84 Ky. 1, 4 Am. St. Rep. 182; *Conway v. Cable*, 37 Ill. 82, 87 Am. Dec. 240.

4. The defendants urge that the plaintiffs are estopped from prosecuting this action, because Mrs. Foster, as guardian for the plaintiffs, receipted for the share of the surplus created by her acceptance of the homestead at its appraised value, which they would have received, if the act were valid. The proof is undisputed that the appellees received no money or other consideration from their guardian. For this reason they are not within the rule announced in *Mote v. Kleen*, 83 Neb. 585, 131 Am. St. Rep. 654, 119 N. W. 1125, and *Borcher v. McGuire*, 85 Neb. 646, 124 N. W. 111. Nor does the principle announced in *Staats v. Wilson*, 76 Neb. 204, 124 Am. St. Rep. 806, 107 N. W. 230, 109 N. W. 379, apply in the case at bar.

5. Finally the defendants argue that the plaintiffs' laches should bar them from equitable relief. *Hawley v. Von Lanken*, 75 Neb. 597, 106 N. W. 456, is cited. The instant case is ruled by *Holmes v. Mason*, 80 Neb. 448, 114 N. W. 606, 115 N. W. 770, and *Hobson v. Huxtable*, 79 Neb. 334, 112 N. W. 658, 116 N. W. 278. Appellees commenced their action within ten years of the date the elder attained his majority. A consideration of the facts in *Hawley v. Von Lanken*, *supra*, will satisfy the reader that the principle of estoppel was wisely and lawfully applied to defeat the plaintiff in that action. In the case at bar the appellees were infants, the younger but three years of age, when Jasper Foster died; neither before nor after attaining majority have they, so far as the record discloses, done anything in the premises to in any manner mislead or prejudice the defendants, nor has there been an instant of time subsequent to the date the widow claimed to own the land in fee simple, that she or any of her grantees could have 29 L.R.A. (N.S.)

prosecuted any proceeding to lawfully divest the appellees of their title. The defenses of estoppel must therefore be resolved against the defendants.

6. The defendants say that, although they may not be vested with an estate in fee simple to the 80 acres, they are life tenants, and the court erred in postponing the collection of the mortgage lien, to which they are subrogated by the court's decree. We think there is merit in this contention. The mortgage constituted a lien upon the remaindermen's as well as upon the life tenant's estate. Before the maturity of the debt, it was the duty of the life tenant, at least to the extent of the rental value of the property, to keep down the annual interest; but he was not compelled to pay of the principal sum when it became due or thereafter. When he satisfied the mortgage, he had a right to an accounting with the remaindermen. *Downing v. Hartshorn*, 6 Neb. 364, 111 Am. St. Rep. 550, 95 N. W. 801. Where a common charge rests upon a fund which belongs to several owners by simultaneous but unequal titles, and the entire charge is paid by one owner, he may call upon the other owners for contribution. In cases like the one at bar, where one estate is for life and the other in remainder, and the life tenant pays the lien, to the extent that he has relieved his estate of the interest charge, he has paid his own debt, and the excess is the debt of the remaindermen. The uncertainty of the duration of the tenant's life injects an element of doubt into the problem; but by adopting a standard life table, a calculation definite enough for the purposes of the law may be made. The payment of the life tenant of the present worth of an annuity equal to the annual interest running during his expectancy of life represents his individual indebtedness, and the balance, after subtracting that sum from the mortgage debt, is the share which the remaindermen should contribute. In the instant case the rule should be applied as of the date the computation shall be made; the widow's expectancy of life should be considered, and not the expectancy of the appellants. *Tindall v. Peterson*, 71 Neb. 166, 98 N. W. 688, 99 N. W. 659, 8 A. & E. Ann. Cas. 721; § 1223; *Pom. Eq. Jur.* 2d ed. *Thomas v. Thomas*, 17 N. J. Eq. 356. The rule adopted by the district court may not work much hardship to the defendants, but it is their lawful right to have immediate contribution. The evidence will not justify us in making that computation.

For the reasons above stated, the decree of the District Court is in all things, save and except as to the subject of contribution

affirmed, and as to the matter of contribution, the cause is reversed and remanded for further proceedings. The costs taxed in this court will be equally divided between the appellees on the one part and the appellants on the other.

OKLAHOMA SUPREME COURT.

MISSOURI, KANSAS, & TEXAS RAILWAY COMPANY, Appt.,

v.

STATE OF OKLAHOMA.

(— Okla. — 107 Pac. 172.)

Railroad commission — requiring stoppage of interstate trains — reasonableness.

Where a railroad company has provided adequate and reasonable facilities for the accommodation of traffic to and from a certain place, an order of the corporation commission, requiring it to stop another train engaged in interstate commerce at said point, is unreasonable.

(a) The term "adequate and reasonable facilities" is not capable of exact definition, being a relative expression, and calls for such facilities as may be fairly demanded; regard being had to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodation asked for, and to all other facts which would have a bearing upon the question of convenience and cost.

(December 7, 1909.)

APPEAL by defendant from an order of the Corporation Commission requiring the stoppage of certain trains at the town of Norfolk. Modified.

The facts are stated in the opinion.

Headnote by WILLIAMS, J.

Note.—Power to compel stoppage of trains at stations.

The general question of power to compel the establishment of stations, or the stoppage of interstate or intrastate trains thereat, is considered in the notes to Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission, 17 L.R.A.(N.S.) 821, and Peterson v. State, 14 L.R.A.(N.S.) 293.

And in the note to the last case is also considered the right to limit the speed of, or require the stoppage of, mail trains.

It is a valid exercise of the police power, as shown in the notes to the two cases above cited, to require the stoppage of passenger trains, whether interstate or intrastate, at stations where adequate train service is not otherwise provided; this doctrine is sustained by the following late cases: St. 29 L.R.A.(N.S.)

Messrs. Clifford L. Jackson and W. R. Allen, for appellant:

The order of the commission is an interference with, and a burden upon, interstate commerce, and is such a regulation of interstate commerce as is prohibited to the states by the commerce clause of the Constitution of the United States.

Illinois C. R. Co. v. Illinois, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096; Atlantic Coast Line R. Co. v. Wharton, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121; Mississippi R. Commission v. Illinois C. R. Co. 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; Deaver v. Wyandotte & St. L. & S. F. R. Co. (1908 Okla.) No. 116; Cleveland C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722.

Mr. George A. Henshaw for appellee.

Williams, J., delivered the opinion of the court:

The appellant railway company was required by the corporation commission to stop its two fast, through trains Nos. 21 and 22, known as "The Flyer," at Norfolk, a station on its line between Oklahoma City and Parsons, Kansas. The Atchison, Topeka & Santa Fé Railroad Company also has a line at said station paralleling appellant's line a considerable distance. Certain passenger trains over the latter line, one going north in the morning about 5:45 and south in the evening at about 9:35, and also a local freight daily, both ways, except Sunday, carrying passengers, stop at said station. The schedule for trains which stop at Norfolk on appellant's line is as follows: Northbound: No. 26, 1:20 P. M. for points between Oklahoma City and Parsons, Kansas, with standard sleeper and chair car attached; No. 562, local freight carrying passengers daily except Sunday, between 12:10 P. M. and 1:10 P. M. Southbound: No. 25, 2:25 P. M. for points be-

Louis & S. F. R. Co. v. Troy (Okla.) 108 Pac. 753; Missouri, K. & T. R. Co. v. Witcher (Okla.) 106 Pac. 852; State ex rel. Great Northern R. Co. v. Railroad Commission (Wash.) 110 Pac. 1075.

Thus, it is within the power of the board of railway commissioners of a state to require the stoppage, upon flag, at a small hamlet, of two interstate trains daily, where but two other passenger trains and two local freight trains stop daily, by which it requires forty-eight hours to go to and return from the county seat, 11 miles distant. Missouri, K. & T. R. Co. v. Witcher, supra.

And an order of such board requiring the stoppage of one interstate train daily, each way, at a small station where the population is 300, will be sustained when but two other trains stop thereat, one early in the

tween Parsons, Kansas, and Oklahoma City, with standard sleeper and chair car attached; No. 561, local freight, carrying passengers daily except Sunday 9:55 A. M. These trains stop at all stations. Norfolk is a prepaid freight station having shipping pens, a cotton gin, two section houses, and a school house, but no stores or residences. Trains number 21 and 22 are designed by appellant to meet the demands for interstate business by making connections at Parsons, Kansas, for Kansas City, and St. Louis points, demanding rapid transit.

The questions raised on this record are whether or not the order complained of (1) is just and reasonable, or (2) interferes with interstate commerce. The matter of validity of the order of the commission requiring railroad companies to stop certain of their trains at stations named has been a matter of much adjudication. A statute of Illinois, requiring the Illinois Central Railroad to delay its fast mail train from Chicago to New Orleans by turning aside from the direct route and running over a branch line to the station of Cairo, 3½ miles away from a point on the main and direct line, and back again to the same point, because said station is the county seat, was held to be unconstitutional if the company had made adequate accommodations by other trains for interstate passengers to and from Cairo. *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096. "A railroad corporation created by a state is for all purposes of local government a domestic corporation, and its railroad within the state is a matter of domestic concern. Even when its road connects, as most railroads do, with

railroads in other states, the state which created the corporation may make all needful regulations of a police character for the government of the company while operating its road in that jurisdiction. It may prescribe the location and the plan of construction of the road, the rate of speed at which the trains shall run, and the places at which they shall stop and may make any other reasonable regulations for their management, in order to secure the objects of the incorporation, and the safety, good order, convenience, and comfort of the passengers and of the public. All such regulations are strictly within the police power of the state. They are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States. *Stone v. Farmers' Loan & T. Co.* 116 U. S. 307, 333, 334, 29 L. ed. 636, 645, 6 Sup. Ct. Rep. 334, 388, 1191; *Smith v. Alabama*, 124 U. S. 463, 481, 482, 31 L. ed. 508, 513, 514, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Hennington v. Georgia*, 163 U. S. 299, 308, 317, 41 L. ed. 166, 170, 173, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 632, 41 L. ed. 853, 854, 17 Sup. Ct. Rep. 418. In Minnesota, as in other states, the county seat of each county is the place appointed for holding the meetings of the county commissioners and the sessions of the district court, and for keeping the offices of the clerk of that court, the judge of probate, the county

morning and another late at night. *St. Louis & S. F. R. Co. v. Troy*, supra.

So, such board may compel the stoppage on signal of one intrastate train in each direction, at a point where no other trains stop and there is a population of seventy-five, and \$2,738 worth of freight business is transacted annually, notwithstanding such point is but 1½ miles from a regular stop. *State ex rel. Great Northern R. Co. v. Railroad Commission*, supra.

And a similar order of such board, requiring the stoppage of trains at a point where the population is 200 and no other trains stopping thereat, will be sustained. *Ibid.*

But, as shown by the notes to *Minneapolis, St. P. & S. Ste. M. R. Co. v. Railroad Commission* and *Peterson v. State*, supra, it is beyond the power of the legislature or board of railway commissioners to compel the stoppage of interstate passenger trains at stations already having proper and adequate train facilities. And to the same effect, see the following late cases: *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135, 54 L. ed. 970, 31 Sup. Ct. 29 L.R.A. (N.S.)

Rep. 633, affirming 157 Fed. 783; *Roach v. Atchison, T. & S. F. R. Co.* 218 U. S. 159, 54 L. ed. 978, 31 Sup. Ct. Rep. 639, affirming 157 Fed. 783; *St. Louis & S. F. R. Co. v. Reynolds* (Okla.) 110 Pac. 668.

Thus, in *Herndon v. Chicago, R. I. & P. R. Co.* supra, this doctrine was applied where there was a statutory requirement that passenger trains should stop at all junction points of other roads, and, as a matter of fact, ample facilities for the traveling public had already been provided.

And in *St. Louis & S. F. R. Co. v. Reynolds*, supra, it was also applied where it appeared that eight trains stopped daily at a station, to receive and discharge passengers.

It was held in *Delaware, L. & W. R. Co. v. Stevens*, 172 Fed. 595, that a Federal court would entertain jurisdiction to enjoin putting into effect an order of the public-service commission of New York requiring the stopping of two interstate passenger trains daily at a station where ten other trains also stop.

W. J. I.

auditor, the county treasurer, the sheriff, and the register of deeds. . . . The legislature of the state may well treat it as one important object of establishing a railroad within the state, that public officers, parties to actions, jurors, witnesses, and citizens generally should be enabled the more promptly to reach and leave the centers to which their duties or business may call them. To require every regular passenger train, running wholly within the limits of the state, to stop at all stations at county seats directly in its course, for the few minutes and at the trifling expense, needed to take on and discharge passengers with safety, is a reasonable exercise of the police power of the state, and cannot be considered a taking of property of the company without due process of law, nor an unconstitutional interference with interstate commerce, or with the transportation of the mails of the United States." *Gladson v. Minnesota*, 160 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627. In distinguishing the foregoing case from the Illinois Case the court said: "The statute of the state of Illinois, as construed and applied by the supreme court of the state, required a fast train, carrying interstate passengers and the United States mail from Chicago, in the state of Illinois, to places in other states south of the Ohio river, over an interstate highway established by authority of Congress, to delay the transportation of such passengers and mails by turning aside from the direct interstate route, and running to a station 3½ miles away from a point on that route, and back again to the same point and thus traveling 7 miles which formed no part of its course, before proceeding on its way; and, as the court observed, the question whether a statute which merely required interstate railroad trains, without going out of their course, to stop at county seats, would be within the constitutional power of the state, was not presented, and could not be decided, upon the record in that case. . . . But in the case at bar the train in question ran wholly within the state of Minnesota, and could have stopped at the county seat of Pine county without deviating from its course; and the statute of Minnesota expressly provides that 'this act shall not apply to through railroad trains entering this state from any other state, or to transcontinental trains of any railroad.'"

In the case of *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465, the legislature of that state required each railroad company whose road was operated in the state to cause three of its regular trains carrying

passengers, each way, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over 3,000 inhabitants sufficient time to receive and let off passengers, for the public convenience, and not a regulation of interstate commerce. In that case, the court said: "The plaintiff in error accepted its charter subject necessarily to the condition that it would conform to such reasonable regulations as the state might from time to time establish, that were not in violation of the supreme law of the land. In the absence of legislation by Congress it would be going very far to hold that such an enactment as the one before us was in itself a regulation of interstate commerce. It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and, as far as practicable, make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute is in aid of interstate commerce of that character. It was not compelled to look only to the convenience of those who desired to pass through the state without stopping. Any other view of the relations between the state and the corporation created by it would mean that the directors of the corporation could manage its affairs solely with reference to the interests of stockholders, and without taking into consideration the interests of the general public. It would mean, not only that such directors were the exclusive judges of the manner in which the corporation should discharge the duties imposed upon it in the interest of the public, but that the corporation could so regulate the running of its interstate trains as to build up cities and towns at the ends of its line or at favored points, and by that means destroy or retard the growth and prosperity of those at intervening points. It would mean also that, beyond the power of the state to prevent it, the defendant railway company could run all its trains through the state without stopping at any city within its limits, however numerous its population, and could prevent the people along its road within the state who desired to go beyond its limits from using its interstate trains at all, or only at such points as the company chose to designate. A principle that in its application admits of such results cannot be sanctioned. We per-

ceive in the legislation of Ohio no basis for the contention that the state has invaded the domain of national authority, or impaired any right secured by the national constitution. In the recent case of *Jones v. Brim*, 165 U. S. 180, 182, 41 L. ed. 677, 678, 17 Sup. Ct. Rep. 282, it was adjudged that, embraced within the police powers of a state was the establishment, maintenance, and control of public highways, and that under such powers reasonable regulations incident to the right to establish and maintain such highways could be established by the state. And the state of Ohio, by the statute in question, has done nothing more than to so regulate the use of a public highway established and maintained under its authority, as will reasonably promote the public convenience. It has not unreasonably obstructed the freedom of commerce among the states. Its regulations apply equally to domestic and interstate railroads. Its statute is not directed against interstate commerce, but only incidentally affects it. It has only forbidden one of its own corporations from discriminating unjustly against a large part of the public, for whose convenience that corporation was created and invested with authority to maintain a public highway within the limits of the state."

In the case of *Cleveland, C. & St. L. R. Co. v. Illinois*, 177 U. S. 514, 44 L. ed. 868, 20 Sup. Ct. Rep. 722, it was held that an act of the legislature requiring all regular passenger trains to stop at county seats constitutes a direct burden upon interstate commerce in violation of the United States Constitution, so far, at least, as that statute requires through interstate passenger trains to stop at such stations when adequate train service has been provided for local traffic. In this case the court said: "A state statute requiring every railroad to stop all its regular passenger trains running wholly within the state, at its stations in all county seats, long enough to take on and discharge passengers with safety, was held to be a reasonable exercise of the police power of the state, even as applied to a train connecting with a train of the same company running into another state, and carrying some interstate passengers as well as the mail. The case was distinguished from that of the *Illinois C. R. Co. v. Illinois*, 163 U. S. 142, 41 L. ed. 107, 16 Sup. Ct. Rep. 1096, in the fact that the train in question ran wholly within the state of Minnesota, and could have stopped at the county seats without deviating from its course, and that the statute of Minnesota expressly provided that the act should not apply to through trains entering the state from any other state, or 29 L.R.A. (N.S.)

to transcontinental trains of any railroad. Speaking of police regulations for the government of railroads while operating roads within the jurisdiction of the state, it was said that 'they are not in themselves regulations of interstate commerce; and it is only when they operate as such in the circumstances of their application, and conflict with the express or presumed will of Congress exerted upon the same subject, that they can be required to give way to the paramount authority of the Constitution of the United States.' The railroad in this case was treated as a purely domestic corporation, notwithstanding it connected, as most railroads do, with railroads in other states. In the most recent case upon this subject (*Lake Shore & M. S. R. Co. v. Ohio*, supra), a statute of Ohio providing that every railroad company should cause three of its regular trains carrying passengers, if so many are run daily, Sundays excepted, to stop at a station, city, or village containing over 3,000 inhabitants, for a time sufficient to receive and let off passengers, was held to be, in the absence of legislation by Congress upon the subject, consistent with the Constitution of the United States, when applied to trains engaged in interstate commerce through the state of Ohio. In delivering the opinion of the court Mr. Justice Harlan observed: 'The statute does not stand in the way of the railroad company running as many trains as it may choose between Chicago and Buffalo without stopping at intermediate points, or only at very large cities on the route, if in the contingency named in the statute the required number of trains stop at each place containing 3,000 inhabitants long enough to receive and let off passengers. It seems from the evidence that the average time required to stop a train and receive and let off passengers is three minutes. Certainly the state of Ohio did not endow the plaintiff in error with the rights of a corporation for the purpose simply of subserving the convenience of passengers traveling through the state between points outside of its territory. . . . It was for the state to take into consideration all the circumstances affecting passenger travel within its limits, and as far as practicable make such regulations as were just to all who might pass over the road in question. It was entitled, of course, to provide for the convenience of persons desiring to travel from one point to another in the state on domestic trains. But it was not bound to ignore the convenience of those who desired to travel from places in the state to places beyond its limits, or the convenience of those outside of the state who wished to come into it. Its statute

in aid of interstate commerce of that character. It was not compelled to look to the convenience of those who wished to pass through the state without stopping. This case is readily distinguishable from the one under consideration, in that that the statute of Ohio required only at three regular passenger trains should stop at every station containing 3,000 inhabitants, leaving the company at liberty to run as many through passenger trains exceeding three per day as it chose, without restriction as to stoppage at particular stations. In other words, it left open the whole which the statute of Illinois has actually closed." The court further said: "It is evident that the power attempted to be exercised under this statute would operate as a serious restriction upon the speed of trains engaged in interstate traffic, and might, in some cases, render it impossible for trunk lines running through the state of Illinois to compete with other lines running through states in which no such restrictions were applied. If such passenger trains may be compelled to stop at county seats, it is difficult to see why the legislature may not compel them to stop at every station,—a requirement which would be practically destructive of through travel, where there were competing lines hampered by such regulations. While, as we held in the Lake Shore Case, railways are bound to provide primarily and adequately for the accommodation of those whom they are directly tributary, and who not only have granted to them their franchise, but who may have contributed largely to the construction of the road, they are bound to do no more than this, and may then provide special facilities for the accommodation of through traffic. We are not obliged to shut our eyes to the fact that competition among railways for through passenger traffic has become very heated, and we think they have a right to demand that they shall not be unnecessarily hampered in their efforts to obtain a share of such traffic. It is evident, however, that neither the greater safety of their tracks, the superior comfort of their cars or sleeping berths, nor the excellence of their tables, would insure them a share if they were unable to compete with their rivals in the matter of time. The great efforts of modern engineering have been directed to combining safety with the greatest possible speed in transportation, both by land and water. The demand this; the railway and steamship companies are anxious in their own interests to furnish it; and local legislation must not stand in the way of it. With no disposition whatever to vary or qualify

(L.R.A.(N.S.))

the cases above cited, neither the conclusions of the court nor the tenor of the opinions are opposed to the principle we hold to in this case that, after all local conditions have been adequately met, railways have the legal right to adopt special provisions for through traffic; and legislative interference therewith is unreasonable, and an infringement upon that provision of the Constitution which we have held requires that commerce between the states shall be free and unobstructed."

In the case of *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90, the court said: "The order cannot be viewed alone in the light of ordering a stop at one place only, which might require not more than three minutes as asserted. It is the question whether these trains can be stopped at all at any particular station when proper and adequate facilities are otherwise afforded such station. If the commission can order such a train to be stopped at a particular locality under such circumstances, then it could do so as to other localities, and in that way the usefulness of a through train would be ruined, and the train turned from a through to a local one in Mississippi. The legislature of a state could not itself make such an order, and it cannot delegate the power to a commission to do so, in its discretion, when adequate facilities are otherwise furnished. The transportation of passengers on interstate trains as rapidly as can with safety be done is the inexorable demand of the public who use such trains. Competition between great trunk lines is fierce and at times bitter. Each line must do its best even to obtain its fair share of the transportation between states, both of passengers and freight. A wholly unnecessary, even though a small, obstacle ought not, in fairness, to be placed in the way of an interstate road, which may thus be unable to meet the competition of its rivals. We by no means intend to impair the strength of the previous decisions of this court on the subject, nor to assume that the interstate transportation, either of passengers or freight, is to be regarded as overshadowing the rights of the residents of the state through which the railroad passes to adequate railroad facilities. Both claims are to be considered, and after the wants of the residents within a state or locality through which the road passes have been adequately supplied, regard being had to all the facts bearing upon the subject, they ought not to be permitted to demand more, at the cost of the ability of the road to successfully compete with its rivals in the trans-

portation of interstate passengers and freight."

In the case of *Atlantic Coast Line R. Co. v. Wharton*, 207 U. S. 328, 52 L. ed. 230, 28 Sup. Ct. Rep. 121, the court said: "That any exercise of state authority, in whatever form manifested, which directly regulates interstate commerce, is repugnant to the commerce clause of the Constitution, is obvious. It hence arises that any command of a state, whether made directly or through the instrumentality of a railroad commission, which orders, or the necessary effect of which is to order, the stopping of an interstate train at a named station or stations, if it directly regulates interstate commerce, is void. It has been decided, however, that some orders which may cause the stoppage of interstate trains, made by state authority, may be valid if they do not directly regulate such commerce. *Lake Shore & M. S. R. Co. v. Ohio*, 173 U. S. 285, 43 L. ed. 702, 19 Sup. Ct. Rep. 465. When, therefore, an order made under state authority to stop an interstate train is assailed because of its repugnancy to the interstate commerce clause, the question whether such order is void as a direct regulation of such commerce may be tested by considering the nature of the order, the character of the interstate commerce train to which it applies, and its necessary and direct effect upon the operation of such train. But the effect of the order as a direct regulation of interstate commerce may also be tested by considering the adequacy of the local facilities existing at the station or stations at which the interstate commerce train has been commanded to stop. True, inherently considered, whether there be adequate local facilities is not a Federal question, but in so far as the existence of such adequate local facilities is involved in the determination of the Federal question of whether the order concerning an interstate train does or does not directly regulate interstate commerce, that question for such purpose is open, and may be considered by us. . . . Without stopping to consider whether, in view of the character of the trains to which the order before us related, it would not result that the order complained of was a direct regulation of interstate commerce, and testing the subject by the local facilities at the station at which the trains were ordered to stop, we think the railroad company in this case has furnished such reasonable accommodations to the people at Latta as it can be fairly and properly called upon to give, and the order to stop these trains is therefore not a valid one. The term 'adequate or reasonable facilities' is not, in its nature, capable of exact defini-

tion. It is a relative expression, and has to be considered as calling for such facilities as might be fairly demanded; regard being had, among other things, to the size of the place, the extent of the demand for transportation, the cost of furnishing the additional accommodations asked for, and to all other facts which would have a bearing upon the question of convenience and cost." The court further said: "Of course, it is not reasonable to suppose that the same facilities can be given to places of very small population that are supplied to their neighbors who live in much larger communities, and the defendants in error, it may be conceded, make no such demand. No one would assert that one daily train each way between New York and Philadelphia would furnish adequate facilities for the transportation of passengers. Twenty times that number of trains would be necessary, and yet one through train a day, each way, through so small a place as Latta to New York or Tampa would, in all probability, easily transport all the passengers desiring transportation between these places. Nevertheless, the fair needs of the locality for transportation, to other local points must be considered and provided for. This, as we think, has been done."

The Atchison, Topeka & Santa Fé south-bound train makes connection at Cushing with a train of the same road for Stillwater, the county seat; likewise, the south-bound trains on appellant's line run into Cushing. The northbound train on the Atchison, Topeka & Santa Fé line connects at Esau junction with a line of the same system for Stillwater, the county seat. Appellant's line diverges from the Atchison, Topeka & Santa Fé line north of Yale, intersecting with the St. Louis & San Francisco line between Tulsa and Enid, at Hallet, and connecting with a line of its system at Osage for Tulsa and Muskogee. It is not necessary, in order to dispose of this appeal, to determine whether or not the stopping of the trains complained of would result in the regulation of interstate commerce; for we think the railroad company in this case has furnished such reasonable accommodation to the people at Norfolk as they can be reasonably called upon to give, the size of the place, the extent of the demand for transportation, etc., considered; and the order to stop these trains cannot be sustained. It seems that the purpose of requesting this order was that persons residing adjacent to this station might have the opportunity of visiting points like Oklahoma City, Bartlesville, and Parsons, Kansas, and return the same day, thereby having the advantage of daytime travel. This identical question was before the su-

reme court of Arkansas. In the case of *t. Louis, I. M. & S. R. Co. v. State*, 85 Ark. 284, 107 S. W. 989, the court said: The principal reason urged as to the inadequacy of the facilities provided by the railroad company is that the only through train to St. Louis which stops at Arkadelphia reaches stations in this state north of Little Rock at an unreasonable hour in the night-time for passengers to debark, and that a through northbound train should be provided which will land passengers from Arkadelphia at those stations at a more reasonable hour. It is also earnestly argued that, as Arkadelphia is the county seat of Clark county, and as circuit court, when in session, usually convenes at 8:30 clock A. M. this train by which litigants and witnesses living south of that place could reach there at 6:18 A. M. ought to be required to stop there for their convenience, instead of requiring them to wait for train No. 24, due to reach Arkadelphia at 9:26 A. M. Now, it will be admitted that there is, at best, some inconvenience which must attend the traveler. A perfect system of railroad transportation, whereby the traveler can begin his journey at an hour which precisely suits his own convenience, progress with due speed, and arrive at his destination, wherever that may be, at a reasonable hour of the day, is scarcely to be expected, however much it is to be desired. That would be Utopian. A main schedule could not be arranged so as to begin and end every journey in the daytime. What the state may demand of a railroad company for the benefit of the people is reasonable service,—facilities which are as near perfect as may reasonably be furnished, considering all the circumstances."

In the case of *Minneapolis, St. P. & S. M. R. Co. v. Railroad Commission*, 136 Minn. 146, 17 L.R.A.(N.S.) 821, 116 N. W. 35, the court said: "In determining whether or not the order of the commission is unreasonable, it must also be considered that every unnecessary burden imposed upon the railroad impairs its net receipts, and diminishes that margin, if there be one, between the amount sufficient to assure a fair return on the value of its property, plus the amount of its fixed charges and operating expenses and its gross receipts. In this margin the public and the railroad are interested, because it is only when this exists that betterments in construction or improvements in service not imperative or indispensable, or reduction in rates, will ordinarily be voluntarily made by the railroad, or can ordinarily be ordered or enforced by the commission. We are not now speaking of those extreme cases

where the public duty must be discharged, whatever the financial consequences to the railroad. *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 41 L. ed. 560, 17 Sup. Ct. Rep. 198, and cases in *Rose's Notes*; 3 *Cook, Corp.* 4th ed. §§ 900, 901, and cases in notes. But in ordinary cases to waste this margin is to waste a fund in which the whole public is interested. This should never be done for the benefit of the few, as against the interests of any. It is also to be considered that this margin ought not ordinarily be exhausted or swept away by orders or requirements of the railroad commission as fast as accumulated, because human nature or railroad nature is such that no one will long economize on operating or other expenses if his economy only furnishes a larger basis for further exactions. The rights of the public and the rights of the railroad under this new law must be ascertained and developed by the railroad commission slowly and laboriously, moving from precedent to precedent as new instances arise, after the manner of the common-law courts. As was said in *Bates v. Relyea*, 23 Wend. 336, 341: 'They [these instances] must, from the nature of our legal system, be the same to the science of law as a convincing series of experiments is to any other branch of inductive philosophy.' Patience on the part of the public and on the part of the carrier, and time, will be necessary. The notion that commissions of this kind should be closely restricted by the courts, and that justice in our day can be had only in courts, is not conducive to the best results. Justice dwells with us as with the fathers, it is not exclusively the attribute of any office or class, it responds more readily to confidence than criticism, and there is no reason why the members of the great railroad commission of this state should not develop and establish a system of rules and precedents as wise and beneficent within their sphere of action as those established by the early common-law judges. We find the statute well framed to bring this about."

In the case of *Deaver v. Wyandotte and St. L. & S. F. R. Co.* decided by the corporation commission on November 20, 1908, the following order was entered, to wit: "The complaint in this case was filed by the citizens of Wyandotte, asking that the commission require the defendant to stop its eastbound train No. 408 at that station for the purpose of performing the usual passenger service, that better connections may be made with the company's northbound train at Afton. The defendant, answering, alleges that this train is known as one of the fast interstate mail trains, and there would be no special reason for stopping at

this station without stopping at other stations of similar size and conditions, and that it would greatly interfere and make it impossible for this train to make its regular time in competition with other fast trains, and that an extra local passenger train was now being operated over this road for the purpose of performing the local passenger service, making two trains a day, each way, stopping at the town of Wyandotte. The evidence in this case shows that train No. 408 is the eastbound interstate fast-mail train operated by the defendant; that the town of Wyandotte has about 400 inhabitants; that its passenger service now consists of two trains each way daily. When towns or communities have a reasonable or the average passenger service that is performed at all similar stations in the state of Oklahoma, as is now enjoyed by Wyandotte, the commission is not disposed to interfere with the schedule of fast-mail trains performing interstate service, by requiring them to stop at all local stations. If this privilege was extended to one town, other towns similarly situated would have the right to demand the same service; and it appears to the commission that the stopping of fast trains at stations should be left largely to the regulation of the railroad managers, when ample and reasonable service by other trains is afforded the communities and towns through which such trains run. It is therefore ordered that the complaint be dismissed without prejudice." See also *Schmidt v. Great Northern R. Co.* (decided by the railroad commission of Wisconsin September 3, 1909) 4 Wis. R. C. Reports 121, wherein the commission, in passing upon a similar case, said: "However much this commission would like to assist the citizens of the territory tributary to Foxboro to have more convenient service in and out of that station, it is powerless to grant the relief asked for."

It is not shown that any considerable number of persons residing at Norfolk embark on appellant's trains at this station for Oklahoma City, Bartlesville, and Parsons points. If the appellant is required by the order of the commission to convert trains numbered 21 and 22 into local trains, that would necessitate an additional through passenger train each way to meet the demands of the interstate traffic. This would occasion additional expense in the way of equipment, employees, maintenance, etc. Passenger fares on the basis of a 2-cent rate should not be jeopardized by unreasonable burdens in the way of unreasonable expense, or hampering the operation of the trains in this state. Common carriers should be required to furnish every reason-

able facility and convenience for the public, but when the policy has been declared that such service shall be supplied for the lowest reasonable rate, and such rate is being put on trial, due care should be exercised that the same be not needlessly endangered.

The order of the corporation commission relating to the stoppage of the trains is reversed, and the part pertaining to the establishment and construction of a depot at said place is affirmed, there being no assignment of error in the record covering that point.

All the Justices concur.

KANSAS SUPREME COURT.

CHAUNCEY DEWEY et al., Exrs., etc., of
C. P. Dewey, Deceased, et al., App'ts.,
v.

H. J. BARNHOUSE.

(— Kan. —, 109 Pac. 1081.)

Gift inter vivos — delivery.

1. To make a complete gift of personal property *inter vivos*, there must be a delivery of the property from the donor to the donee, or to some person for him.

Same — stock certificate.

2. Where a donor decides to give to another a certificate of shares in a building and loan association, and to make the payments thereon for the donee until maturity, and then causes such certificate to be issued in the name of the donee, retaining

Headnotes by GRAVES, J.

Note. — Necessity of actual delivery of certificate to complete gift of shares of stock.

It was said in *Bridge v. Bridge*, 16 Beav. 315: "If a person possessed of stock execute a declaration of trust of that stock in favor of a volunteer, he would, I apprehend, clearly constitute himself a trustee for the volunteer, and equity would execute the trust and compel a transfer of the stock. . . . But if the same person executed an assignment of the stock in favor of the volunteer, and no transfer of the stock took place, this, I apprehend, would as clearly be considered to be no more than an imperfect gift, in which the donor had not done all that was in his power to do, and the donee would get no assistance from a court of equity to compel a transfer of the stock. On the other hand, if stock stood in the names of trustees, and the beneficial owner of it executed, in favor of a volunteer, an assignment of such stock, and if notice of that assignment were given to the trustees, who acknowledged the validity of it and acted upon it, they would thereupon, through the act of the beneficial owner, become the trustees for the volunteer,

possession thereof himself, and makes the subsequent payments thereon in the name of the donee, but at all times regards the certificate as the property of the donee, and his possession as holding in trust for such donee, the delivery to himself as trustee of the donee will be held sufficient to complete the gift.

Building association — certificate of shares — transfer — indorsement.

3. A certificate of shares in a building and loan association, assigned by indorsement in blank upon the back thereof by the person to whom it was issued, will prima facie, as between the parties themselves, constitute the vendee and holder thereof the owner of such certificate.

(Johnston, Ch. J., and Mason, J., dissent.)

(July 9, 1910.)

and equity would enforce the due performance of that trust in his favor."

In *Beech v. Keep*, 18 Beav. 285, it was remarked that this distinction between an assignment in favor of a volunteer, and a declaration of trust in his favor, was very narrow, but the court nevertheless adhered to it, and refused to uphold an assignment of stock where it was not accompanied by a transfer.

So, in *Milroy v. Lord*, 4 De G. F. & J. 264, a deed purporting to assign bank stock, but not amounting to a declaration of trust, was held unenforceable, no actual transfer having been made.

And a deed poll purporting to assign and convey stock to a daughter, with full power to recover such part of the premises as a mere assignment would not enable her to recover, and directing the alleged donor's personal representatives to do all acts necessary to perfect such transfer, was held in *Dillon v. Coppin*, 4 Myl. & C. 647, to be inoperative as a gift, where such donor kept the deed in his possession until his death.

And in *Antrobus v. Smith*, 12 Ves. Jr. 39, where one who was entitled to shares in a company, indorsed the receipt for one of the subscriptions to his daughter, but retained possession of it, the intimation was that the gift was incomplete for want of delivery.

In *Beecher v. Major*, 13 L. T. N. S. 54, it was held that there was a valid gift where one wrote to her niece, saying she had put certain stock in the latter's name, and requested her to execute a power of attorney authorizing the donor to collect the dividends, which the donee did.

But, a communication to one's executors, stating that he had given another certain debenture stock but had retained it for the purpose of collecting the dividends himself, and directing the executors to hand it to the donee after his death, was held in *Re Shield*, 53 L. T. N. S. 5, not to be enforceable as a declaration of trust or a voluntary gift.

Falling within the third situation out-
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APPEAL by defendants from a judgment of the District Court for Riley County in plaintiff's favor in an action brought to recover the value of a certain certificate of shares in a building association which was alleged to have been held in trust for plaintiff by defendants' testator. Reversed.

The facts are stated in the opinion.

Messrs. Charles Blood Smith and Samuel Barnum, for appellants:

The evidence fails to show a consummated gift or a trust on the part of the deceased for the benefit of the plaintiff.

Casteel v. Flint, 112 Iowa, 92, 83 N. W. 796; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157, 2 N. E. 925; *Re Crawford*, 113 N. Y. 560, 5 L.R.A. 71, 21 N. E. 692; *Stokes v. Sprague*, 110 Iowa, 89, 81 N. W. 195; *First Nat. Bank v. Taylor*, 142 Ala.

lined in *Bridge v. Bridge* is *Donaldson v. Donaldson*, Kay, 711, where the court upheld as a complete gift a voluntary assignment, by deed, of stock standing in the name of trustees for the assignor, although no notice of the deed was given to the trustees in the donor's lifetime. It seems that in this case the lack of notice was regarded as being compensated by the fact the trustees did not transfer the stock to the donor before the latter's death, the court saying that if they had done so the donee would have had no remedy against them.

The general principles relative to the validity of gifts, and their application to donations of stock, are well stated by Judge Sanborn in *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 401, 129 Fed. 287. He says: "Among the indispensable conditions of a valid gift are the intention of the donor to absolutely and irrevocably divest himself of the title, dominion, and control of the subject of the gift *in presenti* at the very time he undertakes to make the gift; . . . the irrevocable transfer of the present title, dominion, and control of the thing given to the donee, so that the donor can exercise no farther act of dominion or control over it; . . . and the delivery by the donor to the donee of the subject of the gift or of the most effectual means of commanding the dominion of it. This delivery must be an actual one so far as the subject is capable of it. It must be *secundum subjectam materiam*, and be the true and effectual way of obtaining the command and dominion of the subject." 2 Kent, Com. 439. If the subject of the gift is a chose in action, such as a bond, a note, or stock in a corporation, the delivery of the most effectual means of reducing the chose to possession or use, such as the delivery of the bond, or the note, or the certificate of stock, if present and capable of delivery, is indispensable to the completion of the gift."

It was held in *Kernochan v. Russell*, 36 Misc. 817, 74 N. Y. Supp. 841, that to complete a gift of corporate stock *inter vivos*,

456, 37 So. 695; Allen West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 287; McHugh v. O'Connor, 91 Ala. 243, 9 So. 165; Gethell v. Biddeford Sav. Bank, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895; Warriner v. Rogers, L. R. 16 Eq. 348; Ashman's Estate, 223 Pa. 543, 72 Atl. 899; 28 Am. & Eng. Enc. Law, 2d ed. p. 913.

Equity will not, in case of an imperfect and unconsummated gift, declare a trust merely for the purpose of carrying out the intention of the one attempting to make the gift.

Young v. Young, 80 N. Y. 422, 36 Am. Rep. 634.

The rule requiring gifts *inter vivos* to be established by conclusive evidence is especially applicable where the gift is not asserted until after the donor's death.

Jones v. Falls, 101 Mo. App. 536, 73 S. W. 903; Devlin v. Greenwich Sav. Bank, 125 N. Y. 756, 26 N. E. 744; Ridden v. Thrall, 125 N. Y. 572, 11 L.R.A. 684, 21 Am. St. Rep. 758, 26 N. E. 627; Re Manhardt, 17 App. Div. 1, 44 N. Y. Supp. 836.

A transfer of title to stock, duly made by indorsement on the certificate itself, conveys the title between the parties and all claiming under them.

Culp v. Mulvane, 66 Kan. 144, 71 Pac. 273; Van Demark v. Barons, 52 Kan. 779, 35 Pac. 798.

Possession of stock duly indorsed in blank is presumptive evidence of ownership.

Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273; Plumb v. Bank of Enterprise, 48 Kan.

it must be accompanied by actual or constructive delivery, or evidenced by a written assignment.

Title to bank stock does not vest in a wife whose husband, upon purchasing it, has the certificates issued in her name, where he neither delivers it to her nor declares a trust in her favor. Gethell v. Biddeford Sav. Bank, 94 Me. 452, 80 Am. St. Rep. 408, 47 Atl. 895.

Where the holder of stock in a bank subscribes, for the benefit of his wife, to a new issue of stock, there is not a completed gift to the wife, the price not having been paid nor the scrip issued until after the husband's death; since in such circumstances delivery could not be effected. Egerton v. Egerton, 17 N. J. Eq. 419.

On the other hand, the surrendering of scrip for stock, and procuring new scrip to be issued in the names of the owner's infant children, was held in Francis v. New York & B. Elev. R. Co. 17 Abb. N. C. 1, to be a complete gift so far as to permit the children to elect when they became of age, although the transfer was not accompanied by delivery of the scrip to the children.

And where one bought stock and had the certificate issued in his infant daughter's name, and after his death it was found in his safe-deposit box with other property of the daughter and of other members of the family, the transaction was upheld as a gift, it being aided by evidence that the donor had declared he had given the stock to the daughter, and that his administratrix admitted such fact, and omitted the stock from the inventory of his property. Crouse v. Judson, 41 Misc. 338, 84 N. Y. Supp. 755 (affirmed so far as this point is concerned, in 93 App. Div. 604, 86 N. Y. Supp. 1133).

So, the placing of certificates of stock in a safe-deposit box, one key being given to the donee and the other retained by the donor, was held to be a sufficient delivery, where the donor subsequently stated that he had given the stock to the donee, and kept his own securities in another box. 29 L.R.A. (N.S.)

Gilkinson v. Third Ave. R. Co. 47 App. Div. 472, 63 N. Y. Supp. 792.

Where one subscribed for stock in an opera house corporation, and took the certificates in his own name, but delivered to his wife the ticket for the box in the theater, which represented his shares, it was held that there was not a valid gift of the shares to the wife. Stevens v. Stevens, 2 Redf. 265.

An instrument bequeathing stock to another, to be paid over upon the owner's death, was held in Johnson v. Williams, 63 How. Pr. 233, where there appeared to have been no delivery, to be unenforceable as a gift *inter vivos* or *causa mortis*, although enforceable as an assignment.

And it was held in Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 287, that a gift of corporate stock was not intended to be, and therefore was not consummated, where the owner delivered a formal bill of sale thereof to his wife, but retained the certificate of shares, kept the stock in his own name on the books of the company, and received dividends upon and voted it until he became insolvent, when he indorsed the certificate, surrendered it to the company, and caused new certificates to be issued to the wife.

In Jackson v. Twenty-third Street R. Co. 88 N. Y. 520, where a receipt for the purchase price of stock found its way into the hands of one in whose name the stock was entered on the corporate books, and the purchaser told the treasurer of the corporation to hold the stock until instructed by him whether to deliver it, and told the alleged donee that the stock was set aside for the latter's child, and the latter drew dividends, by the purchaser's special direction and consent, for the benefit of the child,—it was held that a gift was not shown, since the inference from the circumstances was that there was no intention to vest title in the alleged donee.

If a gift of bank stock was intended, it was not completed, where the alleged donor had the certificate transferred to himself

484, 29 Pa. 699; Johnston v. Laffin, 103 U. S. 803, 26 L. ed. 534; Clark & M. Priv. Corp. pp. 782, 783; Lund v. Wheaton Roller Mill Co. 60 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 269; Greshaw v. Columbian Min. Co. 110 Mo. App. 355, 86 S. W. 261; Taylor, Priv. Corp. 5th ed. § 795; Bath Sav. Inst. v. Sagadahoc Nat. Bank, 89 Mo. 500, 36 Atl. 996; Herrick v. Humphrey Hardware Co. 73 Neb. 809, 119 Am. St. Rep. 917, 103 N. W. 685, 11 A. & E. Ann. (Cas. 201); Cook, Stockholders, § 441; Thomp. Corp. §§ 2391, 2392, 2395; Merchants' Bank v. Livingston, 74 N. Y. 226; Dickinson v. Central Nat. Bank, 129 Mass. 279, 37 Am. Rep. 351; Hall v. United States Ins. Co. 5 Gill, 484; Pom. Rem. Rights, 2d ed. § 160.

Mr. John E. Hessin for appellee.

as trustee for his daughters, who did not know of the transfer until his death, and he retained control thereof, and appropriated the dividends to himself. Cummings v. Bramhall, 120 Mass. 552.

And where the purchaser of stock in a building and loan association has the shares issued to himself as "trustee" for another, who does not know of the transaction, and no delivery is made to him during the purchaser's lifetime, it will be held that there was no gift of the stock and no declaration of trust, at least where it is found that the stock was issued to him as trustee in order to avoid a rule of the association limiting the amount of stock that may be taken by one person. Casteel v. Flint, 112 Iowa, 92, 83 N. W. 796.

On the other hand, where the owner of bank stock surrendered the certificates to the bank, and new certificates issued to him as trustee for his children, and allowed subsequently accruing dividends to remain in the bank undisturbed, the transaction was upheld as a gift to the children. Mize v. Bates County Nat. Bank, 60 Mo. App. 358.

Delivery may as well be made to a third person as to the donee, and the mere fact that the donor, without intent to reinvest himself with title, regains naked possession for the temporary purpose of collecting the dividends which he has reserved to himself does not disturb the gift. Tucker v. Tucker, 138 Iowa, 344, 116 N. W. 119.

Where one became entitled to stock for which certificates had not yet been issued, and, expressing a desire to distribute his fortune during his lifetime, executed transfers of the stock to various persons, and delivered them to a third person with power of attorney to cause the stock to be set over to the donees, it was held that such instruments vested title in the beneficiaries therein named. DeCaumont v. Bogert, 36 Hun, 382.

The assignment and delivery of a certificate of bank stock to an attorney, in trust for another, by one who directs that it shall, after his death, be delivered to

Graves, J., delivered the opinion of the court:

This action was commenced in the district court of Riley county by the appellee, to recover from appellants the value of a certificate of twenty-five shares of the Manhattan Building & Savings Association. The plaintiff in that action, H. J. Barnhouse, recovered a judgment against the defendants, who represented the estate of C. P. Dewey, deceased, and they as appellants appeal to this court.

The certificate in controversy was issued by the association in the name of H. J. Barnhouse at the request of C. P. Dewey, in his lifetime, who held the certificate and paid assessments thereon until his death, and the representatives of his estate have made the payments thereon since, until

such other, whom he informs of the transaction, constitutes a completed gift *inter vivos*, which is not affected by the facts that the donor reserved the right to draw the dividends, and that he had the certificate delivered to him, and retained it for a time before returning it to the attorney. Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935.

But a complete gift *inter vivos* of stocks to the donor's sons is not made by taking the shares in their names and leaving them with a third person, subject to the donor's control. Walker v. Walker, 66 N. H. 390, 27 L.R.A. 790, 49 Am. St. Rep. 616, 31 Atl. 14.

It has been held in England that actual delivery to the donee will not complete the gift if no transfer is made on the books of the company. Weale v. Ollive, 17 Beav. 252; Lambert v. Overton, 11 L. T. N. S. 503. Of course these cases do not answer the question considered in this note, whether actual delivery is necessary.

However, it was held in Roberts's Appeal, 85 Pa. 84, that a transfer on the books of the corporation was sufficient to pass title, without delivery to the donee.

The Maryland court has reached a result somewhat similar to that of the foregoing English cases.

Thus, in Pennington v. Gittings, 2 Gill & J. 208, the rule was invoked that actual delivery of the stock was necessary, and it was held that there was not a sufficient delivery of bank stock "transferable at the said bank only, personally or by attorney," by indorsing another's name upon the certificate which was delivered to her, where there was no transfer of the stock upon the books of the bank. And in the case of Baltimore Retort & Fire Brick Co. v. Mali, 65 Md. 93, 57 Am. Rep. 304, 3 Atl. 286, it was held that there should have been a transfer upon the books of the corporation although there was no provision to that effect in the by-laws. The court, however, intimated that if, in addition to leaving with the attorney of the corporation the assignment and certificates, together with a

October, 1905. It is claimed by Barnhouse that C. P. Dewey intended to give the certificate to him, and make all payments thereon until its maturity, as a recognition of the faithful service rendered by him as an employee of Mr. Dewey for many years, and that such gift was completed; that at the time of his death, Dewey was simply holding the certificate in trust for the purpose of conveniently carrying out his original intention. The estate claims that the rules of the association did not permit the holding of more than twenty-five shares by one person, and that C. P. Dewey, to avoid this rule of the association, took a certificate in the name of Barnhouse, so that he could own more than twenty-five shares, but it was not his intention that Barnhouse should own them or have any interest therein.

The facts relied upon to establish the gift are, briefly stated, substantially as follows: C. P. Dewey was a man of large means, residing in Chicago and managing extensive business at Manhattan, Kansas, and H. J. Barnhouse had been an employee of Dewey for several years. On May 21, 1900, C. P. Dewey purchased the certificate in question, saying to the secretary of the association, in explanation for not taking it in his own name, that he wanted to do something for Barnhouse. The certificate was delivered to Dewey by the secretary, for which Dewey gave a receipt to the Secretary, signed "H. J. Barnhouse, by Dewey." A pass book was delivered to Dewey with the certificate. The secretary explained that for convenience many shareholders left their pass books with him so he could credit

payments therein when made, and in that way the pass book would show at all times the state of the account and would correspond with the books of the association and always be accessible to the shareholder. Dewey handed the pass book to Barnhouse, who was standing near, and he handed it to the secretary. Dewey kept the certificate. He also took a like certificate in his own name, one in the name of his son, and another in the name of C. T. Killen, now one of the executors of Dewey's will, for all of which, except the one to his son, he gave receipts. Barnhouse came into the bank about the time the certificate taken in his name was handed to Dewey. From these facts and the reasonable inferences which may be drawn therefrom, the question of gift must be determined. The theory upon which Barnhouse relies is that Dewey intended to give the certificate to him, and that the acts of Dewey while in the bank were such as under the law constituted a complete gift, and that Dewey afterwards held the certificate as trustee of Barnhouse.

The appellants insist that, to constitute a completed gift, the thing given must be actually delivered by the donor to the donee, or to some person for him; that as Dewey never parted with the certificate there was no delivery and consequently no gift. Barnhouse concedes the law to be as the appellants claim, but insists that the facts and the legitimate inferences which may be drawn therefrom establish a sufficient delivery to constitute a completed gift. This case has been in this court before and is reported in 75 Kan. 214, 88 Pac. 877. This

power of attorney to transfer the stock, the alleged donor had made a declaration of trust, perhaps equity would have enforced the trust.

And it is held in *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054, that the handing over of a certificate of stock, without a written assignment or power of transfer, does not transfer the legal title, the court saying; "If we admit it confers an equitable title, the legal has remained in the donor, and cannot be enforced; for equity recognizes and makes effective only assignments founded on a valuable consideration, and does not aid a volunteer."

In *Noble v. Garden*, 146 Cal. 225, 79 Pac. 883, 2 A. & E. Ann. Cas. 1001, the court refused to make any distinction between gifts *inter vivos* and gifts *causa mortis* so far as necessity for delivery was concerned, and held that there was not a sufficient delivery to perfect a gift *causa mortis* by one who assigned the certificates to her agent, with the statement that she wished to retain control of them because she might desire to withdraw some of the money, and who did in fact retain dominion over them, 29 L.R.A. (N.S.)

and draw the dividends after the assignment, although the assignment was accompanied by a delivery to the agent of the certificates, together with a pass book, which the by-laws made essential to a transfer, and a list of persons for whom she desired the stock assigned after her death. This case was followed in *Noble v. Learned* (Cal. App.) 87 Pac. 402.

In *Grymes v. Hone*, 49 N. Y. 17, 10 Am. Rep. 313, the court upheld as a gift *causa mortis* an absolute assignment in writing, transferable on the books of the bank on the surrender of the certificate, of shares of bank stock to the assignor's granddaughter, whom he made his attorney irrevocable to transfer the same to her use, where he handed the assignment to his wife, with instructions to deliver it to the assignee upon his death.

And where a mother surrendered a stock certificate and had another issued in her daughter's name, but retained the certificate and collected the dividends in the name of the daughter, the transaction was upheld as a gift *causa mortis*. *Collins v. Collins*, 11 Misc. 28, 31 N. Y. Supp. 1017. L. A. W.

question of delivery presented great difficulty at that time. Barnhouse contended in that action that Dewey was holding the certificate as trustee for him, but then as now, there was no proof of a delivery except as stated. Dewey had never parted with possession. The case was reversed and sent back for a new trial. In speaking of this difficulty, which was liable to be encountered in the new trial, the court said: "Before a gift can be found in this case it must appear from the evidence that at some time during the transaction in the bank Dewey determined to give stock to Barnhouse, and instead of delivering it to the latter, although present and presumably willing to receive and accept it, concluded to constitute himself the trustee of Barnhouse, and thereupon, as donor, delivered the stock to himself, as trustee, receiving it and accepting it as trustee for Barnhouse. Whether such delivery is shown by the evidence is a question of fact for the jury, and great care should be taken by the court, both in the admission of evidence and in its instructions, to have this question of delivery clearly presented to the jury, and thereby avoid mistake or misconception of the real merits of the inquiry."

The jury, when the case was retried, returned special findings of fact upon this point, which read:

Did Charles P. Dewey, while in the bank, determine to give to Barnhouse the stock in controversy?

Ans. Yes.

Did Charles P. Dewey, at the time of the transaction in the bank, conclude to constitute himself a trustee for Barnhouse?

Ans. Yes.

Did Charles P. Dewey, as donor, deliver the said stock to himself as trustee, receiving it and accepting it for Barnhouse?

A. Yes.

The court, at the conclusion of the trial, not being satisfied with the findings of the jury, found conclusions of fact and law for itself, which in this matter were substantially the same as the findings of the jury, except fuller and more explicit. So far as the findings of the court are material upon this point, they read:

"(1) That prior to the 21st day of May, 1900, the plaintiff, H. J. Barnhouse, had been for many years the manager and confidential employee of the late Charles P. Dewey, and that during about the same period one Charles T. Killen had been the bookkeeper and confidential employee of the said Charles P. Dewey, and that there existed such friendly relationship between the said Charles P. Dewey to contemplate and finally determine to advance and better

their condition by making them a gift of some substantial character, and that on the said 21st day of May, 1900, the said Charles P. Dewey had a conversation with George S. Murphey, secretary of the corporation known as the Manhattan Building & Savings Association, and from said Murphey learned all of the requirements and conditions upon which a stock investment in said company could be made, and the limitations of stock permitted under the by-laws of said association to be held by any one individual.

"(2) That after considering the information derived from said Murphey as to the conditions and method of business transactions of the Manhattan Building & Savings Association, and considering his desires long manifested to favor and advance the interests of said Charles T. Killen and the plaintiff herein, H. J. Barnhouse, the said Charles P. Dewey arrived at the intention then and there to make a gift to the said H. J. Barnhouse and at the same time to the other employee, Charles T. Killen, each of a \$2,500 share interest in the Manhattan Building & Savings Association, intending at said time to give to the said parties such interest in said association, and so long as he should continue in that mind to pay into the said association each month the dues necessary to maintain said interest in the association.

"(3) That, carrying out said intent upon his part, he thereupon ordered the proper officers of the Manhattan Building & Savings Association to issue to said H. J. Barnhouse \$2,500 of stock and the necessary pass book and contracts by which the said H. J. Barnhouse became the owner of a \$2,500 stock interest in said association, and that he manually delivered at said time to the said H. J. Barnhouse the pass book containing the receipt for the membership payment and the first five months' payment upon said stock; and that later, when the certificate of stock was prepared by the proper officers of the association, the same being written in the name of Charles T. Killen, and also for stock prepared for himself, and that at the time of so receipting for the said stock of the said Barnhouse and Killen he determined and concluded to constitute himself as the custodian, agent, or trustee for the safe-keeping of the said certificate of stock, and that thereafter he did keep said certificate of stock among his papers in his safety deposit vault in Chicago, Illinois, up to the time of his death.

"(4) That said certificate of stock does not appear to have been in the manual possession of H. J. Barnhouse at any time, further than that the same appears to have

the signature of H. J. Barnhouse indorsed in blank on the back of said certificate; the purpose and reason of such indorsement is not made to appear or in any manner explained in this case, other than that the same was not done for the purpose of selling the same to C. P. Dewey, or any other person."

Under these facts, found both by the court and jury, we are unable to say that there is no evidence to support the conclusion that there was a completed gift of the certificate by Dewey to Barnhouse. It was therefore the property of Barnhouse.

It appears, however, that Barnhouse afterward assigned the certificate by indorsement in blank, and left it in the possession of Dewey, among whose private papers it was found after his death. It is claimed that the possession of such paper, so indorsed, is *prima facie* evidence of ownership, and that it must be presumed, in the absence of evidence to the contrary, that Barnhouse indorsed the certificate intending that such indorsement should perform the ordinary purpose of an indorsement, to wit, to transfer the ownership of the paper, and that the title to the certificate thereby passed from Barnhouse to Dewey and has been his property since.

Thompson, in § 4317 of volume 4 of the second edition of his work on Corporations, says: "The usual and perhaps the more generally employed method of transferring shares of stock is by the delivery of the certificate with the assignment indorsed thereon, duly signed by the person named in such certificate. This is sufficient ordinarily to transfer the title of the original holder to the assignee. In other words, corporate stock is transferred as to the parties thereto by indorsement and delivery of the certificates. It is a good assignment of shares of stock to deliver the stock thereof, with a blank transfer on the back, to which the holder has affixed his name; and the party to whom it is delivered is authorized to fill such blank indorsement. It has been said that the possession of certificates with a power to transfer them was *prima facie* evidence of title." This subject is fully discussed in the following sections of this work.

In the case of *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273, the second syllabus reads: "Under the statutes of this state, the stock of a private corporation is subject to a valid transfer as between the grantor and grantee by a delivery of the certificate of such stock indorsed in blank, with a purpose thereby to make such transfer. Neither the formal transfer of such stock upon the stock book of the corporation, nor the issuance of certificates to the purchaser, is

essential to the valid transfer thereof, as between the parties thereto or those claiming under them."

In the opinion it is said: "Certificates of stock are frequently spoken of as securities, but they are not such, in the proper signification of the term. They have none of the characteristics of negotiable paper; they are simply paper evidences of the right of the holder to the interest in the corporation described in them. While they are non-negotiable, in the ordinary acceptance of that term, yet they possess one of the attributes of negotiable paper, that of being assignable as between vendor and vendee, pledgeor and pledgee, by simple delivery when properly indorsed, and when thus transferred, pass the title to the extent intended by the parties thereto as between such parties, not only to the paper evidence of title, but to the shares of stock themselves. The authorities extend this rule no further. As against the corporation itself and third parties claiming rights under the corporation, of course, this rule would not obtain. Indeed, it has been held that a provision in the governing statute, declaring that no transfer of corporate stock shall be valid for any purpose, until such transfer shall have been entered on the books, must be limited in its application to the objects sought to be accomplished by the statute, which objects refer to matters growing out of the stockholder's relation to the corporation and its creditors, and does not make invalid an unregistered transfer, as between vendor and vendee. *Johnson v. Underhill*, 52 N. Y. 203. The foregoing views are fully sustained by the discussion found in *Thompson on Corporations*, § 730, and *Cook on Corporations*, § 381. In *Plumb v. Bank of Enterprise*, 48 Kan. 484, 29 Pac. 699, this court has substantially taken the same view by approaching the proposition in a negative form. It is not to be denied that very respectable authorities hold the contrary view, but these are in the minority in number, and, as it seems to us, hold the more unsatisfactory position. It is a matter of common knowledge that the constant practice of the commercial world is to pass title to stock in corporations, or impose thereon the burden of collateral obligations, by a simple passing, from hand to hand, of the indorsed paper certificates of stock. Vast volumes of business are transacted upon the faith that such transfer is perfectly good as between the parties thereto, who act in good faith, without a formal transfer upon the stock register. We think it is, and so hold." Pages 152, 153, of 66 Kan. The case of *Van Demark v. Barons*, 52 Kan. 779, 35 Pac. 798, is to the same effect.

In the case of *Brittan v. Oakland Bank of Savings*, 124 Cal. 282, 71 Am. St. Rep. 53, 57 Pac. 84, it is said: "It is a good assignment of shares of bank stock to deliver the certificate thereof, with a blank transfer on the back of it to which the holder has affixed his name. The party to whom it is delivered is authorized to fill up the blank indorsement."

In the case of *Parker v. Bethel Hotel Co.* 96 Tenn. 252, 283, 31 L.R.A. 706, 34 S. W. 209, it is said: "A sale or transfer of stock, to be valid, need not be in writing. The certificate need not, in fact, be delivered. A transfer is perfectly good, although the seller of the stock never had a certificate at all, and although no certificate is issued to the transferee. An indorsement on the certificate, while not necessary, is the preferable and most convenient form of transfer, because the same instrument then combines the evidence of the seller's right to the stock and of his transfer to the purchaser. *Lowell, Transfer of Stock*, §§ 43, 44."

In the case of *Supply Ditch Co. v. Elliott*, 10 Colo. 327, 3 Am. St. Rep. 586, 15 Pac. 691, it is said both in syllabus and opinion: "Certificates of stock are assignable, and pass . . . by indorsement as bills of exchange and promissory notes pass, and holders of such certificates are prima facie . . . owners thereof, and an innocent purchaser thereof for value will hold them against the true owner, where the latter has placed it in the power of the assignor to perpetrate a fraud upon the innocent assignee."

When these decisions are applied to the facts of this case the contention of the appellants does not seem to be unreasonable. The certificate in question was the property of Barnhouse, and being held in trust for him by C. P. Dewey in whose possession it was. Why did Barnhouse assign it in blank and leave it with Dewey? What purpose consistent with the continued ownership of Barnhouse could such assignment serve? It must be remembered that the parties to this transaction were men of more than ordinary business capacity. Barnhouse had been the trusted employee of Dewey, and for years his business manager. It seems reasonable to presume that they understood the business effect of the indorsement when it was made, and intended it to have that effect. The indorsement was made in the handwriting of Barnhouse. The relations between these men were friendly; it cannot be supposed that either intended to mislead or deceive the other. The evidence shows that Dewey had for years taken deeds, mortgages, and other instruments in the name of Barnhouse and other of his

employees, temporarily, and then caused conveyances thereof to be made to himself. Was this such a transaction?

It does not appear that Barnhouse ever regarded this certificate as his property; he made no inquiry as to whether payments were being made upon it or not, and did not at the time manifest any concern about it, although he was discharged from Dewey's employment for more than a year before Dewey's death. The conduct of both parties seems more consistent with the conclusion that the indorsement of Barnhouse was intended to effect a transfer of the certificate to Dewey, than to accomplish any other or different purpose. The facts and the law seem to point to the same conclusion, and we think that, in the absence of proof to the contrary, it must be held that, from and after the indorsement of the certificate by Barnhouse, it became and continued to be the property of Dewey. This legal conclusion is the necessary result from the unexplained voluntary indorsement of Barnhouse, and is also the natural and reasonable inference to be drawn from the evidence. It follows that the judgment in favor of Barnhouse is erroneous.

The judgment is reversed.

Burch, Smith, Porter, and Benson, JJ., concur.

Johnston, Ch. J., dissenting:

The trial court, as well as the jury found that there was a completed gift of the stock by Dewey to Barnhouse, and in the prevailing opinion it is stated that the proof tends to sustain the finding of a donation and delivery of the stock. The only question left for determination is whether the stock, which was in the possession of Dewey when he died, had been sold and transferred to him by Barnhouse, or whether he was only holding it as trustee for Barnhouse. The trial court made a finding based on supporting testimony that Dewey constituted himself as custodian or trustee for the safe-keeping of the certificate of stock. The decision of this court that he was not holding the stock as trustee rests only upon the blank indorsement on the back of the certificate and his possession of the same. The indorsement and delivery of a certificate may operate as a transfer of the stock, if that was the intention of the parties. The intention of the parties here depends not on the indorsement alone, but upon all of the testimony. The blank indorsement is not inconsistent with the theory that Dewey took the certificate in order to hold the stock as trustee for Barnhouse.

From the evidence it appears that Dewey

stated to the secretary of the association that Barnhouse, who was his manager, was only receiving a small salary and that he intended to take care of him. After making inquiry of the secretary as to the plan on which the stock was issued and sold, Dewey again stated that he wanted to do something for Barnhouse, and asked the secretary to write up twenty-five shares for Barnhouse, and arrange that the monthly payments on them should be charged to him. He receipted for the shares in Barnhouse's name and when the pass book was issued he turned it over to Barnhouse, saying: "Here is your pass book." The shares stood on the books in the name of Barnhouse, the accounts were kept in his name, and no transfer of the stock was ever made in the presence of the president or secretary, as the by-laws of the association required. It is conceded that there was a consummated gift to Barnhouse. The stock actually became his property. When did he lose it? Although the blank indorsement is not explained, the testimony is that he never sold the stock to anyone, and the trial court found that he did not indorse it for the purpose of selling it back to Dewey.

An indorsement of a certificate is some evidence of an intention to transfer ownership of the stock, but it is not conclusive evidence of such a transfer. As was said in *Culp v. Mulvane*, 66 Kan. 143, 151, 71 Pac. 273, 276: "The stock is something apart from the certificates. These but evidence a fact which otherwise exists. They are but paper representations of an incorporeal right, and, as such, resemble other muniments of title. The right of stock may exist entirely, separately and independently of the certificates." The ownership of the stock is not determinable absolutely by either the indorsement of the certificate or the possession of the same. On all the facts and circumstances brought out in the evidence, the trial court found that Dewey took the stock with the intention to hold as trustee for Barnhouse. This court cannot weigh the evidence, or determine which of the items of the testimony is the most worthy of belief.

In the prevailing opinion it is said that the contention of the appellants that the indorsement of the certificate indicated an intention to transfer title "does not seem to be unreasonable," but to the trier of the facts it did seem unreasonable. On the other hand the trial court found that the inference was entirely reasonable. In another part of the opinion it is said: "The conduct of both parties seems more consistent with the conclusion that the indorsement by Barnhouse was intended to effect

a transfer of the certificate to Dewey, than to accomplish any other or different purpose." But the trial court, after balancing the manifestations of intention, drew a different inference and reached the conclusion, as it had a right to do, that the conduct of the parties was more consistent with the theory that Dewey accepted and was holding the stock as the trustee of Barnhouse. In the opinion on the first review this court stated with some particularity what was necessary to be proven in order to establish a gift and a trusteeship in Dewey, and the appellee appears to have met these requirements. In my view the mere circumstance that there was a blank indorsement on the certificate which was in the possession of Dewey does not overcome all the other testimony on the subject, nor overthrow the finding of the trial court.

Mason, J., concurs.

NEBRASKA SUPREME COURT.

BARBARA KUHLMAN

v.

WILLIAM J. LEMP BREWING COMPANY, Appt.

(— Neb. —, 126 N. W. 1083.)

Landlord and tenant — holding over fixed term — effect.

1. Where a tenant under a written lease for one year, with the option of again leasing the premises for one or more years, holds over without exercising his option, his landlord may, if he so elects, consider him his tenant for another year, and thus

Headnotes by BARNES, J.

Note. — Holding over after expiration of lease, with option for extension or renewal, without formally exercising option.

Extension.

By the weight of authority, where a lease provides that the tenant may have, at his option, an extension for a specified time after the expiration of the term agreed upon in the lease, or may occupy for an extended term including the term specified, the mere holding over after the expiration of the specified term will constitute an election to hold for the additional or extended term, and the tenant, after holding over beyond the first term without any new arrangement, is bound for the additional or extended term as fully and completely as though that term had been originally included in the lease when executed. *Platts-mouth v. New Hampshire Sav. Bank*, 71 C.

render him liable for the payment of rent or that period at the rental fixed by the terms of the lease.

same — termination by condition — burden of proof.

2. Where, in such a case, and while holding over, the tenant claims the right to terminate his tenancy at any time, under conditions expressed in the lease, he must allege and prove the existence of the conditions and his compliance therewith, in order to escape the legal consequences of holding over the term.

(June 10, 1910.)

APPEAL by defendant from a judgment of the District Court for Otoe County in plaintiff's favor in an action brought to

C. A. 507, 139 Fed. 631; Hays v. Goldnan, 71 Ark. 251, 72 S. W. 563; Shamp v. White, 106 Cal. 222, 39 Pac. 537; Brandenburg v. Reithman, 7 Colo. 323, 3 Pac. 577; Hamby v. Georgia Iron & Coal Co. 127 Ga. 402, 56 S. E. 1033; Montgomery v. Hamilton County, 76 Ind. 362, 40 Am. Rep. 550; Terstegge v. First German Mut. Ben. Soc. 92 Ind. 82, 47 Am. Rep. 135; Holley v. Young, 66 Me. 520; Kramer v. Cook, 7 Gray, 550; Kimball v. Cross, 136 Mass. 390; Cooper v. Joy, 105 Mich. 374, 63 N. E. 414; Mershon v. Williams, 62 N. J. L. 779, 42 Atl. 778; Voegel v. Ronalds, 83 Hun, 114, 31 N. Y. Supp. 353; Kelly v. Varnes, 82 App. Div. 100, 64 N. Y. Supp. 1040; Harding v. Seeley, 148 Pa. 20, 23 Atl. 1118; Lipper v. Bouve, 41 W. N. C. 566; Gilbert v. Price, 18 Pa. Super. Ct. 359; Henderson v. Schuylkill Valley Clay Mfg. Co. 24 Pa. Super. Ct. 422; Canonico v. Lucente, 40 Pa. Super. Ct. 75; Heffron v. Deeler, 21 S. D. 194, 130 Am. St. Rep. 711, 10 N. W. 781; Carhart v. White Mantel & Tile Co. 122 Tenn. 455, 123 S. W. 747; Raacke v. Anheuser-Busch Brewing Assn. 17 Tex. Civ. App. 167, 42 S. W. 774; Peehl v. Dumbalek, 99 Wis. 62, 74 N. W. 545 ("with privilege of" additional term).

And, conversely, the holding over by the tenant has been held equivalent to an election on his part to take the extended term, so as to enable him to remain, though the landlord should wish to oust him. Slater v. Kimbro, 91 Ga. 217, 44 Am. St. Rep. 19, 18 S. E. 296; Hamby v. Georgia Iron & Coal Co. supra. Cusack v. Gunning System, 109 Ill. App. 588; Callahan Co. v. Michael (Ind. App.) 90 N. E. 642; Chandler v. McGinnis, 8 Kan. App. 421, 55 Pac. 103; Brown v. Samuels, 24 Ky. L. Rep. 1216, 70 S. W. 747; Delashman v. Berry, 20 Mich. 292, 4 Am. Rep. 392; Cooper v. Joy, 105 Mich. 374, 63 N. W. 414; Mershon v. Williams, 62 N. J. L. 779, 42 Atl. 778.

But when the extended term is to be at an increased rental, and tenant when holding over pays rent at the old rate, the term is not extended, but tenant is mere tenant at will. Carhart v. White Mantel & Tile Co. supra.
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recover rent alleged to be due and unpaid. Affirmed.

The facts are stated in the opinion.

Messrs. H. C. Brome and Clinton Brome, for appellant:

In order to have exercised the option it was necessary for the tenant to notify the landlord or in some affirmative way signify his intention to exercise it, other than by retaining possession of the premises.

Andrews v. Marshall Creamery Co. 118 Iowa, 595, 60 L.R.A. 390, 96 Am. St. Rep. 412, 92 N. W. 706; Spangler v. Rogers, 123 Iowa, 724, 99 N. W. 580; Steen v. Scheel, 46 Neb. 252, 64 N. W. 957; Atlantic Nat. Bank v. Demmon, 139 Mass. 420, 1 N. E. 833; Gray v. Maier & Z. Brewery, 2 Cal. App. 653, 84 Pac. 280; Eichorn v. Pet-

Where the parties to a lease agree to a term of one year, "with the privilege of two more at the same rate if they agree," in the absence of evidence of a different understanding the lease is presumed to be extended for the additional two years, when the tenant holds over and pays rent which is accepted. Woodcock v. Roberts, 66 Barb. 498.

But it was held in Mossey v. Mead, 4 La. 195, that where property is leased for a year, with the privilege of remaining seven years longer at the same rent if tenant requires it, the circumstance of the tenant's holding over and paying a monthly rental is no evidence of his intention to avail himself of his option to remain, but an actual requisition must be made.

Renewal.

A mere holding over and payment of rent has been held sufficient evidence of an election to renew, as distinguished from an election to extend, to justify the landlord in holding the tenant for the additional term. Caley v. Thornquist, 89 Minn. 348, 94 N. W. 1084; Ranlet v. Cook, 44 N. H. 512, 84 Am. Dec. 92; Holton v. Andrews, 151 N. C. 340, 66 S. E. 212; McBrier v. Marshall, 126 Pa. 390, 17 Atl. 647; Creighton v. McKee, 2 Brewst. (Pa.) 383; Cairns v. Llewellyn, 39 W. N. C. 251; I. X. L. Furniture & Carpet Instalment House v. Berets, 32 Utah, 454, 91 Pac. 279. *Contra*: Andrews v. Marshall Creamery Co. 118 Iowa, 595, 60 L.R.A. 390, 96 Am. St. Rep. 412, 92 N. W. 706; Spangler v. Rogers, 123 Iowa, 724, 99 N. W. 580 (option of renting premises for four years more); Leavitt v. Maykel, 203 Mass. 506, 133 Am. St. Rep. 323, 89 N. E. 1056; Mack v. Eckertlin, 27 Ohio C. C. 133; Joseph v. Chouillou, Rap. Jud. Quebec, 5 B. R. 259.

And, conversely, a mere holding over and payment of rent by the tenant has been held equivalent to an election to renew, so as to enable him to remain for the additional term, though the landlord should wish to oust him. Caley v. Thornquist, supra; Schroeder v. Gemeinder, 10 Nev. 355; Ran-

erson, 16 Ill. App. 601; *Shamp v. White*, 106 Cal. 222, 39 Pac. 537; *Delashman v. Berry*, 20 Mich. 292, 4 Am. Rep. 392; *Stevenson v. Almes*, 8 Ohio Dec. Reprint, 566, 9 Ohio L. J. 17; *Thiebaud v. Firat Nat. Bank*, 42 Ind. 212; *Orton v. Noonan*, 27 Wis. 272; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776.

If the lessee exercised the option and renewed by holding over, it exercised it for the full period of three years, and the court could not construe it into a one-year period.

Montgomery v. Hamilton County, 76 Ind. 362, 40 Am. Rep. 250; *Terstegge v. First German Mut. Ben. Soc.* 92 Ind. 82, 47 Am. Rep. 135; *Insurance & Law Bldg. Co. v. State Nat. Bank*, 5 Mo. App. 333; *Voegel v.*

let v. Cook, supra. *Contra*: *Renoud v. Daskam*, 34 Conn. 512 (holding notice to lessor before expiration of lease, of lessee's intent to renew, necessary); *Thiebaud v. First Nat. Bank*, 42 Ind. 212; *Perry v. Rockland & R. Lime Co.* 94 Me. 325, 47 Atl. 534; *Caggiano v. Galloreni*, 26 Misc. 819, 57 N. Y. Supp. 2.

Or, at least, that his right to demand a new lease was not cut off by his remaining in possession after the expiration of the term, without demanding a renewal. *Moss v. Barton*, 35 Beav. 197; *Buckland v. Papillon*, L. R. 2 Ch. 67.

It was held in *James v. Pope*, 19 N. Y. 324, that a partnership to whom a lease has been made with privilege of renewal cannot be held for the additional term when, before the original term ended, the two partners left the firm and a new partner entered, although the new firm held over and paid rent. Whether the new firm could be held as assignees of the old was not in issue nor decided. This case was followed in *Buchanan v. Whitman*, 151 N. Y. 253, 45 N. E. 556.

A lease will be deemed renewed without formal notice when, before the expiration of the term, the landlord's assignee knew from circumstantial evidence that the tenant intended to retain the premises for the additional term. *Clarke v. Merrill*, 51 N. H. 415.

Where a lease does not contain an option to renew, but before its expiration the parties agree by letter to renew it and to execute a formal lease, which is not done owing to the illness of the lessee, who, however, holds over, the landlord can hold the tenant for the renewed term. *American Secur. & T. Co. v. Walker*, 23 App. D. C. 583.

Where a lessee had a right to a further lease at the expiration of the term, if she "should desire to take a further lease," she may signify her desire for a new lease even after the lapse of considerable time after the end of the term, where she has remained in possession and paid rent. *Brewer v. Conger*, 27 Ont. App. Rep. 10.

Where a long and valuable lease contained a right to renew for another long
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Ronalds, 83 Hun, 114, 31 N. Y. Supp. 353; *McBrier v. Marshall*, 126 Pa. 390, 17 Atl. 647.

Messrs. D. W. Livingston and George H. Heinke, for appellee:

By holding over the lessee became liable for the payment of rent as a tenant from year to year.

Bradley v. Slater, 50 Neb. 682, 70 N. W. 258; *Critchfield v. Remaley*, 21 Neb. 178, 31 N. W. 687; *Yates v. Kinney*, 19 Neb. 253, 27 N. W. 132; *Haynes v. Aldrich*, 133 N. Y. 287, 28 Am. St. Rep. 636, 31 N. E. 94; *Underhill, Land. and T. p. 97*; *Chicago v. Peck*, 98 Ill. App. 434, 196 Ill. 280, 63 N. E. 711; *Chicago Theological Seminary v. Chicago Veneer Co.* 94 Ill. App. 492; *Snyder v. Henry*, 32 Pa. Super. Ct. 167; *Murt-*

period on giving notice, equity will relieve against a forfeiture of such right to renew when, owing to excusable ignorance as to the time of expiration of the lease, the tenant neglected to give notice of renewal until thirty-six days after the term expired, where he remained in possession after such expiration and paid a half year's rent, and where time was not made of the essence of the contract. *New York Life Ins. & T. Co. v. St. George's Church*, 64 How. Pr. 511, 12 Abb. N. C. 50.

In case of a valuable ninety-nine-year lease, renewable forever, providing for entry until arrearages are paid, in case of delay in payment of ground rent, tenant's mere negligence, not gross, in not paying at the end of the first term one year's rent extraordinary, and charges of drawing and recording conveyance of renewal promptly at the time stipulated, owing to ignorance of the fact that the lease had expired, where he remained in possession and continued to pay the ground rent, will not entitle the landlord to declare the lease forfeited, and equity will give relief by granting specific performance of the agreement to renew. *Selden v. Camp*, 95 Va. 527, 28 S. E. 877.

Distinction between extension and renewal

In some cases a distinction is made between the effect of a mere holding over by a tenant in case of a covenant to extend a lease, and of a covenant to renew a lease, and it is held that, although a mere holding over is sufficient to extend a lease, it is not sufficient to renew a lease. *Shamp v. White*, 106 Cal. 222, 39 Pac. 537; *Gray v. Maier & Z. Brewery*, 2 Cal. App. 653, 84 Pac. 280; *Strousse v. Bank of Clear Creek County*, 9 Colo. App. 478, 49 Pac. 260 (in which, however, notice of renewal would have been necessary in any event, since length of period of renewal was not fixed, but was at option of lessee); *Hamby v. Georgia Iron & Coal Co.* 127 Ga. 802, 58 S. E. 1033; *Montgomery v. Hamilton County*, 76 Ind. 362, 40 Am. Rep. 250; *Callahan Co. v. Michels* (Ind. App.) 90 N. E. 642; *Andrews v. Mar-*

land v. English, 214 Pa. 325, 112 Am. St. Rep. 747, 63 Atl. 882, 6 A. & E. Ann. Cas. 339; Thiebaud v. First Nat. Bank, 42 Ind. 212.

Barnes, J., delivered the opinion of the court:

Action in the district court of Otsego county to recover rent alleged to be due for use of certain premises situated in the city of Auburn in said county. The plaintiff had the verdict and judgment, and the defendant has appealed.

It appears that there was a written lease between the parties, by which the defendant rented from the plaintiff the premises in question from the 1st day of May, 1906, to the 1st day of May, 1907, at \$50 a month,

shall Creamery Co. 118 Iowa, 595, 60 L.R.A. 399, 96 Am. St. Rep. 412, 92 N. W. 706; Brown v. Samuels, 24 Ky. L. Rep. 1216, 70 S. W. 1047; Delashman v. Berry, 20 Mich. 292, 4 Am. Rep. 392; Quinn v. Valiquette, 6 Vt. 434, 14 L.R.A. (N.S.) 962, 68 Atl. 315.

The reason for this distinction is as well pointed out by the court in *Andrews v. Marshall Creamery Co.* supra, as anywhere: "There is good reason, however, supported by authority, for a distinction between a privilege of an extension and a right to renew. The extended term or additional term is one provided for in the lease itself, and the mere enjoyment of the privilege by continuing in possession is enough to bring the extended tenancy within the original contract. But an agreement for an option of renewal would seem to imply that the parties contemplated some affirmative act by way of the creation of an additional term. It is no doubt true that this affirmative act may be something different from, and less than, the execution of a new lease; for, when the tenant has indicated affirmatively the election to avail himself of the privilege of renewal, he has done all that is necessary to create a renewal, for the conditions under which the new term is to be enjoyed will be the same as those under which the first term was enjoyed, save as to the condition which provides for the renewal."

A covenant to renew gives a privilege to the tenant, but is nevertheless an executory contract, and, until the tenant has exercised the privilege, he cannot be held for the additional term."

The distinction between extension and renewal of a lease has not been universally approved. The court, in *Insurance & Loan Co. v. National Bank*, 71 Mo. 58, construing a clause providing that "the said lease has the privilege of a renewal for ten years," said: "It may well be doubted whether the word 'renewal' as employed in the case before us implies anything more than an extension of the term;" and held that a tenant who held over and paid rent at the increased rent provided for in case of re-

newal, thereby elected to renew the term, and could be held by the landlord. And it has been held that both the words "extended" and "renewed" require the making of a new lease. *Orton v. Noonan*, 27 Wis. 272; *Kollock v. Scribner*, 98 Wis. 104, 73 N. W. 776. In other cases the distinction has been practically ignored without discussion.

When notice required by lease.

Where the lease provides that the tenant must give notice of his intent to renew or extend the lease, a failure to give such notice within the required time will justify the landlord in treating the lease as not extended or renewed. *Blumenthal v. Atkinson* (Ark.) 124 S. W. 510; *Lanham v. McWilliams*, 6 Ga. App. 85, 64 S. E. 294; *Abadie v. Berget*, 41 La. Ann. 281, 6 So. 529; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216; *Murland v. English*, 214 Pa. 325, 112 Am. St. Rep. 747, 63 Atl. 882, 6 A. & E. Ann. Cas. 339; *I. X. L. Furniture & Carpet Instalment House v. Berets*, 32 Utah, 454, 91 Pac. 279.

But, as the stipulation for notice is for the benefit of the landlord, it may be waived by him. *Lanham v. McWilliams*, supra; *Stone v. St. Louis Stamping Co.* 155 Mass. 267, 20 N. E. 623; *Wood v. Edison Electric Illuminating Co.* 184 Mass. 523, 69 N. E. 364; *Gerhart Realty Co. v. Brecht*, 109 Mo. App. 25, 84 S. W. 216; *Probst v. Rochester Steam Laundry Co.* 171 N. Y. 584, 64 N. E. 504; *Crouch v. Trimby & B. Shoe Co.* 83 Hun, 276, 31 N. Y. Supp. 932; *Holton v. Andrews*, 151 N. C. 340, 66 S. E. 212.

Nor is the tenant bound, where notice is required of the lessee's intention to claim the extended term, unless notice is given or the intention be otherwise manifested, and it has been held that a naked holding over is insufficient to warrant a finding that the lease has been extended. *Bradford v. Patten*, 108 Mass. 153; *Beller v. Robinson*, 50 Mich. 264, 15 N. W. 448; *Cooper v. Joy*, 105 Mich. 374, 63 N. W. 414; *Gerhart Realty Co. v. Brecht*, supra.

the said Wm. J. Lemp Brewing Company may, upon reasonable notice, terminate the tenancy under this contract, and cancel and annul this lease." It further appears that the defendant took possession of the building situated on the premises described in the lease, and from the 4th day of May, 1906, until the 4th day of May, 1907, conducted a saloon, either by itself or others, for the sale of intoxicating liquors therein; that some time in April, 1907, it informed the plaintiff that, if a license to sell intoxicating liquors could not be procured, it would not exercise its option to again lease the premises as provided by the terms of its existing lease, and there is no claim that it exercised such option. It also appears that two attempts were made to procure a license, which were not successful on account of personal objections to the applicant; and that, pend-

ing the proceeding therefor, the defendant occupied the premises with its stock and fixtures until about the middle of June, 1907; that on the 29th day of that month defendant delivered the key to the building to one Butts, an employee of the plaintiff's husband. There is no evidence in the record showing or tending to show that the city of Auburn prohibited the sale of intoxicating liquors within its borders, or passed obnoxious laws or ordinances forcing the keepers of saloons for the sale of intoxicating liquors to close their places of business, or render such business so unprofitable as to compel them to quit the business, and that defendant gave no notice to the plaintiff of its intention to terminate the lease other than that above mentioned.

At the close of the evidence the court instructed the jury, among other things, as follows: Instruction No. 5. "You are in-

Notice has been held to have been waived in the following cases and under the following circumstances. *Lanham v. McWilliams*, supra (allowing tenant to remain and receiving rent from him); *Kramer v. Cook*, 7 Gray, 550 (allowing tenant to remain in possession and accepting rent at increased rate stipulated in case of extension); *Stone v. St. Louis Stamping Co.* supra (allowing tenant to remain and receiving increased rent stipulated in case of extension); *Long v. Stafford*, 103 N. Y. 274, 8 N. E. 522 (allowing tenant to remain and receiving increased rent stipulated in case of continuance); *Probst v. Rochester Steam Laundry Co.* supra (tenant remaining in possession and paying rent); *Bailie v. Plaut*, 11 Misc. 30, 31 N. Y. Supp. 1015 (tenant remaining in possession and paying rent); *Schuck v. Schwab*, 84 N. Y. Supp. 896 (tenant remaining in possession and paying increased rent stipulated in case of renewal); *Holton v. Andrews*, supra (tenant remaining in possession and paying rent); *Thompson's Estate*, 205 Pa. 555, 55 Atl. 539 (where lessee remained in possession paying rent, and did not pay the extra amount he agreed to pay in case he elected not to take an extended or renewed lease, but otherwise recognized lease as extended or continued).

But it has been held that where a tenant for years has "the privilege of extending the term" for a further period on giving notice a certain length of time in advance, that the lease is not deemed to be extended on a failure to give the notice merely because the tenant holds over and pays rent. *Murtland v. English*, supra.

Failure to give a notice required to renew a lease is excused when the landlord claimed that the old lease had been forfeited, and when the time for giving notice had elapsed pending negotiations for settlement. *Hunter v. Hopetoun*, 13 L. T. N. S. 130.

Where a tenant has a lease for one year, he "to have the privilege to have the prem-

ises for one year . . . longer, but if he leaves he is to give four months' notice before the expiration of this lease," the lease creates a term for two years, defeasible at the election of the tenant after one year by giving notice of intent to leave four months previous to the expiration of the year, and on failure to give such notice, the term will be for the full period of two years, and tenant can hold for such term against the landlord. *Chretien v. Doney*, 1 N. Y. 419.

Where a lease is to continue from year to year, unless notice to terminate it is given by either party a certain period in advance of the termination of any one year, a failure to give the necessary notice will leave the tenant liable for another year. *Megargee v. Longaker*, 10 Pa. Super. Ct. 491.

Where a lease provides that, should lessee remain in possession after expiration of the term, the lease shall be a continuing yearly lease, terminable by either party at the end of any year by giving thirty days' notice, the lessor may, at his option, treat the lease as renewed for another year, where the lessee remained in possession after the expiration of any year, although he had previously given the necessary notice that he intended to quit. *Crawford v. Kline*, 74 N. J. L. 203, 65 Atl. 441.

Where a lease provides that lessee shall give lessor "written notice thirty days before the expiration of this lease, if the premises will then be vacated, otherwise (lessor) shall have the option of continuing the lease for one year, without notice to" lessee, the lessor, when the notice is not given, exercises the option to continue the lease for another year by permitting the defendant to remain in the premises. *Trainor v. Schutz*, 98 Minn. 213, 107 N. W. 812.

Where there is a contract whereby property is rented for one year only, coupled with the further agreement that at the expiration of that year the landlord and tenant shall regard a new renting for another

structed that where a tenant with the consent of his landlord, express or implied, holds over his term, the law presumes a continuation of the original tenancy for a like term and upon the same conditions, and you are instructed that the first term mentioned in the lease was one year, and if you add from the evidence that the defendant held over his term,—that is, stayed in possession until May 5, 1907, or the 20th day of June, 1907,—either with the express assent of the plaintiff, Barbara Kuhlman, or by her implied consent, then you are instructed that the defendant would be liable for rent at the rate of \$50 per month for the year ending May 1, 1908. You are instructed in this case that there is no evidence in this case that the city of Auburn prohibited the sale of intoxicating liquors in said city, or passed laws forcing saloons to close their places of business, or to ren-

der their business unprofitable." Defendant strenuously contends that the giving of this instruction was reversible error, and argues that, by holding over from May 4, 1907, to about the middle of June of that year, it became at most only a tenant at will, and could thereafter terminate the lease at any time it desired to do so. To this contention we cannot give our assent. It may be said that upon this question there is a division of the authorities, but this court is fairly committed to the rule that where a tenant under a written lease for one year, with the option of renewal, or of again leasing the premises for one year or more years, holds over without exercising his option, the landlord may, if he so desires, consider him a tenant for another year, and liable for the rent for that period at the rate fixed by the terms of the lease. *Bradley v. Slater*, 50 Neb. 682, 70

as agreed on, unless there is a previous assent, a permitted holding over by the tenant is an assent of both parties to the contract for the first year as the contract for the second year, and should bind both parties as if there had been a formal contract entered into for the second year. *Unruh v. Bamberger*, 6 Ky. L. Rep. 447.

Circumstances excusing holding over.

It has been held that, although the fact of holding over and paying rent raises a presumption that a tenant has elected to hold over for the further term stipulated in the lease, the presumption is not conclusive, but is rebuttable by evidence. *Atlantic Nat. Bank v. Demmon*, 139 Mass. 61, 1 N. E. 833.

Merely holding over for a few days will not constitute an election to exercise the privilege of an additional term, where before termination of the term the tenant notified the landlord that he would vacate, it was prevented from leaving for a few days because a subtenant failed to leave promptly as directed by the tenant; but tenant will be deemed a tenant from year to year. *Racke v. Anheuser-Busch Brewing Co.*, 17 Tex. Civ. App. 167, 42 S. W. 774. Merely holding over for two months because of a promise of the landlord to make repairs is not an exercise of an option to hold for an additional term, where tenant left when such repairs were not made. *Williams v. Houston Cornice Works*, 40 Tex. Civ. App. 70, 101 S. W. 839, 1195.

A tenant for two years, with the privilege of three years more, cannot be held by the landlord for the additional three years, although he remained in possession and paid rent, where before the term expired he told the landlord that he would not take for the additional term, as he was erecting a new building in which to carry on his business, but which would not be ready for occupancy when the term expired. *Stevenson v. Almes*, 8 Ohio Dec. print. 566.

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Mere occupancy of land after the expiration of a lease giving the privilege of an additional term, after the lessee had notified the lessor that he would not hold for the additional term, and the lessor had acted upon such notification, cannot be considered an election to hold for the additional term. *Barnett v. Feary*, 101 Ind. 95.

Zorkowski v. Astor, 156 N. Y. 303, 50 N. E. 983, held that where a landlord agreed either to renew a lease, or to pay the value of improvements placed thereon by the tenant, but the tenant did not agree to accept a renewal if offered, and the landlord elected to renew, the mere fact that the tenant remained in possession after the expiration of the term, under an erroneous but bona fide claim promptly asserted, that a proper appraisal of the premises had not been made, on the value of which, as appraised, depended the amount of the rent for the renewed period, will not constitute an election to accept the offered renewed term.

Where a landlord gave a tenant a lease for a certain term, "with the refusal of leasing said property for the term of two years longer," and the tenant moved out before the termination of his term and locked up the building, the mere fact that the tenant retained the key for two months after the expiration of his first term will not support a finding that the relation of landlord and tenant existed after the expiration of such term. *Steen v. Scheel*, 46 Neb. 252, 64 N. W. 957.

Where tenant has option of several periods.

Where tenant has option to extend or renew lease for one of several named periods, by holding over without stating which period he desires, he will be deemed to hold over for the shortest period. *Lanham v. McWilliams*, 6 Ga. App. 85, 64 S. E. 294; *Falley v. Giles*, 20 Ind. 114. R. A. E.

N. W. 258; Critchfield v. Remaley, 21 Neb. 178, 31 N. W. 687; Yates v. Kinney, 19 Neb. 275, 27 N. W. 132; Thiebaud v. First Nat. Bank, 42 Ind. 212. In Haynes v. Aldrich, 133 N. Y. 287, 28 Am. St. Rep. 636, 31 N. E. 94, it was said: From tenant's holding over "after the expiration of his term, the law will imply an agreement to hold for a year upon the terms of the prior lease; that the option to so regard it is with the landlord, and not with the tenant, and the latter holds over at his peril." In that case the holding over was for the period of two days, which occurred by reason of difficulty on the part of the lessee to procure trucks with which to move, and also from the illness of a boarder; and it was held that this would not prevent the holding over from operating as a renewal of the lease for another year if the landlord so elected to treat it, and it was said: Lessor's election to treat a holding over, as a renewal of the lease for another year, having been manifested in direct and unequivocal language, is not avoided by evidence that he subsequently visited the premises, and, finding them deserted by his tenant, had some repairs attended to, and tried in vain to rent them to another tenant. Indeed, without citing further authorities, we may safely say that the rule adopted by this court is sustained by the great weight of authority in this country.

Defendant has cited some cases to the contrary, among which are Andrews v. Marshall Creamery Co. 118 Iowa, 595, 60 L.R.A. 399, 96 Am. St. Rep. 412, 92 N. W. 706, and Spangler v. Rogers, 123 Iowa, 724, 99 N. W. 580. It appears, however, that those cases were governed by § 2991 of the Iowa Code, which provides that a tenant holding over a specified term becomes a tenant at will, and that the tenancy may be terminated upon giving thirty days' notice, and therefore do not sustain the defendant's contention.

Finally, defendant contends that the provision contained in the lease which is quoted above gave it the option of terminating the tenancy at any time upon the happening of certain events and the giving of reasonable notice, and therefore it could not be held for the payment of rent after May 1, 1907. It must be observed, however, that there is no evidence in the record that the events upon which the right to cancel the lease depended ever occurred, or that reasonable notice was given to the plaintiff of the defendant's intention to terminate its tenancy, and therefore the district court did not err in giving the instruction complained of.

Finding no error in the record, the judgment of the District Court is affirmed.
29 L.R.A. (N.S.)

VIRGINIA SUPREME COURT OF APPEALS.

CITY OF RICHMOND, Impleaded, etc.,
Plff. in Err.,
v.

MARIE E. SCHONBERGER, by Next Friend.

(— Va. —, 68 S. E. 284.)

Municipal corporation — street crossing — unevenness — liability.

A municipal corporation is not liable for injury to a pedestrian who, in attempting to cross a street, stumbles and falls because of a piece of stone projecting 2 inches above the level of the cross walk, where the walk is constructed of two level strips of paving stone, with the intervening space filled with loose stones, and covered with dirt.

(June 9, 1910.)

Note. — Liability of municipality for injuries from unevenness in sidewalk or cross walk.

This subject is treated at page 640 of 20 L.R.A. (N.S.) as part of a general note commencing at page 513, on the Liability of municipal corporations for defects or obstructions in streets. A few subsequent cases have appeared on this particular aspect of that general subject.

Thus it is held in Northrup v. Pontiac, 159 Mich. 250, 123 N. W. 1107, that an obstruction caused by a grating in the sidewalk about 2 or 3 feet in superficial area, and above the level of the surrounding walk, at one corner 1½ inches, and at another, 1¼ inches, was not such as to render the walk not reasonably safe for public travel.

A mere elevation in a pavement is not negligence *per se*, as the law does not require perfect sidewalks, the standard being reasonable safety. Purcell v. Riebe, 227 Pa. 503, 76 Atl. 212. The implication from the opinion is that negligence could not be predicated of the existence of a step 2 inches high, extending the width of a sidewalk, made by the overlapping of planks of a temporary walk at a point where an excavation had been made in the walk in the course of erection of a building. It was further held in this case, however, that the plaintiff, who was injured by tripping over the step after dark, was guilty of contributory negligence, it appearing that she had frequently passed over the walk, and knew, or ought to have known, of the condition, and that she could have easily chosen another and safer route.

In Covington v. Belser (Ky.) 123 S. W. 240, upon the ground that a municipality is not bound to make the streets absolutely safe, but it is only required to keep and maintain them in a reasonably safe condition, the court held that evidence that a brick in a sidewalk over which the plaintiff

ERROR to the Circuit Court for the City of Richmond to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendants' negligence. Reversed.

The facts are stated in the opinion.

Messrs. H. R. Pollard, Beverley T. Trump, and Emmett Seaton, for plaintiff in error:

As the uncontroverted evidence shows that the slight inequality in the surface of the street grew out of necessary repairs in the street, not completed at the time of the accident, the situation calls for the determination and judgment of the court on the question of negligence.

Richmond v. Courtney, 32 Gratt. 800; Parrish v. Huntington, 57 W. Va. 286, 50 E. 416; Winchester v. Carroll, 99 Va. 27, 40 S. E. 37; Portsmouth v. Houseman, 69 Va. 558, 65 S. E. 11.

The inequality was not sufficient to render the city liable.

25 Cyc. Law & Proc. p. 1366; Burroughs v. Milwaukee, 110 Wis. 478, 86 N. W. 159; Siglow v. Kalamazoo, 97 Mich. 121, 56 N. W. 339; Raymond v. Lowell, 6 Cush. 524, 3 Am. Dec. 57; Beltz v. Yonkers, 148 N. Y. 67, 42 N. E. 401; Weiss v. Detroit, 65 Mich. 482, 63 N. W. 423; Kawiecka v. Superior, 136 Wis. 613, 21 L.R.A.(N.S.) 920, 118 N. W. 192.

Stumbled projected $\frac{3}{4}$ of an inch above the surrounding surface was not sufficient to present a question of negligence for the jury.

In O'Donnell v. Hannibal (Mo.) 128 S. W. 819, however, the court, while conceding that a city is not liable for an injury from a hidden defect in the walk of which it had no actual knowledge, and which had not existed a sufficient length of time to justify the assumption that, by the exercise of ordinary care, the city might have known of its existence, nevertheless held that an inference of negligence on the part of the city was justified by evidence that an ordinary farm gate hinge, used to fasten a cellar door to the sidewalk in a city street, had become loosened so that it was raised above the surface of the door and walk 2 or 3 inches, there being evidence that the defect had existed a sufficient time, and was so obvious to ordinary inspection, as toarrant the inference that the defendant had actual or constructive knowledge of its existence in time to have repaired it had reasonable care been exercised. It was further held that the plaintiff, who was injured by tripping over the hinge on a moonlight night, was not guilty of contributory negligence, notwithstanding that the sidewalk, though in shadow, was sufficiently lighted for a person constantly paying attention to the sidewalk, it appearing that at the time

Mr. L. O. Wenderburg for defendant in error.

Keith, P., delivered the opinion of the court:

Mary E. Schonberger, an infant under twenty-one years of age, brought suit by her next friend against the city of Richmond, William E. Fletcher, and Charles Gasser, to recover damages for an injury received by her, due, as she claims, to their negligent conduct.

It is the duty of the city of Richmond to keep its streets in a reasonably safe condition, and in the performance of this duty it employed the defendants Fletcher and Gasser to put in proper order the crossing on the south side of Louisiana street, at its intersection with Eighth street. The crossing was made of two parallel lines of stone flagging, separated from each other by a short distance, the intervening space to be filled in with stones. The declaration alleges that it is the duty of the city, in paving and filling in this space, to do the work so as not to cause the same to be a defect in and obstruction upon Eighth street, but that the city and its employees, unmindful of their duty in this behalf, filled in the open space between the lines of flagging with stone blocks, and left them projecting above the level of the flagging about $2\frac{1}{2}$ inches, against which the plaintiff, without negligence on her part, struck her

she tripped she was conversing with a companion; and it was further held that the fact that the point where the accident occurred was not on the nearest route to her home, to which she was going at the time of the injury, would not convict her of contributory negligence, since she had a right to choose any route over the public streets that appeared reasonably safe.

So, the court in Terry v. Perry (N. Y.) — L.R.A.(N.S.) —, 92 N. E. 91, while conceding that a municipality may be liable in exceptional cases when a slight depression or difference in grade is peculiar, and specially calculated to work injury to pedestrians, yet held that an inference of negligence was not justified by evidence that the plaintiff stumbled at a point in the sidewalk where one of the cement blocks was depressed $1\frac{1}{2}$ inches below the surrounding blocks, notwithstanding that, prior to the accident, one or two other persons had been seen to stumble at the same place, and one of the trustees of the village had turned his ankle at that place, and had reported that fact to the board, which gave an informal direction to the street commissioner to call upon the owner of the adjoining property to make repairs to the walk.

Numerous allied questions are treated in notes referred to in Index to Notes, 1-24 L.R.A.(N.S.), pages 124 et seq., under the topic "Highways." G. H. P.

foot while crossing Eighth street in the nighttime, and was thrown and greatly injured.

Fletcher and Gasser were made parties defendant by virtue of a provision of the charter of the city (Acts 1899, p. 288) which provides that "in any action against the city to recover damages against it for any negligence in the construction and maintenance of its streets, alleys, or parks, where any person is liable with the city for such negligence, every such person shall be joined as defendant with the city in any action brought to recover damages for such negligence; and where there is a judgment or verdict against the city, as well as the other defendant, it shall be ascertained by either the court or the jury which of the defendants is primarily liable for the damages assessed."

The case was tried before a jury, which rendered a verdict in favor of the defendant Gasser, and against the city of Richmond and William E. Fletcher for the sum of \$3,000, and further found that Fletcher was primarily liable therefor. During the progress of the trial numerous exceptions were taken, but in the view that we take of the case it will only be necessary to consider one of them, as its decision will be conclusive of the controversy, and render unnecessary the consideration of subordinate questions.

Stating the case of the defendant in error as strongly as is warranted by the evidence, it amounts to this: On the evening of May 16, 1908, she with two other female companions was passing along Louisiana street, going in the direction of Williamsburg avenue. When she reached the crossing of Eighth street the light fell so as to throw a shadow over the crossing. She stepped down from the sidewalk on the crossing, struck her foot against an obstacle, and fell, sustaining the injuries for which she sues. The crossing consists of two parallel paths or courses of flagging stones, laid smooth and level, separated by a small space which was filled in with pieces of stone, one of which projected about 2 inches above the level. The proof is that this work was done in the usual way, and that it was left four days before the accident, by the contractor under whose supervision the work was done, in good condition; that, having laid the paving stones, the intervening space was filled in with loose stones and covered with earth, the custom being to leave the crossing in that condition, to be finished with granite blocks by those employed to do that part of the work.

We are of opinion that the obstruction was not such as to render the city liable in damages.

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In *Richmond v. Courtney*, 32 Gratt. 798, it is said by Judge Christian, in whose opinion Judge Moncure concurred, that "a municipal corporation is not an insurer against accidents upon its streets and sidewalks. Nor is every defect therein, though it may cause the injury sued for, actionable. It is sufficient if the streets are in a reasonably safe condition for travel in the ordinary modes, by night as well as by day. It is not to be expected, and ought not to be required, that a city should keep its streets at perfectly level and even surface. Slight obstructions, produced by loose bricks in the pavement, or by the roots of trees which may displace the pavement, from the very nature of things cannot be prevented. And so there cannot be perfect uniformity of a level surface, where curbstones and culverts are necessary to be constructed on the streets. In a large city, with many miles of paved streets, it must often happen, from the very nature of the material out of which the pavement is constructed, that the bricks, from the very wear and tear of the use to which they are subjected, will become broken and displaced, so as to cause the fall of a person not careful in walking over them. Certainly, if the obstructions are of such a character as those indicated, and which would not cause the fall of a person exercising ordinary care, the city in such case could not be held liable."

The obstruction in that case consisted of a place in the pavement 3x5 feet, or thereabouts, from which bricks had been removed and loose bricks were lying about in the opening,—certainly a more serious obstruction than the one under consideration. In that case the obstruction was upon the sidewalk. In this, the obstruction was upon the crossing of a street, which,—it is true, may be considered, in a sense, as a part of the sidewalk. But it is only reasonable to say that one passing over a street crossing may more reasonably expect obstructions, and should, therefore, exercise a greater degree of care, than when upon the sidewalk, strictly so called. To hold the city liable for every slight inequality in its streets would, we think, be altogether unreasonable.

In *Bigelow v. Kalamazoo*, 97 Mich. 121, 56 N. W. 339, it is said: "Even in our most prominent thoroughfares, paved in the most approved manner, curbs must be carried, and at the crossings they are from 2 to 6 inches higher than the pavement. The curb must be left bare, and inattentive people be liable to stumble, or, as is frequently done, a plank is placed upon an incline, upon which pedestrians carelessly advancing are liable to slip. In either case there

the minimum of danger. The walk is not absolutely safe, but it cannot be said that it is not in a reasonably safe condition. The same is true of nearly all of our alley crossings. Gutters are necessarily left for the passage of water. These crossings are not absolutely safe, but they may be reasonably so. Neither streets, sidewalks, nor cross-walks, can be constructed upon a dead level. People are liable to tumble over a Persian rug upon a parlor floor, and streets cannot be made less dangerous than drawing rooms. . . . Cities are not required to keep streets in a condition absolutely safe for travel. A cross walk must be reasonably safe,—reasonably safe in view of the purpose for which it is constructed, the necessary uses of the street, and all the varying conditions.”

In *Weisse v. Detroit*, 105 Mich. 482, 63 N. W. 423, it appears that there was a rise in a cross walk, caused by one end of a plank lying lengthwise in the walk being raised 2 inches above the adjoining plank. It was held not a defect in the walk, so that it was not reasonably safe for travel. The court said: “If the plaintiff could recover in this case, every municipality would be compelled to exercise the most vigilant care over its streets to see that no rise of 2 inches occurred along the line of travel on side and cross walks.”

We are of opinion that neither the city of Richmond nor Fletcher was guilty of actionable negligence. The judgment of the Circuit Court must therefore be reversed, the verdict set aside, and the cause remanded for a new trial, to be had not inconsistent with the views expressed in this opinion.

Harrison, J., absent.

GEORGIA SUPREME COURT.

MALCOLM C. TARVER, Plff. in Err.,
v.

MAYOR AND COUNCIL OF CITY OF
DALTON et al.

(134 Ga. 402, 67 S. E. 920.)

Municipal corporation — grant of tax exemption by contract — validity.

1. A municipality cannot exempt from taxation property which does not belong to any of the classes which the Constitution of this state permits to be exempted.

(a) A contract between the owner of property in a city and the municipal authorities of the latter, wherein it is provided that no taxes on such property above

a specified amount (which is less than the amount of taxes due) shall be collected by the city, in consideration of specified privileges and benefits conferred upon it by the owner of the property, is unlawful and not enforceable.

Taxation — payment — set-off.

2. Where a taxpayer applies for mandamus to compel the municipal authorities to collect, for the years hereinafter referred to, taxes on property located in the city and subject to taxation for year in which such application is filed and for seven years prior thereto, and the answers of the authorities aver that by reason of the contract referred to in the preceding headnote, the municipal authorities of previous years collected no taxes during such years except the amount specified in the contract, which was less than the amount of taxes due on such property, and the present municipal authorities, on account of such contract, are willing that no taxes other than those specified should be collected during the year present, and that no other

Note. — Power of municipality to exempt property from taxation.

This question was considered in the note to *Whiting v. West Point*, 15 L.R.A. 860, and no further reference to the cases therein cited is necessary.

A municipality has no inherent power to exempt from taxation property which it is authorized to tax. *State ex rel. Nelson v. Tyler*, 48 Conn. 145; *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202, 23 So. 416; *McCullom v. Louisville*, 7 Ky. L. Rep. 684 (abstract); *Yazoo & M. Valley R. Co. v. Adams*, 76 Miss. 545, 25 So. 306; *Vrana v. St. Louis*, 164 Mo. 146, 64 S. W. 180; *Jersey City v. North Jersey Street R. Co.* (N. J. L.) 73 Atl. 609; *Sinnehoning Iron & Coal Co. v. Shaffer*, 14 Pa. Dist. R. 308; *McTwiggan v. Hunter*, 19 R. I. 265, 29 L.R.A. 526, 33 Atl. 5; *Germania Sav. Bank v. Darlington*, 50 S. C. 337, 27 S. E. 846; *Garrison v. Laurens*, 54 S. C. 440, 32 S. E. 696; *Milster v. Spartanburg*, 68 S. C. 26, 46 S. E. 539; *Dallas v. Dallas Consol. Electric Street R. Co.* 95 Tex. 268, 66 S. W. 835; *Thomas v. Snead*, 99 Va. 613, 39 S. E. 586.

It has, however, been held that Congress acting as a local legislature for the District of Columbia may at its discretion wholly exempt certain classes of property from taxation or may tax them lower than other classes of property. *Gibbons v. District of Columbia*, 116 U. S. 404, 29 L. ed. 680, 6 Sup. Ct. Rep. 427.

The illegality of a tax, upon the ground that the city excepted therefrom stocks of goods held by merchants, is not cured by the fact that the city added to the tax on the monthly sales of merchants, more than enough to meet the deficiency. *London v. Wilmington*, 78 N. C. 109.

A municipality can grant tax exemptions only to the extent that the legislature has authorized it to do so (*Louisville*

Headnotes by HOLDEN, J.
25 L.R.A.(N.S.)

taxes should be collected for previous years, no sufficient facts are averred to show any legal settlement of such taxes, or to show any valid reason why they should not be collected for any of such years.

(a) If the owner of such property has against the city a debt equal in amount to the taxes due by the owner to the city, this fact will not prevent the city from collecting such taxes.

Parties — mandamus — taxes — owner of property.

3. A taxpayer applied for mandamus to compel the municipal authorities to collect taxes on property of a private corporation in the city subject to taxation, and the municipal authorities claimed in their answer that the property was not liable for such taxes, by reason of a contract between the city and such private corporation,

which had no objection to being made a party defendant to such proceedings. Held, that it was not error, upon motion of the municipal authorities, to make the owner of the property a party to such proceedings.

Mandamus — motion to make absolute.

4. A motion by the relator to make the mandamus absolute involves the determination of the question as to whether or not the averments in the answers afford a sufficient reason why the mandamus should not be made absolute.

(a) In this case it was error to refuse to make the mandamus absolute, the answers setting up no sufficient reason why this should not be done.

(April 27, 1910.)

v. Board of Trade, 90 Ky. 409, 9 L.R.A. 629, 14 S. W. 408; New London v. Colb. Academy, 69 N. H. 443, 46 Atl. 743); and statutes giving such power will be strictly construed (Middlesboro v. New South Brewing & Ice Co. 108 Ky. 351, 56 S. W. 427; Continental Tobacco Co. v. Louisville 123 Ky. 173, 94 S. W. 11; People's Mill. Co. v. Meaford, 10 Ont. Rep. 405).

The creation of an exemption is not within the power of a municipal council to reduce assessments for overvaluation. Board of Liquidation v. Thoman, 42 La. Ann. 605, 8 So. 482.

And municipal power to levy and collect taxes does not authorize it to discriminate between objects of taxation, or to levy upon only a portion of one kind of property. Fitch v. Pinckard, 5 Ill. 69.

So, legislative power of a county court of claims to manage the fiscal affairs of the county, and to lay the county levy, does not authorize it to exempt property from taxation. Louisville & N. R. Co. v. Christian County, 24 Ky. L. Rep. 894, 70 N. W. 180; Nashville & K. R. Co. v. Wilson County, 89 Tenn. 597, 15 S. W. 446.

It has been held that the legislature cannot delegate to municipalities the power to determine upon what property taxes shall or shall not be imposed. Brewer Brick Co. v. Brewer, 62 Me. 62, 16 Am. Rep. 395. This is probably true if taken in its strictest sense. But it is also true that the state may delegate to municipalities the power to exempt property belonging to persons or corporations engaging in certain lines of business. Colton v. Montpelier, 71 Vt. 413, 45 Atl. 1039; Crafts v. Ray, 22 R. I. 179, 49 L.R.A. 604, 46 Atl. 1043.

But power is not conferred upon a city to exempt a factory from taxation for fifty years on condition that it be kept in operation for ten years, by an act authorizing it to abate taxes upon property "actually employed and used in the business of manufacturing." Havre De Grace Real Estate & P. Co. v. Havre De Grace, 102 Md. 33, 61 Atl. 662.

And a statute empowering towns to ex-

empt from taxation the capital used in existing or proposed manufactories does not authorize the exemption in general terms of the capital used or to be used in manufactories, but the town must confine its action to such specific establishments as are in existence, or are proposed at the time of the vote. Cox Needle Co. v. Gilford, 62 N. H. 503; Franklin Fall Pulp Co. v. Franklin, 66 N. H. 274, 20 Atl. 333. But a blanket vote is authorized, where the statute provides that "taxes may, by vote, exempt from taxation . . . any establishment therein, or which may thereafter be erected or put in operation therein." Caverly-Gould Co. v. Springfield (Vt.) 76 Atl. 39. A statute of this nature does not authorize the exemption of establishments not engaged in manufacturing. Re Denne, 10 Ont. Rep. 767; Kimball Carriage Co. v. Manchester, 67 N. H. 483, 39 Atl. 334. And therefore a town derives no power therefrom to exempt an electric light plant (Williams v. Park [Williams v. Warren] 72 N. H. 305, 64 L.R.A. 33, 56 Atl. 463), or an establishment known as "the general grain business" (People's Mill. Co. v. Meaford, supra). Nor does it have authority to exempt property belonging to one not entitled to such exemption, merely because he has leased it to one for use in the latter's exempted establishment. Portsmouth Shoe Co. v. Portsmouth, 74 N. H. 222, 66 Atl. 1045. But where one builds a manufacturing plant and equips it with machinery, the city's power of exemption will not be held inapplicable thereto merely because the plant is operated by tenants instead of the owner. Colton v. Montpelier, supra. The exemption cannot, however, be granted in consideration of the manufacturer's undertaking to furnish land for the right of way of a railroad, at least where the agreement is made to evade a statute requiring all propositions for railroad aid to be submitted to the voters. Scott v. Tilsburg, 13 Ont. App. Rep. 233.

It has been held in Canada that under an act empowering municipalities to grant exemptions to establishments following

ERROR to the Superior Court for Whitfield County to review an order denying a motion to strike defendants' answers in a mandamus proceeding to force a collection of certain taxes and make the mandamus absolute, and an order making the Crown Cotton Mills a party defendant. Reversed.

Statement by Holden, J.:

Malcolm Tarver, as a citizen and taxpayer of the city of Dalton, sought by mandamus proceedings in the superior court of Whitfield county to force a collection from the Crown Cotton Mills (hereinafter called the "mills") of certain taxes alleged to be due the city. The relator alleged that the mills owned a large amount of real estate of the

probable value of \$500,000, and personal property of great value, within the limits of the city, on which it had been illegally exempted from the payment of ad valorem taxes (since 1808 on the property then owned, and since 1902 on property acquired that year), but in lieu of all special and ad valorem taxes it had paid to the city per annum \$850 as a fixed commutation tax, in violation of the constitutional requirement embodied in § 5883 of the Civil Code, that all taxes shall be uniform upon the same class of subjects and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax; that the board of tax assessors of the city had failed and refused to make any assessment of its real property, as re-

specified lines of business, an exemption could not be granted arbitrarily, but that there must be a sufficient benefit to the taxpayers, actual or anticipated, and a good consideration, to the exemption. *Re Scott*, 10 Ont. Rep. 119.

A statute empowering towns to grant to water companies the right to construct reservoirs, and to lay pipes under highways, upon such conditions as they may deem proper, including power to exempt the pipes and reservoirs from taxation, does not authorize an exemption of pipes and reservoirs already installed. *Bowen v. Newell*, 16 R. I. 238, 14 Atl. 873.

Under a statute empowering cities to lease land for parks, and pay an amount equal to the taxes thereon, a city was held to have power to exempt from taxation land of a town-lot company, used by the city as a public park. *Henderson v. Hughes County*, 13 S. D. 576, 83 N. W. 682.

Without legislative authority a city or town has no power to bind itself by contract to forbear to impose municipal taxes on particular property. *Tampa v. Kaunitz*, 39 Fla. 683, 63 Am. St. Rep. 202, 23 So. 416; *Cartersville Waterworks Co. v. Cartersville*, 89 Ga. 689, 16 S. E. 70; *Dayton v. Bellevue Water & Fuel Gaslight Co.* 119 Ky. 714, 68 S. W. 142, 7 A. & E. Ann. Cas. 1012; *Shuck v. Lebanon*, 24 Ky. L. Rep. 451, 68 S. W. 843.

And it cannot compromise an action to recover taxes. *Louisville v. Louisville R. Co.* 111 Ky. 1, 98 Am. St. Rep. 387, 63 S. W. 14.

Adjoining towns cannot contract that each shall not tax lands lying therein, which belong to residents of the other. *Dillingham v. Snow*, 5 Mass. 547.

It was held in *Sioux City Street R. Co. v. Sioux City*, 138 U. S. 98, 34 L. ed. 898, 11 Sup. Ct. Rep. 226, that where a statute provided that all corporations incorporating thereunder should be subject to regulation, and the imposition of conditions for the public good, by the general assembly, a city could not, by contract with such a corporation, deprive the legislature of the power to tax the company.

About the only difficulty encountered by 23 L.R.A. (N.S.)

the courts seems to be in determining whether, by a particular contract, a preference has been created.

A release of taxes on property of a proposed railroad given to induce its construction cannot be upheld, although resulting in great benefit to the county. *Nashville & K. R. Co. v. Wilson County*, supra.

And it has been held that there was an unauthorized exemption where a city undertook to remit taxes assessed against a water company, in consideration of service rendered the city by the company. *Columbia Ave. Sav. Fund, S. D. Title & T. Co. v. Dawson*, 130 Fed. 152.

In *Bartholomew v. Austin*, 29 C. C. A. 568, 52 U. S. App. 512, 85 Fed. 359, the court seemed to think that a contract by which a city "exempted" property of a water company from municipal taxation, in consideration of the free use of water for municipal purposes, was not, strictly speaking, an exemption, where it did not appear that one value was greater than the other.

A municipality may, in consideration of the conveyance of land to it, exempt other lands of the grantor from taxation for a certain period. *Springfield v. St. Boniface*, 10 Manitoba L. Rep. 615. So, in consideration of the donation of land upon which to build a schoolhouse, the trustees of a school district may release the donor from the payment of taxes levied to build the schoolhouse. *Gess v. Common School Dist.* 15 Ky. L. Rep. 30 (abstract). A transaction of this kind may be regarded as a payment of taxes in advance. *Springfield v. St. Boniface*, supra.

And a city may undertake to pay an amount for street lighting supplied equivalent to the amount of municipal taxes imposed upon the gas company, if such amount is a fair and reasonable compensation for the value of the service, and the stipulation is bona fide, and not in the nature of an evasion of the law prohibiting exemption from taxes. *Cartersville Improv. Gas & Water Co. v. Cartersville*, 89 Ga. 683, 16 S. E. 25.

In *Henderson v. Hughes County*, supra,

quired by law, and it had not been subjected to its proportionate part of taxes due from property of the same class; that the city clerk had failed to value the personalty as not returned, as is his duty under the law, and to issue tax executions for the amount of unpaid taxes for the respective years; and that the city council refused to enforce the collection of the taxes due,—all of which neglect was for the purpose of exempting the property from taxation other than the \$850 commutation tax. Relator prayed that a writ of mandamus issue, directed to the officials above mentioned, requiring them to proceed with the collection of the ad valorem tax on the property of the mills for seven years past, which it had owned for that length of time, and on property acquired by it in 1902 since the date of its ownership. The mayor and council of Dalton sought by petition to have the Crown Cotton Mills made a party defendant, which was done, over the objection of the relator.

All of the defendants filed answers. The tax assessors set out that they had not assessed the realty of the mills for 1908 and 1909, because they had been informed by the clerk that an agreement which the city had with the mills in respect to taxes rendered their doing so unnecessary. The mayor and council answered that the taxes had not been regularly assessed and collected, because of an agreement between the city and the mills relative to taxes, a copy of which was attached to the petition. The contract

between the city and the mills to which reference is made herein consisted of two agreements, the last entered into May 25, 1898, for a period of twenty-five years; but, for convenience, we speak of the entire agreement as the contract. In the contract in question, the mills granted to the city certain water privileges in connection with a spring and a creek located on its property, stipulating: "In consideration of the privileges and rights by the mills herein granted to the city, the city agrees that the mills shall in no event pay to the city for taxes—general, specific, or privilege—annually, a sum greater than eight hundred and fifty dollars (\$850); and if, at the rate of taxation imposed by the city, the taxes upon the mills' entire property, as it is now improved or may hereafter be improved by the erection of additional buildings and the placing of additional machinery or otherwise, the taxes upon said property, including privilege tax, shall exceed the sum of eight hundred and fifty dollars (\$850), that such excess shall be remitted to the mills as compensation and payment for the privileges granted to the city in this contract, so that the sum to be paid by the mills to the city for taxes of every kind shall in no event during the continuance of this contract exceed the sum of eight hundred and fifty dollars (\$850) per annum." As an additional consideration, the city guaranteed to the mills a sufficient supply of water for the use of its tenants, engines, boilers, etc. The answer

the court held that the whole tax levy would not be set aside because the city exempted property of a waterworks company, where there was nothing to show that the authorities acted otherwise than in good faith.

Certainly the contract will be upheld where no injury results therefrom, as, for instance, where the municipality realizes a sum equivalent to the amount of taxes. *Reynolds & H. Constr. Co. v. Police Jury*, 44 La. Ann. 863, 11 So. 236.

The contracts involved in the following cases have been held not objectionable as relieving a person or corporation from the burden of taxation:

Where a city borrowing money to construct a sewage plant contracted to refund, until the debt was paid, all water rents owing from the lender, together with all taxes on his property at a specified valuation, such refunds to be credited upon the amount of the loan. *Glucose Sugar Ref. Co. v. Marshalltown*, 153 Fed. 620.

Where, in consideration of a supply of water, the city agreed to pay municipal taxes assessed against the water company. *Ludington Water Supply Co. v. Ludington*, 119 Mich. 480, 78 N. W. 558; *Alpena City Water Co. v. Alpena*, 130 Mich. 518, 90 N. W. 323. The same result was reached 29 L.R.A. (N.S.)

where it appeared that the supply of water constituted an adequate consideration for the agreement. *Maine Water Co. v. Waterville*, 93 Me. 586, 49 L.R.A. 294, 45 Atl. 330. A contract of this kind can be upheld because it expressly contemplates the payment of taxes, and therefore in no sense creates an exemption. *Monroe Waterworks Co. v. Monroe*, 110 Wis. 11, 85 N. W. 683.

And where the city agreed to accept 1 per cent of the gross earnings of a street car company in lieu of all city taxes, such being a fair approximation to what would have been realized by assessment in the regular way. *Detroit v. Detroit City R. Co.* 76 Mich. 421, 43 N. W. 447. This case was indorsed in *Detroit Citizens' Street R. Co. v. Detroit*, 125 Mich. 673, 84 Am. St. Rep. 589, 85 N. W. 96, 86 N. W. 809.

So, a city granting a franchise to a telephone company to construct a plant and occupy the streets may, without violating the constitutional provision forbidding it to exempt property from taxation, contract that the company shall pay the city a certain sum for each box in use by it in lieu of other municipal taxes. *Nashville v. Cumberland Teleph. & Teleg. Co.* 76 C. C. A. 297, 145 Fed. 607 (writ of certiorari denied in 203 U. S. 589, 51 L. ed. 330, 27 Sup. Ct. Rep. 776).

L. A. W.

of the mayor and council further averred that they did not have any property right in the spring or creek in question; that they were entirely dependent upon the arrangement with the mills for a water supply for the city, and at present were unable to secure water supply elsewhere, and it would take a long time to establish waterworks at other points; that they did not wish to terminate the present arrangement with the mills *instantly*, as this would entail suffering among the people for lack of adequate water supply, and subject the city to the danger of a conflagration. They admitted that the taxes of the mills, if regularly assessed, would exceed \$850 per annum. They stated that they were not attempting illegally to exempt the bills from taxation, but believed the contract to be binding; and asked, should the court hold it void, that it so frame its decree as to give the city an opportunity to make provision for a water supply. In an amendment the mayor and council further alleged: "That neither the present mayor and council nor any of their predecessors have ever repudiated the contracts between the city and the Crown Cotton Mills, as set out in the original answer of file. That the present mayor and council not only have not repudiated the said contract, but do not intend to do so for this year, 1909; defendant being satisfied with the terms of said contract for the present until they can make a more satisfactory contract, and defendant considering that the amount of the taxes which they propose to repay or remit to the mill are a reasonable price to be paid for the benefits the city obtains from said mills under said contract. The present mayor and council, acting on this line, have passed a resolution ratifying the contract for the present year, and, as far as their power lies, ratifying the same for past years, which resolution is as follows: 'Be it resolved by the mayor and council of the city of Dalton, that the board of tax assessors be and they are hereby instructed to proceed at once to make an assessment of all property subject to assessment by said board within the corporate limits of the city of Dalton, of the Crown Cotton Mills, and make report of their actings and doings to the clerk of this council, who shall place the said assessment upon the books for the registration of said property. Be it resolved, further, that upon the rendering by said Crown Cotton Mills of an account for the use of water from the Hamilton spring, rights of way for pipe lines, use of real estate for power houses, pools, etc., and for services rendered the city during the current year by pumping for the city in emergencies, and for any and all other

services rendered, or privileges furnished: Then this council shall enter into an accounting with said Crown Cotton Mills for said services and shall pay to the said Crown Cotton Mills for said services and privileges an amount not to exceed the sum due said Crown Cotton Mills as provided in the contract now existing in relation to the use of said privileges and services rendered for the present year. Be it further resolved by the mayor and council aforesaid, that in the event the mayor and council of the city of Dalton have not fully settled with said Crown Cotton Mills for the use of water and other privileges aforesaid for the years preceding the present year, that all such settlements that have been made or should have been made are hereby fully concurred in by the mayor and council aforesaid, and are hereby, to all intents and purposes, ratified and confirmed, and as to all amounts due by the Crown Cotton Mills for services as aforesaid for preceding years, and the taxes due by said Crown Cotton Mills to the city of Dalton, are hereby considered and declared fully settled and squared off between the parties.'"

The answer of the Crown Cotton Mills set out that the city executed with it the contract above referred to; that it had paid \$850 taxes each year to the city; and it set out in detail the nature and value of the benefits which the city had received from the privileges conferred upon it by the contract, the value of which it claimed to be far in excess of any amount of taxes in excess of \$850 which it would have been due the city; and that the indications were that this would be true so long as the present arrangement was carried out. It further averred: "It is further shown that it would be vain and useless to require the property of this defendant within said city limits to be assessed for taxation, and to compel this defendant by tax execution to pay such taxes in cash into the city treasury merely to be by the city repaid to this defendant for the use of the water privileges and other rights now enjoyed by the city under said contracts, when it is manifest that the value of said privileges and rights far exceeds the amount of such tax." It is asked, in the event it was held that the city, under the law, must withhold the stipulated price, or any part thereof, that the court declare the right of the mills to a complete cancellation of the contract and a surrender of the spring and the rights and privileges now used by the city thereunder. It averred: "The use of said spring and rights and privileges now enjoyed by the city would be of much greater value to the city, if now surrendered by the city,

than any possible amount of taxes that could be assessed against its property in the city limits at the present rate of taxation, and this defendant denies the right of the city to hold or enjoy the use of said spring or any of the rights and privileges on any other consideration than that stipulated in said contract; and, if by reason of any constitutional prohibition the city is denied the power to comply with its stipulations under said contracts, then this defendant will insist on the surrender by the city of the use of the spring and of all other privileges enjoyed on defendant's property under the contracts aforesaid, this defendant being in need of said property rights and privileges for its own use and benefit. This defendant is willing to cancel the whole arrangement if desired; but, so long as the city is willing to comply with the terms of the contract, this defendant feels bound to comply with its obligations thereunder, although the entire cancellation of the contract would greatly benefit it. This defendant denies so much of paragraph 5 of plaintiff's petition as alleges that the tax has not been paid on defendant's realty in said city, and that the sum of \$850 has been accepted each year in lieu of all of said taxes; defendant insisting, as hereinbefore shown, that in addition to the cash payment of \$850 it paid the city each year in the use of water rights and other privileges greatly exceeding in value the amount of taxes which could have been assessed against it. This defendant shows that it has never consented to grant or surrender to said city the use of said spring and other privileges mentioned in the said contracts, on any consideration other than that named in said contracts, and does not now consent to do so, and respectfully denies the power of the court to make any other or different contracts for it. Whatever taxes may be assessed against this defendant by the city in excess of the sum of \$850 in cash actually paid by it to the city, if any such is assessed, is, and ever will be, under the written contract aforesaid, a correct measure of the amount to be allowed to this defendant as payment for the use of said spring and other valuable rights and privileges conferred on the city by said contracts."

Upon the hearing of a motion to strike the answers of all of the defendants and make the mandamus absolute was denied, and the relator excepted. He also excepted to the order making the Crown Cotton Mills a party.

Messrs. M. C. Tarver and George G. Glenn for plaintiff in error.

Messrs. J. M. Neel, W. E. Mann, and C. D. McCutchen for defendants in error.
29 L.R.A. (N.S.)

Holden, J., delivered the opinion of the court:

1. Article 7, § 2, ¶ 1, of the Constitution of this state, embodied in Civil Code § 5883, declares: "All taxation shall be uniform upon the same class of subjects, and ad valorem on all property subject to be taxed within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws." Under Const. art. 7, § 2, ¶¶ 2, 4 (Civil Code, §§ 5884, 5886), no property can be exempted from taxation other than that specifically mentioned in ¶ 2. The property involved in the present case belongs to a class which is nonexempt. It is as unlawful to sell an exemption as it is to give it away. Municipal authorities can no more bestow on an owner of property subject to taxation an exemption therefrom, for a consideration, than it could bestow it gratuitously. It is true that municipal authorities, where they have the power to pay for certain privileges, have the right to make a binding contract whereby they agree to pay, for such privileges, an amount equal to the taxes which the owner of such property is liable to pay, provided that the amount of such taxes is a reasonable and fair compensation for the privileges contracted for, and the contract does not constitute an invasion of the laws prohibiting exemption from taxation. Such a contract does not exempt any property from taxation, or prevent the city from collecting the taxes assessed against the same. Under a contract of this character the city can collect from the owner of the property the taxes assessed against it, although the city might owe the owner of the property an amount equal to the taxes. Under such a contract there is no agreement to exempt property from taxation, or to refrain from the collection of taxes thereon. But there is a radical difference between a valid contract of the nature referred to, and one whereby the authorities agree to charge the owner of property no taxes in consideration of privileges conferred by the owner upon the municipality. If the municipal authorities have the right to buy privileges of a certain character, they have the right to pay therefor any reasonable sum agreed upon, or a sum to be measured in a definite way by the amount of taxes which would be assessed against the owner, or against any other person, provided, as before stated, that the contract is reasonable and fair, and is not an attempt to evade the constitutional prohibition against exemption. A contract, however, which purports to bind the city to collect no taxes from the owner of property in return for a valuable consideration, is clearly a sale of an exemption of such property by way of commutation of

the tax, and is illegal under the provisions of the Constitution above referred to. The fact that the city, under a contract of this nature, may have received from the tax debtor benefits which, in value, equal or exceed the amount of the tax due, cannot deter the city from enforcing the collection of such tax, and any contract of this character purporting to bind the city so as to prevent the collection of its tax revenue is unlawful. *Cartersville Waterworks Co. v. Cartersville*, 89 Ga. 689, 16 S. E. 70. Upon a careful consideration of the contract referred to in the statement of facts, we construe it to be an attempt by the city to sell to the mills an exemption of its property from taxation over \$850, in consideration of certain water privileges and other benefits given the city by the mills, and therefore unlawful.

2. In *Dawson v. Dawson Waterworks Co.* 106 Ga. 696, 32 S. E. 907, it was ruled: "Without the preliminary sanction of a popular vote as required by the Constitution, a municipal corporation cannot contract for a supply of water, on the credit of the city, for a longer period than one year; and a contract which by its terms is to run for twenty years, each year's supply to be paid for semi-annually from year to year, is operative from year to year so long as neither party renounces or repudiates it." It was further ruled in that case: "The city council of Dawson has a right to make a contract to supply the city with water for one year, provided they have in the treasury of the city a sum sufficient to pay therefor which may be lawfully appropriated for that purpose, or if such sum can be secured by lawful taxation levied during the year in which the contract is made. While a contract for a longer space of time is illegal, yet, where the other parties to such a contract have complied with their part by erecting a plant at great expense in order to furnish the city with water, the city is liable for the amount stipulated in the contract for each year that it received the benefits thereof."

The contract we are considering, however, independently of its feature of creating an unauthorized debt, is illegal because in it the city undertook to exempt the property of the mills from taxation. The pleas of the defendant municipality, properly construed, are to the effect that its authorities each year charged no taxes against the mills over and above the sum of \$850, and the mills charged and collected from the city nothing for the privileges referred to in the contract as furnished to the city by the mills, and that all of this was done pur-

suant to the contract outlined in the statement of facts. It is alleged in the answer of the Crown Cotton Mills that it would be useless to require the municipal authorities to assess its property and collect taxes thereon, when such action could only result in the city refunding the amount collected as taxes, to compensate the mills for the benefits which it had conferred upon the city. The municipal authorities object to their being required to enforce the payment of taxes by the mills, on the ground that the latter, under the contract, owes the city no taxes. But the contract is illegal, and the municipal authorities cannot avail themselves of it as an excuse for the non-performance of their duty to collect taxes which the mills are due under the law. To permit the city to refuse to collect taxes on the property of the mills because of the contract would amount to a recognition of its validity, and would be an enforcement of it by the courts as though it were legal. The municipal authorities do not, in their answer, admit that the city owes the mills anything other than by virtue of the contract which we have declared to be illegal. The mere fact that the city owes it an amount equal to, or greater than, the amount of its municipal tax, does not prevent the city from collecting the taxes due by the former. *Cartersville Waterworks Co. v. Cartersville*, supra; *Wayne v. Savannah*, 56 Ga. 448. The resolution of the municipal authorities, copied in the statement of facts, correctly interpreted, means that by reason of the contract they are willing to treat the amounts respectively due from the mills to the city, and *vice versa*, for the year 1909 and previous years, as settled. The allegation in the amendment immediately preceding the copy of the resolutions set out in the amendment is as follows: "The present mayor and council, acting on this line, have passed a resolution ratifying the contract for the present year, and, as far as their power lies, ratifying the same for past years, which resolution is as follows." This allegation, especially in view of the preceding allegations in the amendment, shows that whatever was attempted to be done by the resolution was in pursuance of the contract. There is no allegation in any of the answers that any actual settlement has been had between the city and the mills, except in pursuance of the illegal contract; the only averments in this respect meaning that each year, under the contract, they had treated the taxes as being settled in consideration of the benefits received. Had there been, independent of this contract, any settle-

ment between them of their respective obligations, whether the same would be binding or not, it is not before us for consideration, and therefore not decided.

3. The plaintiff complains that the presiding judge erred in making the Crown Cotton Mills a party defendant, upon the motion of the municipal authorities. The mills were vitally interested in the question as to whether or not the contract between it and the city was valid, and whether or not the latter should proceed against it for the collection of the taxes alleged to be due. In the answer of the mills it was stated: "This defendant has no objection to being made a party defendant to said action, inasmuch as it is interested in the question sought to be adjudicated by said petition." In 26 Cyc. Law & Proc. p. 415, it is said: "Individuals or corporations who have a special legal interest in the subject-matter of a mandamus proceeding, and whose rights will be collaterally determined by a judgment awarding the writ, may properly be joined as parties respondent, and are generally required to be so joined." The court committed no error in making the mills a party defendant.

4. The plaintiff made a motion to make the mandamus absolute, and to strike all of the answers of the defendants. In the case of Southern R. Co. v. Atlanta Stove Works, 128 Ga. 207, 57 S. E. 429, in referring to the decisions in the cases of Hollis v. Nelms, 115 Ga. 5, 41 S. E. 263; Stromberg-Carlson Teleph. Mfg. Co. v. Bisbee, 115 Ga. 346, 41 S. E. 573, and Ray v. Anderson, 117 Ga. 136, 43 S. E. 408, Justice Evans said: "None of these cases were decided by a full bench, and we are not absolutely bound thereby. We think the reasoning on which they are based is fallacious. See Crew v. Hutcheson, 115 Ga. 533, 42 S. E. 16; Kelly v. Strouse, 116 Ga. 890, 43 S. E. 280. A motion to make a mandamus absolute necessarily involves a determination that the averments in the answer either afford, or do not afford, a sufficient reason in opposition to the issuance of the writ. If the answer avers matters which set forth no defense to making the rule absolute, in this day of directness in formulating the substantial issues by means of the pleadings, its sufficiency is tested by the motion to make the rule absolute. . . . The assignment of error that the court erred in making the mandamus absolute, because the allegations of the answer raised certain issues of fact which should first have been submitted to a jury, raises the question whether any issue of fact was made by the answer." No issues of fact were made by the answers of the defendants, and the matters therein set forth offered no sufficient

reason why the mandamus absolute should not have been granted. The court committed error in refusing the motion. Judgment reversed.

All the Justices concur.

KANSAS SUPREME COURT.

INGLESIDE ASSOCIATION

v.

JAMES M. NATION, State Auditor.

(— Kan. —, 109 Pac. 984.)

Public money — appropriation for home for aged women — constitutionality.

The appropriation of \$400, made in behalf of the Ingleside Association, Topeka, by § 2 of chapter 1 of the Laws of 1909, for the year 1910, is not unconstitutional, and that association is entitled to such appropriation, and it was the duty of the state auditor to issue a warrant upon the state treasurer therefor, upon proper demand.

(July 9, 1910.)

Headnote by GRAVES, J.

Note. — Requiring payment from inmates as affecting right of charitable institution to public aid or exemption from taxation.

Although the fact that the institution involved in the foregoing case generally required a fee as a condition of admitting inmates is not made the basis of a distinct argument in the opinion as to its character as a public institution, that fact seems to have been taken into consideration, and the decision necessarily involves the point that that fact did not deprive the institution of its character as a public charity for the aid of which public funds might be constitutionally appropriated.

In *Fordham v. Thompson*, 144 Ill. App. 342, involving the right of a county to appropriate money to a hospital, the fact that admission was charged or payments required of some classes of patients was largely relied upon in the contention that the use in question was a private one, for which public funds could not be appropriated; but it was held that the fact of such admission fees or charges is not controlling upon the question, but that if a charity is otherwise a public one, the fact that a fee is charged for admission to the institution, or some charges made therein, does not prevent the appropriation of public funds in its aid. The court said: "We hold that, under the proofs, this is a non-sectarian public hospital for the sick or infirm, located within the limits of Lee county, and for the support of which its

APPPLICATION for a writ of mandamus to compel James M. Nation, as state auditor, to issue a warrant for the amount of an appropriation which had been made for the benefit of the plaintiff association. Granted.

The facts are stated in the opinion.

Messrs. George H. Whitcomb and Clad Hamilton, for plaintiff:

The plaintiff is strictly a public charity. 15 Am. & Eng. Enc. Law, pp. 758, 761, 893, 897; *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 559; *Cooley*, Taxn. 2d ed. 124, 125; *State v. Nelson County*, 1 N. D. 88, 8 L.R.A. 283, 26 Am. St. Rep. 609, 45 N. W. 33.

In the absence of express constitutional restrictions the legislature may aid private charitable institutions for the relief of the poor.

20 Am. & Eng. Enc. Law. p. 1085; *People ex rel. New York Inst. v. Fitch*, 154 N. Y. 14, 38 L.R.A. 591, 47 N. E. 983; *People ex rel. Inebriates' Home v. Brooklyn*, 152 N. Y. 399, 46 N. E. 854; *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1067; *Shepherd's Fold v. New York*, 96 N. Y. 137; *White v. Inebriates' Home*, 141 N. Y. 123, 35 N. E. 1092.

Mr. E. W. Grant, with Messrs. F. S. Jackson, Attorney General, John Marshall, and Charles D. Shukers, for defendant:

The legislature has no right to levy a tax or to appropriate money raised by taxation, except for a public purpose.

Cooley, Const. Lim. 598; *Cooley*, Taxn. pp. 55, 103; *Brodhead v. Milwaukee*, 9 Wis. 625, 88 Am. Dec. 711; *Lumsden v.*

board could contribute a sum of money, under *Sisters of Third Order v. Board of Review*, 231 Ill. 317, 83 N. E. 272; *Board of Review v. Chicago Policlinic*, 233 Ill. 268, 84 N. E. 220, and *Hennepin County v. Brotherhood of Church*, 27 Minn. 460, 38 Am. Rep. 298, 8 N. W. 595. It is not prevented from being a public hospital by the fact that those patients received by it who are able to pay are required to do so, or that it received contributions from outside sources, so long as all the money it receives is devoted to the general purposes of charity, and none of it goes to the benefit of any private individual or corporation organized for profit. There was no private gain to any person connected with the institution. No obstacle was placed in the way of those who needed treatment for which they were not able to pay, in obtaining admission to the hospital and the benefits of its appliances and the services of its nurses. The word 'public' applied to property may either mean the character in which it is held or the uses to which it is applied. . . . The uses of this hospital are public. Though those who are able to pay are charged, yet it is established and conducted without a view to profit, and without any chance for anyone to make a profit out of its receipts. It is obviously operated at a loss, made up in whole or in part by the contributions of the city and the county, and it is operated solely for the public good, and for the promotion of the health of the public."

The three cases cited by the court (supra) in support of its holding that the institution in question was a public hospital, for the support of which the county could appropriate public funds, are all cases involving the question as to the rights of the respective charitable institutions to certain statutory exemptions from taxation, but seem to involve the same principle of law as if the question had been whether there would have been a right to appropriate public funds in their aid. 23 L.R.A.(N.S.)

In the first case cited (*Sisters of Third Order v. Board of Review*, supra), it is held that an institution of public charity, open to all members of a community, does not lose its character as such, and a consequent statutory exemption from taxation, by reason of the fact that persons able to pay for the services rendered by it are required to do so, provided all money received is devoted to its charitable purpose, and none is permitted to inure to the benefit of any private person managing the charity. And to the same effect is *Board of Review v. Chicago Policlinic*, supra.

In *Hennepin County v. Brotherhood of Church*, supra, where it appeared that in a hospital maintained by the defendant for the benefit of the public generally, those cared for, if pecuniarily able, were charged according to their ability, it was held that the institution was nevertheless exempt from taxation as an institution of "purely public charity," the court saying: "The word 'public' has two proper meanings. A thing may be said to be public when owned by the public, and also when its uses are public. . . . That patients who are able to pay are charged for hospital services according to their ability, and that the county pays for such services rendered to those who are a legal county charge, are facts of no importance upon the question as to the character of the institution as one of purely public charity; for the fact still remains that, notwithstanding all receipts from such sources, the hospital is established, maintained, and conducted without profit or a view to profit; and that, on the whole, it is operated at a loss, which is necessarily made up by private contributions.

In *Philadelphia v. Pennsylvania Hospital*, 154 Pa. 9, 25 Atl. 1076, it was held that "the Pennsylvania Hospital is a purely public charity in the highest and best sense of the term," and accordingly exempt from taxation, although it appeared that the managers of the hospital maintained

Cross, 10 Wis. 282; Opinion of Justices, 58 Me. 590; Moulton v. Raymond, 60 Me. 121; Allen v. Jay, 60 Me. 124, 11 Am. Rep. 185; Sharpless v. Philadelphia, 21 Pa. 147, 59 Am. Dec. 759; Weismer v. Douglas, 64 N. Y. 91, 21 Am. Rep. 586; Re Washington Ave. 69 Pa. 352, 8 Am. Rep. 255; People ex rel. Detroit & H. R. Co. v. Salem, 20 Mich. 452, 49 Am. Rep. 400; Hanson v. Vernon, 27 Iowa, 28, 1 Am. Rep. 215; 1 Dill. Mun. Corp. 4th ed. § 508; 2 Dill. Mun. Corp. 4th ed. § 736; State ex rel. New Richmond v. Davidson, 114 Wis. 574, 58 L.R.A. 739, 88 N. W. 596, 90 N. W. 1007; Board of Education v. State, 51 Ohio St. 531, 25 L.R.A. 770, 46 Am. St. Rep. 588, 38 N. E. 614; Citizens' Sav. & L. Asso. v. Topeka, 20 Wall. 655, 22 L. ed. 455; Commercial Nat. Bank v. Iola, 9 Kan. 689.

A levy of a tax or the appropriation of money raised by taxation for the benefit of plaintiff's home would not be for a public purpose.

Kronshage v. Varrell, 120 Wis. 167, 97 N. W. 928; Tyree v. Bingham, 100 Mo. 451, 13 S. W. 952; Re Cullimore, Jr. Rep. 27 Eq. 24; Coleman v. O'Leary, 114 Ky. 415, 70 S. W. 1068; Atty. Gen. v. Northumberland, 47 L. J. Ch. N. S. 571; Income Tax

Comrs. v. Pemsel, 61 L. J. Q. B. N. S. 265; Re Macduff, 65 L. J. Ch. N. S. 703; Re Clark, L. R. 1 Ch. Div. 497; Nash v. Morley, 5 Beav. 183; People ex rel. New York Inst. v. Fitch, 12 App. Div. 581, 39 N. Y. Supp. 927, 42 N. Y. Supp. 1131; St. Mary's Industrial School v. Brown, 45 Md. 310.

Graves, J., delivered the opinion of the court:

This is an original proceeding in this court for a writ of mandamus to compel the state auditor to issue a warrant in favor of "The Ingleside Association for Aged Women," in the sum of \$400, that amount having been appropriated by chapter 1 of the Laws of 1909 for the benefit of said association. An alternative writ was issued from which the following facts are taken:

The Ingleside Association is and has been an eleemosynary corporation duly created under the laws of this state, and has been engaged in conducting a charitable institution at Topeka. The special line of charitable work which this association does is to furnish a permanent Christian home for homeless and aged women and a temporary home for women seeking employment. To enter this home as a permanent resident the

upon the land in question a large building, reserved exclusively for the use of patients paying a higher rate than any others; that the object of the trustees in maintaining this department was to make a profit, but no actual profit was realized after taking into consideration the value of the ground and improvements and the cost of maintenance; and that the apparent profit was used in extending the hospital's capacity for good among the destitute members of the community, and no portion of it inured to the benefit of any person concerned in administering the charity.

So, also, the character of a library company as an "institution of purely public charity," under a statute exempting the property of such institutions from taxation, is not affected by its receipt of compensation from those who enjoy its benefits, provided its use is not confined to privileged individuals, but is open to the indefinite public, and its objects and purposes are wholly charitable, and it contains no element of private gain. Donohugh's Appeal, 86 Pa. 312.

And a hospital whose property is by statute exempt from taxation if no income is derived from it, and if the same is used exclusively for the purpose for which the hospital was chartered, does not waive its exemption because it charges some people, who are able to pay, where the money received from pay patients is wholly applied to the support and attendance of those who cannot pay. People ex rel. Society of New York Hospital v. Purdy, 58 Hun, 386, 34 N. Y. S. R. 893, 12 N. Y. 29 L.R.A.(N.S.)

Supp. 307, affirmed on opinion below in 126 N. Y. 679, 28 N. E. 249.

And in St. Joseph's Hospital Asso. v. Ashland County, 96 Wis. 636, 72 N. W. 43, it was held that the fact that patients in a hospital who are able to pay do pay a very moderate charge, while those who are unable to pay receive the same care for nothing, does not render the work done any the less benevolent, or alter the nature of the hospital corporation as a "benevolent association," within the meaning of a statute exempting the property of such associations from taxation.

Other cases to the same effect, involving the right of the charitable institution in each to some statutory exemption from taxation, and holding that the fact that an admission fee is charged or some other charge made therein does not affect the character of such charitable institution, are: Blake v. London, L. R. 18 Q. B. Div. 437; Cawse v. Nottingham Lunatic Hospital [1891] 1 Q. B. 585; R. v. Fulbourn, 6 Best & S. 451; Brewer v. American Missionary Asso. 124 Ga. 490, 52 S. E. 804, following Linton v. Lucy Cobb Institute, 117 Ga. 678, 45 S. E. 53; Franklin Square House v. Boston, 188 Mass. 409, 74 N. E. 675; Michigan Sanitarium & Benev. Asso. v. Battle Creek, 138 Mich. 676, 101 N. W. 855; State ex rel. Alexian Bros. Hospital v. Powers, 10 Mo. App. 263; Paterson Rescue Mission v. High, 64 N. J. L. 116, 44 Atl. 974; State ex rel. Cunningham v. Orleans, 52 La. Ann. 223, 26 So. 872.

In numerous cases, also, not involving the right to appropriate public funds to

woman must be not less than sixty-five years of age, and pay an admission fee of \$300, which is the total amount required during her life. It is estimated that such women may be expected to live between eleven and twelve years, or until seventy-six or seventy-seven years of age. Should they live ten years, the sum of \$300, paid for admission fee, would amount to less than 58 cents each per week toward paying their expenses. From this it will be seen that the home is not maintained for the profit derived therefrom. All the appointments and conveniences of a modern home are supplied to the inmates. Needy women are supplied with temporary homes when necessary. It is managed by a board of directors composed of women who belong to the association, and give their time and labor without compensation. The association depends to some extent upon contributions from persons who are charitably inclined. Shawnee county contributes the sum of \$35.53 monthly. One of the conditions of admission as an inmate is that the applicant has no relatives legally liable for her maintenance who are able to provide for her. The admission fee is not always required.

The principal objection urged by the auditor against the payment of this appropriate

tion is that it is using public money provided by taxation for a purpose not public. To define what constitutes a public purpose for which a tax may be lawfully imposed is a task of some difficulty. In the case of *State ex rel. New Richmond v. Davidson*, 114 Wis. 563, 578, 58 L.R.A. 739, 743, 88 N. W. 596, 90 N. W. 1067, 1070, the supreme court of Wisconsin said: "To justify a court in declaring a tax void, and arresting proceedings for its collection, the absence of all possible public interest in the purposes for which the funds are raised must be so clear and palpable as to be immediately perceptible to every mind. Claims founded in equity and justice, in the largest sense of those terms, or in gratitude or charity, will support a tax." This rule is in harmony with the decisions of this court as to when and under what circumstances a legislative enactment should be declared unconstitutional. *State ex rel. Crawford v. Robinson*, 1 Kan. 17; *Wyandotte County v. Abbott*, 52 Kan. 148, 34 Pac. 416; *State ex rel. Atwood v. Hunter*, 38 Kan. 578, 17 Pac. 177.

Applying this rule here to the act in question we are unable to say that it is invalid. It seems to us that the protection and comfort of aged women who are home-

aid a charitable institution, or the right of such institution to exemption from taxation, but where the public or private nature of the charity has been in question for some other purpose, it has been held that the circumstance that an inmate of such institution pays in whole or in part for his privileges, treatment, maintenance, or general care therein, does not alter the nature of the institution.

In *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529, an action to recover for an injury to a patient, brought against the defendant hospital, a "public charitable institution" under the laws of the commonwealth, it was held that "the fact that its funds are supplemented by such amounts as it may receive from those who are able to pay wholly or entirely for the accommodation they receive does not render it the less a public charity. All sums thus obtained are held upon the same trust as those which are the gifts of pure benevolence."

Other cases of a similar nature and to like effect are: *Powers v. Massachusetts Homeopathic Hospital*, 65 L.R.A. 372, 47 C. C. A. 122, 109 Fed. 294 (writ of certiorari denied in 183 U. S. 695, 40 L. ed. 394, 22 Sup. Ct. Rep. 932); *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L.R.A.(N.S.) 486, 86 N. E. 909; *Downes v. Harper Hospital*, 101 Mich. 555, 25 L.R.A. 602, 45 Am. St. Rep. 427, 60 N. W. 42; *Hughes v. Monroe County*, 147 N. Y. 49, 39 L.R.A. 33, 41 N. E. 407; *Collins v. New York Post Graduate Medical School*, 29 L.R.A.(N.S.)

59 App. Div. 63, 69 N. Y. Supp. 106; *Noble v. Hahnemann Hospital*, 112 App. Div. 603, 98 N. Y. Supp. 605; *Gable v. Sisters of St. Francis*, 227 Pa. 254, 75 Atl. 1087.

In *American Asylum v. Phoenix Bank*, 4 Conn. 172, 10 Am. Dec. 112, involving the question of plaintiff's rights under a statute incorporating a bank, and providing that the bank should at all times be open for subscriptions, at a certain rate per share, from the funds of any school or corporation for charitable purposes, within the state, it was held that plaintiff was an "incorporated school for charitable purposes," and as such entitled to the rights provided for by the statute in question, although it received a pecuniary compensation from pupils of ability to make it.

The case of *Gooch v. Association for Relief of Aged Indigent Females*, 109 Mass. 559, involved a charitable institution very similar to INGLESIDE ASSO. v. NATION, but was an action brought by an inmate to recover for an alleged wrongful expulsion from the home maintained by the association. It was there held that a corporation established for the support of poor and old women, which devotes all its funds to the support of such women in its home, and is no source of profit to its members, is a charitable corporation, although it requires a payment of money as a requisite for admitting a woman into its home.

As to requisites of public character of charity for purposes of charitable bequest, see note in 14 L.R.A.(N.S.) 68.

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less and without means or near relatives able to provide them with subsistence is a matter of general public concern,—a charity which will be regarded with universal favor. The inmates are not received from any specified territory. The association is in no sense local. It is open to the state so far as its capacity will permit. It is recognized by the state as a deserving charitable institution and worthy of public support, and the state board of control has issued a certificate to that effect. The inmates can be much better cared for in such an association than in one large enough to accommodate the entire state, and where employees are supplied by the state. This association is cared for and supplied and managed by women who devote their time and attention thereto without compensation, and solely for the sake of bestowing charity upon worthy and appreciative people, and for whom they entertain a lively and kindly sympathy. It is not contemplated by the policy of this state that its charities shall be directly administered by the state itself, but, on the contrary, § 1 of article 7 of the Constitution provides that charitable institutions shall be fostered and supported by the state, etc. The section reads: "Institutions for the benefit of the insane, blind, and deaf and dumb, and such other benevolent institutions as the public good may require, shall be fostered and supported by the state, subject to such regulations as may be prescribed by law. Trustees of such benevolent institutions as may be hereafter created shall be appointed by the governor, by and with the advice and consent of the senate." To make the appropriation in question conform fully with this constitutional provision, the same legislature, in the same law, provided as follows: "All private institutions of the state of a charitable nature, which shall receive state aid, shall be subject to the same visitation, inspection, and supervision by the board of control of state charitable institutions as are the public charitable institutions of this state. And it shall be the duty of said board of control to pass annually upon the fitness of every such institution, and every such institution shall annually, at such time as such board of control shall direct, make report thereto, showing its condition, management, and competency to adequately care for its inmates or patients, and such other facts as said board may require." Laws 1909, chap. 1, § 1.

Under these laws, this association is recognized as a charitable institution worthy of the fostering care of the state, and the small sum provided by this appropriation is not entitled to be dignified by a suggestion that the state is supporting this association, but it is sufficient to denominate it

as a small sum given to foster and aid a worthy charitable enterprise. We are unable to see wherein this appropriation can be fairly criticized. It carries out the constitutional provision that the state shall foster such benevolent institutions as the public good may require. The state has investigated through its proper officials, and found the association to be worthy of assistance. The appropriation is one which seems to be proper and commendable. The auditor should issue the warrant.

The writ is allowed.

All the Justices concur.

ALABAMA SUPREME COURT.

BIXBY-THEISON LUMBER COMPANY,
Appt.,
v.
M. H. EVANS.

(— Ala. —, 52 So. 843.)

Damages — contract to lend money — breach.

1. For breach, after the disappointed party has entered upon the work of tearing out the old dam, of a contract to lend money to replace a milldam and furnish logs to be sawed in the mill, the value of the service to be applied in satisfaction of the loan, damages may be recovered which will make him whole, without the necessity of his showing that he could not have obtained the money from any other source.

Same — lost profits — operation of mill.

2. The damages to be awarded for breach of a contract to lend money to replace a milldam cannot include the profits which were anticipated from the operation of the mill in its improved state.

Same — repayment of advances.

3. The damages to be awarded for breach of a contract to lend money to replace a milldam cannot include the amount advanced by the disappointed party to carry on the work, where the contract provided for use of his money only in the event that the money to be advanced under the contract proved insufficient to complete the work.

(June 2, 1910.)

Note.—Damages recoverable for breach of contract to lend money.

Earlier cases are found in a note to *Lowe v. Turpie*, 37 L.R.A. 233.

The cases are rare in which damages are recoverable for breach of an agreement to lend money, since \$1 of legal tender is worth no more than another, and the price of money is the principal and the legal or contract rate of interest. *Anderson v. Hil-*

APPEAL by defendant from a judgment of the Circuit Court for Marshall County in plaintiff's favor in an action brought to recover damages alleged to have been caused by breach of a contract to furnish money to erect a milldam. Reversed.

The facts are stated in the opinion.

Mr. J. A. Lusk, for appellant:

The measure of damages in case of breach of a contract to make a loan is the difference between the agreed rate and the rate the borrower had to pay, if he procured the money elsewhere.

3 Page, Contr. § 1593, pp. 2417, 2418; New York L. Ins. Co. v. Pope, 24 Ky. L. Rep. 485, 68 S. W. 851; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571; Lowe v. Turpie, 147 Ind. 652, 37 L.R.A. 233, 44

ton & D. Lumber Co. 121 Ga. 688, 49 S. E. 725.

No injury will flow from such a breach, if the same amount can be borrowed from another on the same terms. Ibid; New York L. Ins. Co. v. Pope, 24 Ky. L. Rep. 485, 68 S. W. 851.

Remote, indirect, or speculative damages are not recoverable; hence, where the breach is of an agreement to lend money at a particular time, the general rule is that the measure of damages is the amount of the difference between the interest on the loan at the contract rate and at the rate (not exceeding that permitted by law) which the borrower would have had to pay for the money in the market, since, in legal contemplation, money is always in the market and procurable at the lawful rate of interest. Hedden v. Schneblin, 126 Mo. App. 478, 104 S. W. 887; Western U. Teleg. Co. v. Hearne, 7 Tex. Civ. App. 67, 26 S. W. 478; New York L. Ins. Co. v. Pope, 24 Ky. L. Rep. 485, 68 S. W. 851; McGee v. Wineholt, 23 Wash. 748, 63 Pac. 571.

The measure of damage for a failure to advance money as agreed, to carry on a business, is any extra expense to which the borrower is put to obtain the money. The failure to perform an agreement to loan a man money, unless some special and consequential damages are shown to be in contemplation of the parties when the contract was made, would not subject him to speculative damage. C. B. Coles & Sons Co. v. Standard Lumber Co. 150 N. C. 183, 61 S. E. 736; Kelly v. Fahrney, 38 C. C. A. 183, 97 Fed. 176.

So, for a breach of contract to loan money, damages are not recoverable which are based on the rental value of houses which the loanee intended to build with the money, although the purpose of the loan was understood by both parties and the loanee could not procure the money elsewhere, since such damages are too remote and speculative, as, the building not having been erected, there is no previous expenditure on which to base rental value. 55 L.R.A. (N.S.)

N. E. 31, 47 N. E. 150; London v. Taxing Dist. 104 U. S. 771, 26 L. ed. 923; New Orleans Ins. Co. v. Piaggio, 16 Wall. 378, 21 L. ed. 358; 5 Am. & Eng. Enc. Law, pp. 25, 27, note 2.

Recovery cannot be had in the absence of an averment that plaintiff was unable to procure the money from other sources at the same rate at which the defendant agreed to furnish it.

New York L. Ins. Co. v. Pope and Lowe v. Turpie, supra.

The defendant is not liable for any damages accruing to the plaintiff by reason of his inability to construct the dam for want of the money, as money supplied from any other source would have avoided the result complained of.

Levinski v. Middlesex Bkg. Co. 34 C. C. A. 452, 92 Fed. 449.

Nor can damages be recovered based on a rise in the cost of building after the breach. Ibid.

A complaint in an action to recover damages for breach of contract to loan money not only should make it appear that the borrower had been unable to obtain a like sum elsewhere, but should also show definitely and distinctly that the damage (other than that from having to pay a higher rate of interest) was in contemplation of the intending lender at the time he made the agreement to lend. Ibid.

To recover special damages for breach of a contract to loan money, the peculiar facts causing the same should be alleged and proved, coupled with notice to the party guilty of the breach, and also coupled with evidence that all reasonable means had been adopted to lessen the damages resulting from such causes. Western U. Teleg. Co. v. Hearne and New York L. Ins. Co. v. Pope, supra.

One who has made a contract to purchase land, which he is unable to carry out owing to the breach of an agreement to loan him money, cannot recover damages for such breach, based on a rise in the value of the land, where the one who was to loan the money did not know of the purpose to which it was to be put. Equitable Mortg. Co. v. Thorn (Tex. Civ. App.) 28 S. W. 276.

On breach of an agreement to advance money to buy goods, profits which might have been made on their resale are too precarious to constitute an element of damage, it not being shown that the goods had been contracted for at less than their market price, or that they were at any time worth more than the price agreed upon. Carsey v. Farmer, 117 Ky. 826, 79 S. W. 245.

The breach of an agreement to lend money furnished no grounds for a recovery of damages for injury to the reputation of the borrower for not getting it. Ibid.

1 Sutherland, Damages, pp. 155, 192, §§ 51, 60.

The profits to be derived from the operation of a mill or machine which the borrower of money expected to construct or purchase with money which one agreed to loan him are too remote and speculative to authorize recovery.

Moulthrop v. Hyett, 105 Ala. 493, 53 Am. St. Rep. 139, 17 So. 32; Nichols v. Rasch, 138 Ala. 372, 35 So. 409.

Messrs. Street & Isbell, for appellee:

Since the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damages resulting from the breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these circumstances, so known and communicated.

Hadley v. Baxendale, 9 Exch. 341, 5 Eng. Rul. Cas. 502, 6 Eng. Rul. Cas. 617; Daugherty v. American U. Teleg. Co. 75 Ala. 175,

But when, from the terms of the contract considered in the light of its special circumstances, known to both contracting parties, it reasonably may be said that the special injury was the natural and proximate result of a contract made under such special circumstances, substantial damages may be recovered. Hedden v. Schneblin and Western U. Teleg. Co. v. Hearne, supra; Bohemian-American Workmen's Gymnastic Asso. v. Northern Bank, 120 N. Y. Supp. 134.

Hence, substantial damages should be awarded where an administrator, when contracting to sell mortgaged personalty of the estate to one known by him to be a stranger in the community, of small means, who was able to make but a small payment thereon, agreed personally to advance him money to pay off the mortgage and the balance of the purchase price, but failed to keep his agreement, in consequence whereof, the purchaser being unable to procure money elsewhere, the property was sold on foreclosure for merely enough to pay the mortgage. Hedden v. Schneblin, supra.

So, also, damages for loss of profits can be recovered from a lumber company for breach of its agreement to furnish money to another, to enable him to carry on his logging business, when it knew that the money could not be procured elsewhere, and operations had been carried on long enough to form a basis for computation. Graham v. McCoy, 17 Wash. 63, 48 Pac. 780, 49 Pac. 235.

So, where the creditors of an insolvent debtor have agreed to accept a percentage of their claims in satisfaction of the whole, a third person, who for a consideration has agreed to advance the money to pay off the

51 Am. Rep. 435; Western U. Teleg. Co. v. Way, 83 Ala. 542, 4 So. 844; 13 Cyc. Law & Proc. pp. 34, 35, 54 and notes; 8 Am. & Eng. Enc. Law, pp. 584, et seq. and note: Bell v. Reynolds, 78 Ala. 511, 56 Am. Rep. 52; Manchester & O. Bank v. Cook, 49 L. T. N. S. 674; Turpie v. Lowe, 114 Ind. 37, 15 N. E. 834, 147 Ind. 652, 37 L.R.A. 233, 44 N. E. 25, 47 N. E. 150.

Proof of special injuries, though not alleged, and not, strictly speaking, an item to be recovered as damages, is often admissible in evidence to show the extent of the injury. In ascertaining the amount of the damages that is legally recoverable, the jury has the right to consider every circumstance that sheds any light upon it.

13 Cyc. Law & Proc. p. 184; 2 Sedgw. Damages, 7th ed. p. 640; Alabama G. S. R. Co. v. Yarbrough, 83 Ala. 238, 3 Am. St. Rep. 715, 3 So. 447; Helton v. Alabama Midland R. Co. 97 Ala. 275, 12 So. 276.

The contract between the parties, having fixed the price of sawing lumber and the amount to be sawed, furnishes data for the

claims, on breach of his agreement, is liable in damages for the difference between the amount of the claims and the sum of the percentage and consideration agreed upon. Banewur v. Levenson, 171 Mass. 1, 50 N. E. 10.

Losses directly incurred, as well as gains prevented, may furnish a legitimate basis for compensation to the party injured by repudiation of a contract to loan money. Holt v. United Security L. Ins. & T. Co. 76 N. J. L. 585, 21 L.R.A.(N.S.) 691, 72 Atl. 301.

Where the profits prevented by repudiation of an agreement to loan money cannot be recovered, by reason of the want of definite proof, expenditures fairly incurred by the injured party in preparation for performance, or in part performance, of the agreement, form a proper subject for consideration, where the party injured, while relying upon his contract, makes the expenditures in anticipation of the advantages that will come to him from complete performance. Ibid.

Substantial damages cannot ordinarily be recovered for failure to advance money as agreed, where an obligation would at once arise to repay such money on demand. Bradford, E. & C. R. Co. v. New York, L. E. & W. R. Co. 123 N. Y. 316, 11 L.R.A. 116, 25 N. E. 499; Goldsmith v. Holland Trust Co. 5 App. Div. 104, 38 N. Y. Supp. 1032; Kelly v. Fahrney, supra.

But such is not the case where the circumstances show that immediate repayment was not contemplated, though in form the loan was to be paid on demand. Goldsmith v. Holland Trust Co. supra.

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estimate of profits. They are not, therefore, speculative and uncertain, and are consequently recoverable.

13 Cyc. Law & Proc. pp. 51-54; Bell v. Reynolds, 78 Ala. 514, 56 Am. Rep. 52.

Sayre, J., delivered the opinion of the court:

Plaintiff in the court below, appellee here, recovered judgment for the breach of a contract by which defendant agreed to lend him sufficient money, in no event to exceed \$2,000, with which plaintiff was to construct a dam of stone and concrete across Town creek, where he then had a wooden dam which furnished power for the operation of a gristmill. Plaintiff undertook, also, with the money to be advanced, to purchase, and set up in readiness for operation a turbine wheel and band sawmill, guaranteeing that the sum named would be sufficient for the improvements specified, and that he would complete them out of his own purse in the event it proved insufficient. To secure the loan defendant was to have, and did get, a mortgage upon plaintiff's water power and surrounding tract of land. The contract also contained a provision that for a fixed period after the completion of the improvements plaintiff was to saw logs for defendant at a fixed schedule of prices, giving preference to defendant's logs at any and all times. Defendant was to furnish logs enough to make the bill for sawing equal to the amount of money advanced. Payment was to be made in that way. After defendant had furnished money to an amount between \$400 and \$500, it refused to furnish more, or to go further with the performance of the contract. Defendant, however, contended that it had fully complied with its contract by purchasing a mill for plaintiff by plaintiff's direction, the price of which, along with the money furnished, made up the sum agreed upon. Meantime plaintiff had torn away the wooden dam and a water house, which constituted a part of the plant, and had expended several hundred dollars of his own money in procuring and preparing stone for the proposed dam. He claimed damages on account of the diminished value of his property, loss of time, labor, and money expended in tearing away the old structure, preparing for the erection of the new, and for loss of profits.

Notwithstanding Judge Stone's criticism of the leading case of *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502, 6 Eng. Rul. Cas. 617, in *Daughtery v. American U. Tel. Co.* 75 Ala. 168, 51 Am. Rep. 435, and his refusal to apply the doctrine of that case to the peculiar facts of the case he had in hand,—a case in which the defend-

ant company had failed to correctly transmit a cipher telegram,—he assented, and the courts generally assent, to the proposition that if the plaintiff's special, ulterior purposes in making the contract are disclosed, they then become an element of the duty thereby imposed upon the defendant, and afford a substantial basis for the assessment of special damages. The rule is clearly stated by the supreme judicial court of Massachusetts in the following language: "When the special circumstances are known to both parties, it is obvious that each may have contracted with reference to them; and that, if such was in fact the case, the party in fault may be held justly to make good to the other whatever damages he has sustained, which were the reasonable and natural consequences of a breach, under the circumstances so known and with references to which the parties acted. In such cases the larger damages may be recovered as having been in the contemplation of both parties and as naturally resulting, under the special circumstances, from the breach itself." *Lonerger v. Waldo*, 179 Mass. 135, 88 Am. St. Rep. 365, 60 N. E. 479. The rule here stated requires that both parties shall have contracted with reference to the special circumstances. In New York it is held that bare notice of special consequences which may result from a breach of contract will not suffice, unless under circumstances involving the implication that it formed the basis of the agreement. *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487. In *Daughtery's Case* it was said that if the special circumstances are communicated, they become an implied element of the contract. And in *Reed Lumber Co. v. Lewis*, 94 Ala. 626, 10 So. 333, it was held, in effect, that the engagement must have been entered into with reference to the special damages. Money, like the staples of commerce, is, in contemplation of law, always in the market and procurable at the lawful rate of interest. For the breach of a contract to pay, the principal with interest is the measure of damages. Such is the invariable measure in a creditor's action against his debtor. 1 *Sutherland, Damages*, § 76. It seems to follow, as was noted in *Gooden v. Moses Bros.* 99 Ala. 230, 13 So. 765, that ordinarily the damages for the breach of a contract to lend money cannot be more than nominal. Recognizing the rule just stated, plaintiff invokes an application of the principle of *Hadley v. Baxendale* for the recovery of special damages, by alleging in the third count of his complaint his inability to get from other sources money with which to replace his dam, and that defendant knew the fact, and knew that plaintiff was to use the money for the purpose of

tearing away the improvements then on the land and erecting others in their stead. And special damages for the destruction of his improvements under these circumstances, and other special damages, as we have already noted, are claimed.

The principle on which special damages are recoverable for breaches of contract has been applied on correct theory and evident justice to cases in which the contract was for the loan of money. In *Gooden v. Moses Bros.* supra, Moses sold Gooden a lot upon the instalment plan, and as part of the contract agreed to advance money with which the purchaser might build a house. Gooden sued for a breach in failing to advance the money. It was conceded by the court that plaintiff might have recovered special damages but for the fact that she failed to show that she might not have protected herself against loss, as she was bound to do, if she could. The following authorities will be found to support the proposition that where the obligation to pay money is special, and has reference to other objects than the mere discharge of a debt, special damages may be recovered according to the actual injury suffered: *Lowe v. Turpie*, 147 Ind. 652, 37 L.R.A. 233, 44 N. E. 25, 47 N. E. 150; *Turpie v. Lowe*, 114 Ind. 37, 15 N. E. 834; *McGee v. Winholt*, 23 Wash. 748, 63 Pac. 571; *Western U. Teleg. Co. v. Hearne*, 7 Tex. Civ. App. 67, 26 S. W. 478; *New York L. Ins. Co. v. Pope*, 24 Ky. L. Rep. 485, 68 S. W. 851; 1 *Sutherland, Damages*, § 77; 3 *Page, Contr.* § 1593.

In *Lowe v. Turpie* and *Western U. Teleg. Co. v. Hearne*, supra, it was held that the plaintiff suing for the breach of a contract to lend money, and seeking to recover special damages, must allege not only the peculiar facts causing the damages, and notice of the same to the party guilty of the breach, but that all reasonable means within the power of the plaintiff had been adopted to prevent loss. In *Baxley v. Tallassee & M. R. Co.* 128 Ala. 183, 29 So. 451, this court held that the complaint should contain an averment of the special circumstances and that defendant had notice. Further the court did not go, because the exigencies of the case did not require it to do so. There may be good reason for the rule of the Indiana and Texas cases requiring an allegation of plaintiff's inability to prevent loss where the breach is of a contract to lend money. But, however that may be, there is in the contract in the present case a feature which it would seem ought to relieve the plaintiff of the burden of proving that he was unable to go into the market and borrow the money with which to complete the contemplated improvement, or that he had not in hand the funds necessary for

that purpose. Such a course would not have made him whole. The contract provided not only that defendant was to advance money with which plaintiff was to construct a dam of stone and concrete in place of the wooden dam he already had, but that defendant was to furnish logs, by sawing which at a stipulated price plaintiff was to be enabled to repay the money advanced, and that defendant would furnish other logs which, we will assume, the plaintiff might saw with a profit. It does not appear that but for the last-mentioned stipulation plaintiff would have entered upon the contract. Presumptively he would not. Defendant's breach of the contract to advance money, unless it were excusable on some ground set up in special pleas, involved by necessity a breach of the collateral agreement in respect to manner of repayment and the furnishing of other logs. After the breach alleged plaintiff owed defendant no duty to take up the additional burden of going into the market for money, or to expend money in hand, in order to complete the dam in the manner contemplated by the contract, when it already appeared that he would lose in any event a material advantage for which he had contracted. Thereupon he was entitled to be made whole, to compensation, to such damages as would be the equivalent of a restoration of his *status quo ante*.

Profits such as the plaintiff may have expected to realize from the operation of the mill in its improved form, and which the parties doubtless contemplated as one result of the contract, were nevertheless speculative, remote, and incapable of that clear and satisfactory proof which the law requires to constitute recoverable damages. *Reed Lumber Co. v. Lewis*, supra; *Moulthrop v. Hyett*, 105 Ala. 493, 53 Am. St. Rep. 139, 17 So. 32; *Nichols v. Rasch*, 138 Ala. 372, 35 So. 409; *Southern R. Co. v. Coleman*, 153 Ala. 286, 44 So. 837. The contract speaks for itself, and conclusively, as to the expenditure by the plaintiff of money other than that to be advanced by defendant. It contemplated such expenditure in the event only that the sum agreed to be advanced was insufficient to complete the dam. Plaintiff was not, therefore, entitled to recover as special damages, under the evidence, sums so expended.

There are many assignments of error. We do not think the occasion demands a separate treatment of each of them. By reference to the opinion herein advanced, it will be seen that the trial court, in a number of rulings on the evidence and in some special instructions to the jury, misconceived in part the measure of recoverable damages, and for those errors the judgment

will be reversed, and the cause remanded for another trial. In other respects, the record shows no error.

Reversed and remanded.

Dowdell, Ch. J., and Simpson and Mayfield, JJ., concur.

KENTUCKY COURT OF APPEALS.

CITY OF HARRODSBURG, Appt.,

v.

OSCAR ABRAHAM.

(138 Ky. 157, 127 S. W. 758.)

Highway — obstruction — runaway horse — liability.

A municipal corporation is not liable for the death of a horse through collision, while running away from a cause for which the municipality is not responsible, with an obstruction left standing near the curb in the highway, if ample space remained in the highway for safe travel, so that the street, with the obstruction in it, was reasonably safe for the uses of ordinary public travel.

(May 3, 1910.)

Note. — Liability of municipality for injury to person or property of one driving over defective highway, where at the time of the accident his horse is frightened without fault of either party.

The earlier cases upon this subject are collected and discussed in a note to Denver v. Utzler, 8 L.R.A.(N.S.) 77, and this note is supplementary thereto.

Cases in which the fright of the horse also was due to the negligence of the defendant have not been taken.

As is shown in the earlier note, the great majority of the cases support the rule that where two causes combine to produce the injury, both of which are in their nature proximate, the one being a defect in the highway, for which the city is liable, and the other the running away of a horse, for which neither party is responsible, then the corporation is liable, provided the injury would not have been sustained but for the defect in the highway.

McLemore v. West End, 159 Ala. 235, 48 So. 663; Jones v. Tampa, 52 Fla. 292, 120 Am. St. Rep. 203, 42 So. 729, 11 A. & E. Ann. Cas. 510; Emporia v. White, 74 Kan. 864, 86 Pac. 295; McDowell v. Preston, 104 Minn. 263, 18 L.R.A.(N.S.) 190, 76 N. W. 470; Turner v. Southwest Missouri R. Co. 138 Mo. App. 143, 120 S. W. 129; Townsend v. Joplin, 139 Mo. App. 394, 223 S. W. 474; Wallace v. New Albion, 121 App. Div. 66, 105 N. Y. Supp. 524, affirmed without opinion in 192 N. Y. 544, 94 N. E. 1122; Rucker v. Huntington, 66 2d L.R.A.(N.S.)

APPEAL by defendant from a judgment of the Circuit Court for Mercer County in plaintiff's favor in an action brought to recover damages for the killing of plaintiff's horse, which was alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

Messrs. R. W. Keenon and C. E. Rankin for appellant.

Mr. J. F. Vanarsdall, for appellee:

The obstruction was the proximate cause of the injury.

Fugate v. Somerset, 97 Ky. 48, 29 S. W. 970; Elliott, Roads & Streets, 451-453, 401; Dill. Mun. Corp. §§ 730, 1008, 1017, 1024, 1025; Joliet v. Shufeldt, 144 Ill. 403, 18 L.R.A. 750, 30 Am. St. Rep. 453, 32 N. E. 969.

Barker, Ch. J., delivered the opinion of the court:

While the appellee was driving his horse along one of the streets of the city of Harrodsburg, the shafts of the vehicle became detached by the breaking of a bolt, and fell upon the horse, so frightening it that it ran away and collided with an old and unused fire engine standing near the curb upon one of the streets of the city, with the result that the horse was so severely in-

W. Va. 104, 25 L.R.A.(N.S.) 143, 66 S. E. 91; Thomas v. North Norwich Twp. 9 Ont. L. Rep. 666; Plant v. Normanby Twp. 10 Ont. L. Rep. 16; Kelly v. Whitechurch Twp. 11 Ont. L. Rep. 155, appeal dismissed in 12 Ont. L. Rep. 83.

But if the plaintiff's driver was negligent, and plaintiff knew of it in time to have prevented the injury to herself, but failed to do so, she is guilty of contributory negligence, and cannot recover. Canter v. St. Joseph, 126 Mo. App. 629, 105 S. W. 1.

And in Fetterman v. Rush Twp. 28 Pa. Super. Ct. 77, where a horse became frightened at a passing freight train, and backed over a bridge at which no railing was maintained, the court held that the contributory negligence of the plaintiff was a question for the jury.

So, whether or not the plaintiff, in urging on a gentle horse which had become frightened at some bags of cement near a culvert, was guilty of contributory negligence, so as to preclude a recovery for injuries caused by the horse becoming temporarily out of control and running into the culvert, which was open and without any warning signs, was held, in Judd v. Caledonia Twp. 150 Mich. 480, 114 N. W. 346, to be a question for the jury.

Where there is some question whether the fright of the horses or the defect in the highway was the proximate cause of the injury, the question is properly submitted to the jury. Johnson v. Marquette, 154 Mich. 50, 117 N. W. 658.

The fact that a city designated the place in a street for the location of a fire plug

jured that it was necessary to kill it, causing a total loss of its value to the owner. In an action against the city to recover the value of the horse in damages, based upon the alleged negligence of the municipality in allowing the fire engine to stand in the highway, appellee recovered a judgment in the sum of \$200, of which the municipality now complains.

The evidence showed the facts to have been substantially as above stated, and in addition, that the fire engine was about 8 feet wide and stood close to the curbing of the sidewalk, occupying some 8½ or 9 feet of the street, and had stood there several months; that the street, at the point where the accident occurred, was about 70 feet in width from curb to curb; and that, deducting the width occupied by the engine, there was more than 60 feet of highway left free from obstruction and reasonably suited for the use of the traveling public. It may be postulated that the fright of the horse was not caused by the negligence of the owner. The question then arises: Is the city liable for the accident which occurred?

Sixty feet is the average width of a public street, including the sidewalk, and very few municipal highways are more than 45 feet in width between the curbing; so that, after deducting the width of the street occupied by the fire engine, the evidence shows without contradiction there was left for the use of the traveling public in width considerably more highway than is afforded by

the average street when entirely unobstructed. There was a total failure of evidence showing that the street with the engine standing by the curb was not reasonably safe for the uses of ordinary public travel.

Appellee relies upon the opinion in *Fugate v. Somerset*, 97 Ky. 46, 29 S. W. 970, to support the judgment; but the circumstances were not the same in that case as here. It appears from the opinion that it was alleged in the petition that the municipality had "placed, or suffered and permitted others to place, large piles of lumber on one of its principal streets, whereby same was made and left in an unsafe and dangerous condition for public travel;" and it also appears that the evidence adduced on behalf of plaintiff substantially proved the allegations of the petition. But it is neither alleged nor proved in the case at bar that the street where the accident occurred was in either an unsafe or dangerous condition; and, even if it had been so alleged, the evidence entirely refutes the supposition. It is well established that it is the duty of municipalities to exercise reasonable care and diligence to keep its public highways in a reasonably safe condition for travel, and that, if they fail in this, they are liable for all resulting injuries caused by the negligent failure to discharge this important public duty. But it does not follow—and the case of *Fugate v. Somerset*, supra, is not authority for the proposition

by a waterworks company will not prevent the company from being liable for injuries due to a horse which had become frightened running into the plug. *Decatur Waterworks Co. v. Foster*, 161 Ala. 176, 49 So. 759.

A railroad company is liable for injuries caused by a frightened horse running into a wood pile negligently maintained in a street, although it was not responsible for the fright of the horse. *Williams v. San Francisco & N. W. R. Co.* 6 Cal. App. 715, 93 Pac. 122.

In some cases involving injuries caused by a defect in a highway, where the horse was running away before coming in contact with the defect, it has been held that the city was not negligent in the matter alleged.

Thus, in *Dignan v. Spokane County*, 43 Wash. 419, 86 Pac. 649, upon the horses becoming frightened, the tongue of the wagon dropped to the ground, and as the horses ran, the end of the tongue being pulled along the ground caught in some planks on a bridge and overturned the wagon. The court, in holding the county not liable, said: "To be reasonably safe for ordinary travel, a bridge does not have to be in such a condition that the tongue of a wagon dropped in front and pulled onto it front on, will slide over it without catching." 29 L.R.A. (N.S.)

So, a city is not liable for injuries caused by a horse which was frightened by a passing car, and ran into an electric light pole which was so located at the end of the traveled part of the road as to leave a clear driveway of about 12½ feet. *Norwalk v. Jacobs*, 29 Ohio C. C. 123. Upon a former trial (27 Ohio C. C. 691), it was held error to charge the jury in effect that, if the pole was set beyond the curb line into the street, that would amount to negligence *per se* upon the part of the city.

As to liability of municipal corporation for defects or obstructions in street, see note to *Elam v. Mt. Sterling*, 20 L.R.A. (N.S.) 513.

As to liability of townships for defects in highway, see note to *James v. Wellston Twp.* 13 L.R.A. (N.S.) 1219.

As to what may be deemed to be the proximate cause of injuries following a runaway, see note to *Collins v. West Jersey Exp. Co.* 5 L.R.A. (N.S.) 373.

As to what injuries may be deemed to be proximately caused by the absence of a guard rail in a highway, see note to *Lyons v. Watt*, 18 L.R.A. (N.S.) 1135.

And see *Opdycke v. Public Service R. Co.* ante, 71.

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—that, if the street is in a reasonably safe condition for public travel, the municipality will be liable to the owner of a runaway horse which blindly and unnecessarily dashes into an obstruction left by the city authorities near the curbing. The duty of the municipal authorities is to maintain its highways in a reasonably safe condition for ordinary public travel; but they are not maintained for the use of runaway horses, and the use of the streets by runaway horses is not, and cannot be, anticipated by the officers of a city. We are of opinion, then, both upon reason and authority, that, if the street is reasonably safe for public travel in the ordinary way, there is no liability for an injury resulting to a runaway horse. The engine was in plain view, and the accident occurred in the daytime, and no one would pretend that, if the owner had allowed his horse, while driving it, to collide with the engine, the city would be liable for the resulting damage; and it is difficult to see why the municipality, having discharged its full duty to the traveling public by affording a reasonably safe highway for ordinary travel, should be liable for a damage which a runaway horse inflicts upon itself by rushing blindly into a vehicle in plain view, upon a part of the street not necessary for the ordinary and reasonable use of the street.

In *Kieffer v. Hummelstown*, 151 Pa. 304, 17 L.R.A. 217, 24 Atl. 1060, the plaintiff's horse became frightened and ran into a pile of stone left in the highway, where it was injured. The stone occupied some 5 or 6 feet of the width of the roadway, and the space left for travel was some 26 or 27 feet in width. It was held by the supreme court of Pennsylvania that the municipality was not liable for the damage to the horse. In the opinion it is said: "In the present case there was no testimony showing, or tending to show, that the accident which caused the plaintiff's injury was either the natural or probable consequence of the presence of the stone pile. The plaintiff himself said he always got along, in passing this place, without any difficulty on account of the stone pile, and that his horses did not frighten at the stone pile, but at the shooting. Now the shooting was an extraordinary circumstances for which the borough was in no sense responsible, and against the consequences of which they were not bound to take precautions. As there was abundant space of roadway to accommodate all the passing travel, outside the wall, and no proof whatever that it was in any respect insufficient or defective in failing to provide for all the ordinary travel conducted in the ordinary way, we are of opinion that there was nothing in the tes-

timony upon which a recovery could be based." To the same effect is *Schaeffer v. Jackson Twp.* 150 Pa. 145, 18 L.R.A. 100, 30 Am. St. Rep. 792, 24 Atl. 629. In the case of *Moulton v. Sanford*, 51 Me. 127, there was a bridge over a narrow stream in the town of Sanford, which the plaintiff was crossing with his horse. The animal became frightened at some unusual noise, and jumped over the side of the bridge and was injured. The bridge was of sufficient width, and well built; but there was no railing. It was held by the supreme court of Maine that the plaintiff had no cause of action against the municipality. The case of *Bleil v. Detroit Street R. Co.* 98 Mich. 228, 57 N. W. 117, arose as follows: The plaintiff's horse was hitched on one of the streets of Detroit. It became frightened by an object falling from an upper window in a building near which it was hitched. The frightened animal broke away from its fastening, and ran into a pile of iron material which the street car company had piled along the side of the curb in the street, and was so injured that it had to be killed. Ample room had been left in the street for the passage of vehicles in the ordinary manner, while under control of their drivers. The court said: "The accident was not the natural and probable result of piling the rails in the street close to the curb, but of the fright of the horse. The proximate, and not the remote, cause controls in such cases in this state." In *Brown v. Glasgow*, 57 Mo. 156, it was held that the municipality was not liable for injury to runaway horses caused by a defect in the street, where there was sufficient width of highway for the uses of the usual travel thereon. To the same effect is *Johnson v. Philadelphia*, 139 Pa. 646, 21 Atl. 316; *Moss v. Burlington*, 60 Iowa, 438, 46 Am. Rep. 82, 15 N. W. 267; *Ring v. Cohoes*, 77 N. Y. 83, 33 Am. Rep. 574.

It may be conceded that there is respectable authority for holding the city liable under the circumstances detailed in this case; but we are of opinion that the great weight of authority, as well as of reason, sustains the theory that, if the city authorities provide and maintain a highway reasonably wide and reasonably safe for public travel in the ordinary way, they have discharged their whole duty to the public, and are not bound to anticipate the extraordinary exigencies of runaway horses. Indeed, it would be difficult to provide against frightened animals injuring themselves while running away. If there was an excavation in the street, an ordinary barricade would not stop a frightened horse; nor would the ordinary signals of danger avail. It is considered sufficient if the city author-

ities give timely and reasonable warning of obstructions in the highway, so that the traveling public may see and avoid the danger created; but, of course, no sort of signals or warnings would avail in the case of a runaway horse, and, therefore, no ordinary provision for the safety of the traveling public would prevent it from injuring itself. It therefore seems to us sound doctrine that the city authorities are not bound to anticipate and provide against so extraordinary a danger as a runaway horse. The rule would, of course, be different if the fright of the horse was due to the negligence of the municipal authorities; and likewise it would be different if the highway where the injury occurred was in a dangerous condition for ordinary travel. In either of these cases the city would be liable, because the negligence of its officers would be the proximate cause of the injury; but, where the municipal authorities are in no wise responsible for the fright of the horse, the city is not responsible in damages for its subsequently injuring itself in unnecessarily running against an obstruction in the highway, if there be ample space for the ordinary use of the traveling public.

The uncontradicted facts herein show that the city was in no wise to blame for the accident to appellee's horse; it had nothing to do with the fright which caused the horse to run away, and, as there was more than sufficient space at the place where the injury occurred, for the use of the traveling public, under the rule announced before, there was no liability on the part of the city for the resulting injury. The trial court should have sustained the motion of appellant for a peremptory instruction to the jury to find for it at the close of the testimony.

For these reasons, the judgment is reversed for further procedure consistent with this opinion.

OKLAHOMA SUPREME COURT.

L. PULS, Plff. in Err.,
v.

S. T. HORNBECK and Wife.

(— Okla. —, 103 Pac. 665.)

Sale — cattle — latent defect — concealment — knowledge.

A vendor who sells cattle at a sound price, knowing that they have Texas fever ticks on them, or any other infection affecting their value for the purpose for which they are bought, the infection not being easily detected by those having had no ex-

perience with it, and who does not disclose such knowledge to the vendee, is guilty of the fraudulent concealment of a latent defect, for which he must answer, and the rule of *caveat emptor* does not apply.

(a) But the vendor is not answerable unless he has knowledge, prior to the time the sale is consummated, that the cattle had such ticks on them.

(July 13, 1909.)

ERROR to the District Court for Kingfisher County to review a judgment in defendants' favor in an action brought to recover damages for loss alleged to have been inflicted upon plaintiff by diseased cattle sold by defendants. Affirmed.

Statement by Williams, J.:

On the 15th day of September, 1906, the plaintiff in error, L. Puls, as plaintiff, commenced this action in the district court of Kingfisher county, Oklahoma Territory, against the defendants in error, S. T. Hornbeck and Emilia Hornbeck, his wife, as defendants, alleging, in substance, that on the 3d day of September, 1906, he entered into a contract with the defendants for the purchase of thirty-five head of mixed cattle, at the price of \$400; that the cattle were delivered

Note. — Liability of vendor of diseased live stock, in the absence of express warranty.

The proposition of law enunciated in the above case is well settled that the rule of *caveat emptor* applies to a sale of live stock, even though they are diseased, if the seller is unaware of their condition, and no fraud is practised upon the buyer. *Grojean v. Darby*, 135 Mo. App. 586, 116 S. W. 1062; *Overhulser v. Peacock* (Mo. App.) 128 S. W. 526; *Cotton v. Reed*, 25 Misc. 380, 54 N. Y. Supp. 143; *Kinch v. Haynes*, 58 Misc. 499, 111 N. Y. Supp. 618; *Wart v. Hoose*, 65 Misc. 463, 119 N. Y. Supp. 1107; *Kimmel v. Lichty*, 3 Yeates 262; *Needham v. Dial*, 4 Tex. Civ. App. 141, 23 S. W. 240; *Warren v. Buck*, 71 Vt. 45, 76 Am. St. Rep. 754, 42 Atl. 979.

Thus, in *Dorsey v. Watkins*, 151 Fed. 340, the court refused, in the absence of fraud on the part of the seller, to rescind a sale of dairy cattle, though at the time of the sale the herd was infected with tuberculosis, where it appeared that the purchaser was a competent judge of such property, and had full opportunity and ample time to inspect the same before the purchase, and the seller was unaware of the cattle's condition.

In *Court v. Snyder*, 2 Ind. App. 440, 50 Am. St. Rep. 247, 28 N. E. 718, it was held that the rule of *caveat emptor* applied to the sale of a horse affected with a latent disease, though the seller was aware of its condition, where he made no false representation as to the horse's condition, and

him under such contract; that he paid the purchase price; that the cattle were sold to him as sound and merchantable and free and clear of all disease; that the plaintiff understood, and contracted for said cattle as sound and merchantable; that at the time the cattle were sold to plaintiff the same were infected with what is known as Texas fever ticks," and were not merchantable stock; that the fact that said cattle were infected with Texas fever ticks was concealed from the plaintiff by the defendants; that the defendants knew that the cattle were so infected, and not merchantable, but that they concealed such facts from the plaintiff, and sold the cattle to him as sound and merchantable; that plaintiff placed said cattle in his pasture and mixed them with other cattle, and shipped them, together with the other cattle, to the market; and that, by reason of said cattle being infected with Texas fever ticks, he suffered various elements of damages, for which he seeks to recover from the defendants the sum of \$1,500.

The plaintiff asked the court to instruct the jury as follows, which was refused: (4p.) The jury are instructed that if the plaintiff paid defendants a fair value for said thirty-five head of cattle, as if said cattle were free and clear of such Texas fever ticks, and the defendants received such consideration from the plaintiff, such consideration would import that such cattle were in sound condition and free of Texas fever ticks and of the value of sound cattle and free of fever ticks, at the place where those cattle were at the time plaintiff purchased them from the defendants. (5p.) The jury are instructed, also, in estimating damages, if there were any damage sustained by plaintiff, to take into consideration the expense of plaintiff, the annoyance and time occupied by plaintiff because of such cattle being infected with fever ticks and because of such quarantine regulations. (6p.) You are instructed that in the sale of personal prop-

erty the law is that there is an implied warranty that the article or thing sold is fit for the purpose for which the article or thing is intended. If you find from the evidence that the plaintiff in this case, Puls, purchased the cattle from the defendants for the purpose of using the same for sale upon the markets, and such fact was known to the defendants at the time of the sale, then if you further find that the cattle at the time were infected with what is known as Texas fever ticks, or fever ticks, then your verdict should be for the plaintiff, provided you further find that the plaintiff sustained any damage by reason of the transaction. (7p.) If the jury believe from the evidence that the defendants sold cattle to the plaintiff for the purpose of plaintiff shipping them to market, and that the defendants knew at the time that such cattle were infected with Texas fever ticks, and the defendants did not disclose that fact to the plaintiff, and the plaintiff did not know that fact, then the jury may allow exemplary damages over and above the actual damages sustained by the plaintiff, as to the jury may seem just and reasonable under all the circumstances of the case."

erty the law is that there is an implied warranty that the article or thing sold is fit for the purpose for which the article or thing is intended. If you find from the evidence that the plaintiff in this case, Puls, purchased the cattle from the defendants for the purpose of using the same for sale upon the markets, and such fact was known to the defendants at the time of the sale, then if you further find that the cattle at the time were infected with what is known as Texas fever ticks, or fever ticks, then your verdict should be for the plaintiff, provided you further find that the plaintiff sustained any damage by reason of the transaction. (7p.) If the jury believe from the evidence that the defendants sold cattle to the plaintiff for the purpose of plaintiff shipping them to market, and that the defendants knew at the time that such cattle were infected with Texas fever ticks, and the defendants did not disclose that fact to the plaintiff, and the plaintiff did not know that fact, then the jury may allow exemplary damages over and above the actual damages sustained by the plaintiff, as to the jury may seem just and reasonable under all the circumstances of the case."

No appearance for plaintiff in error.

Messrs. R. W. Wylie and Lee M. Gray, for defendants in error:

The sale of a chattel does not carry with it an implied warranty of the thing sold.

Parsons, Contr. 7th ed. pp. 584, 585.

As there is no evidence even tending to prove that the defendants made any representation concerning the quality or condition of cattle sold and delivered to plaintiff, or that defendants had at that time or for several days thereafter any knowledge that the cattle were affected in the least with fever ticks, the plaintiff, having alleged fraud, must, in order to recover, prove it by a preponderance of the evidence.

Cooley, Torts, 474; Eames v. Morgan, 37 Ill. 260.

did not act in any way calculated to deceive the buyer or induce him not to investigate. And the rule is the same if the diseased condition of the animal, though known to the seller, was also known to the buyer, or might have been discovered by him by the exercise of ordinary diligence. *Burnett v. Hensley*, 118 Iowa, 575, 92 N. W. 678; *Hanson v. Hartse*, 70 Minn. 282, 68 Am. St. Rep. 527, 73 N. W. 163; *Spencer v. McLean*, 24 N. C. (2 Ired. L.) 95.

On the other hand, if, at the time of such sale, the live stock was subject to a disease known to the seller, which he concealed, and which was not discoverable by the buyer with ordinary vigilance, the rule of caveat emptor does not apply, and the sale will be deemed fraudulent. *Pease v. McClelland*, 2 Bond, 42, Fed. Cas. No. 10,882; *Grigsby v. Stapleton*, 94 Mo. 423, 7 S. W. 421; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *Divine v. McCormick*, 50 Barb. 116; *Kimmel v. Lichty*, supra; *Cassel v. Herron*, 5 Clark (Pa.) 250.

In *Snowden v. Waterman*, 100 Ga. 588, 28 S. E. 121, subsequent appeal 105 Ga. 384, 31 S. E. 110, damages were allowed the purchaser of diseased mules, though their condition was unknown to the vendor, under a statute declaring that in all cases, unless expressly or from the nature of the transaction excepted, the vendor warrants that the article sold is merchantable and reasonably suited to the use intended.

J. A. C.

Williams, J., delivered the opinion of the court:

In this case the facts are undisputed that the defendant in error S. T. Hornbeck understood that the cattle, which were located above the quarantine line, were being purchased by the plaintiff in error for the purpose of being shipped to the Wichita or St. Joe market. Cattle infected with Texas fever ticks would not be classed as marketable cattle in said markets.

The court instructed the jury: "(5) When one sells personal property he impliedly warrants that it is merchantable and reasonably suited to the use intended, and that the seller knows of no latent defects. 'Latent defects' mean such defects as are hidden. The implied warranty, however, does not cover such defects which can be discovered by ordinary prudence and caution. As to those, the law presumes the buyer to exercise his own judgment. If you find that the cattle referred to in the evidence in this case, or a portion of them, were infected with Texas fever ticks, and that such infection rendered the cattle unmerchantable, or unfit for the purpose for which they were purchased, and that such infection was a latent defect, and was not such a defect as could be discovered by ordinary prudence and caution, then the seller will be held to have impliedly warranted them to be free from such defect. Upon the other hand, if you find from the evidence that the cattle, at the time they were purchased by the plaintiff, were infected with Texas fever ticks, but that such defect, if you find same to be a defect, was such that could have been discovered by the plaintiff by ordinary prudence and caution, and that he failed to exercise the same, then he cannot hold the defendant to any implied warranty as to the cattle being free from such defect."

The court further instructed the jury: "(6) The detriment caused by the breach of a warranty of the fitness of personal property for a particular use is deemed to be the excess, if any, of the value which the property would have had, at the time to which the warranty referred, if it had been complied with, over its actual value at that time, together with a fair compensation for the loss incurred by an effort in good faith to use the property for the purpose for which it was purchased. That is, the measure of damages in this case, if you find that the plaintiff is entitled to recover any damages, will be the excess, if any, of what the cattle would have been worth had they been sound and free from any infection, over their actual value at the time of the purchase, together with a fair compensation for the loss incurred by the plaintiff in an effort

in good faith to use the cattle for the purpose for which he purchased the same; but, before the plaintiff can recover damages for loss incurred in an effort to use the cattle for the purpose for which he purchased them, he must show by a preponderance of the evidence that the defendant knew, or had reasonable grounds to know, the purpose for which the plaintiff intended to use them."

And further: "(8) If the jury believe from the evidence that the cattle which the defendant S. T. Hornbeck sold the plaintiff, Puls, had Texas fever ticks upon them at that time, and that the defendant knew that fact, or knew that they had ticks upon them, but was uncertain as to whether such ticks were fever ticks or ticks that were harmless, and if defendant also knew that plaintiff was buying such cattle for shipment to market, and defendant did not disclose the fact of such cattle being infected by such ticks, then the defendant would be liable to plaintiff for all the damages sustained by plaintiff occasioned by the depreciation in value of the cattle in the market by reason of being infected with fever ticks; and the defendant would, under such circumstances, be liable to the plaintiff for all damages sustained by the plaintiff resulting from the commingling of the cattle he bought from Hornbeck with plaintiff's other cattle."

In the case of Grigsby v. Stapleton, 94 Mo. 429, 7 S. W. 423, the court said: "There is no claim in this case that defendant [vendee] knew these cattle were diseased. It seems to be conceded on all hands that Texas fever is a disease not easily detected, except by those having had experience with it. The cattle were sold to the defendant at a sound price. If, therefore, plaintiff knew they had the Texas fever, or any other disease materially affecting their value upon the market, and did not disclose the same to the defendant, he was guilty of a fraudulent concealment of a latent defect. It is not necessary to this defense that there should be any warranty or representations as to the health or condition of the cattle. Indeed, so far as this case is concerned, if the cattle had been pronounced by some of the cattle men to have the Texas fever, and, after knowledge of that report came to plaintiff, some of them to his knowledge died from sickness, then he should have disclosed these facts to the defendant. They were circumstances materially affecting the value of the cattle for the purposes for which they were bought, or for any other purpose, and of which defendant, on all the evidence, had no equal means of knowledge. To withhold these circumstances was a deceit, in the absence of proof that defendant possessed such in-

ormation." See also: *Ricks v. Dillahunt*, 1 Port. (Ala.) 133; *Barnett v. Stanton*, 1 Ala. 184; *Armstrong v. Buford*, 51 Ala. 13; *Cardwell v. McClelland*, 3 Sneed, 150; *Jeffrey v. Bigelow*, 13 Wend. 518, 28 Am. Dec. 476; *McAdams v. Cates*, 24 Mo. 223; *Barron v. Alexander*, 27 Mo. 530.

In the case at bar, the plaintiff was buying cattle in a district above the quarantine line, where the Texas fever ticks would not reasonably be supposed to exist, and a reasonable and prudent man would not be supposed to examine for them (*Croff v. Reese*, 7 Okla. 414, 54 Pac. 558); and when he (the plaintiff in error) went to buy cattle in such a district for the purpose of shipping them to the northern market, if the defendant in error S. T. Hornbeck, knowing that cattle infected with the Texas fever ticks would not be marketable in such market, stood silently by and sold such cattle to the plaintiff in error with knowledge of such infection, he would be liable for proper damages. By instruction 8, *supra*, the court appears to have so instructed the jury. The testimony is undisputed that S. T. Hornbeck knew the purpose for which the cattle were bought, and the jury necessarily found in this case that said Hornbeck had no knowledge that the cattle were so infected, and therefore, having no such knowledge, he was not liable under any theory. *Id.*; *Missouri P. R. Co. v. Finley*, 38 Kan. 50, 16 Pac. 951; *Patee v. Adams*, 37 Kan. 33, 14 Pac. 505; *Lynch v. Grayson*, 5 N. J. 487, 25 Pac. 902, *Id.*, 163 U. S. 468, 41 Fed. 230, 16 Sup. Ct. Rep. 1064.

There are various assignments of error relative to the admission of testimony; but his evidence, except in instances where it is purely hearsay, or the questions are leading, was offered as to the measure of damages; and there being no liability found by the jury, if there was error as to the admission of testimony, there having been no damages found whatever, it would be error without injury.

We think the instructions of the nisi prius court properly submitted the issues to the jury as to the liability, and were sufficiently favorable to plaintiff in error; and, the jury having found against the plaintiff in error on that point, if any evidence was excluded as to the measure of damages under the finding of the jury as to the facts, it would be error without injury.

The vice of instruction 4p., requested by the plaintiff in error, is that it eliminates the question as to knowledge on the part of the defendants in error as to the infected condition of the cattle, and for that reason should have been refused. Instruction 5p., requested by the plaintiff in error, was sustained L.R.A.(N.S.)

ceptible of the construction that the plaintiff was entitled to recover damages for mental annoyance, and on that score it was properly refused, there being neither any allegation nor proof tending to support such damages. Instruction 6, given by the court, appears to have properly submitted the question of damages, and for that reason, if for no other, there was no error in refusing instruction 5p. Instruction 6p., requested by the plaintiff in error, is fairly covered by instruction 8, given by the court. The jury having found that there was no liability whatever on the part of the defendants, the refusal of instruction 7p. was without error, because, if the plaintiff was not entitled to nominal and actual damages, the failure to submit the question of exemplary damages, even though plaintiff in error was entitled to such submission, would be error without injury.

The evidence failed to sustain any liability against the wife of the defendant.

Upon the whole record, we find no reversible error, and the judgment of the lower court is, accordingly, affirmed.

All the Justices concur.

MARYLAND COURT OF APPEALS.

WILLIAM SCHEFFENACKER, Appt.,

v.

JOSEPH T. HOOPES.

(— Md. —, 77 Atl. 130.)

Payment — accord and satisfaction — securing certification of check.

Procuring the certification of a check sent in full payment of a claim for a larger amount constitutes an acceptance which will amount to satisfaction of the claim, although the creditor holds the check without collecting the money on it, and notifies the maker that he cannot use it except as part payment.

(April 1, 1910.)

Note. — Certification of check as release of drawer or indorser.

This question is discussed in a note to *First Nat. Bank v. Currie*, 9 L.R.A.(N.S.) 698, and this note is supplementary thereto.

As is shown in the earlier note, the rule is that a drawer of a check who procures its certification, and then delivers it to the payee, is not discharged, but continues liable thereon; while if the payee or holder of the check procures its certification for his benefit or in his own behalf, instead of getting it paid, the drawer or indorser is thereby discharged. The more recent cases follow the same rule.

Thus, in the following cases it was held

A PPEAL by plaintiff from a judgment of the Circuit Court for Hartford County in defendant's favor in an action brought to recover the amount alleged to be due and unpaid for printing certain catalogues. Affirmed.

The facts are stated in the opinion.

Messrs. Thomas Mackenzie, John S. Young, and H. Findlay French, for appellant:

A mere statement of payment of a sum smaller than the debt due can never support a plea of accord and satisfaction.

Rohr v. Anderson, 51 Md. 214.

Payment of a less amount than is due operates only as a discharge of the amount paid, leaving the balance still due, and the creditor may sue therefor, notwithstanding the agreement.

1 Cyc. Law & Proc. pp. 319, 334; Geiser v. Kershner, 4 Gill & J. 305, 23 Am. Dec. 566; People ex rel. Morrison v. Hamilton County, 56 Hun, 459, 10 N. Y. Supp. 88.

The payment of an amount less than that for which the debtor is liable does not constitute a valid accord and satisfaction, un-

less there is a bona fide dispute as to the debtor's liability or as to the amount due from him, or unless the damages are unliquidated.

Levenson v. Gillen Pub. Co. 30 Misc. 454, 62 N. Y. Supp. 472; Laroe v. Sugar Loaf Dairy Co. 180 N. Y. 367, 73 N. E. 61; Emmittsburg R. Co. v. Donoghue, 67 Md. 389, 1 Am. St. Rep. 396, 10 Atl. 233; Hodges v. Truax, 19 Ind. App. 651, 49 N. E. 1079; Meyer v. Green, 21 Ind. App. 138, 69 Am. St. Rep. 344, 51 N. E. 942; Jennings v. Durlfinger, 23 Ind. App. 673, 55 N. E. 979; 1 Am. & Eng. Enc. Law, p. 437.

An agreement to accept in satisfaction of an ascertained debt a sum less than the full amount due is not sufficient, unless founded on additional consideration.

Curran v. Rummell, 118 Mass. 482; Potter v. Green, 6 Allen, 442; Slade v. Mutrie, 156 Mass. 19, 30 N. E. 168; Gurley v. Hiteshue, 5 Gill, 222; Hardey v. Coe, 5 Gill, 189; Commercial & F. Nat. Bank v. McCormick, 97 Md. 705, 55 Atl. 439; Prudential Ins. Co. v. Cottingham, 103 Md. 319, 63 Atl. 359.

that where the holder of a check had it certified by the drawee bank, the check would be considered paid as between the holder and the drawer: Times Square Automobile Co. v. Rutherford Nat. Bank, 77 N. J. L. 649, 134 Am. St. Rep. 811, 73 Atl. 479; Gallo v. Brooklyn Sav. Bank (N. Y.) — L.R.A.(N.S.) —, 92 N. E. 633; Meuer v. Phenix Nat. Bank, 94 App. Div. 331, 88 N. Y. Supp. 83, affirmed in 183 N. Y. 511, 76 N. E. 1100; St. Regis Paper Co. v. Tonawanda Board & Paper Co. 107 App. Div. 90, 94 N. Y. Supp. 946, affirmed in 186 N. Y. 563, 79 N. E. 1115; Dunn v. Whalen, 120 App. Div. 729, 105 N. Y. Supp. 588; Blake v. Hamilton Dime Sav. Bank, 29 Ohio C. C. 465, affirmed in 79 Ohio St. 189, 20 L.R.A.(N.S.) 290, 128 Am. St. Rep. 684, 87 N. E. 73, 16 A. & E. Ann. Cas. 210.

This rule is asserted in Meridian Nat. Bank v. First Nat. Bank, 7 Ind. App. 322, 52 Am. St. Rep. 450, 33 N. E. 247, 34 N. E. 608, but in this case the check had been altered after certification, and the case turns rather upon the fact of such alteration.

Under the negotiable instruments act, the certification of a check by a bank, at the request of the holder of the check, discharges the drawer and all indorsers from liability thereon. Times Square Automobile Co. v. Rutherford Nat. Bank; Gallo v. Brooklyn Sav. Bank; and St. Regis Paper Co. v. Tonawanda Board & Paper Co., —supra; Drewry-Hughes Co. v. Davis, 151 N. C. 295, 66 S. E. 139.

In the following case the rule that, if the drawer himself causes the check to be certified, he continues to be liable thereon, is recognized. Times Square Automobile Co. v. Rutherford Nat. Bank, supra, 29 L.R.A.(N.S.)

The facts in St. Regis Paper Co. v. Tonawanda Board & Paper Co. supra, are somewhat similar to those in SCHEFFENACKER v. HOOPES. The check was made payable to the order of the payee, "in full account as per statement on reverse side of this voucher," and contained this indorsement: "Indorsement by the payee is acknowledged of full payment and satisfaction of the account as follows," and there followed a statement showing an amount unpaid equal to the face of the check. The payee procured the certification of the check, and then replied that he was unable to accept the check as full payment; but it was held that the certification of the check by the bank on which it was drawn, at the request of the payee, discharged the drawer from liability thereon, and, as there was a genuine dispute between the parties as to the amount of the debt, the act of procuring the certification of the check was, as a matter of law, accord and satisfaction.

A similar decision was rendered in Dunn v. Whalen, supra, in which it was held that the act of the payee in procuring the certification of the check sent "in full payment" of an account concerning which there was a genuine dispute was an acceptance of the condition imposed by the drawer when she sent the check.

In Drewry-Hughes Co. v. Davis, supra, a similar condition was attached to a check which the payee procured to be certified, but, under the facts of the case, it was held that the drawer had waived the condition.

As to right of drawer to stop payment of certified check, see note to Blake v. Hamilton Dime Sav. Bank Co. 20 L.R.A.(N.S.) 291.

W. M. G.

The certification of the check did not work an accord and satisfaction.

Day v. McLea, 58 L. J. Q. B. N. S. 293.

Messrs. Stevenson A. Williams and Fred R. Williams, for appellee:

If a creditor procures the check of his debtor to be certified by the bank upon which it is drawn, it is *ipso facto* an acceptance of the check in absolute payment of the debt; and when such check has been tendered in payment in full of an unliquidated disputed claim, the creditor cannot recover anything beyond.

Dille v. White, 132 Iowa, 327, 10 L.R.A. (N.S.) 536, 109 N. W. 909; Dunn v. Whalen, 120 App. Div. 729, 105 N. Y. Supp. 588; Born v. First Nat. Bank, 123 Ind. 78, 7 L.R.A. 443, 18 Am. St. Rep. 312, 24 N. E. 173; Thomson v. Bank of British N. A. 82 N. Y. 6; First Nat. Bank v. Leach, 52 N. Y. 352, 11 Am. Rep. 708.

Urner, J., delivered the opinion of the court:

The controlling question on this appeal is whether the evidence in the record is uncontradicted and conclusive in support of the defense of accord and satisfaction, so as to justify the withdrawal of the case from the jury.

It appears that the plaintiff below, who is the appellant here, printed a number of catalogues upon the order of the defendant, for use in connection with the sale of cattle by the latter at a county fair; and this suit was brought to recover the price of the publication. The declaration was upon the common counts, and the pleas were the general issue, payment, and accord and satisfaction. A demurrer which was interposed to the last-mentioned plea and overruled by the court below will be considered later in this opinion.

Evidence was offered by the plaintiff to show that he printed, under contract with the defendant, 1,000 copies of the catalogue, and afterwards, at the defendant's request, printed 300 additional copies, with changes and additions made by the defendant; that the plaintiff distributed some of the catalogues by mail under the defendant's instructions, and the remainder were delivered to the defendant and by him accepted and used; that at the time of the sale the plaintiff presented his bill, amounting to \$722.20, to the defendant, and requested payment, and the defendant promised to send him a check when he got the money in hand; that on October 24, 1908, the defendant sent the plaintiff a check, which was offered in evidence, for \$361.20, accompanied by a letter as follows: "I inclose a check for three hundred any sixty-one dollars and twenty cents (\$361.20), intend-

ed to be in settlement of bill for printing catalogues, which you rendered me under date of October 20th. You know my dissatisfaction with your work. Your failure to do it properly has caused me great damage and injury. I should require you to make my loss good, but I do not wish a controversy, and rather than have one I am inclosing check for (\$361.20), one half of your bill, in full settlement thereof. If you do not care to accept such a compromise, do not use my check, and I will then reserve the right to claim for the damage I have suffered." It was testified by the plaintiff that this was the first intimation he had that the defendant intended to refuse to pay the bill in full.

The plaintiff replied to the defendant's letter on October 26, 1908, acknowledging receipt of the check, and stating, so far as it is necessary to quote, as follows: "I am positive that you do not intend to beat me out of the balance of my bill, for you are too honorable for that, and you are laboring under the impression that it was the fault of the first catalogue which kept prospective bidders away. Now you know yourself that if the first catalogue kept bidders away, it was on account of not having full information regarding the animals, and not on account of the arrangement of the catalogue, for the only difference was the information regarding breeding, etc., and the number of animals. Now I am sure that leaving off the numbers would not keep people away, but more on account of not having the desired information, which was no fault of mine. Perhaps, too, it was due to getting them out too late, but you know we could not proceed with the work on account of your holding me up with the copy, but after I got the full copy I exerted every means to get them out, and devoted all my time that I could to get them out a minute earlier than promised. . . . Why not come to see me, and have a heart to heart talk over the matter. I want to satisfy you, and if you can prove to me that through the omission of the numbers of animals and the paging, that you lost money, I will gladly compromise on anything reasonable. . . . You surely could not expect me to accept \$361.20 for this job after all I did for your sake, and then lose money, and consequently I am unable to use the check sent until you write me that it is not intended as full payment, but only as part payment." The plaintiff's testimony was further to the effect that he refused to accept the check in full payment; that he sent the check to the bank on which it was drawn, for certification, but the defendant's deposits were not sufficient to cover it until on or about November 5, 1908, when it

was certified and returned to the plaintiff; and that he has not made any other use of the check, but has kept it in his possession.

It was proved by the defendant that he suffered loss and injury in the sale of his cattle by reason of errors and omissions in the first edition of the catalogues, which he did not see until after they had been mailed and distributed by the plaintiff; that he pointed out to the plaintiff the errors and omissions, and explained their injurious effect upon the sale, and requested that a corrected edition be printed; that this was done and the additional catalogues were delivered on the morning of the sale and just prior to its commencement; that he did not promise to pay the plaintiff's bill when presented, but said he would look into it; and later he wrote the letter and inclosed the check offered in evidence.

There was no further evidence adduced on either side. At the conclusion of the testimony, prayers were submitted by both the plaintiff and defendant, but all were refused, and the court of its own motion instructed the jury, in effect, that, according to the undisputed evidence, the defendant wrote to the plaintiff the letter of October 24, 1908, and the plaintiff, subsequent to its receipt, caused the check in question to be presented to and certified by the bank upon which it was drawn, and that this amounted to an acceptance of the check by the plaintiff in satisfaction of his claim, and the verdict should, therefore, be for the defendant. This instruction was based upon the theory that the act of the plaintiff in causing the check to be certified was an acceptance of the part payment and compromise offered by the defendant in full settlement of the plaintiff's controverted demand, and that as the terms of the offer, the existence of the dispute, and the fact of acceptance were uncontradicted, and established conclusively an accord and satisfaction, there was no question left for the jury to determine.

The principles applicable to a defense of this character are well settled. In the case of a liquidated claim, such as the present one may be assumed to be for the purposes of this decision, an acceptance of part of the amount in satisfaction of the whole will bar a recovery of the remainder, if the settlement is supported by some consideration additional or collateral to the partial payment. *Booth v. Campbell*, 15 Md. 575; *Maddux v. Bevan*, 39 Md. 504; 1 Poe, § 654; 1 Cyc. Law & Proc. p. 311. "Anything which would be a burden or inconvenience to the one party or a possible benefit to the other" may constitute such a consideration (*Maddux v. Bevan*, supra), and the com-

promise of a disputed claim is a familiar and favored basis for an accord and satisfaction (*Emmittsburg R. Co. v. Donoghue*, 67 Md. 389, 1 Am. St. Rep. 396, 10 Atl. 233; note to *Fuller v. Kemp*, 20 L.R.A. 795).

There has been no question raised as to these well-recognized principles; but it is urged on behalf of the appellant that the evidence is not uncontradicted as to the circumstances of his acceptance of the defendant's check. It is insisted that, in view of the plaintiff's testimony that, when he first presented the bill, the defendant did not question it, but promised to send a check, the existence of a bona fide dispute as to the claim should not have been treated as being conclusively established. It is also contended that the certification of the check at the instance of the plaintiff was not equivalent to an unqualified acceptance of the defendant's offer, especially in view of the statement by the plaintiff, in his letter of October 26th, that he could not use the check until he was advised by the defendant that it was intended only as part payment.

While there is a conflict in the testimony of the plaintiff and defendant as to what was said by the latter when the bill was first presented, it is evident from the correspondence in the record that, at the time the check was tendered, there was a substantial and honest dispute between them as to the amount the plaintiff was entitled to recover in view of the defendant's claim of recoupment. The defendant in his letter charged that the plaintiff's failure to do the work properly had caused him great damage. In reply to this the plaintiff expressed his willingness to compromise if the defendant could prove that, on account of certain omissions from the catalogue, he had sustained any loss. There had undoubtedly been a previous discussion between them on this subject, because, while the defendant in his letter mentions no details as to the deficiencies in the work, the plaintiff, in his reply, refers particularly to the grounds of the defendant's complaint. We see no contradiction in the evidence, therefore, as to the existence of a bona fide dispute over the claim at the time the plaintiff was called upon to decide whether he would accept the check as full settlement, upon the basis of the proposed compromise.

The plaintiff's letter shows that he understood thoroughly that he was not at liberty to use the check except in full satisfaction of his demand. He does not question this understanding, but contends that in procuring the certification he has not in fact used the check. This contention cannot be sustained in view of the very important change occasioned by the certification of a check

at the instance of the holder, in the relations of the parties to the instrument. The legal effect of such a certification is that the funds of the drawer are appropriated to the amount of the check and he is released, while the check is converted into a certificate of deposit, upon which the bank becomes the debtor of the holder. 5 Cyc. Law & Proc. p. 541, and numerous cases there cited; note to *Dille v. White*, 10 L.R.A. (N.S.) 536; *Lineweaver v. Slagle*, 64 Md. 487, 54 Am. Rep. 775, 2 Atl. 693; Code, art. 13, § 207. The drawer loses control of his funds through the transaction as absolutely as if he had paid to the bank for the use of the holder of the check a corresponding sum in cash, or as if the check had actually been collected. *First Nat. Bank v. Leach*, 52 N. Y. 352, 11 Am. Rep. 708; *Born v. First Nat. Bank*, 123 Ind. 73, 7 L.R.A. 442, 18 Am. St. Rep. 312, 24 N. E. 173; *Thomson v. Bank of British N. A.* 82 N. Y. 6. It cannot, therefore, be held that the certification in this case did not amount to the "use" of the check, within the condition imposed by the defendant's offer of compromise.

The plaintiff's expression of dissatisfaction with the defendant's proposal could not qualify the effect of his actual use of the check and appropriation of the defendant's money through its certification, in view of the terms of compromise under which alone it could be used. It was the use of the check that determined the question of the acceptance of the offer, and not the verbal dissent by which it was accompanied.

In *Ostrander v. Scott*, 161 Ill. 339, 43 N. E. 1090, it was held that a creditor to whom a check is sent, reciting that it is in full payment of a claim, the amount of which is in dispute, cannot receive it, without the assent of the debtor, in part payment only, but his receipt and use of the check will constitute a full satisfaction of the claim. "It was the right of the plaintiff," said the court, "to accept the check upon the terms proposed, or to reject it; but there could be no modification of the terms by his will alone, without the concurrence of the defendant."

It was held in *Pollman & Bros. Coal & Sprinkling Co. v. St. Louis*, 145 Mo. 651, 47 S. W. 563, that, if one accepts a payment upon the condition that it is to be received in full satisfaction of his claim by way of compromise, his entire claim becomes satisfied, even though he filed a written protest at the time of accepting the amount paid, notifying the debtor that he would insist on the balance claimed. To the same effect is the case of *Connecticut River Lumber Co. v. Brown*, 68 Vt. 239, 35 Atl. 56, 29 L.R.A. (N.S.)

the court holding that where there is an offer of part payment of a controverted claim upon condition that the sum tendered, if accepted at all, must be taken in full satisfaction, the creditor, if he accepts the amount, takes it subject to the condition attached to the offer, and it operates as a satisfaction of his claim, notwithstanding he does not intend it to have that effect, and so declares when he receives the money.

In *Fuller v. Kemp*, 138 N. Y. 231, 20 L.R.A. 785, 33 N. E. 1034, it was held that in the case of a conditional compromise offer, the acceptance of the amount tendered cancels the claim, and no protest, declaration, or denial on the part of the creditor can vary that result.

This principle is clearly stated, and numerous cases in its support are collected, in 1 Cyc. Law & Proc. p. 333.

The cases of *Prudential Ins. Co. v. Cottingham*, 103 Md. 319, 63 Atl. 359, and *Day v. McLea*, 58 L. J. Q. B. N. S. 293, relied upon by the appellant, are not at all similar to the one now before us, and do not affect the general rule we have found to be applicable to the present situation. In the *Cottingham Case*, there was held to have been no consideration to support the agreement of an administratrix to receive part of the proceeds of a life insurance policy in full discharge of the company's liability, where she had accepted the settlement on the erroneous theory that the age of the insured was not correctly stated in the application; while in *Day v. McLea*, there was no express condition imposed, in connection with the partial payment, that the acceptance of the amount offered should be in full satisfaction of the claim.

It results from the conclusions we have stated as to the law and evidence in this case, that we find the essentials of a complete accord and satisfaction to have been established without contradiction; and we accordingly approve the action of the court below in directing a verdict for the defendant on that ground. This renders it unnecessary to consider the prayers offered. There was a special exception filed by the plaintiff to the court's instruction. The same questions which are presented by this exception have been discussed and disposed of in other connections in this opinion, and, in the view we have taken of the case, it was properly overruled.

There remains to be noticed the demurrer to the plea of accord and satisfaction. It is only necessary to say in reference to this feature of the case that, while the plea may not have been sufficiently full and explicit to gratify the rule laid down in the case of *Emmitsburg R. Co. v. Donoghue*, supra, yet, as the same defense was avail-

able under the general issue plea (1 Poe, § 607; Herrick v. Swomley, 56 Md. 439; Thorne v. Fox, 67 Md. 67, 8 Atl. 667), it does not appear that the plaintiff has been prejudiced by the overruling of the demurrer, and the action of the court below in that regard, therefore, involved no reversible error.

Judgment affirmed, with costs.

MINNESOTA SUPREME COURT.

JOHN GUND BREWING COMPANY,
Appt.,
v.

HARRIET A. TOURTELLOTTE et al.,
Respts.

(108 Minn. 71, 121 N. W. 417.)

Broker — sale of land — authority.

1. An agent with authority to sell certain land of his principal has no implied authority to assign to one with whom he contracts for a sale the rent to accrue from tenants during the pendency of negotiations, or from the date of the contract to the completion of the transaction.

Headnotes by BROWN, J.

Note. — Effect of principal's performance of part of contract in ignorance of unauthorized provisions inserted by his agent, as ratification of latter.

It is a well-settled rule of law that if an agent, in making a contract on behalf of his principal, inserts therein, without the latter's knowledge, stipulations which he was not authorized to make, and such stipulations are not essential elements of such contract, and are not brought to the notice of the principal, the latter's performance of his part of the contract will not be deemed a ratification of the unauthorized provisions.

Such was the rule applied in Lindow v. Cohn, 5 Cal. App. 388, 90 Pac. 485, in which it was held that there was no ratification of an unauthorized agreement of a selling agent to allow the purchaser damages alleged to have arisen from the fact that former goods sold by the same principal did not fulfil their warranty, merely because the principal shipped the goods as per order, where the principal was unaware of the unauthorized agreement.

So, in Bohanan v. Boston & M. R. Co. 70 N. H. 526, 49 Atl. 103, it was held that where a railway company's agent, without authority, promised a certain sum and employment during good behavior in adjustment of a claim for damages against the company, payment of the money and the furnishing of work for a limited period was not a ratification, if the company had

Agent — unauthorized act — ratification by principal.

2. The principal is not chargeable with liability on the ground of having ratified such a contract, in the absence of notice or knowledge on his part of its unauthorized terms.

(May 21, 1909.)

A PPEAL by plaintiff from an order of the District Court for Hennepin County denying a new trial after judgment in defendants' favor in an action brought to recover certain rents collected by defendants, to which plaintiff claimed to be entitled under an assignment in a contract of sale. Affirmed.

The facts are stated in the opinion.

Messrs. Gjertsen & Lund, for appellant:

The power of attorney was general in its terms, and therefore gave the agent authority to make the contract in question.

Le Roy v. Beard, 8 How. 468, 12 L. ed. 1159; Vanada v. Hopkins, 1 J. J. Marsh. 285, 19 Am. Dec. 92; Owings v. Hall, 9 Pet. 607, 9 L. ed. 246; Silverman v. Bullock, 98 Ill. 11; Henderson v. Beard, 51 Ark. 483, 11 S. W. 766; Taggart v. Stanbery, 2 McLean, 549, Fed. Cas. No. 13,724; Bronson v. Coffin, 118 Mass. 156; Backman v.

no knowledge that the unauthorized promise as to continued employment was a part of the consideration for the settlement.

And in Bierman v. City Mills Co. 151 N. Y. 482, 37 L.R.A. 799, 45 N. E. 856, it was held that an express warranty, made without authority by one acting as agent, was not ratified by adopting the sale and delivering the goods without knowing of the warranty or representations, if there was no custom to make a warranty on sales of that kind.

And in Daley v. Iselin, 218 Pa. 515, 67 Atl. 837, it was held that where an agent authorized to purchase land contracted not only to purchase the land, but also certain options, and his principal, without knowledge of the unauthorized agreement as to the options, accepted a deed for the land, and paid the purchase money therefor, there was no ratification of the agreement to purchase the options.

To the same effect are Lester v. Kinne, 37 Conn. 9; Davis v. Talbot, 137 Ind. 235, 36 N. E. 1098; Taylor v. Hoey, 4 Jones & S. 402, affirmed without opinion in 58 N. Y. 677; Suderman-Dolson Co. v. Rodgers, 47 Tex. Civ. App. 67, 104 S. W. 193; Haynes v. Tacoma, O. & G. H. R. Co. 7 Wash. 211, 34 Pac. 922.

This note, of course, does not purport to deal with the general question as to the effect of the principal's receipt of benefits under the contract as a ratification.

J. A. C.

Charlestown, 42 N. H. 125; *Schultz v. Griffin*, 121 N. Y. 291, 18 Am. St. Rep. 925, 24 C. E. 480; *Peters v. Farnsworth*, 15 Vt. 55, 40 Am. Dec. 671.

The power given the agent to sell carried with it the authority to do whatever was usual and necessary to effect a sale of the property in question.

1 Am. & Eng. Enc. Law, 2d ed. p. 997; *Alpin v. Cassidy*, 17 Tex. 449; *Benjamin*, 15 Conn. 347, 39 Am. Dec. 34; *Holladay v. Daily*, 19 Wall. 606, 26 L. 187; *Spect v. Gregg*, 51 Cal. 198; *Vanada Hopkins*, supra; *Watts v. Howard*, 70 Inn. 122, 72 N. W. 840; *Story, Agency*, ¶ 58, 68, 97; *Mechem, Agency*, ¶¶ 194, 38, 388; *Ryan v. Tudor*, 31 Kan. 366, 2 Pac. 17.

The execution of the deed to the purchaser constituted an act of ratification which makes the terms of the contract binding upon the principal.

Tilley v. Wolverton, 54 Minn. 78, 55 N. 822; *Busch v. Wilcox*, 82 Mich. 336, 21 N. St. Rep. 563, 47 N. W. 328; *Myers v. Mutual L. Ins. Co.* 32 Hun, 321; 1 Am. & Eng. Enc. Law, 2d ed. p. 1202; *Byrne v. Wright*, 13 Ga. 46; *Terril v. Flower*, 6 Ark. (La.) 584; *Szymanski v. Plassan*, 20 N. Ann. 90, 96 Am. Dec. 382.

Mr. Charles M. Pond, for respondents: The purchaser, in dealing with the agent, is bound to know and understand the extent and scope of the agent's authority to contract for the sale of this real estate.

Towle v. Leavitt, 23 N. H. 360, 55 Am. 195; *Stainback v. Read*, 11 Gratt. 281, 1 Am. Dec. 648; *Craighead v. Peterson*, N. Y. 279, 28 Am. Rep. 150; *Story, Agency*, § 22; *Nye v. Swan*, 49 Minn. 431, N. W. 39; *Jordan v. Humphrey*, 31 Minn. 5, 18 N. W. 450; *Jackson v. Badger*, 35 Inn. 54, 26 N. W. 908; *Smith v. Tracy*, N. Y. 79; *Fay v. Slaughter*, 194 Ill. 157, L.R.A. 564, 88 Am. St. Rep. 148, 62 N. 592; *Young v. Harbor Point Club House*, 99 Ill. App. 290; *Americus Oil Co. v. Gurr*, 114 Ga. 624, 40 S. E. 780.

The principal, by executing and delivering the warranty deed, and receiving the consideration therefor, did not ratify the contract made by the agent as to the unauthorized assignment of rents.

Reese v. Medlock, 27 Tex. 120, 84 Am. Dec. 1; *Stainback v. Read*, supra; *Bohart v. Erie*, 36 Kan. 284, 13 Pac. 388; *Russell v. Erie R. Co.* 70 N. J. L. 808, 67 L.R.A. 3, 59 Atl. 150, 1 A. & E. Ann. Cas. 672; *German v. City Mills Co.* 151 N. Y. 482, L.R.A. 799, 56 Am. St. Rep. 636, 45 N. E. 6; *Pennsylvania, D. & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 248, 29 Am. 543; *Bryant v. Moore*, 26 Me. 84, 45 N. Dec. 96; *Smith v. Tracy*, supra; *Yel-* L.R.A. (N.S.)

low Jacket Silver Min. Co. v. Stevenson, 5 Nev. 224; *Holm v. Bennett*, 43 Neb. 808, 62 N. W. 194.

Brown, J., delivered the opinion of the court:

Defendants were the owners of certain real property situated in the city of Minneapolis, and on December 12, 1906, authorized Wyvell-Harrington Company, real-estate dealers, to sell the same for the consideration of \$42,000, they to receive \$1,000 for their services. The authority of the agents was contained in the following writing: "In consideration of Wyvell-Harrington Company listing for sale the real estate described in memorandum upon opposite side thereof, I hereby authorize said company to sell or contract in my name to sell the same upon the terms herein mentioned, and agree to execute due and sufficient warranty deed of said real estate, in which my wife or husband shall join, to such persons as said company shall sell or agree to sell the same; and for said consideration I further agree to pay said company \$1,000 commission upon any sale of said property while this agreement remains in force, whether such sale be made by Wyvell-Harrington Company or myself, or by any agent acting for me."

On December 20, 1906, the agents entered into a contract for the sale of the property to plaintiff in this action on the terms specified by defendants, which contract contained, among other things, a condition that if the title to the property was not good, or could not be made good within sixty days, the advance payment of \$2,000, made by the purchaser, should be returned to him; and that, if the title was good, and the purchaser failed to complete the transaction by payment of the balance of the purchase price within sixty days, then and in that case the advance payment should be forfeited. These stipulations gave each party sixty days within which to complete his part of the contract, and no forfeiture could be declared by either before the expiration of that time. The contract of sale contained the further stipulation that the purchaser should have and receive the rents to become due from tenants then occupying the premises on and after January 1, 1907. The contract of sale was never submitted to defendants, and they were not otherwise informed of the terms thereof, save that a sale had been effected for \$42,000. They conveyed the property, however, pursuant to the contract, and plaintiff paid in full the purchase price. Some controversy appears to have arisen respecting the payment of taxes, and the sale and transfer were not completed until March 1, 1907. In

the meantime defendants remained in control of the premises, and collected the rents accruing from tenants for the months of January and February. Thereafter, plaintiff brought this action to recover the rent so received, basing the action upon the special stipulation in the sales contract, assigning the same to it. The action was tried below without a jury, and judgment was ordered for defendants, on the ground that the agents had no authority to include in the contract an assignment or transfer of the rent to plaintiff. Plaintiff appealed from an order denying a new trial.

It is contended by plaintiff (1) that it was within the authority of the agents to embody this special agreement in the contract of sale, because a usual and necessary incident to such contracts; and (2) that, in any event, defendants ratified the act of the agents by completing the transaction, and conveying the property pursuant to the contract, even though they had no knowledge of this particular provision. We are unable to concur in either contention.

1. The authority conferred upon the agents by defendants, as shown by the written document, was restricted to a sale of the property for the sum of \$42,000. It was not a general power of attorney, authorizing the agents to do any and all things defendants might or could have done in reference to the transaction, had they been present, but was limited to a sale of the property on the terms stated. This, of course, included such incidental authority as was necessary to effect a sale, including the terms of payment, if time was authorized to be given the purchaser, the rate of interest on deferred payments, the time within which the transaction should be completed, and all other matters necessarily and usually incident to such transactions; but it clearly did not include, by implication or otherwise, the right to assign to prospective purchasers rent to accrue from tenants during the pendency of negotiations for a sale. An agreement of that nature is not necessarily incidental to such contracts, and the record furnishes no evidence of a custom or general practice in that respect. We are not justified in assuming as a matter of law the existence of such a custom among real estate dealers. The attempt of the agents, therefore, to assign the accruing rent, was beyond their authority, and not binding on defendants. *Kearns v. Nickse*, 80 Conn. 23, 10 L.R.A. (N.S.) 1118, 66 Atl. 779, 10 A. & E. Ann. Cas. 421. And it is unimportant that plaintiff was ignorant of their authority. Its officers knew that they were dealing with agents, and were bound to inquire as to the extent of their authority. *Nye v. Swan*, 49 Minn. 431, 52 N. W. 39; 29 L.R.A. (N.S.)

Jackson v. Badger, 35 Minn. 54, 26 N. W. 908; 1 Current Law, 50; *Tibbs v. Zirkle*, 55 W. Va. 49, 104 Am. St. Rep. 977, 46 S. E. 701, 2 A. & E. Am. Cas. 30.

2. The second contention of plaintiff, namely, that defendants, by the execution of the deed in performance of the contract, thereby ratified the act of the agents in assigning the rent to accrue in the future, even conceding a lack of authority in the agents to so contract, is not sound. Defendants had no knowledge of the terms of the sale contract in this respect. The trial court so found, and this is not controverted by plaintiff. But it is insisted that knowledge on the part of defendants was not necessary; that inasmuch as they had authorized a sale, and having been informed that a contract for sale had been entered into by their agents, they were bound to inform themselves of all the terms thereof; and, failing in this, they cannot be heard to plead want of knowledge. This would undoubtedly be true if the assignment of rent was an essential element in a contract for the sale of land; for every agency carries with it power to do all things necessary or usual to effectuate the purposes for which it was created. But, as already held in construing the agency contract, the right to assign the rent in question was not included therein, nor does the record show any custom or general practice of real estate dealers in this respect. Therefore the rule invoked by plaintiff does not apply. On the contrary, the case is controlled by the general rule that knowledge of all the facts is essential to ratification of unauthorized acts of an agent. *Humphrey v. Havens*, 12 Minn. 298, Gil. 196; *Wheeler v. McGuire*, 86 Ala. 398, 2 L.R.A. 808, 5 So. 190. The act of defendants in completing the sale by the execution of a proper deed was without knowledge of the terms of the contract, and in the absence of evidence to the contrary we are bound to assume that they proceeded on the theory that an authorized contract had been made. They were not bound to inquire whether the agents had exceeded their authority. *Johnson v. Ogren*, 102 Minn. 8, 112 N. W. 894; *Jackson v. Badger*, 35 Minn. 52, 26 N. W. 908.

The case of *Tilleney v. Wolverton*, 54 Minn. 75, 55 N. W. 822, cited by plaintiff, is not in point. In that case plaintiff had authorized her agents to sell certain of her real property. They effected a sale as such agents, and became interested as purchasers with those to whom they sold. The property was sold for \$35,000. The plaintiff ratified the transaction, with notice that her agents were interested with the purchasers. The property was subsequently

ld for \$80,000, and plaintiff brought
at action against her agents for the prof-
a they realized in the matter, alleging that
e had no notice, when she deeded the
roperty pursuant to the contract, of the
tent of the interest held by her agents
purchasers. The court held that, inas-
uch as plaintiff knew that the agents were
some extent interested in the purchase,
was immaterial that she did not know
e full extent thereof. In the case at bar
endants had no information whatever of
e terms of the contract of sale.
Order affirmed.

CALIFORNIA SUPREME COURT.

B. H. LEAVITT, Respt.,

v.

LASSEN IRRIGATION COMPANY, Appt.

(— Cal. —, 106 Pac. 404.)

Water — appropriation — sale of sys-
tem — reservation of right.

1. One who has appropriated water for
the purpose of sale, rental, and distribution
to the public, cannot, upon disposing of
the water system, reserve to himself a por-
tion of the right which he had appropriated
to public use.

Same — cotemporary private appro-
priation — sale — effect.

2. One who, when appropriating water
for sale, rental, and distribution to the
public, makes at the same time an appro-
priation for the benefit of his own land,
to be taken through the ditches constructed
for the public use, will, after selling his
public rights, be limited to the amount of
water which he had been actually taking
and applying to a beneficial use upon his
land.

Same — grant of preferential rights —
validity.

3. One who owns a system for the dis-
tribution of water appropriated for sale,

*Note. — Right of appropriator of water
for distribution to the public, to
grant exclusive or preferential rights
to individual.*

Aside from LEAVITT v. LASSEN IRRIG. Co.
and the cases therein cited and sufficiently
reviewed, especially noting Fresno Canal &
Irrig. Co. v. Park, 129 Cal. 437, 62 Pac.
71, and Stanislaus Water Co. v. Bachman,
22 Cal. 716, 15 L.R.A. (N.S.) 359, 93 Pac.
38, practically no authority has been
found dealing with the question whether
one who has appropriated water for distribu-
tion to the public has the right to grant
exclusive or preferential rights to indi-
viduals.

A case similar to the LEAVITT CASE, and
adding to the same effect for the reasons
9 L.R.A. (N.S.)

rental, and distribution to the public can-
not confer upon any consumer a preferen-
tial right to the use of any part of the
water by contract to supply him in per-
petuity with water, and then assign him
his own rights under the contract, so that
he will hold the right to the water free
from any obligation to the public system.

Same — legislative grant — validity.

4. The legislature cannot confer upon any
particular consumer of water from a pub-
lic system a preferential right where the
Constitution provides that water appro-
priated for sale or rental shall be a public
use.

(December 24, 1909.)

APPEAL by defendant from a judgment
of the Superior Court for Lassen Coun-
ty in plaintiff's favor and from an order
denying a new trial in an action brought
to recover damages for injuries to plain-
tiff's crops, alleged to have been caused by
defendant's wrongful refusal to allow plain-
tiff to take water for irrigation purposes
from certain ditches. Reversed.

The facts are stated in the opinion.

Mr. W. F. Williamson, for appellant:

Purser was the agent in charge of a pub-
lic use, and any attempt by him to create
a private estate out of that public use was
void.

McCrary v. Beaudry, 67 Cal. 121, 7 Pac.
264; Merrill v. South Side Irrig. Co. 112
Cal. 433, 44 Pac. 720; Hildreth v. Montecito
Creek Water Co. 139 Cal. 29, 72 Pac. 395;
Cozzens v. North Fork Ditch Co. 2 Cal.
App. 405, 84 Pac. 342; Crow v. San Joaquin
& K. River Canal & Irrig. Co. 130 Cal. 313,
62 Pac. 562, 1058; Price v. Riverside Land
& Irrigating Co. 56 Cal. 431.

The person in control of a public use
cannot escape the duty of furnishing water
to the public by the assertion of a right
to apply the water to his own uses or to
those of his grantees.

there given, is Lassen Irrig. Co. v. Long
(Cal.) 106 Pac. 409.

A case of possible interest here is North-
ern Colorado Irrig. Co. v. Richards, 22 Colo.
450, 45 Pac. 423, which holds that under
a statute giving consumers who have pur-
chased and used water for irrigation, and
have not ceased to do so for the purpose or
intent of procuring water from some other
source, a right to continue to purchase
water to the same amount for irrigation of
their lands, one who has procured water
from a ditch, paid for it, and used it for
irrigation during one season, without hav-
ing violated his statutory right thereto, is
entitled to at least a preference to the same
amount of water for subsequent years over
new applicants.

G. V.

Price v. Riverside Land & Irrigating Co. supra.

The agent of a public use cannot limit its liability to the public by contract.

Colorado Canal Co. v. McFarland (Tex. Civ. App.) 94 S. W. 400; Boise City Irrig. & Land Co. v. Clark, 65 C. C. A. 390, 131 Fed. 419.

Mr. H. D. Burroughs also for appellant.

Mr. N. J. Barry for respondent.

Henshaw, J., delivered the opinion of the court:

Plaintiff's complaint contained two causes of action. In the first he asserted his ownership of the Leavitt Buggytown ranch, containing 1,000 acres; alleged that he was of right entitled to take, free of charge, sufficient water from defendant's canals and ditches to thoroughly and properly irrigate all of these lands. He alleged that defendant refused to allow him so to take the water in the irrigating season of 1905, and that by reason of this refusal his crops were seriously damaged. The second cause of action sets forth a like claim to the free taking and use of water from the defendant's ditches sufficient to thoroughly and properly irrigate another piece of land of 160 acres, in the irrigating season of 1905; the defendant refused to allow plaintiff so to take the water, with the result that his crops were damaged. In both causes of action he seeks compensation for this damage, and an adjudication of his rights to water for these lands. The cause was tried without a jury, judgment passed for plaintiff, and from that judgment and from the court's order denying defendant's motion for a new trial it appeals.

1. Plaintiff's asserted right to the free use of water for his Buggytown ranch rests upon the following facts: In 1889 and the years following, plaintiff constructed the Susan river irrigation system, by which he appropriated, for the purpose of sale, rental, and distribution, the surplus waters of Susan river, in Lassen county. Plaintiff testifies that he appropriated these waters for the purposes of sale, rental, and distribution, and also for private use upon his Buggytown ranch. The court finds that immediately after the construction of the system, plaintiff appropriated and used from the waters of the system a sufficient quantity to irrigate this ranch. Subsequently plaintiff sold his water system, but, in selling, reserved to himself "the prior and preferred right to take from said system a sufficient quantity of water to properly irrigate, during the irrigating season of each and every year, all of the lands comprising said Leavitt Buggytown ranch." 29 L.R.A. (N.S.)

After further findings to the effect that defendant acquired title to the system with full notice and knowledge of plaintiff's prior and preferred right, the court gave its judgment that "plaintiff has a prior and preferred right to take from said system, free of charge, during the irrigating season of each and every year, water in sufficient quantities to thoroughly and properly irrigate all of the lands comprising the said Leavitt Buggytown ranch (describing it), and the defendant, its agents, attorneys, and employees be and they are hereby perpetually enjoined from in any manner interfering with plaintiff's right to take from said system so much of the waters thereof as may be necessary to irrigate the said 1,000 acres of land during the irrigating season of each and every year." For respondent, the most favorable view which can be taken of the evidence is that he made an appropriation of waters for the public use of sale, rental, and distribution under the Constitution of 1879; that by means of the same canal and ditches he made a private appropriation of waters for use upon his individual land; and that when he came to sell his irrigating system, he withheld from the sale the waters so privately appropriated. It cannot be said that there was anything illegal in these acts. But when the rights of plaintiff come to be measured by the trial court, it is noticeable that he is given far more than the facts and the law warrant. Treating Leavitt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his *ipse dixit*, convert a public use into private ownership; or, if he could reserve a part for himself, he could, with equal authority, give away parts of the supply to others, and by this method destroy what the Constitution itself has declared shall forever remain a public use. Therefore the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch. If this be so, then his rights to water would be measured as are the rights of every other private appropriator,—not by the amount which he took, not by the amount which he claimed, not, as the court decrees, by an amount sufficient thoroughly and properly to irrigate

thousand acres of land; but it would be measured by the amount which he had been actually taking and applying to a beneficial use upon that land. His right to priority in the use of water would also be measured by and limited to this quantity. Senior v. Anderson, 115 Cal. 496, 47 Pac. 454; Smith v. Hawkins, 120 Cal. 86, 52 Pac. 139; Strong v. Baldwin, 137 Cal. 440, 70 Pac. 88. The findings and judgment as above noted establish that the court adopted the erroneous view that respondent, by his so-called reservation, had been able to secure for himself an undetermined quantity of water, without regard to the amount which he had been beneficially using. The findings and judgment are silent upon the question as to this latter amount, and the judgment upon this cause of action must therefore be reversed. This discussion has been upon the assumption that Leavitt did in fact make a private appropriation of water for use upon his Buggytown ranch in connection with his appropriation of the waters of Susan river for public use. If, however, the facts should be that he did not make such private appropriation, his attempted reservation of a private right out of a public trust, as above stated, would be futile and void.

2. Respondent's second cause of action is based upon breach of contract. One Purser came into the ownership of Leavitt's irrigation system. As Purser became the owner subject to whatever force and effect attached to Leavitt's reservation of water for his Buggytown ranch, it is to be remembered that all other waters were appropriated for the public use of sale, rental, and distribution, and that Purser stood simply as the agent of the public in the execution of this use. Purser, while so the owner, made a contract with Grace Elledge, a daughter of plaintiff, who was at that time in possession of 160 acres of land. By this contract, Purser agreed to supply Grace Elledge with sufficient water from the Susan river irrigation system for the annual irrigation of this land. Grace Elledge agreed to pay the sum of \$1 per acre annually "for each and every acre of land which may have been previously cleared of brush or cultivated." It was further agreed that the water should be delivered by Purser at seasonable times, and should be taken and used by Grace Elledge in conformity to the lawful rules and regulations which Purser might make. It was understood that Grace Elledge should have a priority of right to the use of water over and above all other consumers, saving those who held contracts like her own. The contract contained many other provisions; but, as they touch matters foreign to this consideration, it is not necessary to set them forth. 29 L.R.A. (N.S.)

This contract between Purser and Grace Elledge was acknowledged upon February 15, 1896, and upon the same day there was indorsed thereon, but not acknowledged, the following: "For a valuable consideration I hereby assign the within agreement and all my rights thereunder to B. H. Leavitt. [Signed] Edward T. Purser, Grace E. Elledge." Subsequently Grace Elledge made a deed of the 160 acres of land to her father, Leavitt, granting therewith "all ditches, water, and water rights used thereunto or appurtenant thereto." Upon this state of facts the court found that Leavitt was entitled to take from defendant's system, free of charge, "a sufficient quantity of water during the irrigating season of each and every year to properly and thoroughly irrigate" this 160 acres, and that this right was a permanent right, and prior and preferred over all other rights, saving the rights of those who had contracts with Purser of like effect.

Against this judgment appellant advances many propositions of gravity, not a few of which we consider valid. Thus, he argues that the judgment itself is void for uncertainty, in decreeing to respond in general terms water sufficient to "thoroughly irrigate 160 acres of land," without specifying the quantum of water, the kind of irrigation, or in any way the amount which might actually be needed. Again, he argues that the contract itself provided that Purser, the owner of the system, would supply water under the rules and regulations which he might make, while the decree entitles Leavitt to enter and take the water. He further argues and shows that the purported assignment to Leavitt was not acknowledged, so that no constructive notice came to appellant of the purported assignment, and that if, as respondent contends, Grace Elledge's rights were such as passed by her deed to her father, it could only be so upon the theory that an easement—an interest in land—had been created, and if such was the case, and as Purser had made a subsequent assignment of his rights under this very contract to a third person, and it had been duly recorded, Leavitt's unrecorded assignment became void. Civil Code, § 1214; Cady v. Purser, 131 Cal. 552, 82 Am. St. Rep. 391, 63 Pac. 844. Again, appellant argues, and with much force, that the effect of Purser's assignment of the contract to Leavitt, and of Grace Elledge's assignment of the contract to Leavitt, could not in law be the creation of a free right to water against the appellant; that Purser's assignment carried the right to collect tolls at the rate of a dollar per acre for the water supplied, but carried also, the duty of supplying the water; that

Grace Elledge's right was to receive water upon the payment of a dollar per acre; that the conveyance into a single person of all of both parties' rights and duties under such a contract could result in nothing but a merger of these rights and duties and an extinguishment of the contract, since no man can contract with himself, and no man can be compelled to furnish water to himself, and pay himself therefor a dollar per acre for so doing. These, and many other objections, are advanced against this judgment, with much force and learning. But the paramount question renders unnecessary their consideration and determination. That question may be thus stated: Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental, and distribution under the Constitution of 1879. He was but the purveyor of this public use, the agent in the execution of this public trust. If, by any method, however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. Nakedly stated, it amounts to this: That a corporation which has appropriated water which the Constitution has declared shall forever be devoted to a public use may contract with A., B., and C. to supply them in perpetuity with a given quantity of this water, and then, by assigning in turn to A., B., and C. its rights under these contracts, confer upon A., B., and C. a private right superior to and destructive of the public use. If this can be done with one, it may be done with many, and water which has thus been appropriated for public rental, distribution, and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done.

The fundamental and all-important proposition, then, is this: That a public-service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any part of its water. Even before the adoption of the Constitution of 1879 and its declaration therein contained (art. 14, § 1), it was said by this court, in *Price v. Riverside Land & Irrigating Co.* 56 Cal. 431; "Every corporation deriving its being from the act above cited has impressed upon it a public trust, the duty of furnishing water, if water it has, to all those who come within the class or community for whose alleged benefit it has been created." In *McCrary v. Beaudry*, 67 Cal. 120, 7 Pac. 264, is con-

tained the first statement of this court in construction of the constitutional provision: "Whenever water is appropriated for distribution and sale, the public has a right to use it; that is, each member of the community, by paying the rate fixed for supplying it, has a right to use a reasonable quantity of it, in a reasonable manner." And in the late case of *Hildreth v. Montecito Creek Water Co.* 139 Cal. 22, 72 Pac. 395, it was said by Mr. Justice Shaw, speaking for the court in bank, in defining the public use declared by the Constitution: "In the case of a public use, the beneficiaries do not possess rights to the waters which are, in the ordinary sense, private property. A public use 'must be for the general public, or some portion of it, and not a use by or for particular individuals, or for the benefit of certain estates.' *McQuillen v. Hatton*, 42 Ohio St. 202. 'The use and benefit must be in common, not to particular individuals or estates.' *Lewis, Em. Dom.* § 161; *Coster v. Tide Water Co.* 18 N. J. Eq. 68; *Pocantico Waterworks Co. v. Bird*, 130 N. Y. 259, 29 N. E. 246; *Gilmer v. Lime Point*, 18 Cal. 251; *McFadden v. Los Angeles County*, 74 Cal. 571, 16 Pac. 397. The right of an individual to a public use of water is in the nature of a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of the water, regardless of whether they have previously enjoyed it or not." The principle receives universal recognition, says the supreme court of Indiana, in *State ex rel. Wood v. Consumers' Gas Trust Co.* 157 Ind. 345, 55 L.R.A. 245, 61 N. E. 674. "No statute has been deemed necessary to aid the courts in holding that, when a person or company undertakes to supply a demand which is 'affected by a public interest' it must supply all alike who are like situated, and not discriminate in favor of nor against any." 45 Cent. L. J. p. 278; *Haugen v. Albina Light & Water Co.* 21 Or. 411, 14 L.R.A. 424, 28 Pac. 244; *Olmsted v. Morris Aqueduct*, 47 N. J. L. 311; *Com. v. Wilkes-Barre Gas Co.* 2 Kulp. 499; *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690; *Nebraska Teleph. Co. v. State*, 55 Neb. 627, 634, 45 L. R. A. 113, 76 N. W. 171; *Watauga Water Co. v. Wolfe*, 99 Tenn. 429, 63 Am. St. Rep. 841, 41 S. W. 1060; *State ex rel. Atwater v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 57 Am. Rep. 543, 2 Atl. 803.

All are equally entitled to share in the use of the water who pay, or offer to pay, the legal rate, and to abide by the reasonable rules and regulations of the company. It does not follow that a water company

may not make specific contracts with individual consumers which are within the purview of the Constitution, and within valid legislative enactments regulating the public use. This is precisely as decided by *Fresno Canal and Irrig. Co. v. Park*, 129 Cal. 437, 62 Pac. 87. But, as decided in *Crow v. San Joaquin & K. River Canal & Irrig. Co.* 130 Cal. 309, 62 Pac. 562, 1058, immediately following the *Park Case*, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to the water furnished by the public-service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply. The language of this court in *Stanislaus Water Co. v. Bachman*, 152 Cal. 716, 15 L. R. A. (N. S.) 359, 93 Pac. 858, must be construed in the light of the facts there presented. The court was there considering the claim of a water company to the right to collect rates in excess of those fixed by a contract made with its predecessor; its claim being in part founded on the theory that by a foreclosure sale it had acquired the water and distributing system free from that contract. The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to *Bachman's* land attached the water right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates. The company made the additional argument that the water was in fact devoted to public use, that if it could be thus attached to land as an appurtenance, the property dedicated to public use would be converted into private property, and that, as this could not be permitted, the contract was against public policy and void, so far as it attempted to create the appurtenance or fix rates. This argument is not fully stated in the opinion. In answer to the argument, the court cited the case of *Fresno Canal & Irrig. Co. v. Park*, supra, and declared that the constitutional provision regarding water devoted to public use did not prevent a water company from making a contract giving to a particular tract of land the right to receive water for permanent and continuous use for irrigation, subject to the condition that the public authorities could regulate and control the use. Such a contract disposing of water devoted to public use, of course, would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which

the public use extended, and establish its status as land permanently entitled to share in the public use. It did not appear in that case that any public regulation had been made, and the contract controlled the rights of the parties. It was therefore immaterial, so far as the right to collect the rates in controversy in that case was concerned, whether the water right was appurtenant to the land as private property, or whether the land was entitled to a part of the water as a sharer in the public use, where public rates had not been fixed and private contracts controlled. This is the essence of the decision, and it does not conflict with *Hildreth v. Montecito Creek Water Co.* supra, or any other cases on the subject of public use.

The foregoing statement that a water company, or person in charge of water devoted to public use, cannot confer a preferential right upon one consumer over another, is not to be understood as denying the right of such company or person in possession of a limited amount of water to devote that amount to the irrigation of a given area of land. We are not to be understood as saying that the company may not fix the limits of this territory, and lawfully agree to supply its waters, first, to the lands within that territory, and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This would not be in derogation of the public trust, but would be a mere regulation of use in the performance of the trust.

Hunt v. Jones, 149 Cal. 297, 86 Pac. 686, is not in conflict with the principle enunciated. A land company had acquired water for use upon its lands. It was in its nature a private appropriation. In selling the lands it sold with them, as appurtenant to them, a proportionate share of water as a private water right. It was in effect the sale by a private landowner of land with water rights appurtenant thereto, and his subsequent attempt to withhold the water. It involved no question of the rights of consumers in waters appropriated to public use.

It is, of course, a truism of the law that an act of the legislature conflicting with constitutional provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of waters so appropriated are subordinate to the provisions of the Constitution, and, to be valid, must be in harmony therewith. We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the state for public rental, dis-

tribution, and sale, cannot give a preferential right to one consumer over another. Permanent rights, in a limited sense, such consumers may acquire. That is to say, having once been supplied by the company, they are entitled to a continuation of such supply, unless their quantum shall be diminished by a shortage for which the water company is not responsible, or a shortage by reason of the increased demand of added consumers. In such cases the duty of the water company is to supply such water as it has, fairly apportioned between its consumers. If it be conceived that § 552, Civil Code, is designed to confer upon any particular consumer any special, permanent, and preferential right above what is here stated, that effort, being plainly violative of the Constitution, would be held void. The same declaration applies to the provision of the act entitled, "An Act to Regulate and Control the Sale, Rental, and Distribution of Appropriated Waters in This State Other Than in Any City, City and County, or Town Therein, and to Secure the Rights of Way for the Conveyance of Such Water to the Place of Use," approved March 12, 1889, and of the amendment to that act by the act approved March 2, 1897, (Stat. 1897, chap. 54, p. 49).

In *Fresno Canal & Irrig. Co. v. Park*, supra, it was held that, in the absence of a rate fixed by the supervisors, a rate agreed upon between the parties could be enforced. In *Crow v. San Joaquin & K. River Canal & Irrig. Co.* supra, it was held that a consumer did not deprive himself of the right to take water under the rate established by law by reason of his refusal to pay under and in accordance with the terms of his contract. In this case there was no refusal upon the part of the appellant company to furnish water. Respondent was tendered the water—first, at the rate fixed by law, and, second, at the rate fixed by the Grace Elledge contract. But he refused to pay anything for the water, and insisted upon his right to take it and use it without charge. This right he did not have. The utmost for which he could contend was the right to the use of water (in consonance with the foregoing principles) upon tender of payment of the contract rate. The contract was continuous, its obligations concurrent. Respondent's conduct amounted to more than a default. It was an intentional breach and repudiation by which, whatever it may have been conceived they were, his rights under the contract came to an end. Page, Contr. §§ 1447, 1461; *South Boulder & R. Co. Ditch Co. v. Marfell*, 15 Colo. 302, 25 Pac. 504; *Green v. Covillaud*, 10 Cal. 317, 70 Am. Dec. 725.

For the foregoing reasons, the judgment 29 L.R.A.(N.S.)

and order are reversed, and the cause remanded.

We concur: Shaw, J.; Angellotti, J.; Sloss, J.; Lorigan, J.; Melvin, J.

ILLINOIS SUPREME COURT.

CHARLES F. PIETSCH

v.

OTTO E. PIETSCH et al., Appts.

(245 Ill. 454, 92 N. E. 325.)

Trial — directing verdict on opening statement.

The court cannot direct a verdict for plaintiff in an action of forcible entry and detainer to recover possession of real estate upon the admission of counsel in his opening statement that the legal title is in plaintiff.

(June 29, 1910.)

Note. — Right to direct verdict or enter nonsuit on opening statement of counsel.

This note does not cover the general question whether the statements of counsel in their opening constitute admissions binding upon their clients.

Where the opening statement of plaintiff's counsel clearly shows that there is no cause of action, or that a defense exists, the trial court is generally held authorized to direct a verdict or a nonsuit. *Brown v. District of Columbia*, 29 App. D. C. 273, 25 L.R.A.(N.S.) 98; *Hornblower v. George Washington University*, 31 App. D. C. 64, 14 A. & E. Ann. Cas. 696; *Kluska v. Chicago*, 97 Ill. App. 666; *Lindley v. Atchison*, T. & S. F. R. Co. 47 Kan. 433, 28 Pac. 20; *Missouri P. R. Co. v. Hartman*, 5 Kan. App. 581, 49 Pac. 109; *Spicer v. Bonker*, 45 Mich. 630, 8 N. W. 518; *Pratt v. Conway*, 148 Mo. 299, 71 Am. St. Rep. 602, 49 S. W. 1025; *Miner v. Hopkinton*, 73 N. H. 232, 60 Atl. 433; *Jordan v. Reed*, 77 N. J. L. 584, 71 Atl. 280; *Sims v. Metropolitan Street R. Co.* 65 App. Div. 270, 72 N. Y. Supp. 835; *Garrison v. McCullough*, 28 App. Div. 467, 51 N. Y. Supp. 128; *Denenfeld v. Baumann*, 40 App. Div. 502, 58 N. Y. Supp. 110; *Preusse v. Childwold Park Hotel Co.* 134 App. Div. 384, 119 N. Y. Supp. 98; *Sweeney v. O'Dwyer*, 197 N. Y. 499, 90 N. E. 1129; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; *Tompkins v. Knut*, 94 Fed. 956; *United States v. Dietrich*, 126 Fed. 676.

But it is held that the trial court should not exercise the power to direct a verdict on the opening statement of plaintiff's counsel unless it clearly appears that he cannot recover. *Emmerson v. Weeks*, 58 Cal. 384; *Hornblower v. George Washington University*, supra; *Coffeyville Min. & Gas Co. v.*

APPPEAL by defendants from a judgment of the Appellate Court, First District, affirming a judgment of the Municipal Court of Chicago, entered on a directed verdict for plaintiff in an action of forcible entry and detainer to recover possession of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Edwin L. Harpham, Lambert Kaspers, and C. W. Greenfield, for appellants:

It is error for a judge, at the trial of an action, to direct the jury to find a verdict upon the opening statement of counsel.

Martin Emerich Outfitting Co. v. Siegel, C. & Co. 108 Ill. App. 364; Fletcher v. London & N. W. R. Co. 65 L. T. N. S. 605; Jones v. Baltimore & P. R. Co. 5 Mackey,

8; De Wane v. Hansow, 56 Ill. App. 575; Smith v. Commonwealth Ins. Co. 49 Wis. 322, 5 N. W. 804; Haley v. Western Transit Co. 76 Wis. 344, 45 N. W. 16; Leonard v. Beaudry, 68 Mich. 312, 36 N. W. 88; Emmerson v. Weeks, 58 Cal. 382; Lusk v. Throop, 189 Ill. 127, 59 N. E. 529.

Statements made by counsel in his opening to the jury are not binding admissions, dispensing with proof of the facts by the other party.

Ferson v. Wilcox, 19 Minn. 449, Gil. 388; 1 Thomp. Trials, p. 199, § 201; 1 Greenl. Ev. § 186; McKeen v. Gammon, 33 Me. 187; Adey v. Howe, 15 Hun, 20; Lusk v. Throop, supra.

The statements made by the counsel for defendants in support of their motion for

Carter, 65 Kan. 565, 70 Pac. 635; Brashear v. Rabenstein, 71 Kan. 455, 80 Pac. 950; Noble v. Frack, 5 Kan. App. 786, 48 Pac. 1004; Stewart v. Rogers, 71 Kan. 53, 80 Pac. 53; Wilson v. Press Pub. Co. 14 Misc. 514, 36 N. Y. Supp. 12; Redding v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 Pac. 308; Brooks v. McCabe & Hamilton, 39 Wash. 62, 80 Pac. 1004; Gross v. Bennington, 52 Wash. 417, 100 Pac. 846.

The court in Brashear v. Rabenstein, supra, said: "In view of the growing practice in some of the district courts of this state of testing the right of a plaintiff to recover by the preliminary statement of his case to the jury, it is proper to say that that stage of a trial need not be approached as the inevitable crisis of the lawsuit. That step in the proceedings may be entirely omitted without incurring any legal censure. If undertaken it is not indispensable that the facts be stated either with fullness or precision, and summary judgment for the defendant cannot be imposed as a penalty for failing so to do. On the other hand, the plaintiff's attorney may, if he so desire, merely sketch the outlines of the case, and he may make his sketch as meager and as partial as may suit his purpose. He may elaborate upon such facts as he may wish specially to impress upon the jury, and altogether omit as many others, vitally essential to recovery, as he may choose; and if he should negligently or even ignorantly fail to allude to one or more matters necessary to be proved, his client could not be sent out of court for it. Besides being incomplete, the statement may be indefinite and ambiguous; important facts may be left doubtful, and others may be suggested merely, or left wholly to inference. The pleadings, and not the statements, make the issues, and no matter how deficient a statement may be from an artistic standpoint, or what its shortcomings may be in the estimation of the critical attorney on the other side, the court is not authorized to end the case because of them unless some fact be clearly stated or some admission be clearly made which evidence relevant under the pleadings cannot cure, and which, therefore, 29 L.R.A. (N.S.)

necessarily and absolutely precludes recovery."

The mere fact that the plaintiff's opening statement is insufficient to constitute a cause of action will not warrant the direction of a verdict where it does not show that the case is founded on a corrupt cause of action. Martin Emerich Outfitting Co. v. Siegel, C. & Co. 108 Ill. App. 364; De Wane v. Hansow, 56 Ill. App. 575.

Or fails to show an admission fatal to the case. Stewart v. Hamilton, 3 Robt. 672; Leonard v. Beaudry, 68 Mich. 312, 36 N. W. 88.

So, where the opening of plaintiff's counsel presents but a mere outline of the case, leaving the details to be supplied by proof, it is error to direct a verdict for defendant. Jones v. Baltimore & P. R. Co. 5 Mackey, 8; Redding v. Puget Sound Iron & Steel Works and Brooks v. McCabe & Hamilton, supra.

And where in plaintiff's opening it is stated that he is compelled to rely upon circumstantial evidence and hostile witnesses, and cannot tell exactly what he will be able to prove by them, the complaint should not be dismissed on the ground that, if plaintiff proved all he promised in his opening, it would be insufficient to take the case to the jury. Darton v. Interborough Rapid Transit Co. 125 App. Div. 836, 110 N. Y. Supp. 171.

And in Fillingham v. St. Louis Transit Co. 102 Mo. App. 575, 77 S. W. 314, it was held that a nonsuit should not be entered on a statement of anticipated proof, although the statement contained something that might, if established by proof, result in a nonsuit.

If plaintiff's opening statement contains facts permitting reasonable inferences sufficient to make out a case if the facts are proved, a motion for a nonsuit should be refused. Kelly v. Bergen County Gas Co. 74 N. J. L. 604, 67 Atl. 21. The court in this case said: "A motion for a nonsuit upon the opening of counsel is not frequently resorted to. In dealing with it, it is obvious that the rule which is applied to a motion for a nonsuit at the close of plaintiff's evidence is the one which should be applied. In both

a continuance were not admissions justifying the trial court in directing a verdict for plaintiff.

1 Thomp. Trials, p. 201; 1 Greenl. Ev. § 186; Adey v. Howe, supra.

Mr. Henry R. Baldwin, for appellee:

In courts of record, admissions by counsel in the trial of the cause bind his client, unless fraudulently and collusively made.

Wilson v. Spring, 64 Ill. 14; Chicago & N. W. R. Co. v. Hintz, 132 Ill. 265, 23 N. E. 1032; Elgin, J. & E. R. Co. v. Fletcher, 128 Ill. 619, 21 N. E. 577; Grand Lodge, I. O. F. S. I. v. Ohnstein, 110 Ill. App. 312; Kapischki v. Koch, 180 Ill. 44, 54 N. E. 179; Chalmers v. Tandy, 111 Ill. App. 252; Meriden Hydro-Carbon Arc Light Co. v. Anderson, 111 Ill. App. 449; Leahy v.

Stone, 115 Ill. App. 138; Pierce v. Perkins, 17 N. C. (2 Dev. Eq.) 250; Scarritt Furniture Co. v. Moser, 48 Mo. App. 543; Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539; Jones v. Baltimore & P. R. Co. 5 Mackey, 8; Spicer v. Bonker, 45 Mich. 630, 8 N. W. 518; Baylis v. Travellers' Ins. Co. 113 U. S. 316, 28 L. ed. 989, 5 Sup. Ct. Rep. 494; Lord v. Bigelow, 124 Mass. 185.

The court may direct a verdict for the defendant when the opening statement of plaintiff's counsel shows no case or facts upon which a recovery could be had for plaintiff.

Oscanyan v. Winchester Repeating Arms Co. supra; Kelly v. Hendrie, 26 Mich. 253; Spicer v. Bonker and Jones v. Baltimore

cases, the question presented is whether the facts stated or proved, and reasonable inferences which may be drawn therefrom, disclose that the plaintiff is not entitled to submit his case to the jury, because a verdict in his favor could not be maintained. In practice, a motion for a nonsuit, made upon the opening of counsel, is, perhaps, more liberally treated than an application for a nonsuit at the close of the plaintiff's case. In the former case, if objection be made to a statement too meager to sustain the plaintiff's case, counsel will doubtless be permitted to enlarge his statement; but, in the haste required by the pressure of business at the present day, counsel in general restrict themselves to a mere outline of the case they design to present. The opening appearing in the bill of exceptions is somewhat meager, and, if objected to on that ground, counsel would, no doubt, have been permitted to make his statement more complete."

And it is error to direct a verdict for the plaintiff where the defendant, in his answer and opening, sets up facts claimed to show payment as a defense which, according to the court's statement, amounts to a "bookkeeper's puzzle or problem," but which the court construes as not showing payment. Butler v. National Home, 144 U. S. 71, 36 L. ed. 351, 12 Sup. Ct. Rep. 581.

And where the opening statement does not show conclusively that the plaintiff was guilty of contributory negligence, and it might reasonably be that there was no negligence, a nonsuit should not be entered. Kelly v. Bergen County Gas Co. supra.

So, where it could not be said as a matter of law that a further barrier to protect travelers along a road was not necessary, an action for an injury claimed to have been sustained by reason of an insufficient barrier should not be dismissed on the opening of counsel. Roblee v. Indian Lake, 11 App. Div. 435, 42 N. Y. Supp. 326.

In Hoffman House v. Foote, 172 N. Y. 350, 65 N. E. 169, the court said that a complaint should not be dismissed upon the opening of counsel unless it clearly appears (1) that the complaint does not state a cause of action; (2) that a cause of action

well stated is conclusively defeated by something interposed by way of defense, and clearly admitted as a fact; or (3) that the counsel for the plaintiff, in his opening address, by some admission or statement of facts, so completely ruined his case that the court was justified in granting a nonsuit. To the same effect is Montgomery v. Boyd, 78 App. Div. 65, 79 N. Y. Supp. 879.

And it is error to enter judgment for defendant where, after plaintiff's opening, defendant moves to dismiss on the ground that an act of Congress constitutes a bar to the action, but it is not made to appear from the record that the money sued for is within the description of the act claimed to be a bar. Liverpool, N. Y. & P. S. S. Co. v. Emigration Comrs. 113 U. S. 33, 28 L. ed. 899, 5 Sup. Ct. Rep. 352.

But a motion to dismiss is properly granted where, from plaintiff's opening statement, it appears that the cause of action did not survive to the plaintiff. Hey v. Prime, 197 Mass. 474, 17 L.R.A.(N.S.) 570, 84 N. E. 141.

And where the plaintiff's opening shows that his action is barred by limitations, a dismissal of the complaint is proper. Preusse v. Childwold Park Hotel Co. 134 App. Div. 384, 119 N. Y. Supp. 98.

And where it shows that the action is based on a contract which is against public policy, the trial court may direct a verdict. Oscanyan v. Winchester Repeating Arms Co. 103 U. S. 261, 26 L. ed. 539.

So, where the opening statement in an indictment against a member of Congress for receiving a bribe shows that, at time of the commission of the alleged offense, he was not a member of Congress, a verdict for defendant is properly directed. United States v. Dietrich, 126 Fed. 676.

And where the plaintiff's opening statement shows that he seeks to recover under an illegal contract whereby he undertook to obstruct the course of justice, and obtain the release from jail of a person so that he might be gotten away, and not appear as a witness, a verdict for the defendant is properly directed. Crisup v. Grosslight, 79 Mich. 380, 44 N. W. 621.

& P. R. Co. supra; Lindley v. Atchison, T. & S. F. R. Co. 47 Kan. 432, 28 Pac. 201; Johnson v. Spokane, 29 Wash. 730, 70 Pac. 122; Reading v. Puget Sound Iron & Steel Works, 36 Wash. 642, 79 Pac. 308; Butler v. National Home, 144 U. S. 64, 36 L. ed. 346, 12 Sup. Ct. Rep. 581; Kluska v. Chicago, 97 Ill. App. 665; Leahy v. Stone, supra; Scarritt Furniture Co. v. Moser, supra; Wilson v. Spring, 64 Ill. 14; 1 Thomp. Trials, 269; Crichfield v. Bermudez Asphalt Paving Co. 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552; Wright v. Cudahy, 168 Ill. 86, 48 N. E. 39.

Cartwright, J., delivered the opinion of the court:

This is a suit in forcible detainer for the

And in Wallace v. Vernon, 3 N. B. 5, which was an action by an assignee for a breach of covenant, it was held that a nonsuit should be granted where, in his opening, he showed that he had parted with his estate in the property.

So, in Lafitte v. Vanderwark, 41 Colo. 270, 92 Pac. 694, where the abstract showed that the lower court dismissed the action on the opening statement of plaintiff's counsel, in which he admitted that the cause had been previously litigated and the judgment satisfied, the lower court's decision was affirmed, although the counsel's statement did not appear in the record.

Where a complaint is dismissed on the opening of counsel, all the facts referred to in his opening or offers of proof should be considered, including facts not stated in the complaint, unless objection to proof of such additional facts is made on the specific ground that it is not admissible under the pleadings. Clews v. Bank of New York Nat. Bkg. Asso. 105 N. Y. 398, 11 N. E. 814; Kley v. Healy, 127 N. Y. 555, 28 N. E. 593; Robertson v. New York, 7 Misc. 645, 28 N. Y. Supp. 13, affirmed in 149 N. Y. 609, 44 N. E. 1128; Scott v. New York, 27 App. Div. 240, 50 N. Y. Supp. 191; Roblee v. Indian Lake, 11 App. Div. 435, 42 N. Y. Supp. 326; St. James Church v. Huntington, 82 Hun, 125, 31 N. Y. Supp. 91.

In disposing of a case on the opening of counsel, nothing should be taken against the party making the statement without full consideration; for it is not a detailed statement of all the evidence, but ordinarily a summary of what is intended to be proven; and the inferences to be drawn should be as comprehensive as the statement will justify. Carr v. Delaware, L. & W. R. Co. (N. J.) 75 Atl. 928.

And counsel should be given opportunity to explain and qualify their statements and to correct any omissions or errors before the court acts on the opening statement. Oscanyan v. Winchester Repeating Arms Co. and United States v. Dietrich, supra.

And counsel should have the benefit of the presumption that they did not intend to make a statement or admission that would

possession of a lot in Chicago, begun by Charles F. Pietsch, the appellee, by filing his complaint in the municipal court of Chicago against Otto E. Pietsch and Helen Pietsch, appellants. After a jury had been impaneled and sworn, the attorney for plaintiff made an opening statement of the case to the jury to the effect that the defendants, who are husband and wife, had made a mortgage or trust deed on the lot, which was foreclosed; that a sale was made under the decree, from which there was no redemption; that a deed was made, in pursuance of the sale, to Charlotte L. Clark; that the property was bought from her by the plaintiff for \$3,000 or \$4,000, and a deed was made to him; that the defendants were in possession of the premises and re-

be fatal to their case. Gross v. Bennington, 52 Wash. 417, 100 Pac. 846.

So, in testing the correctness of the dismissal on the opening statement of counsel, the plaintiffs must be treated as though they have proved every allegation in their complaint and in the opening of counsel. Carr v. Delaware, L. & W. R. Co. supra; Hannigan v. Smith, 28 App. Div. 176, 50 N. Y. Supp. 845; Eckes v. Stetler, 98 App. Div. 76, 90 N. Y. Supp. 473.

And a motion for judgment upon the pleadings and upon the admissions and statements of plaintiff's counsel in his opening admits that counsel's remarks are true. Roberts v. Colorado Springs & I. R. Co. 45 Colo. 188, 101 Pac. 59.

Where the trial court had expressed its intention of directing a verdict upon the plaintiff's opening statement, and counsel attempted to remove a misapprehension of facts by a further statement, but was told to make his statement to the stenographer after the judge finished his charge, his statement should receive the same consideration as if made before the charge. Barto v. Detroit Iron & Steel Co. 155 Mich. 94, 118 N. W. 738.

And where, after the expression of intention to direct a verdict as above, the plaintiff offers a witness to prove the facts alleged in his declaration, such facts must be taken as established. Ibid.

Where a complaint is dismissed on the opening of the plaintiff's counsel, and the opening does not appear in the appeal book, it will be presumed that such statement followed the pleading under which it was made; and it cannot be assumed, even to support a judgment on appeal, that the opening contained either a fatal admission or anything inconsistent with the allegations of the complaint. Kley v. Healy, supra.

But it was held in Johnson v. Spokane, 29 Wash. 730, 70 Pac. 122, that where a judgment of nonsuit was based upon the pleadings and on the opening statement of counsel, and the record on appeal did not contain the opening statement, the appeal should be dismissed, since sufficient of the

fused to surrender possession after demand in writing; that the testimony might show there was some talk concerning an agreement that if the defendants would pay to the plaintiff the amount of money that was represented by his purchase of the property, with interest and costs, within a reasonable time, they might have the property and he would deed it to them; that if it should appear there was an agreement, the plaintiff was still willing to perform it, but that he was claiming the possession of the property in the suit. An attorney for the defendants then stated to the jury, in substance, that the defendant Helen

Pietsch, being the owner of the premises occupied by the defendants as their home, made a mortgage on the same, which was foreclosed; that about the time when the redemption would expire she went to the plaintiff, her brother-in-law, and wanted him to loan her the amount of the mortgage and permit her to remain there; that he let her have the money as a loan, but said he would take the deed in his own name as security; that he put up something over \$4,000; that the matter ran along and she paid him back \$1,000 at one time, \$150 at another, and afterward, \$200 more; that it ran along for three or four years afterward, and she had

record was not presented to enable the court to pass intelligently upon the questions raised.

Where, after plaintiff has opened his case, the court dismisses the complaint on the ground that it fails to constitute a cause of action, and no leave to amend is asked, but an appeal is taken, the complaint on appeal will be treated as if it had been demurred to; and the only question is whether it sufficiently states a cause of action. *Sheridan v. Jackson*, 72 N. Y. 170.

It has been held that, on a motion to dismiss, the plaintiff is concluded by the statement of his counsel as to the character of the cause of action alleged in his complaint, although it may contain another good one, since all reasonable intendments will be permitted in support of a ruling of the court. *Coyle v. Nies*, 25 N. Y. Week. Dig. 556, 6 N. Y. S. R. 194.

It was held in *Steele v. Wells*, 49 N. Y. S. R. 646, 20 N. Y. Supp. 736, that the complaint should not be dismissed on the merits upon the plaintiff's opening statement, but that a simple dismissal of the complaint was all that was allowable.

In Massachusetts it is held that if the plaintiff on his opening fails to state a case, the defendant may request that a verdict be ordered; and the judge, in his discretion, may either then give a decision, or wait until the plaintiff's or the entire evidence has been introduced before deciding the question. *Hey v. Prime*, 197 Mass. 474, 17 L.R.A. (N.S.) 570, 84 N. E. 141.

In Wisconsin it is held that the practice of granting a nonsuit upon the opening statement of the case does not prevail. *Fisher v. Fisher*, 5 Wis. 472; *Haley v. Western Transit Co.* 76 Wis. 344, 45 N. W. 16; *Smith v. Commonwealth Ins. Co.* 49 Wis. 322, 5 N. W. 804.

The court in *Fisher v. Fisher*, supra, said: "It would, undoubtedly, be very convenient, and might frequently save the expense and delay of a long trial, were counsel to state in their opening their case precisely as it could be established by competent evidence, and then take the opinion of the court as to whether the action would lie. And when the trying of causes is confined to old and experienced counsel, there might not be much objection to such a practice. But we are 29 L.R.A. (N.S.)

not aware that the practice of granting a nonsuit upon the opening of counsel has obtained to any extent in this state; and, considering the peculiar circumstances of our people, and the fact that many important causes are necessarily intrusted to inexperienced practitioners, we are of the opinion that the adoption of such a rule of practice would be dangerous to the rights of parties, and we therefore are not prepared to sanction it."

And in *Fletcher v. London & N. W. R. Co.* [1892] 1 Q. B. 122, it was held that the judge at the trial court could not, without counsel's consent, nonsuit the plaintiff on the opening of counsel. Lord Esher said: "I am of opinion that the learned judge struck too soon. I will state the proposition in its broadest form. In my opinion a judge has no right, without the consent of the plaintiff's counsel, to nonsuit the plaintiff upon his counsel's opening statement of the facts. The opening of counsel may be incorrect in consequence of his having had wrong instructions. Owing to some accident, even with the greatest care, the evidence of the witnesses when they are called may differ from that which has been opened by counsel. It is for that very reason that a right of reply is given to the plaintiff's counsel, and in recent times a right to sum up the evidence has been given to the plaintiff's counsel and the defendant's, respectively, after his witnesses have been called. The experience of judges and of practitioners shows that the evidence often turns out to be somewhat different from that which appears in the instructions given to counsel. Therefore I state this proposition in its full extent,—a judge has no right to nonsuit a plaintiff upon his counsel's opening without the consent of the counsel."

The statute in Idaho provides that a judgment or nonsuit may be entered "by the court, upon motion of the defendant, when, upon the trial, the plaintiff fails to prove a sufficient case for the jury." Under this act the fact that the opening statement of plaintiff's counsel fails to state facts sufficient to authorize a recovery is not a ground for a nonsuit. *Wheeler v. Oregon R. & Nav. Co.* 16 Idaho, 375, 102 Pac. 347.

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another piece of property upon which there was a mortgage of \$8,800, and he said he would loan her enough money to take that in. The attorney for the plaintiff objected to the statement relating to other property, and the attorney for the defendants said that he wanted to state to the jury that the plaintiff got his money back by means of a mortgage upon the other piece of property and this one; but the court sustained the objection and an exception was taken to the ruling. Continuing, the attorney stated that the amount was \$4,283.98 upon which payments had been made, and that it was agreed that Mrs. Pietsch should remain in possession of the premises and was entitled to remain there. The court then said: "I assume you have stated all of your defense," and the attorney replied, "Yes, sir." whereupon the court instructed the jury to return a verdict finding the defendants guilty of unlawfully withholding possession of the premises, and that the right of possession was in the plaintiff. The jury returned a verdict accordingly, and the court, after overruling a motion for a new trial, entered judgment on the verdict. The appellate court for the first district affirmed the judgment, and granted a certificate of importance and an appeal to this court.

When the jury had been sworn to try the issues and render a verdict according to the evidence, it was the privilege of the attorney for each party, if he saw fit to do so, to make an opening statement of what he expected to prove. Such a statement is not intended to take the place of a declaration, complaint, or other pleading, either as a statement of a legal cause of action or a legal defense, but is intended to advise the jury concerning the questions of fact involved, so as to prepare their minds for the evidence to be heard. How full it shall be made, within reasonable limits, is left to the discretion of the attorney; but the only purpose is to give the jury an idea of the nature of the action and defense. To relate the testimony at length will not be tolerated. 1 Thomp. Trials, 267. A party is entitled to introduce evidence and prove a cause of action, or to defend against evidence tending to sustain a cause of action, if no statement at all is made, and is not confined in the introduction of evidence to the statement made in the opening, if one is made. The opening statement may be wrong as to some facts, and there is no requirement that it shall give all the facts of the case, which may turn out to be different from the statement. The argument that a court may direct a verdict, not upon the evidence or the want of evidence, 79 L.R.A.(N.S.)

but upon the statement of an attorney, rests mainly upon the power of an attorney to make admissions binding upon his client and to waive his rights. There is no dispute about the authority of an attorney to admit facts on the trial and waive the necessity of introducing evidence as to such facts, but the authorities cited relate to such admission in the trial of the case. That the opening statement to the jury cannot be treated as an admission of facts binding upon the client was decided in *Lusk v. Throop*, 189 Ill. 127, 59 N. E. 529, where the refusal of an instruction that any statement made by the attorney for the plaintiffs in his opening statement, about what the evidence would show, was as binding upon the plaintiffs as if the plaintiffs themselves had made such statement, and as such should be considered by the jury in making their verdict, was indorsed by this court. If the jury could not treat statements of an attorney, in his opening statement, as to what the evidence would show, as admissions of fact, binding on the client, and consider the same in making up their verdict, the same rule must necessarily be applied to the court, and it follows that there was no admission here of the cause of action or that there was no defense to it. Even if it could be said that the attorney admitted that the legal title to the lot was in the plaintiff, and the title could not be tried in forcible detainer, there was no attempt to try the question of title. The title was not involved and could not be tried or determined, but it did not necessarily follow that the plaintiff was entitled to the possession of the property. The law in England is, that a court cannot take such action as was taken in this case upon an opening statement. In *Fletcher v. London & N. W. R. Co.* 65 L. T. N. S. 605, the judge nonsuited the plaintiff on the ground that the opening statement did not show any cause of action, and it was held that the judge at the trial had no right to nonsuit a plaintiff upon his counsel's opening statement without the consent of his counsel. It was pointed out that a suitor might lose his case because his counsel had omitted or misstated something in the opening, and the course adopted in that case was condemned as most dangerous to the rights of litigants. The law is the same in Wisconsin. *Fisher v. Fisher*, 5 Wis. 472; *Haley v. Western Transit Co.* 76 Wis. 344, 45 N. W. 16. The same argument was made to the Wisconsin court that is made here,—that it would be convenient and conduce to the speedy administration of the law and justice to permit the court to decide the case upon an

opening statement,—but while that was conceded by the court, the practice was considered too dangerous to the rights of clients to be sanctioned. It is undoubtedly true that the method adopted in this case would be expeditious, and if there were no omissions or defects in the statement, and it was certain that the evidence would turn out in accordance with it, the court might be enabled to do justice; but it would be a still more expeditious method and equally conducive to the ends of justice for the court to call up the attorneys and examine them and decide the case on what they say before calling a jury, whereby much time, labor, and expense would be saved. But if parties have a right to a trial by jury of the issues made by the pleadings, the verdict must rest upon evidence or want of evidence, and not upon opening statements.

The decision chiefly relied upon in support of the ruling of the court was made in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 26 L. ed. 539; but that was a case where the statement disclosed a contract that was void, as being corrupt in itself and prohibited by morality and public policy. The statement was that the plaintiff sued for commissions on a sale of arms to the Turkish government, of which he was then consul general at the port of New York, and no court would entertain any action upon such a contract. Counsel for appellee is unable to perceive any difference between stating a corrupt cause of action, contrary to public policy and good morals, and failing to state a good cause of action or defense; but the difference is quite apparent. If a cause of action is such as no court would entertain, a court is bound to raise the question in the interest of due administration of justice, and not for the benefit or in the interest of either party. Whether a claim of illegality is made by the pleadings or not, parties cannot compel a court to adjudicate upon alleged rights growing out of a contract void as against public policy, or in violation of public law. *Wright v. Cudahy*, 168 Ill. 86, 48 N. E. 39; *Crichfield v. Bermudez Asphalt Paving Co.* 174 Ill. 466, 42 L.R.A. 347, 51 N. E. 552. In this case the defendants had moved for a continuance for a limited time, and urged as a ground that their remedy against the action was in equity, and that they desired to proceed in a court of equity; but the continuance was denied, and the grounds stated in support of the motion formed no basis for directing the verdict. The judgments of the Appellate Court and the Municipal Court are reversed, and the cause is remanded to the Municipal Court.
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NEBRASKA SUPREME COURT.

HERMAN SCHUSTER

v.

ANTON SCHUSTER et al.

(84 Neb. 98, 120 N. W. 943.)

Cotenants — accounting.

1. A tenant in common who is in sole, exclusive, and adverse possession under claim of title is liable to his cotenant for an accounting for rents and profits.

Limitation of action — cotenants — accounting.

2. An action for the recovery of rents and profits from a cotenant is not barred by the statute of limitations until four years have elapsed from the accruing of such action.

Cotenants — creation of relation — evidence — sufficiency.

3. A., J., L., and H., brothers, by joint contributions of labor and money, purchased 320 acres of farm land, taking the title in the names of all the brothers. The evidence examined, discussed in the opinion, and held, the brothers are tenants in common, and H. may lawfully prosecute and maintain an action for partition and for rents and profits.

(April 13, 1909.)

Headnotes by DEAN, J.

Note. — Liability of cotenants to account for use and occupation or rents and profits.

The earlier cases on this subject are presented in a note to the case of *Gage v. Gage*, 28 L.R.A. 829.

As shown in the earlier note, at common law one cotenant is not required to pay rent for the use and occupation of the premises while he remains in possession, in the absence of an agreement to the contrary, unless he excludes his cotenant; but if he receives rent from a third person, he must account for it. The reason for the rule is that each tenant is entitled to the occupation of the premises, and possession of one tenant in common, or joint tenant, is constructively the possession of all, the possession of one being deemed to be for the benefit of himself and his cotenant.

Mere occupation without ouster.

In harmony with *THURSTIN v. BROWN*, the majority of the cases hold that the mere use and occupation of the common property does not render a tenant in common liable to his cotenant for rent.

As shown in the earlier note, however, a different rule prevails in some jurisdictions. The reason for this difference of opinion, in the absence of other express statutory authority, is probably due to the construction placed upon the statute of 4 and 5 Anne, chap. 16, § 27, which rendered a joint tenant

CROSS APPEALS from a judgment of the District Court for Polk County in an action to partition certain real estate and for an accounting for rents and profits thereof; plaintiff appealing from so much of the judgment as denied an accounting, and defendants appealing from so much as decreed partition. Reversed on plaintiff's appeal.

The facts are stated in the opinion.

Mr. W. M. Cornelius, for plaintiff:

Plaintiff is entitled to rents and profits for the four years preceding the institution of the suit therefor.

Names v. Names, 48 Neb. 701, 67 N. W. 751; Miller v. Mills, 4 Neb. 362.

Messrs. J. J. Sullivan and J. G. Reeder, for defendants:

The plaintiff never paid any consideration for the land, and his rights and ownership therein are measured by the contract, which gave an option for the purchase of an interest in the land after attaining his majority.

Ide v. Leiser, 10 Mont. 5, 24 Am. St. Rep. 17, 24 Pac. 695; Coleman v. Applegarth, 68

or tenant in common liable to his cotenants "for receiving more than comes to his just share or proportion." The construction placed upon the statute by the English courts was that the act only intended to make the tenant accountable for receiving from a stranger, on account of rents and profits of the property, more than his just share, and not for the mere use and occupation. This construction has been followed by some of the American courts, while others hold that the word "receive," as used in the statute, literally meant a receiving of the profits as well as of use and occupation, and renting out of the property.

See, in this connection, subd. III. of the earlier note (28 L.R.A. 832).

In the following cases it was held that the mere use and occupation of the common property does not render the occupying tenant liable to account to his cotenants for such use: McCaw v. Barker, 115 Ala. 543, 22 So. 131; Ryason v. Dunten, 164 Ind. 85, 73 N. E. 74; Hixon v. Bridges, 18 Ky. L. Rep. 1068, 38 S. W. 1046; McLaughlin v. McLaughlin, 80 Md. 115, 30 Atl. 607; Kirchgassner v. Rodick, 170 Mass. 543, 49 N. E. 1015; Carroll v. Carroll, 188 Mass. 558, 74 N. E. 913; Biglow v. Biglow, 75 App. Div. 93, 77 N. Y. Supp. 716; Willes v. Loomis, 94 App. Div. 67, 87 N. Y. Supp. 1486; Cole v. Cole, 57 Misc. 490, 108 N. Y. Supp. 124; Solomon v. Rogers, 13 Pa. Super. Ct. 70; Cannon v. Stevens, 88 Ark. 610, 115 S. W. 388.

The reason for the rule is stated in the last case as follows: "The occupation of . . . [a tenant in common] so long as he does not exclude the other is but the exercise of a legal right. If, for any reason, one does not choose to assert the right of common enjoyment, the other is not obliged to

Md. 21, 6 Am. St. Rep. 417, 11 Atl. 284; Englebert v. Troxell (Englebert v. Pritchett) 40 Neb. 195, 26 L.R.A. 177, 42 Am. St. Rep. 665, 58 N. W. 852; Askey v. Williams, 74 Tex. 294, 5 L.R.A. 176, 11 S. W. 1101.

In the absence of special equities in favor of the plaintiff, a court of equity will not award partition, where the joint owners have covenanted between themselves that the estate shall be held and enjoyed in common only, and for a particular use, which enters into the consideration creating it.

Oliver v. Lansing, 50 Neb. 837, 70 N. W. 369; Hill v. Reno, 112 Ill. 154, 54 Am. Rep. 222; Latshaw's Appeal, 122 Pa. 142, 9 Am. St. Rep. 76, 15 Atl. 676.

Dean, J., delivered the opinion of the court:

The Schuster family came to the United States from Austria in 1877, arriving in Platte county, Nebraska, in midsummer of that year. The members of the family involved in this action consist of the four sons, Anton, Julius, Louis, and Herman,

stay out; and if the sole occupation of one could render him liable therefor to the others, his legal right to the occupation would be dependent upon the caprice or indolence of his cotenant."

A son who, after the death of his father, continues as before to reside upon the father's farm with his two sisters, without objection from them or the other heirs, or any agreement respecting rents or profits, is under no obligation to account for rents and profits, as he is a cotenant, in possession with the consent of the other cotenants. Owings v. Owings, 150 Mich. 609, 114 N. W. 393.

And a tenant in common will not be required to pay rent to his cotenants for the use of a part of a dwelling house, where the use is not such as to amount to a denial of the rights of the cotenants, and there is nothing to prevent them from equally enjoying the property. Lloyd v. Turner, 70 N. J. Eq. 425, 62 Atl. 771.

And so a tenant in possession of a farm is not liable to his cotenants for the use of the common property, where there is nothing to show that he has refused possession to his cotenants, and it also appears that there never was a net income. Rose v. Cooley (N. J. Eq.) 62 Atl. 867.

In Moreland v. Strong, 115 Mich. 211, 69 Am. St. Rep. 553, 73 N. W. 140, it was held that the rule that a tenant in common, in possession by consent of his cotenant, cannot be required to account to the latter for a share of the profits arising from his use of the premises, cannot be carried so far as to permit the tenant in possession to have the exclusive use of the premises, after entry or demand of possession, until the growing crops are matured; that as to such crops, the cotenant may be permitted

who were all minors when they came to America; Anton, the eldest, then being about fifteen years of age. After a brief residence in Columbus, the family, consisting of the parents, the four sons, and one or more minor children who are not involved in this suit, moved onto a rented farm in Platte county, upon which they resided and farmed until 1885 or 1886, when the father of the household and the boys together purchased a farm in Polk county, taking the title in the father's name, and upon which for many years was maintained the Schuster family home; final payment of the purchase price being made about the year 1895 from the proceeds of the farm and the joint earnings of the father and his boys. The testimony shows that, by the industry and

united effort of the father and his boys, both before and for a period long after the latter attained their majority, considerable property, both real and personal, besides the home farm, was accumulated by them and held jointly. This action was brought in Polk county by Herman Schuster, plaintiff and appellee, the youngest of the brothers, and who is hereinafter called the plaintiff, for an accounting of rents and profits and for a partition of 320 acres of farm land in Polk county, purchased, as he alleges, and paid for jointly by him and his brothers, the record title thereof standing in the name of himself and the defendants. In June, 1899, the plaintiff, who testifies he was then twenty-seven years of age, went to the city of Columbus to engage in the business of

to share the proceeds in an accounting in equity upon a bill filed for partition.

In *Bennett v. Bennett*, 84 Miss. 493, 36 So. 452, it was held that an occupying tenant is not liable to the others for rents unless he had occupied more than his proportionate share of the land; and then only for the rent of the excess.

In *Spellbrink's Estate*, 15 Pa. Co. Ct. 506, it was held that tenants in common who are also trustees, and who occupy part of the common realty, are liable to their cotenants for a reasonable rent for the same.

And in *Sharp v. Zeller*, 114 La. 550, 38 So. 449, it was held that a joint owner in possession was accountable to his cotenants for rent.

So, also in *Stephens v. Hewitt* (Tex. Civ. App.) 77 S. W. 229, it was held that a tenant in common who is in possession must account for the rents and profits, although ignorant of the title of his cotenants.

So, a tenant in common who is suffered by his cotenants to sink and operate gas wells on the common property must account to them for their share of the net proceeds of such wells. *Dangerfield v. Caldwell*, 81 C. C. A. 400, 161 Fed. 554.

In Pennsylvania, a tenant in possession may be made to account to the other cotenants by reason of the act of June 24, 1895 (Pamph. Laws, 273). *Lancaster v. Flowers*, 208 Pa. 199, 57 Atl. 526.

And so, also, in South Carolina, the occupying tenant is accountable to his cotenant for the net profits arising from his use of the common property, in excess of his share in the property. *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 683, 31 S. E. 278.

But a father, as occupying tenant, is not required to account for rents and profits used in maintaining his minor children, who also resided on the common property and are his cotenants. *Ibid*.

In an action by one tenant in common against another, to recover the plaintiff's share of the rentals for the common property, collected by the defendant, the plaintiff cannot recover from the defendant for the latter's use and occupation of the prem-

ises, unless he has made such an averment in his statement of claim. *Dorrance v. Ryon*, 35 Pa. Super. Ct. 180.

This note does not include cases involving an account for minerals, etc., taken from the common property, as those are things not, in a proper sense, the products of the land, realized from its use as rents and profits, but are a part of the land itself, and operate as a diminution of the estate.

Construction of state statutes.

A statute entitled, "An Act to Provide for the Liability of Tenants in Common, in Possession, to Their Cotenants, Out of Possession," was held in *Wells v. Becker*, 24 Pa. Super. Ct. 174, not to apply to tenants under a lease for years, but as intended to affect such owners of real estate as are joint tenants, or tenants in common, at common law. The court said that the term "real estate," as used in the statute, did not apply to a chattel real, such as a leasehold.

Under a statute providing that where a cotenant exercised exclusive ownership, destroyed or otherwise injured property held in joint tenancy, or tenancy in common, the party aggrieved should have his action for the injury in the same manner as he would have had if such joint tenancy in common had not existed; one tenant may be held accountable to his cotenant for the mere use and occupation of the common property, and also for rents and profits collected from third persons for the use of the property, on the ground that the use of the property by the cotenant would be the assumption and exercise of exclusive ownership over it, and the nonoccupying cotenant would be the party aggrieved, within the meaning of the statute. *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145.

Under a statute requiring an occupying tenant to account to his cotenant for the profits received by him in excess of his share or proportion, an infant tenant in common has the same right as an adult tenant in common to require the occupying tenant to account; but where he does ac-

manufacturing scales, and it appears the father and the sons were then the owners of three quarter sections of land, one quarter section being the home farm, with the title in the name of the father, and a half section with the title in the names of the four sons jointly, and in which latter tract the father has no claim or interest, about \$3,600 in cash, and a considerable amount of personal property, all of the land having been bought and paid for by the joint earnings of the family and from the sale of the products of the farms. The ownership of the half section of land standing in the names of the Schuster brothers, parties hereto, and the right of plaintiff to participate in the rents and profits arising there-

from, are the questions in dispute between the plaintiff and the defendants.

In his petition the plaintiff alleges, in substance, that himself and the defendants Anton, Julius, and Louis Schuster, who are hereinafter called the defendants, "now are, and for more than five years have been, seised in fee and tenants in common each of the undivided fourth of the S. E. $\frac{1}{4}$ of section 11 and the N. W. $\frac{1}{4}$ of section 13, all in township 15, range 3 W., in Polk county, Nebraska;" that defendants have exclusively used and occupied said premises for eight years; that the rental value of plaintiff's interest therein is \$160 per year, and is unpaid. The defendants filed a joint answer, denying generally the allegations of the petition, and alleging that on May 26,

count, his liability is fixed by the same method of calculation with respect to interest as applies to others who have received and retained the property of an infant. *Watts v. Watts*, 104 Va. 269, 51 S. E. 359.

Under a statute providing that where a tenant "shall take and use the profits or benefits" of the estate in a greater proportion than his interest, he shall account therefor to his cotenants, such tenant is liable to account to the extent of the rental value of the premises. *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609.

A statute rendering a joint tenant or tenant in common, using the common land exclusively, liable to his cotenants for use and occupation, does not change the common-law rule as to parceners, under the rule of construction of statutes that the mention of one is the exclusion of the other, and the court will presume that the law-makers did not change the common-law rule as to parceners. *Ward v. Ward*, 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746.

A statute which provides that one tenant in common may maintain an action for money had and received against his cotenant for receiving more than his just proportion of the rents and profits, and which is construed to justify a recovery only for moneys actually received, exclusive occupancy not being sufficient to create a liability under the statute, does not impair the right of a tenant against whom the premises have been held adversely by his cotenant, to have an allowance made in partition proceedings for the value of the use and occupancy. *Fenton v. Miller*, 116 Mich. 65, 72 Am. St. Rep. 502, 74 N. W. 384.

Occupation under an agreement.

As shown in the earlier note, it is competent for cotenants to make valid contracts with reference to the use of a part or the whole of the common property, or to act as agents for the collection of the rents and profits.

The rule that an action between coten-

ants will not lie for rent does not apply where there is a contract to pay. *Elliott v. Knight*, 64 Ill. App. 87.

The exclusive use by one is a sufficient consideration to support his promise to pay rent at a stipulated rate. *Ayotte v. Nadeau*, supra.

And a tenant in common who occupies the premises under an understanding that rent shall be paid may be charged therefor in a suit for partition. *Wetlaufer v. Ames*, 133 Mich. 201, 103 Am. St. Rep. 449, 94 N. W. 950.

And a tenant in common who occupies the whole estate under an oral agreement to pay his cotenant for the occupancy is liable to the latter in an action at law for the agreed price and rental. *Chapman v. Duffy*, 20 Colo. App. 471, 79 Pac. 746; *Elliott v. Knight* supra.

And where there is an agreement by the occupying tenant to pay for such occupation, although not definite in amount, he may be held to account for the reasonable rental of such property in an action at law. *Carroll v. Carroll*, 188 Mass. 558, 74 N. E. 913.

And to the same effect is *Peirce v. Peirce*, 199 Pa. 4, 48 Atl. 689, where it was held that where one tenant in common agreed to pay his cotenant rent at an amount to be "thereafter agreed upon," an action of assumpsit could be maintained for the use and occupation upon the failure of the parties subsequently to agree upon a fixed sum.

Upon one tenant in common leasing his moiety to his cotenants, the parties are subject to the obligations and entitled to the rights of landlord and tenant. *Schmidt v. Constans*, 82 Minn. 347, 83 Am. St. Rep. 437, 85 N. W. 173.

And a tenant in common in possession by consent, without limit of time, is a tenant at will, or from year to year. *Gregg v. Roaring Springs Land & Min. Co.* 97 Mo. App. 44, 70 S. W. 920.

But such a contract can only exist by virtue of mutual intention and agreement of the parties; the mere fact that one tenant in common, who is permitted to have the exclusive occupation of the entire prop-

1890, the defendants Anton and Julius Schuster purchased and paid for said section 13; that "title to said premises . . . was taken in the name of A. J. L. & H. Schuster Brothers;" that in February, 1893, defendants Anton and Julius Schuster purchased said section 11 for \$4,400, and that "title was taken in the name of defendants Anton Schuster, Julius Schuster, and Louis Schuster, and plaintiff, Herman Schuster," in pursuance of an agreement with plaintiff, which reads: "May 26, 1890. It is herewith agreed that Louis and Herman Schuster may, after they become of age, obtain for home purpose from Anton and Julius Schuster a part of N. W. 13-15-3 by paying the purchase price for it. [Signed] Anton Schuster, Julius Schuster, Louis Schuster,

Herman Schuster;" that it was the understanding between the parties that plaintiff would assist in the work and management of the land, so that by united effort they might accumulate property and build up a large and profitable business; that the written contract and oral agreement were made "for the purpose of encouraging said Herman Schuster in said work, and upon the express promise of said Herman Schuster, as above set forth, and relying thereon;" that the defendants Anton and Julius Schuster consented that legal title to an undivided one-fourth part of said premises be taken in the name of plaintiff; that plaintiff has always failed "to perform his part of said contract, and has never contributed one cent toward the payment of the

erty, agrees to pay his cotenant a reasonable compensation for the use of his undivided share, is not sufficient, in itself, to make his occupancy that of a tenant at will. *Smith v. Smith*, 98 Me. 597, 57 Atl. 999.

Neither would an agreement by one tenant in common to pay his cotenant a specific sum as his share of the monthly income of the property, even though the term "rent" was employed to signify such share, necessarily establish the relation of landlord and tenant, unless it was so understood and agreed. In that case it was held that the evidence failed to show any intention to establish the relation of landlord and tenant between the parties. *Ibid*.

In *Moreira v. Schwan*, 113 La. 643, 37 So. 542, it appeared that one of the joint owners was in possession of part of the common property as a tenant, but applied the rent to pay expenses on other property also owned in common, and it was held that he could not, in opposition to the will of his co-owners, continue to apply the rental to the expenses of the other property; that the rent, under the circumstances, did not enter into all the accounts between the parties, to be used as one of the number might please, but that he was an agent of the joint owners, and was accountable to them for their portion of the rent from the date he was notified to account.

—tenant holding over.

There is some conflict of authority as to the position of a cotenant who holds over after the expiration of a lease for the exclusive possession of the common property.

As shown in the earlier note, some of the cases hold that the presumption is that the cotenant holds possession under his own title, and not under the lease, while others take the position that where the duration of the tenancy is definitely fixed by the terms of the agreement under which the tenant goes into possession of the premises, and he continues to occupy after the close of the term, without a new contract, the rights of the parties are controlled by the terms and conditions of the contract.

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Thus, in *Schmidt v. Constans*, 82 Minn. 347, 83 Am. St. Rep. 437, 85 N. W. 173, it was held that a tenant in common who remains in exclusive possession after the term for which his cotenant's share was leased to him does so in the character of tenant at will, and not as a cotenant, and that the same rules apply as in the case of any other tenant holding over.

But the occupancy of a tenant in common who leased his cotenant's half of the land becomes at the end of the term, as it was before, possession of one tenant in common for all, where he distinctly notifies the cotenant that he will not rent again on the former terms, and they fail to agree. *Long v. Grant*, 163 Ala. 507, 50 So. 914.

And in *Valentine v. Healey*, 178 N. Y. 391, 70 N. E. 913, reversing 77 App. Div. 635, 79 N. Y. Supp. 1149, it was held that the general rule that the landlord may, at his option, hold a tenant who remains in possession after the termination of his lease for another year, upon the terms of the prior lease, does not apply to a tenant in common owning an interest in the premises, but that he may, as such tenant in common, and in opposition to the wishes of his cotenant, permit a firm of which he is a member, and which had a lease of the premises for a definite period, to continue in possession temporarily after the termination of the lease without subjecting it to the liabilities that ordinarily obtain where a tenant holds over.

In case of ouster.

As shown in the earlier note and in *SCHUSTER V. SCHUSTER*, tenants are liable to their cotenants where the latter have been ousted or prevented from sharing the possession of the common property.

To the same effect are the later cases: *Tatum v. Price-Williams* (Fla.) 52 So. 3; *McCrum v. McCrum*, 36 Ind. App. 636, 76 N. E. 415; *Rippe v. Badger*, 125 Iowa, 725, 106 Am. St. Rep. 336, 101 N. W. 642; *Names v. Names*, 48 Neb. 701, 67 N. W. 751; *Willes v. Loomis*, 94 App. Div. 67, 87 N. Y. Supp. 1086; *Smith v. Smith*, 150 N.

mortgage assumed as a part of the purchase price of one of the parcels of land above described;" that plaintiff engaged in a separate scale manufacturing business on money supplied by defendants, and retained the proceeds of the business. Plaintiff's reply denied all the material allegations of new matter in the answer; admitted title to the land was taken in the name of plaintiff and defendants; alleges he was a minor when the written contract was entered into, and that he was never bound thereby. Upon the issues thus presented, the district court, upon trial, rendered judgment of partition in favor of plaintiff and against the defendants, finding and decreeing that plaintiff was an owner of an undivided one-fourth part of the premises in-

involved herein. Upon the question of rents and profits, judgment was rendered against the plaintiff and in favor of the defendants. The usual exceptions were taken by each of the parties, and the cause is brought here for review.

After a careful examination of the entire record, we are convinced the proofs sustain the material allegations of plaintiff's petition. Anton vigorously contends the 320 acres in dispute were brought and paid for without any contribution of either time or money from the plaintiff, but two of his own letters, one under date of June 1, 1906, and one under date of June 16, 1906, written by him to Ilberman, utterly refute his contention on this vital point. In the letters he corroborates the testimony of plaintiff in

C. 81, 63 S. E. 177; Stephens v. Hewitt (Tex. Civ. App.) 77 S. W. 229.

So, a tenant in common who occupies the common property and excludes his cotenant must account to him, though he does not take more than his just share of the rents and profits. Cecil v. Clark, 47 W. Va. 402, 81 Am. St. Rep. 802, 35 S. E. 11.

And the right of a tenant in common to recover for the value of the use from his cotenant, who has excluded him from possession, is not affected by the fact that, but for the inclosure of the land by the tenant in possession, it would not have produced any profits, and would have had no rental value. Stephens v. Taylor (Tex. Civ. App.) 36 S. W. 1083.

And in Renshaw v. First Nat. Bank (Tenn.) 63 S. W. 194, it was held that such tenants must account for rents received during the period of exclusion which are in excess of the enhanced value of the premises, due to its improvement.

Under such circumstances it is sufficient to entitle the plaintiffs to recover in their action for an accounting of the rents and profits to show an ouster by their cotenant, and his subsequent possession, together with the reasonable value of the rents and profits for the period they were precluded from enjoying the profits arising from the property. Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149.

And it was immaterial whether the premises were occupied by the tenant, or leased by him to a stranger. Ibid.

But ouster will not be presumed from exclusive possession by one tenant, but actual ouster must be proved; there is no constructive ouster among tenants in common, but positive acts of hostility must be shown. McLaughlin v. McLaughlin, 80 Md. 115, 30 Atl. 607.

As to presumption of ouster of one tenant in common from long-continued, undisturbed possession by another, see note to Dobbins v. Dobbins, 10 L.R.A. (N.S.) 185.

Position of purchaser of cotenant's share.

A purchaser of land from a tenant in 29 L.R.A. (N.S.)

common, who, though ignorant of the true state of the title, was chargeable with notice by reason of the record of a deed, cannot escape liability to the other tenants for rents and profits on the ground that he expended them in caring for his grantor, under the contract of purchase. Eighmey v. Thayer, 135 Mich. 682, 98 N. W. 734.

Liability to account for rents received.

There is no doubt of the liability of a tenant in common to account to his cotenants for rents and profits of the common property received from a third person, where he has received more than his share. McCaw v. Barker, 115 Ala. 543, 22 So. 131; Regan v. Regan, 192 Ill. 589, 61 N. E. 842; Cheney v. Ricks, 187 Ill. 171, 58 N. E. 234, affirming 87 Ill. App. 388; Van Ormer v. Harley, 102 Iowa, 150, 71 N. W. 241; German v. Heath, 139 Iowa, 52, 116 N. W. 1051; Gregg v. Roaring Springs Land & Min. Co. 97 Mo. App. 44, 70 S. W. 920; Ayotte v. Nadeau, 32 Mont. 498, 81 Pac. 145; Lloyd v. Turner, 70 N. J. Eq. 425, 62 Atl. 771; Myers v. Bolton, 89 Hun. 342, 35 N. Y. Supp. 577; Adams v. Bristol, 126 App. Div. 660, 111 N. Y. Supp. 231, affirmed in 196 N. Y. 510, 89 N. E. 1095; Dorrance v. Ryon, 35 Pa. Super. Ct. 180.

A tenant in common who receives rent from a lessee of the common property may be compelled to account to the other cotenants for their share, under the statute of 4 and 5 Anne, chap. 16, § 27. Enterprise Oil & Gas Co. v. National Transit Co. 172 Pa. 421, 51 Am. St. Rep. 748, 33 Atl. 687; Lancaster v. Flowers, 208 Pa. 199, 57 Atl. 526.

A tenant in common who has been excluded from the common property by his cotenant may require the latter to account for his just share of royalties received from third persons to whom he leased the premises. Cecil v. Clark, 49 W. Va. 459, 39 S. E. 202.

An arrangement for convenience merely, between cotenants, that each shall undertake the collection of his one half of the rents, does not estop one to claim half of

almost every essential particular. The course of Anton's testimony is so devious that he is met at almost every material point by contradictory statements formerly made by himself in his letters to Herman.

The plaintiff testified that a settlement was had between himself and his father and his brothers concerning the cash on hand in the common family fund just before his departure for Columbus in 1899, and that the money then apportioned among them was derived in large part from the sale of farm products from the father's 160 acres and from the 320 acres owned by the four boys. He testified the total amount of cash then on hand was approximately \$3,600, and that it was divided into five parts; the father and each of the boys re-

ceiving approximately \$730. This was denied by Anton and the other defendants. They admitted that money in about the sum named by Herman in his testimony was handed to him about the time of his departure for Columbus, but that it was not given as a settlement or a distribution of the cash on hand, but as a gift from the family. On this point the testimony of Anton and his codefendants is met and overcome by Anton's letter of June 1, 1906, wherein he says to Herman, among other things: "Wel Brother Herman i talkt with Julius and Louis and pa—they said nothing about wether they would or would not pay you a rent. Father said you have a perfect right to come and work and dig monie out of your ground. I thing you should have somting

the excess collected by the other, even though the latter has not collected a full half of the whole rent due, under a statute authorizing a tenant in common to recover his share of his cotenant who has received more than his proportion. *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1, affirming 19 App. Div. 407, 46 N. Y. Supp. 590.

In *Messing v. Messing*, 64 App. Div. 125, 71 N. Y. Supp. 717, it was held that a wife was entitled to maintain an action against her husband for an account for rents and profits received by him from their joint property, held as tenants in entirety.

One of several cotenants of an oil lease, who did not joint in an assignment of the lease to an operator in consideration of a part of the product, and who notified the assignee not to deliver oil to his cotenants, was not entitled to recover the value of his share of the oil in an action against his cotenants without proving that his cotenants had received more than their share. The court said that if he chose to affirm the assignment of the lease, he must take his share with the others upon a distribution of the royalties, after deducting all proper charges and expenses; but if he did not affirm the lease, he could not claim any share in the royalty, and could only look to the lessee as a cotenant who had not acquired his title. *Enterprise Oil & Gas Co. v. National Transit Co.* supra.

Claims by one of two tenants in common against the estate of his deceased cotenant for his proportion of the rents collected by the deceased from each of two pieces of property are several, as arising out of different acts; and a judgment upon the claim as to one piece of property is not a bar to a claim as to the other, especially where, at the time of filing the first claim, the claimant did not know that his cotenant had collected the rent on the property which formed the basis of the second claim. *Gedney v. Gedney*, 160 N. Y. 471, 55 N. E. 1.

Remedy as between cotenants—statutory action of account.

As shown in the earlier note, subd. V. a, 29 L.R.A. (N.S.)

numerous statutes have been enacted in various states to provide for an action of account between cotenants, and in some states it is held that the English statute of 4 and 5 Anne, § 16, under which an action of account lies by one tenant in common against the other, as bailiff, for receiving more than his share, is in force.

—proceedings in equity.

As shown in the earlier note, an action at law for an accounting could not be maintained by a tenant in common against his cotenant, but a resort must be had to equity; and the extension of the action of account under the English statute of Anne was not regarded as interfering with the jurisdiction of courts of chancery in that respect, but that equity extends to matters of account in which the parties are jointly interested, and especially where discovery is sought, or where the accounts are complicated. And so, also, in a bill in equity for partition, an accounting for the rents may also be taken into consideration. This view is followed in the later cases.

Thus, a suit in equity for an accounting of rents and profits may be maintained where the one tenant in common has ousted his cotenant, and retained all the rents and profits collected from the common property. *Starks v. Kirchgraber*, 134 Mo. App. 211, 113 S. W. 1149.

And a bill for partition between tenants in common and for accounting may be maintained in equity where it alleges that the defendant has for many years received all the rents and profits of the common property, and that the accounts in regard thereto are complicated. *Moseley v. Bolster*, 201 Mass. 135, 87 N. E. 606. And to the same effect is *Tatum v. Price-Williams* (Fla.) 52 So. 3.

And in *Cheney v. Ricks*, 187 Ill. 171, 58 N. E. 234, affirming 87 Ill. App. 388, it was held that the remedy against a tenant who had received from a third party more than his share of the rents and profits was by bill in equity for an accounting.

And a separate action for an account for rents received may be maintained in equity

for it, even if we are looser by it, as we have not made waitches by farming it you can figure it yourself we had 730 apice wen you left and now 2135 you can also figure it out yourself how much we made when you was with us. You should know where the money went to but mony or no mony it is ouer home and other people shal not kik us around any more. . . . Wy dit you not come out last January the 15th—dit i not tell you to that effect. you dit not come also you dit not answer me my letter from January the 10th. my mony will be with me after July 20th, if you need it come than and get it. Al you need is a quit claim deed for one fourth ($\frac{1}{4}$) your interest in n. w. $\frac{1}{4}$ of section 13-15-3, also s-east $\frac{1}{4}$ quarter 11-15-3, Polk county, Nebr.

the land will never be divided in 40's but in strips runing through the whole quarters. You can not nor any of us sell to outside partys unles by (mutual agreement of all concerned)." In the trial court Anton testified that the plaintiff was only three years old when they arrived in the United States, and was thus in his tender years a charge upon the family and a hindrance rather than a help, and that he never contributed anything after he reached his majority to aid in farming or stock raising, or to assist in the common enterprise of accumulating property. The plaintiff testifies that he began attending school before the family left Austria, and that he was eight years of age upon their arrival at Columbus, and that he put in practically all of his

after the termination of partition proceedings in which the respective rights of the parties have been determined, where a tenant in common refuses to give his cotenants their respective shares, on the theory that the tenant becomes a trustee of the amount collected, for the benefit of all the tenants in common, in the proportion of their respective holdings. *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407, 45 S. W. 641.

But a tenant in common cannot maintain a bill in equity against his cotenant for a portion of the rents received for the use of the common property, where the amount received is fixed and certain and there is no confusion or complication of accounts between them, since there is a plain and adequate remedy at law for its recovery. *McCaw v. Barker*, 115 Ala. 543, 22 So. 131.

And a court of equity has no jurisdiction of a bill for an accounting of profits, brought by one out of possession, who claims to be a joint owner, against the alleged cotenant, until the question of title is first determined in an action at law. *Swearingen v. Barnsdall*, 210 Pa. 84, 59 Atl. 477.

—in assumpsit.

As shown in the earlier note, there is some conflict of authority among the cases as to whether an action of assumpsit is the proper remedy between cotenants, and under what circumstances it can be maintained. The weight of authority of the cases cited in that note, however, seems to sustain the right to maintain the action, even though there may also be another remedy.

In *McCaw v. Barker*, supra, the court suggested that an action of assumpsit was the proper remedy for a tenant in common to recover his share of the rents received by his cotenant for the use of common property where the amount was fixed and certain. In that case the court dismissed a bill in equity upon the ground that the remedy at law was adequate where the amount was certain, and there was no complication

or confusion of accounts between the cotenants.

Tenants in common may maintain an action of assumpsit to recover their shares of the profits received by their cotenant from a stranger. *Dorrance v. Ryon*, 35 Pa. Super. Ct. 180.

And by virtue of Pennsylvania statute of June 24, 1895 (*Pamph. Laws*, 237), a tenant in common may maintain assumpsit against his cotenant in possession, to recover for the use and occupation of the property. *Ibid*.

Prior to the above-mentioned statute, assumpsit could only be maintained by one tenant against another on an express promise to pay rent or to account. *Enterprise Oil & Gas Co. v. National Transit Co.* 172 Pa. 421, 51 Am. St. Rep. 746, 33 Atl. 687; *Keller v. Lamb*, 10 Kulp, 248, affirmed in 202 Pa. 412, 51 Atl. 982.

An action of assumpsit for use and occupation may be sustained on an agreement of one tenant in common to pay his cotenant a "reasonable rent." *Peirce v. Peirce*, 199 Pa. 4, 48 Atl. 689.

And an action may be maintained against a tenant in common who occupies the whole estate under an oral agreement to pay his cotenant a certain amount for occupancy. *Chapman v. Duffy*, 20 Colo. App. 471, 79 Pac. 746.

And in *Ayotte v. Nadeau*, 32 Mont. 498, 81 Pac. 145, it was held that an action for the reasonable value of the occupation and use may be maintained by one cotenant against the other, as to the net profits resulting from such occupation, whether they be the result of rents received from third persons, holding under one cotenant, or from the profitable use by the cotenant himself. The court said that the occupant becomes the bailee for his cotenant, and may be charged as such under a statute rendering a tenant in common or a joint tenant, who exercises exclusive ownership over the common property, liable to his cotenant in the same manner as if such tenancy did not exist.

But in *Kran v. Case*, 123 Ill. App. 214, it was held that an action of assumpsit

time from early boyhood until he was twenty-seven years of age in farm work and kindred occupations upon the lands of the family in the furtherance of the joint enterprise, and that the proceeds of all of his skill and labor went into the common family fund. Again Anton, after denials on the witness stand, corroborates the statement of Herman by his letter of June 16, 1906, which he identifies as having been written by himself, and which reads as follows:

Silver Creek, Nebr. 6/16 1906.

Dear Brother Herman:—

In regard to yours of the 12th i state that it was written by all 3 of us. it is not ouer intention to bet you or run you short. ouer

time and all we saved went to Father up to 21 yeahrs and even latter and it is only fair if yours goes the same way. Then we commenced with nothing as the cattle that was on hand would hardly have covered the then existing indeptenes. all the mony that was payd for the land up to 1,000 dollars was on hand before you reashed your age. afterwards you put in six yeahrs with us. and through those 6 yeahrs each one of us saved 218 Dollars a yeahr. The land was bought for home purpose and not for selling or speculating. also a deed to that effect will never be signed by any of us. Louis and Julius do not want it and i myself do not care for it (i am about workt out) but in order to have pieise in the family and as i do consider you as a brother yet, i

cannot be maintained by one tenant in common against his cotenant, for his proportion of the rents accruing from the common property, as the theory of liability in such a case is not based upon the existence of a promise, either express or implied.

And in *Wells v. Becker*, 24 Pa. Super. Ct. 174, it was held that a tenant in common cannot maintain assumptit against his cotenants to recover for the use and occupation of his one-half interest in a leasehold estate, in the absence of an agreement to pay rent therefor, or an ouster, on the ground that the statute authorizing an action for use and occupation did not apply to tenants under a lease for years, but was intended to affect such owners of real estate as are joint tenants or tenants in common at common law.

The interests of the parties in a building, erected on their common property by one cotenant, at his own expense, under an agreement that when the rents received by him were equal to one half the cost of the building, they were to be equally divided between them, cannot be adjudicated in an action at law for the rents collected and retained for the use of the building. *Ayotte v. Nadeau*, supra. The court suggested in that case that an action for ejectment was required for that purpose.

—necessity of a demand.

A complaint containing no allegation of a demand for a general accounting and a refusal by the defendant states no cause of action. *Ayotte v. Nadeau*, supra.

A tenant in common must make a demand upon his cotenant for an accounting within a reasonable time to entitle him to maintain an action therefor, and what is a reasonable time is a question of fact. *Ela v. Fla.*, 70 N. H. 163, 47 Atl. 414.

The commencement of an action of ejectment by one tenant in common against a cotenant who has excluded him is a sufficient demand to be let into possession upon which to found a claim for use and occupation in partition proceedings. *Fenton v. Miller*, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.
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Nature and extent of liability.

There is some conflict among the authorities whether the cotenant who occupies the premises without an agreement with the other, assuming that he is liable at all, is liable as for use and occupation or rental value of the property, or is merely bound to account for profits.

In *Tatum v. Price-Williams* (Fla.) 52 So. 3, which was a bill for an accounting and for partition, the court decreed that the losses incurred in the operation of the property during the period the complainant had been excluded from participating in the operation and benefits should not fall upon such excluded part owner, and that he was entitled to the rental value of his interest in the property while so excluded.

And in *Rippe v. Badger*, 125 Iowa, 725, 106 Am. St. Rep. 336, 101 N. W. 642, it was held that a disseisor is chargeable with the rental value of his cotenant's share of the property, whether the rent is actually received by him or not.

In *McParland v. Larkin*, 155 Ill. 84, 39 N. E. 609, it was held that a tenant in common who occupies the premises to the exclusion of his cotenants must account to them for their share of the rental value of the premises.

So, where one cotenant occupies the common property exclusively, he is liable only for a reasonable rental value where such occupancy is not tortious. *Bennett v. Bennett*, 84 Miss. 493, 36 So. 452.

Some of the cases, however, hold that the liability is for profits, and not for rental value.

Thus, a tenant in common in sole possession, claiming exclusive ownership, taking petroleum oil and converting it to his exclusive use, is liable to account on the basis of rents and profits, and not for annual rental. *Williamson v. Jones*, 43 W. Va. 562, 38 L.R.A. 694, 64 Am. St. Rep. 891, 27 S. E. 411.

So, in *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278, where, as above shown, it is held that there may be a recovery although there was no ouster, it is further held that if the occupying tenant's

offer you 2,000 for your share of it. it will be the biggest 6 years wages you ever had. . . . You can accept my offer or go to law. I think I have done the right and acted right. . . .

Yours truly,
[signed] Schuster Bros.

It is significant that Anton's letter of June 16th corroborates Herman in regard to the latter's age. He says: "All the money that was paid for the land up to 1,000 dollars was on hand before you reached your age, afterwards you put in six years with us." Herman testified he was twenty-seven years of age in 1899 when he left home, and this in effect, is what Anton says in his letter, which contradicts his own testimony at

the trial, and also the testimony of both of his codefendants upon this point. Upon the subject of the litigation herein, the letters of Anton are their own commentary. They require no labored analysis. They disclose a recognition of Herman's title as a tenant in common with his brothers, from which there is no escape. Anton, with pen in hand, writing letters in an unguarded way in June, 1906, furnishes testimony upon the subject in controversy herein more convincing than when, in October, 1907, as a self-interested witness, he testifies upon the same subject. Both letters were identified, introduced in evidence, and attached as exhibits to the record, and form a material part of the case. None of the defendants disavowed their contents at the trial.

possession is not tortious, he must have taken or received more than his just share of the proceeds or products of the common property in order to render him liable to account to his cotenant, in the absence of an agreement.

And such an occupying cotenant may limit his accountability for rents and profits by showing the amount actually received; but where he fails to do so, it may be shown by speculative testimony what he has probably received, and evidence of the fair rental value of the premises is admissible for that purpose. *Ibid*.

So, a tenant in common in possession under the belief of exclusive ownership is liable to account to his cotenant only for what he actually receives. *Adams v. Bristol*, 126 App. Div. 660, 111 N. Y. Supp. 231, affirmed in 196 N. Y. 510, 89 N. E. 1095.

Where the rent received was mostly grain, which was for a time stored by the cotenant, and afterwards sold at a profit, it was proper, when accounting, to charge him with all he had received, and to credit him with the amounts paid out for taxes and labor to protect, store, and market the grain received. *Cheney v. Ricks*, 187 Ill. 171, 58 N. E. 234, affirming 87 Ill. App. 388.

And in *McCrum v. McCrum*, 36 Ind. App. 636, 76 N. E. 415, it was held that a cotenant was only bound to account to the ousted cotenants for the share of the crops actually harvested by him, unless his negligence or wilful misconduct contributed to the injury or destruction of such crops.

In the absence of an express promise of a liquidated sum, a cotenant is obliged to account only for a share of the profits. *Enterprise Oil & Gas Co. v. National Transit Co.* 172 Pa. 421, 51 Am. St. Rep. 746, 33 Atl. 687.

Defendants in an action of account rendered, brought by heirs of their deceased cotenant to recover rents and profits received, cannot show that the decedent had received in his lifetime more than his share of the profits, for which he failed to account, and was thereby indebted to the defendants, since the proposed set-off was not in the same right, inasmuch as it was primarily

against the decedent's personal representatives. *Sieger v. Sieger*, 209 Pa. 65, 58 Atl. 140.

The amount of rents with which a father's estate is chargeable by reason of his having used and enjoyed his infant son's land, which he held in common with his own land, should be fixed and charged according to the value of the rents of the portion set apart for the infant by partition proceedings after the father's death, and not merely of the infant's proportion of the rent of the tract as a whole. *Watts v. Watts*, 104 Va. 269, 51 S. E. 359. The reason assigned by the court in the above case was that the proceedings establishing the metes and bounds of the infant's land could have been instituted when his interest vested in him as well as at a later time; and that it was not done was the fault of those who were using and occupying the land; and that they cannot take advantage of this dereliction of duty, to the prejudice of the infant heir.

Where a tenant in common agreed to pay his cotenant a specific sum per month for the exclusive use of the common property, it was held in *Smith v. Smith*, 98 Me. 597, 57 Atl. 999, that he was entitled in an action for rent to an instruction that, during the time the building was undergoing repairs, and was not in a condition for convenience and full occupancy, there could only be a recovery for what the use of it in its then condition was fairly worth, where the court found that the agreement for its use was not sufficient to establish the relation of landlord and tenant.

—when liable to pay interest.

Interest will be allowed on rents found due from one cotenant to another. *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241; *Starks v. Kirchner*, 134 Mo. App. 211, 113 S. W. 1149.

After demand made and refusal to account, a tenant in possession will be liable to pay interest upon his cotenant's share from the date of demand therefor. *Ela v. Ela*, 70 N. H. 163, 47 Atl. 414.

The defendants undertake to explain the reason why the first tract was taken in the names of all of the brothers jointly in 1890, and to this end, besides oral testimony, they introduce as exhibit 4 the original contract that is set out in full in the outline of defendants' answer in this opinion. This instrument is of doubtful validity. When it was dated, plaintiff was yet a minor, and he testified he had no recollection of signing it. Besides, the proof shows the tract then purchased was paid for by the contributions of all the brothers. *Cameron v. Nelson*, 57 Neb. 381, 77 N. W. 771; *Dailey v. Kinsler*, 31 Neb. 340, 47 N. W. 1045; *Pillsbury-Washburn Flour-Mills Co. v. Kistler*, 53 Minn. 123, 54 N. W. 1063; *Hansen v. Berthelsen*, 19 Neb. 433, 27 N. W. 423. The defendants'

attempted explanation of their reasons for taking the second tract in the names of the four brothers in 1893 is even less satisfactory than their attempt to explain the purchase of the first tract in that manner. When the second tract was purchased, a part of the purchase money was paid at the time, and notes and a mortgage given by all the brothers for the deferred payments, and the obligations so incurred were paid by all of them. The plaintiff thus shared with the defendants the burdens of the joint enterprise, and must not now be deprived the privilege of sharing with them the benefits. From the record before us, we therefore conclude the judgment of the district court is right in holding plaintiff to be an owner of an undivided one-fourth

And a tenant in common who refuses to pay any portion of the rents which he collects from the common property is liable for the interest thereon from the date of such collection, although he has received no interest himself. *Bates v. Hamilton*, 144 Mo. 1, 66 Am. St. Rep. 407, 45 S. W. 641.

And where a tenant in common mingles his collections of rents from the common property with his own funds, and uses them in his own business, and fails to render an account, he may be held liable for interest on the annual balances of collections over disbursements in an action for an accounting, but not for compound interest. *Myers v. Bolton*, 157 N. Y. 393, 52 N. E. 114, modifying 89 Hun, 342, 35 N. Y. Supp. 577.

But interest cannot be charged in addition to the value of the use or rental of the common property from one in exclusive possession who holds adversely to his cotenant, where no demand for rent was made prior to the bringing of the action. *Names v. Names*, 48 Neb. 701, 67 N. W. 751.

An entry by a tenant in common under a deed purporting to convey the whole estate, under which he claimed the land adversely, may render him liable for interest on his cotenant's share of rents and profits received, under a statute providing that interest shall be allowed on money received to the use of another, and retained without the owner's consent, notwithstanding his cotenant's failure to demand the same. *Armijo v. Neher*, 11 N. M. 645, 72 Pac. 12.

Defendants in an action of account render between tenants in common cannot complain for being charged with interest, where the court makes a reasonable allowance of time for settlement, and charges interest only from the time when the money should have been paid over, and not from the date when it was received. *Sieger v. Sieger*, 209 Pa. 65, 58 Atl. 140.

A father who, as tenant in common with his infant son, takes all the rents arising from the portion of land belonging to the son, occupies the relation of *de facto* guardian, and must account for such rents, with compound interest. *Watts v. Watts*, 104 Va. 269, 51 S. E. 359.
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—deductions.

As shown in the earlier note, the courts have in many instances taken into account the value of improvements made by the tenant in possession from whom an accounting for rents and profits is claimed, and allowed the same to be deducted from the amount found to have been collected and received by such tenant.

A tenant in common exercising control and collecting rents from common property under the belief that he is entitled to hold property is entitled to an allowance for taxes paid and for keeping the premises in ordinary repair. *Adams v. Bristol*, 120 App. Div. 660, 111 N. Y. Supp. 231, affirmed in 196 N. Y. 510, 89 N. E. 1093; *Armijo v. Neher*, 11 N. M. 645, 72 Pac. 12.

And the occupying tenant will be entitled to a deduction for the amount expended for taxes and improvements which inure to the benefit of his cotenants, when compelled to account for such use and occupation. *Sharp v. Zeller*, 114 La. 530, 38 So. 449; *Bennett v. Bennett*, 84 Miss. 493, 36 So. 452; *Smith v. Smith*, 150 N. C. 81, 63 S. E. 177; *Vermillion v. Nickell* (Ky.) 114 S. W. 270.

And the rule is the same where the tenant has received the rents from a third person. *Van Ormer v. Harley*, 102 Iowa, 150, 71 N. W. 241; *German v. Heath*, 139 Iowa, 52, 116 N. W. 1051; *Vaughan v. Langford*, 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 A. & E. Ann. Cas. 91; *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278; *Lloyd v. Turner*, 70 N. J. Eq. 425, 62 Atl. 771.

A tenant in common in possession of the common property, who had applied the rents and profits to the removal of an encumbrance, will not be required, in addition, to account to his cotenants also for rent. *Stokeley v. Flanders* (Ky.) 128 S. W. 608.

But a tenant who applied the rents collected by him to the extinguishment of an encumbrance is not entitled to a credit for payment made after his authority was revoked. *Switzer v. Switzer*, 57 N. J. Eq. 421, 41 Atl. 486.

part of the half section of land, and a tenant in common with the defendants.

The plaintiff alleges that defendants have exclusively used and occupied the half section of land in dispute for eight years, and he contends that he is entitled to remuneration for his share of the premises so occupied by them in the sum of \$160 annually. The answer alleges, and the proof clearly shows, that the defendants denied plaintiff's title, and exclusively occupied and used the land continuously ever since the year 1899. The proof also shows the defendants not only alone occupied the common property, but they held possession thereof adversely under a claim of sole ownership to the exclusion of their cotenant from the enjoyment of any part of the premises, thus bringing

themselves substantially within the rule announced by this court in *Names v. Names*, 48 Neb. 701, 67 N. W. 751, which holds: "A tenant in common who alone occupies the common property, and holds possession adversely as sole owner, or where he excludes his cotenant from the enjoyment of the premises is liable to his cotenant for the rents and profits." The doctrine of the *Names Case*, supra, which was unknown to the common law, finds support in many jurisdictions, and among them are the following: *Edsall v. Merrill*, 37 N. J. Eq. 114, which holds: "A tenant in common who prevents his cotenants from obtaining from the premises held in common their just shares of the income the premises are capable of yielding, or who takes possession of

Under a statute rendering a tenant in common liable to account to his cotenant for use or benefits taken or received from the common property in excess of his due proportion, it was held in *Brady v. Brady*, 2 Conn. 424, 74 Atl. 684, that the due proportion of the rents received by a defendant in an action under the statute could not be determined without a consideration of all the equities between the parties, arising from dealings of either as to the property; that where, so far as the legal title was concerned, each held an equal share, yet, in equity, the defendant might have the right to charge his cotenant with half the cost of a building placed upon the land at his own expense.

But a tenant in common who claims the entire ownership of the property, and prevents his cotenant from sharing possession, can claim for improvements only against the rents, which is the rule applied to all trespassers, for the reason that its converse would enable one man, against the will of another, to improve the latter out of his property. *Renshaw v. First Nat. Bank (Tenn.)* 63 S. W. 194.

A tenant in common who was guardian of his cotenant is entitled to credit for the ward's proportion of the cost of a barn erected on the common property as an offset in the ward's suit for an accounting of rents and profits, though a partition suit has supervened, in which the cost of such barn was not put in issue. *Sutton v. Sutton (Tenn.)* 58 S. W. 891.

Tenants in common who are entitled to an undivided interest in certain land upon which defendant's grantor had erected a permanent improvement are chargeable, as a condition to their right to share the rents, with their share of the improvements as of the date of the filing of the bill to compel defendant to convey, with interest from that date; and are entitled to credit for their share of the net rents and profits as of the date they were received, and to interest thereon, reckoned from the average date thereof. *Sunter v. Sunter*, 204 Mass. 448, 90 N. E. 561.

A cotenant who is a disseisor cannot

compel contribution for improvement. *Rippe v. Badger*, 125 Iowa, 725, 106 Am. St. Rep. 336, 101 N. W. 642.

But in *Starks v. Kirchgraber*, 134 Mo. App. 211, 113 S. W. 1149, it was held that a tenant in common who has ousted his cotenants and paid taxes on the land while in his possession will be entitled to set off the proportionate share of such taxes against his cotenants in a suit for an accounting, on the ground that such taxes were a lien against the land, and the discharge of such lien inured to their benefit.

A tenant in common, in possession under a lease from his cotenant, cannot charge his landlord for repairs made during the tenancy, in an action for partition, in the absence of a special agreement for compensation. *Schmidt v. Constans*, 82 Minn. 347, 83 Am. St. Rep. 437, 85 N. W. 173.

The reason for the rule as announced by the court was that he could only compel such payments because the parties continued to be tenants in common; whereas, by express agreement, the relation of landlord was established, and that therefore both parties were subject to the obligations and entitled to the rights of landlord and tenant. *Ibid.*

Nor for expenses incurred for the restoration of a building destroyed by fire, in excess of the amount received for insurance. *Myers v. Bolton*, 89 Hun, 342, 35 N. Y. Supp. 577.

The occupying tenant will not be given credit for repairs in a suit for an accounting, where it does not appear that they were necessary, or that they added to the rental or permanent value of the premises. *Armijo v. Neher*, supra.

The occupying tenant must pay the taxes and ordinary repairs, and cannot claim credit for such expenditures in a general accounting, where he is not charged with rent for his use. *Cole v. Cole*, 57 Misc. 490, 108 N. Y. Supp. 124.

But where such tenant demands pay from his cotenants for improvements, he must account for the rents and profits. *Eighmey v. Thayer*, 135 Mich. 682, 98 N. W. 734.

the whole, and uses them as his own, and thereby makes a profit, is bound to account to his cotenants either for the rental value of the premises or the profit he has made." See also *Roberts v. Roberts*, 55 N. C. (2 Jones, Eq.) 128; *Woolley v. Schrader*, 116 Ill. 29, 4 N. E. 658. *Medford v. Frazier*, 58 Miss. 241, holds: "A . . . cotenant . . . will be liable only where it is shown that he has occupied more than his rightful share of the common estate, and then only for the rent of the excess." *Cain v. Cain*, 53 S. C. 350, 69 Am. St. Rep. 863, 31 S. E. 278, holds: "An occupying tenant using more than his share of the common property is accountable to his cotenants for the net profits arising from such use." *Berry v. Whidden*, 62 N. H. 473, holds, in substance, that a tenant in common who occupies and receives the income of the whole estate by permission of his cotenant, without any agreement to account, is not liable to his cotenants for a share thereof where it does not appear that he had received any more

than his share of the rents and profits of the common estate. *Shiels v. Stark*, 14 Ga. 429, holds: "[6] Occupancy by one cotenant of the joint property by the consent of the other does not necessarily relieve him from the payment of the rent. [7] At common law one tenant in common was not liable to his companion, either for waste or the profits of the joint estate. [8] By the Stat. Westm. II. chaps. 6, 22, and Stat. 4 Anne, chap. 16, § 27, joint tenants and tenants in common have an action for waste as well as an account for the profits." In support of the above propositions the court says: "[7] According to the doctrines of the common law, one tenant in common was not liable to his companion, either for waste or the profits of the joint estate, although he may have embezzled the profits, or appropriated the whole to himself. [8] The injustice of this doctrine was obviated in England by Stat. Westm. II. chaps. 6, 22, and Stat. 4 Anne, chap. 16, § 27: the first giving to joint tenants and tenants in com-

Nor is a tenant in common who collected rents and took care of the property entitled to compensation for his services, as against his cotenants, in the absence of a special agreement. *Switzer v. Switzer*, 57 N. J. Eq. 421, 41 Atl. 486.

A father who, as tenant in common with his infant son, takes all the rents arising from the land, occupies the relation of *de facto* guardian to his son, and as such should not be allowed credit for improvements or repairs. *Watts v. Watts*, 104 Va. 269, 51 S. E. 359.

Lien for rents.

There is considerable conflict among the authorities as to the right of a tenant in common to a lien on property for rents and profits received by the cotenant, and as to the extent to which it may be enforced.

Some cases deny the existence of a lien in favor of a tenant in common against a cotenant's interest in the property for rents collected and received by him in excess of his share; other cases take the view that while there is no fixed lien on the common property for the rents in favor of one cotenant, against another, for which the court will provide for payment from the common property, to the prejudice of persons holding conveyances or liens on the interest of the cotenant owing rent, yet, as among the parties themselves, the court, in decreeing partition, has the power, in doing full justice in the premises, to adjust all demands for rent, and will require the amount found due to be settled from the share of the proceeds of the sale of the property coming to the cotenant owing the rent, or charge it upon the portion allotted to him; while a third class of cases holds that the cotenant's lien for the share of the rents is superior to 20 L.R.A. (N.S.)

the rights of third persons, either as lienors, purchasers, or otherwise.

—view that no lien exists.

In *Burch v. Burch*, 82 Ky. 622, it is held that there is no lien in favor of a joint tenant against his cotenant for rents collected by the latter before a partition of the land. In that case the court considers the question on principle and cites no authority for its conclusion. This decision was followed in *Clark v. Hershy*, 52 Ark. 473, 12 S. W. 1077, and to the same effect are *Brittinum v. Jones*, 56 Ark. 624, 20 S. W. 520; *Dunavant v. Fields*, 68 Ark. 534, 60 S. W. 420.

The reason assigned by the court in *Burch v. Burch* was that the right to partition, which may be enforced at any time, was adequate; that pending the action therefor the chancellor could amply protect the rights of each joint owner by placing the estate in the hands of a receiver, or by other proper provisional remedy; and that therefore there was no reason why there should be a charge or encumbrance upon the interest of one joint owner, either before or after partition, to satisfy a claim of his cotenant for rents and profits received, since it is not the policy of the law to enforce liens for unadjusted and unknown accounts which may affect innocent purchasers and creditors.

And in *Newbold v. Smart*, 67 Ala. 326, it was held that a claim against a cotenant for unequal use and occupation of the common property is a simple contract debt, and creates no lien on the land.

In *Flack v. Gosnell*, 76 Md. 88, 16 L.R.A. 547, 35 Am. St. Rep. 413, 24 Atl. 414, it was held that one tenant in common had no lien against his cotenant's interest in the property for rents in excess of his

mon an action for waste, and the second an account for the profits (5 Bacon, Abr. 304). It is to be presumed from the reasonableness of their provisions that these acts . . . are everywhere treated as the general law of this country. . . . And the court says in Thompson v. Bostick, McMull. Eq. 75: 'There is nothing, I think, in the objection that the defendants did not receive rent, but cultivated the lands themselves. To cultivate and have the use of lands is to receive the rents and profits, though the occupier is his own tenant.' See also Ward v. Ward, 40 W. Va. 611, 29 L.R.A. 449, 52 Am. St. Rep. 911, 21 S. E. 746; Bates v. Hamilton, 144 Mo. 1, 66 Am. St. Rep. 407, 45 S. W. 641. The defendants' answer asserts sole and exclusive ownership. They attempted to substantiate this claim at the trial, thus denying plaintiff's title, and hence also his right to participate in any part of the rents and profits arising from the land.

The plaintiff fairly tendered in his peti-

share, collected and retained by such cotenant before partition of the land. In that case the court sustained a demurrer to so much of the complaint in a partition suit as sought to charge the interest of one of the cotenants, who had made an assignment for creditors, with his cotenant's share of the rents which he had collected and appropriated to his own use.

But in *Wipff v. Heder* (Tex. Civ. App.) 41 S. W. 164, the court refused to sustain a demurrer to a petition for partition for that reason, and held, following the New York decisions, that in partition proceedings a lien may be adjudged against the interest of a tenant who has collected the rents, for the share of the others therein.

—lien as between the parties.

In an action for partition between the cotenants, the judgment may correctly make the amount found due from the one who has received the rents of the premises a lien on his share of the real estate for the excess received beyond the share which belongs to him. *Scott v. Guernsey*, 60 Barb. 180, affirmed in 48 N. Y. 124; see also *Wright v. Wright*, 59 How. Pr. 176.

And so also in the following cases it was held that a cotenant was entitled to a lien on the other share allotted in partition proceedings for his share of the rents collected: *Bennett v. Bennett*, 84 Miss. 493, 36 So. 452; *Wipff v. Heder*, supra; and see *Burns v. Dreyfus*, 69 Miss. 211, 30 Am. St. Rep. 539, 11 So. 107.

And the fact that the rents are collected by the mortgagee of some of the undivided shares is immaterial. *Kingsland v. Chetwood*, 39 Hun, 606.

And in *Kalteyer v. Wipff*, 92 Tex. 673, 52 S. W. 63, it was held that a plaintiff establishing his right to a portion of property 29 L.R.A. (N.S.)

tion an issue upon the question of the rents and profits, and supported it by proof upon the trial. An examination of the record and the law applicable to the facts therein disclosed convinces us that fair dealing demands an accounting between the parties. We conclude, therefore, that the learned trial court erred in rendering judgment against the plaintiff upon this feature of the case.

It is therefore ordered that so much of the judgment as is in favor of the defendants be and it hereby is reversed, and the cause remanded, with directions to take an accounting of the rents and profits of the land in controversy herein for a period of four years next before the beginning of this action, and to render a judgment in favor of plaintiff and against the defendants therefor in such amount as plaintiff may be entitled to recover in accordance with the views expressed in this opinion, and that in all else the judgment of the District Court be, and it hereby is, affirmed.

in partition proceedings was entitled to a judgment against all the defendants thereto for a charge upon their several interests for rents received. The court said, however, that a tenant in common has no lien upon the share of his cotenant for rents received by the latter beyond his share in any such sense that a simple action may be maintained for debt and foreclosure, as may be done in the case of an ordinary lien, but the lien or charge is that which courts of equity enforce in decreeing final partition, and adjusting accounts and equities as a preliminary thereto.

In *Roberts v. Beckwith*, 79 Ill. 246, which was an action to recover a one-fifth share of the rents of property of which a man and his wife had been in exclusive possession, although owning only four fifths of it, the court said it was proper to render a decree against the wife as well as against the husband, and make the amount found due a lien on her interest in the property.

Where one cotenant is in receipt of all the rents, and in the exclusive enjoyment of the whole premises, refusing to let his cotenant in, and such ousted tenant has paid money to relieve the common property of encumbrances, the court will declare a charge in favor of such tenant for the amount of his share of the rents, and for the amount which his cotenant should have contributed toward the encumbrances, on the latter's share in the property, to be paid out of the proceeds of the partition sale before division is made. *Holloway v. Holloway*, 97 Mo. 628, 10 Am. St. Rep. 339, 11 S. W. 233.

In *Pitman v. Smith*, 135 App. Div. 904, 120 N. Y. Supp. 193, it was held that the equitable liens for rents against the interest of a tenant in common who collected all the rents entitled his cotenants to a stay of execution against his interest in the com-

KANSAS SUPREME COURT.

ALICE THURSTIN, Appt.,

v.

MAUD L. BROWN et al.

(— Kan. —, 109 Pac. 784.)

Tenants in common — occupation by one tenant — liability for rent.

1. The mere occupation and use of the common property by one tenant in common does not create the relation of land-

Headnotes by GRAVES, J.

mon property, on a judgment in favor of one of the cotenants for his share, until the equities of all the tenants were adjusted; and that such a stay could be had by an order, on motion, in a suit for partition, pending in the same court.

In *Lynch v. Lynch*, 18 Neb. 586, 26 N. W. 390, it was said that the right of the court in partition proceedings to make a lien in favor of a tenant in common against the interest of his cotenant for rents and profits received by such cotenant was not clear, but as no particular objection was made on that ground, the order was affirmed.

—lien as against third persons.

In *Hannan v. Osborn*, 4 Paige, 343, the court said, such rents, although they may form an equitable lien on the premises as between tenants in common while they continue to hold the premises in common, yet are a personal charge upon the individual receiving the same, and upon his death are primarily payable out of his personal estate.

And the heir or devisee of the cotenant who collects the rent will not take his interest charged with the lien in favor of the cotenants. *Platt v. Platt*, 105 N. Y. 488, 12 N. E. 22.

A debt arising in favor of a tenant in common against his cotenants, seised in trust for himself and his cotenant, for rents collected and retained, will not be charged on the trustee's beneficial interest, as against a purchaser without notice from him. *British Mut. Invest. Co. v. Smart*, L. R. 10 Ch. 507.

In *Hill v. Hickin* [1897] 2 Ch. 579, it was held that the amount due for occupation rent from one of several co-owners could not be set off as against the mortgagee from his share upon the distribution of the proceeds of the land, realized in partition proceedings, though it might have been set off against such co-owner personally. And to the same effect are *Burns v. Dreyfus*, 69 Miss. 211, 30 Am. St. Rep. 539, 11 So. 107; *Omohundro v. Elkins*, 109 Tenn. 711, 71 S. W. 590.

And also in *Flach v. Zanderson* (Tex. Civ. App.) 91 S. W. 348, it was held that a defendant in partition proceedings, who

lord and tenant between him and his cotenant, nor render him liable for rent.

Same — when liable.

2. Before a tenant in common will become liable to pay rent to his cotenants for the use and occupation of the common property, his occupancy must be such as amounts to a denial of the right of his cotenant to occupy the premises jointly with him, or the character of the property must be such as to make such joint occupancy impossible or impracticable.

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permitted his cotenant to collect and retain all the rents from the common property for a series of years prior to the foreclosure of a deed of trust on such cotenant's interest, securing money loaned to take up vendor's lien notes on the land, which deed continued the vendor's liens in force, is barred by laches from enforcing his alleged equitable lien against the interest of his cotenant, to the prejudice of the rights of the holder of the deed of trust, when he could have had a receiver appointed at any time, instead of waiting to litigate his right to his share of the rents and profits in partition proceedings.

In *Hines v. Munnerlyn*, 57 Ga. 35, a bill was filed for a partition and to enjoin a sale of the property under a mortgage which had been given by the cotenant in possession. In dealing with the question of rents, the court said that while it might be true that the complainants had not strictly a legal lien upon the corpus of the joint property, or upon their cotenant's one half of it for what he might be indebted to them for the exclusive use of the property, still, the complainants had a clear equitable right to have the share of the joint property charged with the indebtedness in the decree for partition, especially where the cotenant was insolvent; and the lien so decreed would be given precedence over the mortgage. This case was followed in *Arnett v. Munnerlyn*, 71 Ga. 17.

But in *Pope v. Tift*, 69 Ga. 741, it was held that the claim against a cotenant for rent due on account of occupation for a stipulated rental was a mere debt, and was not a lien on his interest in the land, which could take precedence of the purchaser at a mortgage sale of such interest.

In *Beck v. Kallmeyer*, 42 Mo. App. 565, the question is discussed quite fully, and the court decides that if one cotenant mortgages his own undivided interest, and collects the rents accruing from the property, the lien of the cotenant for his share of those rents takes precedence over the mortgage; and this applies as to rents collected either before or after the mortgage, and prior to its foreclosure.

Although in *McArthur v. Scott*, 31 Fed. 521, it was decided that the equitable claim of one tenant in common against his cotenants for rents and profits received in ex-

APPEAL by defendant from a judgment of the District Court for Neosho County in plaintiffs' favor in an action brought to recover rents alleged to be due for the use of certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. A. S. Lapham and S. W. Brewster, for appellant:

Plaintiffs are not entitled to one half of the rental value of the common property for the period it was occupied by defendant.

Towle v. Towle, 81 Kan. 690, 27 L.R.A. (N.S.) 550, 107 Pac. 228; Cross v. Ben-

son, 68 Kan. 495, 64 L.R.A. 560, 75 Pac. 558.

Messrs. W. R. Cline and J. Q. Stratton, for appellees:

A tenant in common in the possession of real estate, holding adverse to her cotenants, is liable for contribution for her share of the rental value of the property.

Towle v. Towle, 81 Kan. 675, 27 L.R.A. (N.S.) 550, 107 Pac. 228; First Nat. Bank v. Carter, 81 Kan. 694, 107 Pac. 234; Mitchell v. Mitchell, 69 Kan. 441, 77 Pac. 98; Dayton v. Donart, 22 Kan. 256; Gattson v. Tolley, 22 Kan. 678; Compton v. People's

cess of his share is superior only to subsequent mortgages or liens.

No trust or equity attaches to crops raised on the common property, in favor of the other cotenants, which they can assert against the purchaser. Kennon v. Wright, 70 Ala. 434.

And to the same effect is Bird v. Bird, 15 Fla. 424, 21 Am. Rep. 296, where it was held that the mortgagee of crops grown by one tenant in common of the land, who had possession of the entire estate, was not responsible as trustee to the other infant tenant in common of the land with the mortgagor, for crops raised and appropriated to the payment of his mortgage debt.

Application of statute of limitations.

As a general rule, the statute of limitations does not commence to run against tenants in common or joint tenants until the relations are determined by partition, or there has been demand to be let into possession, and an actual ouster, or a demand for an account, and a denial of the right. The reason being that, in regard to possession of the common property, there is a presumption that the cotenant is merely exercising the right which the law gives him; and this presumption must in some way be overcome before the possession becomes adverse and the statute of limitations is set in motion.

Thus, in Ela v. Ela, 70 N. H. 163, 47 Atl. 414, it was held that the statute of limitations does not begin to run against an action for accounting between cotenants until after a demand has been made therefor; since the right of a tenant in common to maintain an action against his cotenant does not accrue until after such a demand had been made.

The statute of limitations begins to run against a tenant in common who has ousted his cotenant, from the time of such ouster, in a suit for an accounting. Starks v. Kirchgraber, 134 Mo. App. 211, 113 S. W. 1149.

An entry by a cotenant claiming a title under a deed purporting to convey the whole estate is a constructive ouster, and sufficient to start the statute of limitations as to his obligation to account to his coten-

ants for rents and profits. Armijo v. Neher, 11 N. M. 645, 72 Pac. 12.

But a tenant in common who has, for a number of years, excluded his cotenant from possession, and asks credit in partition proceedings for improvements made during the entire period, cannot equitably have the statute of limitations applied against the excluded tenant's right to an allowance for use and occupation during the same period. Fenton v. Miller, 116 Mich. 45, 72 Am. St. Rep. 502, 74 N. W. 384.

Improvements by a tenant in possession are regarded as paid *pro tanto* by the rents as they accrue; hence, the statute of limitations will not bar rents and profits chargeable against a cotenant claiming the value of improvements in partition. Vaughan v. Langford, 81 S. C. 282, 128 Am. St. Rep. 912, 62 S. E. 316, 16 A. & E. Ann. Cas. 91.

The statute of limitations runs against a set-off in an action of account render between tenants in common until it is pleaded. Sieger v. Sieger, 209 Pa. 65, 58 Atl. 140.

So, a defendant in a suit for an accounting for rents and profits will only be permitted to set off amounts expended for taxes on the common property for the period prescribed by the general statute of limitations before the bringing of the suit. Starks v. Kirchgraber, *supra*.

Recovery against a cotenant for use and occupation is limited to the period prescribed by the general statute of limitations for actions of debt, under a statute giving a tenant in common or joint tenant a right of action against his cotenant for use and occupation of the common property. Keller v. Lamb, 202 Pa. 412, 51 Atl. 982.

In German v. Heath, 139 Iowa, 52, 116 N. W. 1051, it was held that a statute limiting the right to recover for the use and occupation of premises to five years prior to the commencement of an action to recover real property has no application to a suit to quiet title.

And so, also, in Adams v. Bristol, 126 App. Div. 660, 111 N. Y. Supp. 231, it was held that a similar statute had no application to partition proceedings. Affirmed without opinion in 196 N. Y. 510, 89 N. E. 1095.

A. L. R.

Gas Co. 75 Kan. 572, 10 L.R.A. (N.S.) 787, 89 Pac. 1039.

Graves, J., delivered the opinion of the court:

This is an action for rent of real estate. The property was owned and occupied by J. F. Pullen and wife. Pullen died testate, leaving his wife and nine children as his heirs at law. He owned, at the time of his death, three improved lots in the city of Chanute. The character of the improvements does not appear. His children were all past the age of majority when he died, and were not living with him. His wife was not the mother of the children. By his will, he bequeathed one lot to his wife, some personal property to five of his children, and the remainder to his wife and the appellees jointly, "share and share alike." The wife rejected the will and elected to take under the law. The testator and his wife occupied a part of the property as a homestead during his life, and she has continued to occupy it since. On June 14, 1907, the appellees commenced this action in the district court of Neosho county to recover rent of the widow. They recovered a judgment for rent from the date of their father's death, and the widow appeals. There never has been a division or partition of the land.

The sole question in the case, as stated by counsel, is this: Can one tenant in common who occupies the premises be compelled to pay rent to his cotenants, who are not occupants? It is conceded that the appellant and the appellees own the property as tenants in common. As we understand the rule, it is that each tenant has the right to occupy the premises while it is undivided, and, until divided, neither of them is entitled to recover rent from one who occupies, unless such occupant excludes his cotenants from possession. *Scantlin v. Allison*, 32 Kan. 376, 4 Pac. 618; 23 Cyc. Law & Proc. p. 491; 17 Am. & Eng. Enc. Law, p. 692; *Hamby v. Wall*, 48 Ark. 135, 137, 3 Am. St. Rep. 218, 219, 2 S. W. 705, 706.

There is nothing here which shows exclusive possession on the part of appellant, or that the appellees might not occupy the property at the same time. The appellant seems to have been rightfully in possession, and, until she does something to exclude her cotenants from occupancy, she cannot be compelled to pay rent to them. In the case last cited the court said: "It is a well-settled principle of the common law that the mere occupation by a tenant of the entire estate does not render him liable to his cotenant for the use and occupation of any part of the common property. The reason is easily found. The right of each to 29 L.R.A. (N.S.)

occupy the premises is one of the incidents of a tenancy in common. Neither tenant can lawfully exclude the other. The occupation of one so long as he does not exclude the other is but the exercise of a legal right. If, for any reason, one does not choose to assert the right of common enjoyment, the other is not obliged to stay out; and, if the sole occupation of one could render him liable therefor to the other, his legal right to the occupation would be dependent upon the caprice or indolence of his cotenant, and this the law would not tolerate. 4 Kent, Com.* 369; *Freeman, Cotenancy*, 258; *Everts v. Beach*, 31 Mich. 136, 18 Am. Rep. 169; *Israel v. Israel*, 30 Md. 120, 96 Am. Dec. 571; *Fielder v. Childs*, 73 Ala. 567; *Hause v. Hause*, 29 Minn. 252, 13 N. W. 43; *Reynolds v. Wilmeth*, 45 Iowa, 693; *Pico v. Columbet*, 12 Cal. 414, 73 Am. Dec. 550; *Becnel v. Becnel*, 23 La. Ann. 150."

This rule does not apply where one tenant receives rents and profits for the use and occupation of the premises from another.

The judgment of the District Court is reversed, with directions to grant a new trial, and proceed in accordance with the views herein expressed.

All the Justices concur.

NEW YORK COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK, Appts.,

v.

ERIE RAILROAD COMPANY, Respt.

(198 N. Y. 309, 91 N. E. 849.)

Master and servant — hours of labor — right to regulate.

1. The legislature may, under its police power, forbid a railroad company to keep employees who despatch or space trains by telephone or telegraph, on duty more than eight hours in each twenty-four.

Evidence — judicial notice — character of railroad.

2. In support of a statute forbidding corporations which operate a certain class of

Note. — State regulation of relations between railroad companies engaged in interstate commerce and their employees.

The earlier cases on this subject are cited in the note to *State v. Northern P. R. Co.* 15 L.R.A. (N.S.) 134.

The position taken in *PEOPLE v. ERIE R. Co.*, that a state statute forbidding the working of railroad telegraph operators for more than eight hours during the twenty-four may be upheld, notwithstanding the

railroads to keep their employees on duty more than a certain number of hours in each twenty-four, as against the charge of discrimination in favor of individuals, the court may take judicial notice that all roads to which the act could apply must necessarily be operated by corporations.

Conflict of laws — Federal and state hours of labor.

3. The mere fact that Congress has forbidden interstate railroads to keep signal tower operators on duty more than nine hours in each twenty-four does not preclude the state from prescribing a lesser number of hours for such service, where the road is handling both interstate and intrastate traffic.

Same — suspension of Federal statute — right of state.

4. A state statute may be effective to control the hours of labor of a tower man on an interstate railway after the passage of a Federal statute upon the subject and before it takes effect.

(April 20, 1910.)

regulation on that subject by the act of Congress of March 4, 1907, which fixes a maximum of nine hours for such employees, upon the ground that it is competent for the state statute to raise the minimum limit of safety fixed by the Federal statute, by lowering the maximum hours of labor permitted by the Federal statute,—was expressly considered and rejected in *State v. Texas & N. O. R. Co.* (Tex. Civ. App.) 124 S. W. 984, and *State v. Chicago, M. & St. P. R. Co.* 136 Wis. 407, 19 L.R.A.(N.S.)326, 117 N. W. 686, both holding that state statutes fixing a maximum of eight hours of labor during the twenty-four for train dispatchers and telegraph operators are inhibited by the act of Congress.

An eight-hour local statute in relation to railroad telegraph operators was also held, in *State v. Missouri P. R. Co.* 212 Mo. 653, 111 S. W. 500, to be in violation of the act of Congress. The court, however, did not consider the possibility of sustaining this statute upon the ground that it prescribed a shorter day than the Federal statute.

In the Wisconsin case the court said, in effect, that the Federal statute fixing a limit of nine hours is a declaration of a Federal policy on the subject, which would be violated by a state statute excluding interstate railroads from the use of their employees on interstate commerce for one of those nine hours; and calls attention to the fact that the requirement by the state statute of the absence of such an employee during one of those nine hours might be a most serious inconvenience and burden upon interstate commerce.

The further position of *PEOPLE v. ERIE R. Co.*, that in any event the passage of the Federal statute did not operate to take the subject out of the control of the state, or impair the effect of state statutes on the

APPEAL by the People from an order of the Appellate Division of the Supreme Court, Second Department, reversing a judgment of a Trial Term for Rockland County in their favor in an action brought to recover a penalty for the alleged violation of a statute forbidding railroad corporations to keep train dispatchers on duty more than eight hours in each twenty-four. Reversed.

Statement by Hiscock, J.:

This action was brought to recover a judgment against the defendant for a fine, because it permitted or required an employee in charge of one of its block signal towers to be on duty more than eight hours in twenty-four, in violation of the provisions of § 7a of the labor law (now § 8 [chap. 36] of the labor law in the consolidated laws), which reads as follows: "It shall be unlawful for any corporation or receiver operating a line of railroad, either surface, subway, or

same subject, during the year elapsing between the passage of the Federal statute and the time of its taking effect, is also opposed by these Wisconsin and Texas cases just cited.

The position of the New York court on this point, however, is sustained by *State ex rel. Atkinson v. Northern P. R. Co.* 53 Wash. 673, 102 Pac. 876, holding that the act of Congress did not supersede, during the year intervening between its passage and the time of its taking effect, a state statute on the same subject, which took effect during that interval. The court referred to the Missouri and Texas cases above cited, but said that it was unable to concur with the conclusion there reached on this point. It further said, in this connection, that the fact that Congress had entered the field of legislation on the subject, and that a state statute on the same subject must at most have a short life, must have been a persuasive argument before the state legislature against the passage of such an act, but that it has no force in the courts; that the courts must take the statutes as they find them, and can rightly refuse to give them force only when they violate some positive principle of government laid down in the fundamental law; that statutes are not to be overturned on mere principles of comity.

It will be observed that in all of these cases the state statute was by its terms to go into effect after the passage, but before the taking effect, of the Federal statute. The argument already referred to, that it is not competent for the state legislature to cut down the time allowed by the Federal statute to the railroad companies to adjust their business to the requirements of that act, might, perhaps, have somewhat less force, as applied to a state statute passed and in effect before the enactment of the Federal statute.

elevated, in whole or in part in the state of New York, or any officer, agent, or representative of such corporation or receiver, to require or permit any telegraph or telephone operator who spaces trains by the use of the telegraph or telephone, under what is known and termed the 'block system' (defined as follows): Reporting trains to another office or offices or to a train despatcher operating one or more trains under signals, and telegraph or telephone lever men who manipulate interlocking machines in railroad yards or on main tracks out on the lines, or train despatchers in its service whose duties substantially, as hereinbefore set forth, pertain to the movement of cars, engines, or trains on its railroad by the use of the telegraph or telephone in

despatching or reporting trains or receiving or transmitting train orders as interpreted in this section, to be on duty for more than eight hours in a day of twenty-four hours, and it is hereby declared that eight hours shall constitute a day of employment for all laborers or employees engaged in the kind of labor aforesaid; except in cases of extraordinary emergency caused by accident, fire, flood, or danger to life or property, and for each hour of labor so performed in any one day in excess of such eight hours, by any such employee, he shall be paid in addition at least one eighth of his daily compensation. Any person or persons, company or corporation, who shall violate any of the provisions of this section, shall, on conviction, be fined in the sum of not less than

In *Lloyd v. North Carolina R. Co.* 151 N. C. 536, — L.R.A.(N.S.) —, 66 S. E. 604,—an action by an engineer who, at the time of the injury, was employed on a train engaged in interstate commerce, based on the violation of a state statute declaring that engineers shall not work more than sixteen hours in any twenty-four hours,—the court, in answer to the contention that the act of Congress of March 4, 1907, having prohibited railroad companies from requiring or permitting train crews on trains engaged in interstate commerce to work more than sixteen consecutive hours, rendered the state legislation of no effect, said that that view did not obtain in North Carolina. The court added that, conceding that the act of Congress in its present form is a valid law, it has been held that such legislation does not impair or affect state legislation, unless the Federal law is in operation and is prohibitive in its terms, or in some way affects the very question which the state legislation undertakes to regulate and control. There seems to be here a suggestion that the act of Congress would not in any event affect the particular case, since the violation of the state statute on which the action was based occurred before the act of Congress went into effect, though after its passage. There also seems to be a suggestion that the state and Federal statutes on this subject might coexist, and the court cites in this connection its own decision in *Reid v. Southern R. Co.* 150 N. C. 753, 64 S. E. 874, and the decision of the United States Supreme Court in *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; but the relevancy of these cases is not apparent, since the state statutes there involved related to matters as to which Congress had not acted, whereas the state statute involved in the *Lloyd* Case is upon the same subject as the Federal statute.

In the cases thus far cited in this note, the facts were not such as to enable the court to uphold the state statute as applied to intrastate commerce, even if they had been of the opinion that it was pos-

sible to distinguish between the effect of the statute on interstate commerce and intrastate commerce, and to uphold it as to the latter, while holding it unconstitutional as to the former. With respect to the hours of labor of train men, it may be that it is possible to distinguish between interstate commerce and intrastate commerce, and uphold the statute as applied to train men on trains operating wholly within the state, while holding it inoperative as to train men employed on interstate trains. Even that question, however, presents difficulties, or at least might, if the state statute should prescribe a longer day than the Federal statute, since the employment of a train man, even on an intrastate train, for an hour or two more than the limit prescribed by the Federal statute with respect to interstate commerce, might imperil the safety of interstate trains running over the same track. But however it may be with respect to train men, it seems a practical impossibility to discriminate between interstate traffic and intrastate traffic, with reference to the hours of employment of train despatchers or telegraph operators, where the company is engaged in both kinds of traffic. In *State v. Missouri P. R. Co.* supra, the court said that the statute could not stand as legislation upon intrastate commerce alone; that it does not discriminate between telegraph operators assisting in the operation of interstate commerce trains and traffic, but puts them all under the same blanket regulation, and that the indictment, based on the violation of the state statute, equally failed to discriminate between the interstate and intrastate traffic.

There would seem to be greater possibility of distinguishing between interstate traffic and intrastate traffic, in considering state statutes with relation to matters also covered by the Federal safety appliance act.

Thus, it was held in *Detroit, T. & I. R. Co. v. State (Ohio St.)* 91 N. E. 869, that the Ohio statute requiring the use on cars moving between points within the state, of the same kind of automatic coupler that is required by the Federal safety appliance

\$100, and such fine shall be recovered by an action in the name of the state of New York, for the use of the state, which shall sue for it against such person, corporation, or association violating this section, said suit to be instituted in any court in this state having appropriate jurisdiction. Such fine, when recovered as aforesaid, shall be paid without any deduction whatever, one half thereof to the informer, and the balance thereof to be paid into the free school fund of the state of New York. The provisions of this section shall not apply to any part of a railroad where not more than eight regular passenger trains in twenty-four hours pass each way; provided, moreover, that where twenty freight trains pass each way generally in each twenty-four

hours, then the provisions of this section shall apply, notwithstanding that there may pass a less number of passenger trains than hereinbefore set forth, namely eight."

The defendant was engaged in both interstate and intrastate commerce, and the majority of the trains which the employee in question spaced were moving the former.

Messrs. Edward R. O'Malley, Attorney General, and Edward H. Letchworth, for appellant:

The power to regulate the hours of labor of employees engaged in the operation of railway trains is within the police power of the state.

St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep.

act, is not void as an interference with interstate commerce in respect of a matter as to which Congress had exercised its power. The court specifically held, in reply to questions propounded to it, that the car which, at the particular time in question, was carrying intrastate traffic, was not subject to Federal control in such wise as to take it out of the state control, by the fact (1), that it was commonly and usually employed in interstate traffic, although actually employed in intrastate traffic at the time in question, or (2), by the fact that it was a part of a train containing other cars loaded with interstate traffic (and which were therefore subject to the Federal act), or (3), by the fact that the railroad was commonly and usually employed in interstate commerce, and the defendant was engaged in business as an interstate carrier.

It has also been held that a state statute which provides for the survival of a cause of action for the benefit of the estate, in case of the death of the injured person, is not available in an action brought under the Federal railroad companies employers' liability act (act of April 22, 1908), which provides for a right of action for the benefit of the surviving widow or husband and children or parents or next of kin, but makes no provision for survival for the benefit of the estate. Fulgham v. Midland Valley R. Co. 167 Fed. 660. (This proposition was not affected by the reversal of the case in 181 Fed. 91.)

It is clear, under the general principles laid down by the Federal Supreme Court, that the state still retains the right to regulate the relations between railroad companies and their employees, engaged in interstate commerce, in respect of matters not covered by the Federal statutes.

Thus, the provision of the New York labor law requiring railroads to pay their employees semi-monthly in cash was upheld, in New York C. & H. R. R. Co. v. Williams (N. Y.) — L.R.A. (N.S.) —, 92 N. E. 404, against the objection, *inter alia*, that it was an unlawful interference with interstate commerce. The court said that while it re-

lated to the wages of railroad servants employed wholly in the state of New York, as well as to the wages of those whose duty takes them from that state into others, there was no legislation by Congress on the subject, and the statute does not affect interstate commerce directly.

In Pittsburgh, C. C. & St. L. R. Co. v. State, 172 Ind. 147, 87 N. E. 1034, the constitutionality of a statute known as the "full crew act," requiring railroad companies doing business within the state to employ a certain number of train men on each train, was upheld against the objection that it was an unlawful interference with interstate commerce. The court said that, as the statute was presented, there appeared to be no room for asserting that it could not be so construed as to apply only to intrastate trains; but held, perhaps as an alternative ground, that the subject of the state statute was one which, until Congress had acted in respect thereof, was equally within the power of the state and Congress, and that none of the various acts of Congress to which its attention was called (including safety appliance act; act relating to adjustment of controversies between companies and employees; act requiring reports of accidents to Interstate Commerce Commission; act of March 4, 1907, to promote the safety of employees and travelers by limiting the hours of labor; Hepburn act with respect to annual reports as to number of employees, and joint resolution directing Interstate Commerce Commission to investigate and report on use and necessity for block signals, etc.) had touched the particular subject covered by the state statute. The court rejected the contention that the mere fact that Congress had not seen fit to prescribe any specific rule with respect to the number of men required to man interstate trains did not affect the question; and that its inaction on this particular feature of the subject was without significance, in view of its legislation with respect to safety appliances upon engines and cars of interstate trains, limiting the hours of service of employees, etc. G. H. P.

419; Freund, Pol. Power, §§ 116, 316; People v. Phyfe, 130 N. Y. 554, 19 L.R.A. 141, 32 N. E. 978.

The constitutionality of the statutes may be upheld as an exercise by the state of its reserved power to amend corporate charters, although not in terms such an amendment.

Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 20 Sup. Ct. Rep. 33; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 264, 41 Am. St. Rep. 109, 25 S. W. 75; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 746, 19 Sup. Ct. Rep. 419, 64 Ark. 83, 37 L.R.A. 504, 62 Am. St. Rep. 154, 40 S. W. 705; State v. Brown & S. Mfg. Co. 18 R. I. 16, 17 L.R.A. 856, 25 Atl. 246; Roxbury v. Boston & P. R. Corp. 6 Cush. 432; Bangor, O. & M. R. Co. v. Smith, 47 Me. 34; Shaffer v. Union Min. Co. 55 Md. 74.

Railroad corporations and others affected with a public interest are peculiarly subject to the exercise of this reserved power to amend corporate charters.

People v. Phyfe, *supra*; Louisville & N. R. Co. v. Kentucky, 183 U. S. 503, 46 L. ed. 298, 22 Sup. Ct. Rep. 95.

The statutes do not deprive the defendant of liberty or property without due process of law.

Holden v. Hardy, 169 U. S. 366, 42 L. ed. 780, 18 Sup. Ct. Rep. 383; Red River Valley Nat. Bank v. Craig, 181 U. S. 548, 558, 45 L. ed. 994, 1000, 21 Sup. Ct. Rep. 703; New York ex rel. Hatch v. Reardon, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; People ex rel. Rodgers v. Coler, 160 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 148, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; Muller v. Oregon, 208 U. S. 412, 421, 52 L. ed. 551, 555, 28 Sup. Ct. Rep. 324, 13 A. & E. Ann. Cas. 957; State v. Brown & S. Mfg. Co. *supra*.

The statute is not invalid, as depriving the defendant of the equal protection of the laws.

People ex rel. Farrington v. Mensching, 187 N. Y. 8, 10 L.R.A.(N.S.) 625, 79 N. E. 884, 10 A. & E. Ann. Cas. 101; Kentucky R. Tax Cases, 115 U. S. 321, 337, 29 L. ed. 414, 418, 6 Sup. Ct. Rep. 57; Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 293, 42 L. ed. 1037, 1042, 18 Sup. Ct. Rep. 594; Hayes v. Missouri, 120 U. S. 68, 30 L. ed. 578, 7 Sup. Ct. Rep. 350; Barbier v. Connolly, 113 U. S. 27, 32, 28 L. ed. 923, 925, 5 Sup. Ct. Rep. 357; McLean v. Arkansas, 211 U. S. 539, 53 L. ed. 315, 29 Sup. 29 L.R.A.(N.S.)

Ct. Rep. 206; Cook v. Marshall County, 196 U. S. 201, 49 L. ed. 471, 25 Sup. Ct. Rep. 233; Nicol v. Ames, 173 U. S. 509, 43 L. ed. 786, 19 Sup. Ct. Rep. 522; People v. Hannon, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541; Home Teleph. & Teleg. Co. v. Los Angeles, 211 U. S. 265, 281, 53 L. ed. 176, 186, 29 Sup. Ct. Rep. 50; People ex rel. Williams Engineering & Contracting Co. v. Metz, 193 N. Y. 164, 24 L.R.A.(N.S.) 201, 85 N. E. 1070; New York & N. E. R. Co. v. Bristol, 151 U. S. 556, 571, 38 L. ed. 269, 274, 14 Sup. Ct. Rep. 437.

The state has the power to prescribe rules regulating the relation between railroads and their employees, even though indirectly affecting interstate commerce, unless they are in conflict with an express enactment of Congress.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Cleveland, C. C. & St. L. R. Co. v. Illinois, 177 U. S. 514, 516, 44 L. ed. 868, 869, 20 Sup. Ct. Rep. 722; Mobile, J. & K. C. R. Co. v. Mississippi, 210 U. S. 187, 203, 52 L. ed. 1016, 1023, 28 Sup. Ct. Rep. 650; Employers' Liability Cases (Howard v. Illinois C. R. Co.) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141; Peterson v. State, 79 Neb. 132, 14 L.R.A.(N.S.) 292, 126 Am. St. Rep. 651, 112 N. W. 306; Chicago, R. I. & P. R. Co. v. State, 86 Ark. 412, 111 S. W. 456; Missouri, K. & T. E. Co. v. Haber, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488; Gulf, C. & S. F. R. Co. v. Hefley, 158 U. S. 98, 39 L. ed. 916, 15 Sup. Ct. Rep. 802; Hennington v. Georgia, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; Gladson v. Minnesota, 166 U. S. 427, 430, 41 L. ed. 1064, 1065, 17 Sup. Ct. Rep. 624; Southern R. Co. v. King, 57 C. C. A. 284, 160 Fed. 332.

The Federal act cannot affect the case, because by its very terms it was not in operation at the time of this offense.

State v. Northern P. R. Co. 36 Mont. 582, 15 L.R.A.(N.S.) 134, 93 Pac. 945, 13 A. & E. Ann. Cas. 144; Smith v. Alabama, 124 U. S. 472, 31 L. ed. 510, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564.

Mr. George F. Brownell, with Mr. George N. Orcutt, for respondent:

The statute deprives both the employer and the employee of liberty of contract and of property without due process of law, the employer of its capital, and the employee of the wages which he would earn by working more than eight hours, and is therefore in conflict with the state and Federal Constitutions.

Re Jacobs, 98 N. Y. 110, 50 Am. Rep. 636; People v. Marx, 99 N. Y. 377, 52 Am. Rep. 34, 2 N. E. 29; People v. Gillson, 109

N. Y. 389, 4 Am. St. Rep. 465, 17 N. E. 343; Gilman v. Tucker, 128 N. Y. 190, 13 L.R.A. 304, 26 Am. St. Rep. 464, 28 N. E. 1040; Forster v. Scott, 136 N. Y. 577, 18 L.R.A. 543, 32 N. E. 976; Colon v. Lisk, 153 N. Y. 188, 60 Am. St. Rep. 609, 47 N. E. 302; People v. Hawkins, 157 N. Y. 1, 42 L.R.A. 490, 68 Am. St. Rep. 736, 51 N. E. 257; People ex rel. Rodgers v. Coler, 166 N. Y. 1, 52 L.R.A. 814, 82 Am. St. Rep. 605, 59 N. E. 716; People v. Orange County Road Constr. Co. 175 N. Y. 84, 65 L.R.A. 33, 67 N. E. 129; People ex rel. Cossey v. Grout, 179 N. Y. 417, 72 N. E. 464, 1 A. & E. Ann. Cas. 39; Schnaier v. Navarre Hotel & Importation Co. 182 N. Y. 83, 70 L.R.A. 722, 108 Am. St. Rep. 790, 74 N. E. 561; Wright v. Hart, 182 N. Y. 330, 2 L.R.A.(N.S.) 338, 75 N. E. 404, 3 A. & E. Ann. Cas. 263; People v. Williams, 189 N. Y. 131, 12 L.R.A.(N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 A. & E. Ann. Cas. 798; Boyd v. United States, 116 U. S. 616, 29 L. ed. 746, 6 Sup. Ct. Rep. 524; Allgeyer v. Louisiana, 165 U. S. 578, 41 L. ed. 532, 17 Sup. Ct. Rep. 427; Lochner v. New York, 198 U. S. 45, 49 L. ed. 937, 25 Sup. Ct. Rep. 539, 3 A. & E. Ann. Cas. 1133; Adair v. United States, 208 U. S. 161, 52 L. ed. 436, 28 Sup. Ct. Rep. 277, 13 A. & E. Ann. Cas. 764; Colon v. Lisk, supra; People v. Phylfe, 136 N. Y. 554, 19 L.R.A. 141, 32 N. E. 978.

The statute is not in fact or in form an exercise of the reserved power of the legislature, whatever may be the extent of that power to alter or amend charters. It is an amendment of the labor law.

Lord v. Equitable Life Assur. Soc. 194 N. Y. 224, 22 L.R.A.(N.S.) 420, 87 N. E. 443; Re Ashby, 60 Kan. 101, 55 Pac. 336; State v. Haun, 61 Kan. 146, 47 L.R.A. 369, 59 Pac. 340; People v. Atlantic Ave. R. Co. 125 N. Y. 513, 26 N. E. 622.

Assuming that the statute in question is to be construed as an attempt by the legislature to alter or amend the charter of the defendant, the statute cannot be sustained as a valid exercise of that power.

Lord v. Equitable Life Assur. Soc. 194 N. Y. 212, 22 L.R.A.(N.S.) 420, 87 N. E. 443; Berea College v. Kentucky, 211 U. S. 45, 53 L. ed. 81, 29 Sup. Ct. Rep. 33; Shields v. Ohio, 95 U. S. 319, 324, 24 L. ed. 357, 359; Freund, Pol. Power, § 363; Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 685, 690, 43 L. ed. 859, 861, 19 Sup. Ct. Rep. 565; Johnson v. Goodyear Min. Co. 127 Cal. 4, 47 L.R.A. 344, 78 Am. St. Rep. 17, 59 Pac. 304; Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 407, 23 L.R.A. 274, 41 Am. St. Rep. 109, 25 S. W. 75; St. Louis, I. M. & S. R. Co. v. Paul, 173 U. S. 404, 43 L. ed. 740, 19 Sup. Ct. Rep. 410; 25 L.R.A.(N.S.)

Lawrence v. Rutland R. Co. 80 Vt. 370, 15 L.R.A.(N.S.) 350, 67 Atl. 1091, 13 A. & E. Ann. Cas. 475.

The act of Congress fixing nine hours as the day's work of telegraph operators engaged in spacing trains by the block system is exclusive.

Covington & C. Bridge Co. v. Kentucky, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; Freund, Pol. Power, § 85; State v. Chicago, M. & St. P. R. Co. 136 Wis. 407, 19 L.R.A.(N.S.) 326, 117 N. W. 686; Pennsylvania v. Wheeling & Bridge Co. 18 How. 421, 15 L. ed. 435; State v. Missouri P. R. Co. 212 Mo. 658, 111 S. W. 500; State v. Texas & N. O. R. Co. (Tex. Civ. App.) 124 S. W. 984; Chicago, M. & St. P. R. Co. v. Solan, 169 U. S. 133, 42 L. ed. 688, 18 Sup. Ct. Rep. 289.

Hiscock, J., delivered the opinion of the court:

If § 7a of the labor law, above quoted, was a valid enactment in August, 1907, applicable to a block signal tower operator, engaged in spacing interstate and local trains, the order appealed from was erroneous, and the judgment of the trial court correct, because there is no question that during that month the respondent required one of its employees thus engaged to be on duty more than eight hours out of twenty-four, in violation of the provisions of that act. Two reasons are alleged why said statute was not valid and applicable. The first of these is that the legislature had no power to place such a limitation on the right of the respondent to keep such an employee on duty; and the second one is that, such employee being in part engaged in forwarding interstate commerce, Congress had the superior power to regulate his hours of labor, and that it had done this by legislation which barred or superseded the state legislation referred to.

It is clear that the first defense cannot be maintained. The doctrine that the legislature, under proper circumstances and within reasonable limits, may exercise its police power in the regulation of hours and conditions of labor, is now thoroughly and broadly established. One familiar form of this class of legislation is that which has for its object the promotion of the health and welfare of the employee, as especially in the case of women and children. Another class seeks to protect the safety of the public, by limiting the hours of labor of those who are in control of dangerous agencies, lest, by excessive periods of duty, they became fatigued and indifferent, and cause accidents leading to injuries and destruction of life. This statute comes within the

latter class, and this court, in the case of *Pelin v. New York C. & H. R. R. Co.* 102 App. Div. 71, 92 N. Y. Supp. 468, Id., 115 App. Div. 883, 104 N. Y. Supp. 1136, Id., 188 N. Y. 565, 81 N. E. 1171, affirmed a judgment where the basis of the recovery was, as here, that the defendant had permitted or required an employee to be on duty for a length of time in excess of that prescribed by another section of the act which we are now considering.

The counsel for the respondent has reviewed at length the duties discharged and the exact amount of time required in the actual performance thereof by the operator on the occasion in question, and he makes these facts the basis for an argument that no conditions existed which warranted the legislature in fixing the limit which it did, and he insists that the period of service prescribed for this particular class of employees is entirely out of proportion to that permitted to various other employees engaged in the operation of a railroad. His argument is not without force, and very well might be addressed to the legislature as a reason for permitting employment for a larger number of hours. I do not think, however, that we can say that the facts so conclusively show a lack of relation between the legislation and the justifiable ends sought to be gained, that we can condemn the statute as unconstitutional; for, while each of the duties performed by the operator seems simple enough, still as a whole they form quite a complicated series of acts, in the transmission of signals, the giving of orders, and the movement of trains; and, while the actual time occupied in performing these acts is not large, still the employee, for the proper discharge of his duties, is compelled to be on the alert during the entire time of his employment, and it not infrequently happens that lack of active occupation during hours of duty is more trying than work itself. Thus, it is not at all inconceivable that such an employee subjected to too long hours of duty and confinement might become physically fatigued and mentally inert, and make mistakes which would lead to the destruction of life. This being so, it was permissible for the legislature to pass a statute limiting the hours of labor, and it cannot be said that there is no reason or argument to support its judgment that eight hours was a proper limit. The control of such a matter by the legislature would naturally be exercised by virtue of the police power. If the form of the statute in question could be criticized as relating only to corporations engaged in the operation of railroads, and therefore unduly discriminatory against them, it now being settled that an individual as well as a corporation may

operate a railroad (*Phoenix v. Gannon*, 195 N. Y. 471, 88 N. E. 1006), I think that we might take judicial notice of the fact that all of the railroads in the state to which this act could apply are, and almost necessarily must be, operated by corporations, and not by individuals, since the latter have no power to acquire land by eminent domain for railroad purposes. *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 53 L. ed. 530, 20 Sup. Ct. Rep. 370, 15 A. & E. Ann. Cas. 645.

Moreover, even if the statute failed as a valid exercise of the police power, personally I am not doubtful that, under its reserved control over corporations, the legislature might pass such an act in regulation of the performance of the business for which a railroad was organized. *Lord v. Equitable Life Assur. Soc.* 194 N. Y. 212, 237, 22 L.R.A. (N.S.) 420, 87 N. E. 443; *People v. Phyle*, 136 N. Y. 554, 557, 19 L.R.A. 141, 32 N. E. 978; *Chicago L. Ins. Co. v. Needles*, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; *Louisville & N. R. Co. v. Kentucky*, 161 U. S. 677, 40 L. ed. 849, 16 Sup. Ct. Rep. 714; *Worcester v. Norwich & W. R. Co.* 109 Mass. 103.

Equally important and possibly of more difficult solution are the considerations presented by the second defense, that the statute here sought to be enforced trespasses on a field of legislative action which had already been pre-empted by Congress by virtue of its power to govern interstate commerce and those engaged therein, and that, therefore, it was forbidden and nugatory. It will be noted that this defense assumed, as I think correctly, that the labor law purports and attempts indiscriminately and inseparably to regulate the hours of the classes of employees designated whether engaged in interstate or local traffic, and that, therefore, its validity must be tested by the power of the legislature over the former.

This defense is predicated on the fact that Congress passed a statute, approved March 4, 1907 (Act March 4, 1907, chap. 2939, 34 Stat. at L. 1415, U. S. Comp. Stat. Supp. 1909, p. 1170), and taking effect a year later, which, so far as is here material, provided: "No operator, train dispatcher, or other employee who, by the use of the telegraph or telephone, despatches, reports, transmits, receives, or delivers orders pertaining to or affecting train movements, shall be required or permitted to be or remain on duty for a longer period than nine hours in any twenty-four-hour period in all all towers, offices, places, and stations continuously operated night and day." Concededly this statute applied to such an operator as the one whose alleged excessive confinement is complained of here, when en-

gaged in operating interstate traffic, and the reasoning is that, Congress having thus regulated his hours of labor, the state could not prescribe a different or additional regulation applicable to the same man. As is well understood, the general subject of commerce, for the purpose of defining Federal and state jurisdiction in legislation, may readily be divided into three fields. The first is that in which the power of the state is exclusive; the second, that in which the state may act in the absence of legislation by Congress which is controlling and exclusive; the third, that in which the authority of Congress is exclusive, and the states cannot interfere at all. *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 209, 38 L. ed. 962, 965, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087. It is important to keep in mind for the purposes of this discussion, that within the first field are included regulations by the state of local or intrastate commerce, and it is conceded, and therefore the reasons will not be discussed, that the state, acting within the second field, might pass the present statute in the nature of a police regulation of the hours of those engaged in interstate as well as local commerce, unless the Federal statute barred such legislation. Did it do so?

Of course, it is apparent that, if the Federal statute saying that a signal tower operator may not work more than nine hours prevents a state from saying under controlling conditions that he may not work in excess of a lesser number of hours, state legislation of an analogous character on other subjects which readily suggest themselves, such as the proper weight of rails, the safe speed of trains, the necessary proportion of cars to be equipped with air brakes, may be prevented by Federal legislation simply prescribing the minimum rule of precaution, and the protection by the state of the safety of its citizens at least rendered more complicated and difficult; for, unless there shall be in the future such a separation of interstate and local traffic as has not yet occurred, and which might be made extremely burdensome to the railroads, it will seldom happen that agencies employed in moving the former will not also be moving the latter, and therefore, if the state is prevented by a Federal statute like that before us from adopting additional, but not conflicting, requirements which it deems to be necessary, it will be unable to insure the safety of local passengers and traffic. And it is obvious that a factor of safety like that in the present Federal statute, adapted as we must assume to average conditions prevailing throughout the country, often will be quite insufficient under the special conditions prevailing in a given state. In addition, it is

doubtless established by the Employers' Liability Cases (*Howard v. Illinois C. R. Co.*) 207 U. S. 463, 52 L. ed. 297, 28 Sup. Ct. Rep. 141, that a person injured in the course of local traffic, as the result of negligence of an employee, could not predicate a claim for relief on the Federal statute limiting the latter's hours of employment.

Passing these general considerations, when we seek for authorities on the question whether the Federal statute is exclusive and preventive of the state statute, no decision by the Supreme Court of the United States is found rendered upon facts so similar to those here presented as to make it clearly and manifestly controlling. We are obliged to rely on general rules which have been laid down by that learned court from time to time, in the consideration of questions of the same general class, and which do not seem to be always quite harmonious. In *Gulf C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802, the court had before it the question whether a state statute making it unlawful for a railroad company to charge and collect a greater sum for freight than was specified in the bill of lading was, when applied to interstate freight, in conflict with a Federal statute providing that it should be unlawful to charge and collect a greater or less compensation for the transportation of property than was specified in the published schedule of rates provided for by the act. It was conceded that the state act, although incidentally relating to interstate commerce, would be valid as a police regulation in the absence of congressional legislation, but it was held that it conflicted with the latter, and was therefore invalid. Mr. Justice Brewer, writing for the court, said: "Clearly the state and the national acts relate to the same subject-matter, and prescribe different rules. . . . The carrier cannot obey one statute without sometimes exposing itself to the penalties prescribed by the other. . . . In case of such a conflict the state law must yield. . . . The question is not whether in any particular case operation may be given to both statutes, but whether their enforcement may expose a party to a conflict of duties. It is enough that the two statutes operating upon the same subject-matter prescribe different rules. In such case one must yield, and that one is the state law." If we should apply the language quoted with any degree of literalness to the present case, it would be difficult to escape the conclusion that the eight-hour state statute was barred by the Federal statute. But it is to be observed that what was there written was so written in a case where at times it would not be possible to observe the state statute without violating the Fed-

eral one, and an element of possible actual conflict was present, which is absent here, for, of course, a restriction of employment to eight hours does not in any ordinary sense violate the statute against employment in excess of nine hours.

Other cases seem to me to lay down the rule in more liberal terms in favor of the state legislation. In *Missouri, K. & T. R. Co. v. Haber*, 169 U. S. 613, 42 L. ed. 878, 18 Sup. Ct. Rep. 488, and in *Reid v. Colorado*, 187 U. S. 137, 47 L. ed. 108, 23 Sup. Ct. Rep. 92, 12 Am. Crim. Rep. 506, the court had before it the question of alleged conflict between a Federal statute regulating the inspection, etc., of cattle for purposes of interstate shipment, and state statutes relating to the same subject. Congress had adopted an act known as the "animal industry act," which was designed to regulate and prevent the shipment of infected and diseased cattle, and which went into the subject with much detail and completeness. Amongst other things it provided that, for the purposes of the act, "splenic or Texas fever should not be considered a contagious, infectious, or communicable disease," and apparently it was broad enough to authorize a certificate by Federal officials that cattle were free from any disease. Notwithstanding this, the court held in the first case that the state statute was valid which permitted one of its citizens to recover damages sustained by communication to his animals of Texas or splenic fever by cattle being transported in accordance with the Federal statute, and in the last case upheld a statute making it a criminal offense under certain conditions to bring into the state animals without a certificate by state authorities that they were free from disease. It will be observed that in the first case a recovery was had under the state statute on the theory that Texas or splenic fever was communicable, which was expressly negatived by the Federal statute. Mr. Justice Harlan wrote in each case. In the first one he expressly approved as settled law the rule enunciated in *Sinnot v. Davenport*, 22 How. 227, 243, 16 L. ed. 243, 247, and stated "that a statute enacted in execution of a reserved power of the state is not to be regarded as inconsistent with an act of Congress passed in the execution of a clear power under the Constitution, unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or stand together." In the latter case he wrote: "It should never be held that Congress intends to supersede, or by its legislation suspend, the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested" (page 148 of 187 U. S.), 29 L.R.A. (N.S.)

and again cited with approval *Sinnot v. Davenport*.

In *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564, the court passed upon the validity of the statute of Alabama requiring engineers to undergo an examination and obtain a license from a state board of examiners. The point was made that the statute in its application to engineers on interstate trains was a regulation of commerce among the states, and repugnant to the Constitution. This contention was overruled, and the statute held to be a proper exercise of the police power, in the absence of national legislation which prevented it. Speaking upon this subject, it was said, referring to the fact that Congress had prescribed the qualifications for pilots and engineers of steam vessels engaged in the coasting trade and navigating the inland waters of the United States, while engaged in commerce among the states, that the power of Congress "might, with equal authority, be exercised in prescribing the qualifications for locomotive engineers employed by railroad companies engaged in the transportation of passengers and goods among the states, and in that case would supersede any conflicting provisions on the same subject made by local authority. But the provisions on the subject contained in the statute of Alabama under consideration are not regulations of interstate commerce. . . . Considered in themselves, they are parts of that body of the local law, which, as we have already seen, properly governs the relation between carriers of passengers and merchandise and the public who employ them, which are not displaced until they come in conflict with express enactments of Congress in the exercise of its power over commerce, and which, until so displaced, according to the evident intention of Congress, remain as the law governing carriers in the discharge of their obligations whether engaged in the purely internal commerce of the state or in commerce among the states." 124 U. S. 479. See also *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *Gladson v. Minnesota*, 166 U. S. 427, 41 L. ed. 1064, 17 Sup. Ct. Rep. 627.

It would seem to me that, within the authority of these cases and of what was said in deciding them as above quoted, it may be held that, where Congress has prescribed a general minimum limit of safety applicable to average conditions throughout the country in the movement of interstate traffic, a state statute does not trespass upon forbidden territory and become obnoxious because, in response to special conditions prevailing within its limits, it has raised such limit of safety. There is no conflict; the

state has simply supplemented the action of the Federal authorities. It is the same as if Congress had enacted that the classes of employees named might be employed for nine hours or less, and the state had then fixed the lesser number, which was left open by the Federal statute. The form of the latter fixing the outside limit, but not expressly legalizing employment up to that limit, fairly seems to have invited, and to have left the subject open for, supplemental state legislation, if necessary. Such is the view which this court has taken on another occasion in the decision of a question quite identical with that here presented.

The case of *Fitch v. Livingston*, 4 Sandf. 492, was brought on a bond given for the purpose of discharging a vessel which had been attached as the result of a collision occurring in the Hudson river. The question involved in the action pertained to the negligent management of the vessel for which the bond had been given, and this alleged negligence consisted in noncompliance with the statute of the state requiring such a boat in the nighttime to carry and show two lights, one at the bow and the other at the stern. The offending vessel was engaged in interstate business, and the court said: "The great point of the defense is that the propeller was not bound to carry more than one light, because she was a vessel owned in another state, navigating a river subject to the jurisdiction of Congress, under a national enrolment and license. The act of Congress of July 7, 1838, . . . makes it the duty of the master and owner of every steamboat running between sunset and sunrise to carry one or more signal lights." And the court discussed at considerable length and with much care the question whether a Federal statute requiring a boat to show at least one light barred the state statute requiring it to show two lights, and it was held "that the addition of a further qualification is not in direct collision with a law prescribing the first qualification. The act of Congress does not provide that it shall be sufficient for a steamboat navigating at night to be equipped with one light only, or that, if so equipped, she shall be at liberty to navigate in all waters, whether inland or on the coast. . . . The act of Congress of 1838 requires certain safeguards to be observed by steamboats, one of which is that they shall show at night at least one light. A state, finding those safeguards insufficient within its waters, adds others which are necessary to preserve life and property. There is no direct conflict." The judgment in this case, although not reported, was subsequently affirmed by this court without opinion (January 14, 1853). Furthermore, when a libel springing out of this 29 L.R.A.(N.S.)

same collision came before the circuit court of the United States for consideration (*The Santa Claus*, 1 Blatchf. 370, Fed. Cas. No. 12,326), the court took into consideration the fact that the vessel engaged in interstate travel did not show two lights, notwithstanding that the Federal statute only required one. While this view was predicated on common-law principles, instead of on the state statute referred to, it would seem indirectly to be authority for the proposition that the state statute, in accordance with the rules of safety and necessity requiring two lights, would have been held valid, notwithstanding the Federal statute.

We do not, of course, overlook the fact that the court of last resort in four of our sister states, upon the precise question here involved, has adopted a different conclusion than the one we are reaching (*State v. Chicago, M. & St. P. R. Co.* 136 Wis. 407, 19 L.R.A.(N.S.) 320, 117 N. W. 686; *State v. Missouri P. R. Co.* 212 Mo. 658, 111 S. W. 500; *State v. Texas & N. O. R. Co.* (Tex. Civ. App.) 124 S. W. 984; *State v. Northern P. R. Co.* 36 Mont. 582, 15 L.R.A.(N.S.) 134, 93 Pac. 945, 13 A. & E. Ann. Cas. 144, but necessarily, in the absence of what we regard as adverse controlling authority of the Supreme Court of the United States, we follow the views of our own court, as above cited.

It has been urged, and in one or more of the decisions of other states cited above it was held, that at least the provisions of the state statute would be controlling during the period elapsing between the date of the enactment of the Federal statute and the date, a year later, when it took effect; and in this connection it is pointed out that the alleged violation of the state statute in this case took effect within the period mentioned.

It seems to me that this contention is well founded and sensible. The general rule is, and necessarily must be, that a statute does not become controlling until it actually becomes operative. And it readily will be seen how unfortunate and paralyzing might be the results of any contrary doctrine in this case. From the passage by both Congress and state legislatures of legislation on this subject of hours of employment, we must assume that it was a subject reasonably requiring legislative regulation in the interest of the public. Congress legislating for the entire country might have deemed it wise under all of the circumstances to allow two or even three years within which all of the different employers affected by its statute might prepare to comply with the requirements thereof. If the theory of the respondent is correct, no state within that time, however urgent or pressing the necessity and demand for prompt action under special

conditions prevailing within its borders, might pass any law which would cover even this interval, because general and average conditions throughout the country might be satisfied by such a statute becoming effective at some rather remote day in the future. I do not believe that such a result should be tolerated or adjudged under the facts of this case, even though it should be decided that there was a conflict between the Federal and the state legislation after the former became effective.

These views were adopted in a well-reasoned opinion by the supreme court of Montana, in *State v. Northern P. R. Co.* supra, although that court disagreed with us in the conclusions reached on the first branch of this case.

These views lead to a reversal of the order appealed from, and to an affirmance of the judgment of the trial court, with costs in both courts.

Cullen, Ch. J., and Gray, Edward T. Bartlett, Werner, and Willard Bartlett, JJ., concur. Chase, J., absent.

UNITED STATES SUPREME COURT.

EDWARD S. THOMAS, Trustee, etc., of
Charles I. Lightstone, Bankrupt, Appt.,
v.
SOLOMON M. SUGARMAN.

(218 U. S. 129, 54 L. ed. 967, 30 Sup. Ct. Rep. 650.)

Appeal — in bankruptcy case — time for taking.

1. An appeal to the Federal Supreme Court from a decree of a circuit court of appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt in fraud of creditors need not be taken within the thirty days prescribed by general orders in bankruptcy No. 36, for appeals under the bankrupt act, but the appellate jurisdiction being under, or the same as that under, the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, the appeal is in time if taken within a year.

Election of remedies — effect — pursuing two remedies.

2. The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud

of creditors, make an election which prevents him from suing in equity to set aside such transfer.

(May 31, 1910.)

APPEAL from the United States Circuit Court of Appeals for the Second Circuit to review a decree affirming a decree of the District Court for the Southern District of New York sustaining a plea in bar to a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt as in fraud of creditors. Reversed.

The facts are stated in the opinion.

Messrs. Abram I. Elkus and Carlisle G. Gleason, with Messrs. James, Schell, & Elkus, for appellant:

The trustee became the legal custodian of and entitled to the physical custody of all property of every kind in the bankrupt's possession. The property belonging to third persons passed to the trustee pending the determination of ownership. The bankrupt could not assert an outstanding title in anyone else as against his trustee.

Re Beal, 1 Low. Dec. 323, Fed. Cas. No. 1156; Re Vogel, 7 Blatchf. 18, Fed. Cas. No. 16,982; Re Moses, 1 Fed. 845; Re Smith, 100 Fed. 795.

The trustee took the property subject to all the rights of third parties, and in the same condition in which the bankrupt had it.

Re New York Economical Printing Co. 49 C. C. A. 133, 110 Fed. 514.

The turnover order is not a judgment or decree for the payment of money against the bankrupt, but a mere order for delivery of assets to the trustee. It is merely an assertion of possessory rights.

Re Schlesinger, 42 C. C. A. 207, 102 Fed. 117.

The doctrine of election of remedies applies only where the remedies asserted are irreconcilable.

15 Cyc. Law & Proc. pp. 257, 261; Mills v. Parkhurst, 126 N. Y. 93, 13 L.R.A. 472, 26 N. E. 1041; Re Garver, 176 N. Y. 336, 68 N. E. 667.

The trustee did nothing which will bar the claims of creditors.

Bowdish v. Page, 153 N. Y. 104, 47 N. E. 44; Furness v. Ewing, 2 Pa. St. 479; Butler v. Hildreth, 5 Met. 49.

The doctrine of election of remedies seems to have developed from the doctrine of equitable estoppel, and some courts have held that, to bar a creditor from setting aside a fraudulent transfer made by a debtor, the elements of equitable estoppel must be present.

Jenness v. Berry, 17 N. H. 549; Robins

NOTE.—The question involved in the second headnote to *THOMAS v. SUGARMAN* was commented upon editorially when the decision of the circuit court of appeals in that case was reported in 15 L.R.A. (N.S.) 1267. No additional cases touching the question have been found.

29 L.R.A. (N.S.)

v. Wooten, 128 Ala. 379, 30 So. 681; Wood v. Potts, 140 Ala. 425, 37 So. 253.

The trustee and creditors are not barred by the doctrine of election of remedies.

Butler v. O'Brien, 5 Ala. 316; Torreyson v. Turnbaugh, 105 Mo. App. 439, 79 S. W. 1002; Crumbaugh v. Kugler, 3 Ohio St. 544; Furness v. Ewing, supra; Millington v. Hill, 47 Ark. 301, 1 S. W. 547; Cunningham v. Campbell, 3 Tenn. Ch. 708; Goldnamer v. Robinson, 11 Ky. L. Rep. 630; Pulsifer v. Waterman, 73 Me. 233; Briggs v. Merrill, 58 Barb. 389; Arnold v. Hoschildt, 69 Minn. 101, 71 N. W. 829; Kells v. McClure, 69 Minn. 60, 71 N. W. 827; Lemay v. Bibeau, 2 Minn. 291, Gil. 251; Hathaway v. Brown, 22 Minn. 214; Barker v. Phillips, 11 Rob. (La.) 190; E. S. Bonnie & Co. v. Perry, 117 Ky. 459, 78 S. W. 208; Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Butler v. Hildreth, supra; Fitts v. Beardsley, 28 N. Y. S. R. 658, 8 N. Y. Supp. 567; Rennick v. Bank of Chillicothe, 8 Ohio, 529; Crook v. First Nat. Bank, 83 Wis. 31, 35 Am. St. Rep. 17, 52 N. W. 1131; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Dietz v. Field, 10 App. Div. 425, 41 N. Y. Supp. 1087; Cobb v. Hatfield, 46 N. Y. 533; Terry v. Munger, 121 N. Y. 161, 8 L.R.A. 216, 18 Am. St. Rep. 803, 24 N. E. 272; Goodwin v. Griffis, 88 N. Y. 629.

Sugarman had no right of action against the trustee, and no right of action against anyone else, by reason of the fraudulent transfer. He was in *pari delicto* with the bankrupt, and the court would leave him where it found him.

Wheeler v. Sage, 1 Wall. 518, 17 L. ed. 646; Selz v. Unna, 6 Wall. 327, 18 L. ed. 799; Milwaukee & M. R. Co. v. Soutter, 13 Wall. 517, 20 L. ed. 543; McMullen v. Hoffman, 174 U. S. 639, 43 L. ed. 1117, 19 Sup. Ct. Rep. 839; Goodrich v. Houghton, 134 N. Y. 115, 31 N. E. 516.

The vendee's act being actually fraudulent, he would not be entitled, upon final judgment against him for the property transferred, to have credit for the money he had paid the vendor.

Lynch v. Burt, 67 C. C. A. 305, 132 Fed. 417; Johnston v. Forsyth Mercantile Co. 27 Fed. 845; Burt v. C. Gotzian & Co. 43 C. C. A. 59, 102 Fed. 937; Baldwin v. Short, 25 N. Y. 560, 26 N. E. 928; Fowler v. Dearing, 6 App. Div. 221, 39 N. Y. Supp. 1034; Conde v. Hall, 92 Hun, 335, 37 N. Y. Supp. 411.

Under the fraudulent conspiracy charge in the complaint, the bankrupt and Sugarman are jointly and severally liable to the trustee. The pursuit of one, and the gaining of judgment against him where that judg-

ment is not satisfied, would not bar action against the other.

Watts v. British & A. Mortg. Co. 9 C. C. A. 98, 23 U. S. App. 257, 60 Fed. 483; Lovejoy v. Murray, 3 Wall. 1, 18 L. ed. 129; Russell v. McCall, 141 N. Y. 437, 38 Am. St. Rep. 807, 36 N. E. 498; Osterhout v. Roberts, 8 Cow. 43; Preston v. Hutchinson, 29 Vt. 144.

Mr. John J. Crawford, for appellee:

In seeking to recover the proceeds of sale as a part of the bankrupt's estate, the complainant necessarily affirmed the sale, and hence he may not now proceed upon the theory that the sale was void.

Robb v. Vos, 155 U. S. 13, 39 L. ed. 52, 15 Sup. Ct. Rep. 4; Connihan v. Thompson, 111 Mass. 272; Butler v. Hildreth, 5 Met. 49; Sickman v. Abernathy, 14 Colo. 174, 23 Pac. 447; Hathaway v. Brown, 22 Minn. 214; Millington v. Hill, 47 Ark. 301, 1 S. W. 547; Bank of Iron Gate v. Brady, 184 U. S. 665, 46 L. ed. 739, 22 Sup. Ct. Rep. 529; William W. Bierce v. Hutchins, 205 U. S. 340, 51 L. ed. 828, 27 Sup. Ct. Rep. 524; Furness v. Ewing, 2 Pa. St. 479; Cunningham v. Campbell, 3 Tenn. Ch. 708; Butler v. O'Brien, 5 Ala. 316; Lemay v. Bibeau, 2 Minn. 291, Gil. 251; Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Rennick v. Bank of Chillicothe, 8 Ohio, 529; Scarf v. Jardine, L. R. 7 App. Cas. 345, 19 Eng. Rul. Cas. 738.

The election is determined by the commencement of the proceeding, and not by the result.

Robb v. Vos, supra; Re Garver, 176 N. Y. 386, 68 N. E. 667; Lowenstein v. Glass, 48 La. Ann. 1422, 20 So. 890; Smith v. Gilmore, 7 App. D. C. 192; Theusen v. Bryan, 113 Iowa, 496, 85 N. W. 802; Thomas v. Watt, 104 Mich. 201, 62 N. W. 345; Ludington v. Patton, 111 Wis. 208, 86 N. W. 571.

One of the tests applied in cases of election is whether the two actions could be prosecuted at the same time.

Fowler v. Bowery Sav. Bank, 113 N. Y. 455, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172.

Persons acting in a fiduciary capacity may be bound by their election between inconsistent remedies.

Fowler v. Bowery Sav. Bank, 113 N. Y. 450, 4 L.R.A. 145, 10 Am. St. Rep. 479, 21 N. E. 172; Fitts v. Beardsley, 28 N. Y. S. R. 658, 8 N. Y. Supp. 567; Butler v. Hildreth, supra.

Mr. Justice Holmes delivered the opinion of the court:

This is a bill in equity brought by a trustee in bankruptcy to set aside a transfer

of accounts and bills receivable, made by the bankrupt to the defendant, Sugarman, with intent to delay and defraud creditors. Sugarman pleaded in bar that the plaintiff had ratified his dealings because, with knowledge of all the facts, the plaintiff had taken a judgment against the bankrupt for \$17,500, a part or all of which was money remaining in the bankrupt's hands of \$30,000, alleged by the bill to have been paid to him by Sugarman in pursuance of the fraudulent scheme. A majority of the circuit court of appeals held the ratification made out, on the ground that, to get the judgment, the trustee had to rely upon a right inconsistent with that now set up. 15 L.R.A. (N.S.) 1267, 85 C. C. A. 337, 157 Fed. 669. The plaintiff appealed to this court.

It is argued that the appeal was too late because not taken within thirty days after the decree, as required by general orders in bankruptcy No. 33, for appeals under the act. But this is not an appeal under the act, § 25, by authority of which the general order was adopted, and is not governed by that order. The appellate jurisdiction is under or is the same as that under the court of appeals act of March 3, 1891, chap. 517, § 6, 26 Stat. at L. 828, U. S. Comp. Stat. 1901, p. 549. *Knapp v. Milwaukee Trust Co.* (1910) 216 U. S. 545, 54 L. ed. 412, 30 Sup. Ct. Rep. 412. The appeal was taken within a year and was in time.

On the merits we are of opinion that the decision was wrong. We are quite ready to assume what the court below was at some trouble to establish—that an act of election directed toward a third person may operate *in rem* and establish title as to all parties concerned. But the demand of the trustee on the bankrupt, even when enforced by a resort to the courts and by judgment, had no element of election about it. The legal title to the money had been in the bankrupt, and was transferred by the statute to the trustee. (§ 70). He was entitled to have that money in his hands as against the bankrupt in any event, whether he decided to hand it back to Sugarman or to distribute it in dividends. The law had put him in the bankrupt's shoes with additional powers. Therefore to insist that the bankrupt should do what the statute required him to do was as consistent with a subsequent rescission of the bankrupt's fraudulent acquisition of title as with an affirmation of it. It had no relation to that question, except possibly to put the plaintiff in a position better to decide it.

Decree reversed.

29 L.R.A. (N.S.)

ILLINOIS SUPREME COURT.

MATTHEW H. MCCARTHY, Appt.,
v.

HENRY CRAWFORD.

(238 Ill. 38, 86 N. E. 750.)

Broker — conversion of security — bona fide purchaser.

The owner of a certificate of indebtedness of a corporation, which was issued by its receivers and is transferable on the books of the company, having a blank for assignment on its back, who indorses it in blank and delivers it to his brokers for sale, is bound by their act in transferring it to a bona fide purchaser for value, although the major portion of the purchase price is represented by cancellation of their indebtedness to him.

(October 26, 1908.)

Note. — Effect of putting paper or securities transferable by delivery or indorsed or assigned in blank, into another's possession, to estop owner as against purchaser in good faith.

This note includes only cases where the person by whom the securities were transferred to the bona fide purchaser came rightly into possession, without the commission of crime or fraud, and wrongfully disposed of the paper. As indicated in the title, the note is further limited to cases where the appearance of ownership or right to transfer was created merely by the delivery of the paper, transferable by delivery or indorsed in blank, and does not include cases where there was an express assignment or a specific indorsement of the paper to the person in possession, with a secret understanding or agreement qualifying the apparent title and right to transfer thus created.

Cases like *Bay v. Coddington*, 5 Johns. Ch. 54, 9 Am. Dec. 268, which turn upon the point that the purchaser was not a bona fide purchaser, are also beyond the scope of this note.

As to right of an innocent payee to recover on a note signed in blank and entrusted to a third person, who exceeds his authority in filling up the blanks before delivery to the payee, see note to *Vanler Ploeg v. Van Zuuk*, 13 L.R.A. (N.S.) 490.

As to effect of transfer after maturity of accommodation paper which has been diverted from the use for which it was intended by the accommodating party, see note to *Naef v. Potter*, 11 L.R.A. (N.S.) 1034.

As to title and right to overdue note, as between one who was induced by fraud to transfer it and one who in good faith bought of the fraudulent transferee, see note to *Gardner v. Beacon Trust Co.* 2 L.R.A. (N.S.) 767.

As to rights of owner of negotiable paper payable to bearer or indorsed in blank, as

APPEAL by plaintiff from a judgment of the Branch Appellate Court, First District, affirming a judgment of the Superior Court for Cook County in defendant's favor in an action brought to recover possession of a certificate of indebtedness alleged to have been illegally transferred to defendant by plaintiff's broker. Reversed.

Statement by Dunn, J.:

In 1903 the United States circuit court for the northern district of Illinois appointed James H. Eckels and Marshall E. Sampsell receivers for the Chicago Union Traction Company. The receivers, acting under the authority of an order entered July 10, 1905, with the consent of all the parties, issued to the appellee, Henry Crawford, a certificate

of indebtedness, in which the receivers certified that the Chicago Union Traction Company was indebted to Crawford in the sum of \$10,815.24, with interest at 6 per cent per annum, payable to the registered holder of the certificate quarterly, at the office of the treasurer of said company; that the certificate was one of a series executed by the receivers in conformity with the order of July 10, 1905, to which reference was had; that the registered holder had in all things complied with the conditions of said order, and the claim upon which said certificate was issued had been audited and approved by the receivers under said order as a valid claim against the Chicago Union Traction Company; and that said certificate was registered and transferable only on the

against bona fide purchaser from one unlawfully in possession, see note to Voss v. Chamberlain, 19 L.R.A. (N.S.) 107.

Negotiable paper.

It may be laid down as a general rule that, if the owner of negotiable paper of any kind, payable to bearer or indorsed in blank, delivers it to another in that condition, he is thereby estopped to claim, as against a bona fide purchaser or pledgee for value of the latter.

Thus, it has been held that a payee of a note who indorses it in blank and gives it to his agent to collect the interest and to sell for his benefit, by thus investing the agent with *indicia* of title, is estopped to claim as against one who has bona fide taken it from the agent as a pledge to secure money advanced to the agent, to secure the latter's own debt. *Morris v. Preston*, 93 Ill. 221.

So, the rights of the owner of negotiable paper which is indorsed in blank, and deposited in a receptacle in a bank for safekeeping, are inferior to those of a transferee for value without notice, in due course of business, from a bank official who wrongfully misappropriates the paper and uses it for purposes of his own. *Voss v. Chamberlain*, 139 Iowa, 569, 19 L.R.A. (N.S.) 106, 130 Am. St. Rep. 331, 117 N. W. 269.

The owner of a promissory note indorsed in blank, who intrusts it to another for a special purpose, is estopped to claim as against a bona fide purchaser for value, from the latter, who fraudulently transferred it. *Caruth v. Thompson*, 16 B. Mon. 52, 63 Am. Dec. 559; *Richard v. Charlot*, 122 La. 492, 47 So. 841.

One to whom the payee of a negotiable note transfers it by indorsement in blank, by redelivering to the payee in that condition, thereby clothes the latter with *indicia* of ownership, and is estopped to deny his authority in the premises as against the maker who, in reliance on the payee's apparent ownership, by agreement with the latter, made payment of the note in chat-

tels. *Home Sav. Bank v. Stewart*, 78 Neb. 624, 110 N. W. 947.

An agent having in his possession for discount, sale, safe-keeping, or other purpose on behalf of his principal, bills, notes, or other paper belonging to his principal, indorsed in blank, or in such other form as to permit transfer of title thereto by mere delivery, may be regarded by strangers having no notice of the agency or the capacity in which such paper is held, as the owner thereof, and dealt with accordingly. *Merchants' & M. Nat. Bank v. Ohio Valley Furniture Co.* 57 W. Va. 625, 70 L.R.A. 312, 50 S. E. 880.

One who deposits bills of exchange indorsed in blank with his bankers, to be received by them when due and to be carried to his account, cannot maintain trover for their value against one who in good faith and for value received them as a pledge from the bankers, though the latter wrongfully pledged them, and have become insolvent. *Collins v. Martin*, 1 Bos. & P. 648.

One who allows negotiable bonds payable to bearer to remain in the custody of his agent cannot recover them or their value from a bona fide pledgee thereof of the agent, though the latter was without actual authority to transfer. *Reynolds v. Witte*, 13 S. C. 14, 36 Am. Rep. 678; *Bentinck v. London Joint Stock Bank* [1893] 2 Ch. 120.

In *Goodwin v. Roberts*, L. R. 1 App. Cas. 476, 5 Eng. Rul. Cas. 199, certain foreign governments on negotiating a loan had issued script, which was a written promise that, after all instalments subscribed had been paid, the bearer of the script would be entitled to receive a bond for the amount paid, bearing interest. This script was, by the custom of all the stock markets of Europe, a negotiable instrument. The owner of certain script left it with his broker to be exchanged for bonds, or otherwise disposed of as such owner might desire. The broker fraudulently pledged it for his own debt to a bona fide pledgee. It was held that, by giving the broker *indicia* of title, the owner of the script was estopped from

books of the company by the holder thereof, or his attorney, upon surrender of the same. On the back of the certificate was a printed form of assignment and power of attorney authorizing a transfer on the books of the company, with blank spaces left for the names of the assignor, assignee, and attorney. Crawford signed the certificate on the back in blank and delivered it to A. J. Whipple & Company, brokers in the city of Chicago, with directions to sell for him. On August 24, 1905, the appellant, Matthew H. McCarthy, employed Whipple & Company to purchase for him 100 shares of Atchison, Topeka, & Santa Fé railroad stock. The brokers represented that they had purchased the stock, and on August 28, 1905, McCarthy paid them \$8,616.30, being, with

\$500 theretofore paid, the balance in full therefor. They told him the stock had come from New York, but had to be sent back to be transferred, because it was made out in the wrong name. The statements were false. The stock was not bought and paid for, but the entire amount paid by McCarthy was appropriated by the brokers to the payment of their own debts. In response to the demands of McCarthy for the stock or for his money or security, Whipple & Company, early in September delivered Crawford's certificate of indebtedness to McCarthy to hold as security for the delivery of the stock, telling him that Whipple was the owner of the stock. A few days later McCarthy proposed to buy the certificate of Whipple, and a sale was agreed on at a

reclaiming it or its value from a bona fide purchaser.

This case was followed in *Rumball v. Metropolitan Bank*, L. R. 2 Q. B. Div. 194, in the case of script certificates certifying that, after the payment of certain instalments, the bearer would be entitled to be registered as the holder of shares in a banking company, which certificates were by custom treated as negotiable instruments transferable by mere delivery.

The true owner of promissory notes, to whom they were transferred by the payee for a valuable consideration without any indorsement thereon or other earmark to show that there had been a transfer, and that the payee was not still the owner, who in that condition redelivers to the payee for collection, is estopped from asserting ownership as against an innocent purchaser for value from the payee; and this is true whether the notes are negotiable or non-negotiable because payable in property. *Atlanta Guano Co. v. Hunt*, 100 Tenn. 89, 42 S. W. 482.

Non-negotiable paper.

It may be said generally that where the owner of things in action, although not technically negotiable, has clothed another to whom they are delivered in the method common to all mercantile communities, with the apparent *indicia* of title, he will be estopped from setting up against a second assignee, to whom the securities have been transferred for value and without notice, that the title of the first assignee was not perfect and absolute. *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673.

—certificates of stock.

Where certificates of its stock were, by vote of a corporation, made transferable by indorsement, a stockholder who indorses his certificates in blank and intrusts them to another is estopped to claim as against one who took them in good faith as a pledge from the latter. *Jarvis v. Rogers*, 13 Mass. 105, s. c. on subsequent appeal, 15 Mass. 389. As between the parties the delivery of 29 L.R.A. (N.S.)

the certificate of stock, with assignment and power in blank indorsed, passes the entire title, legal and equitable, in the shares, notwithstanding that, by the terms of the charter or by-laws of the corporation, the stock is declared to be transferable only on its books. *Commercial Bank v. Kortright*, 22 Wend. 348, 34 Am. Dec. 317; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341.

Such provisions are intended solely for the protection of the corporation, and can be waived or asserted at its pleasure, and no effect is to be given to them except for the protection of the corporation. They do not incapacitate the shareholder from parting with his interest, and his assignment, not on the books, passes the entire legal title to the stock, subject only to such liens or claims as the corporation may have upon it, and excepting the right of voting at elections, etc. *Ibid*.

The fact that the owner of stock places it in the hands of another, with authority to transfer it on the books of the corporation, has the effect to clothe the latter with such *indicia* of ownership as to protect one who, in good faith and ignorance of the former owner's rights, advanced money to such other on the hypothecation of the stock. *Brewster v. Sime*, 42 Cal. 147.

Where the owner of certificates of stock of a private corporation signs a blank assignment and power of attorney authorizing the assignee to have the stock represented by the certificates formally transferred to him on the books of the corporation, or authorizing him to assign to another, and containing no limitation of their use by the assignee, and then delivers to another such certificates having such blank assignment and power of attorney indorsed thereon, for a special purpose, such owner will be bound by an unauthorized sale or pledge of such stock by such deliverer to a bona fide purchaser or pledgee having no notice of the ownership or limitation of authority. *Otis v. Gardner*, 105 Ill. 436; *National Safe Deposit, Sav. & T. Co. v. Gray*, 12 App. D. C. 276; *Commercial Bank v. Kortright*, *supra* (pledge); *Fatman v.*

price of 95 per cent of its face, or \$10,274.49. The money McCarthy had paid on the stock purchased was credited on the price of the certificate. The balance, \$1,158.19, McCarthy agreed to pay, and he has ever since retained the certificate. Meanwhile, Whipple & Company having reported to Crawford that they had been unable to obtain an offer for his certificate that they cared to submit to him, on October 9, 1905, Crawford demanded the immediate return of the certificate. Whipple answered that he could not deliver it then because it had been sent to New York, where there were some people who wanted to bid on it. On October 13th a petition in bankruptcy was filed against Whipple & Company, and they were adjudged bankrupts and a receiver appointed.

On October 14th McCarthy presented the certificate to the receivers of the traction company, having first written Crawford's name as assignor and his own name as assignee and attorney in the spaces left therefor in the printed transfer on the back, above the signature of Crawford, and he requested the receivers to issue a new certificate to him, which they refused to do. McCarthy subsequently filed his bill in the superior court of Cook county against Crawford, the Chicago Union Traction Company, and its two receivers, alleging that he was entitled to the transfer of the certificate by the receivers of the traction company and was the equitable owner thereof, and praying that the traction company be directed, through its receiver, to make the transfer,

Lobach, 1 Duer, 354 (pledge); McNeil v. Tenth Nat. Bank, supra (pledge—a leading case); Williams v. Walker, 9 N. Y. S. R. 60; West Branch & S. Canal Co.'s Appeal, 81 Pa. *19; Pennsylvania R. Co.'s Appeal, 86 Pa. 80; Burton's Appeal, 93 Pa. 214 (pledge); Garvin v. Pettee, 15 S. D. 266, 88 N. W. 573; Cherry v. Frost, 7 Lea, 1 (pledge).

But the rule is different when the blank assignment and power of attorney is signed by executors of a deceased registered owner of shares, as such documents are not "in order," and persons dealing with them are put on notice. Colonial Bank v. Cady, L. R. 15 App. Cas. 267.

The true owner of the stock wrongfully pledged by such transferee would be entitled to redeem on payment of the amount actually advanced to the transferee at the time of the pledge, regardless of any pre-existing debts owing to the pledgee by the pledgeor, unless the pledgee proves that he changed his position as to these pre-existing debts for the worse, on the faith of the pledge. National Safe Deposit, Sav. & T. Co. v. Gray, supra.

Where there is a custom for certificates of stock with the transfer on the back signed in blank, to pass from hand to hand without inquiry, the owner of a certificate who gives it to a broker thus signed, for the purpose of surrendering it to the company and obtaining a new certificate including additional stock, is estopped to claim title as against a bona fide pledgee to whom the broker fraudulently pledged the certificate to secure his own debt; and this is true whether the act of the broker amounted technically to larceny or not, and whether the owner of the stock knew of such custom or not. Russell v. American Bell Teleph. Co. 180 Mass. 467, 62 N. E. 751.

The limitation stated at the beginning of the note excludes cases where, as in Hirsch v. Norton, 115 Ind. 341, 17 N. E. 612, the owner had the stock transferred on the books of the corporation to a specified person.

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—bills of lading and dock warrants.

A broker authorized by the owner of goods to deliver a bill of lading indorsed in blank by the owner to a vendee, only upon payment of a bill of exchange drawn against the goods and attached to the bill of lading, cannot bind his principal, the owner of the goods, by a delivery of the bill of lading made without such payment, and hence the owner of the goods can reclaim from one to whom the vendee pledged the goods. Stoltenwerck v. Thacher, 115 Mass. 226.

Although the broker had procured the order for the goods, the court said that the case was not within a statute providing that "every factor or other agent intrusted with the possession of merchandise or a bill of lading consigning merchandise to him for the purpose of sale shall be deemed to be the true owner thereof, so far as to give validity to any bona fide contract made by him with any other person for the sale of the whole or any part of the merchandise," since such broker "was not a factor or a general agent intrusted with the goods for the purpose of sale; but a special agent, with positive and restricted instructions to receive the bill of lading on the acceptance of the draft, hold the bill of lading and the cotton until the draft was paid, and then deliver them to Gray & Company. He had no right of possession of the bill of lading of the cotton for any other purpose, and no title in or lien on the cotton." The court further said: "A bill of lading, even when in terms running to order or assigns, is not negotiable, like a bill of exchange, but a symbol or representative of the goods themselves; and the rights arising out of the transfer of a bill of lading correspond, not to those arising out of the indorsement of a negotiable promise for the payment of money, but to those arising out of a delivery of the property itself under similar circumstances. If the bill of lading is once assigned or indorsed generally by the original holder, upon or with a view to a sale of the property, any subsequent transfer there-

and that Crawford be enjoined from setting up any claim of right, title, or interest to the certificate.

The answer of Crawford admitted the issue to him of the certificate, and alleged that he employed Whipple & Company, as brokers, to negotiate its sale for cash at a designated price; that it was not delivered to them when defendant employed them or for a considerable period thereafter, and was not delivered in order that any intending purchaser could inspect it, the signature of the defendant to the blank assignment on the back having been placed there long before the employment of said brokers. He also filed his cross bill, in which he prayed that the court would decree that he was the lawful owner of the certificate; that the assignment to McCarthy on the back of said certificate was without consideration or authority; that McCarthy should be enjoined from setting up any title or right of possession; and that the certificate be surrendered to the complainant in the cross bill. McCarthy answered the cross bill, and on the final hearing the court rendered a decree finding that Crawford was the lawful owner of the certificate, directing its delivery to

him, and enjoining the receivers from recognizing the assignment to McCarthy or issuing a new certificate to him. The appellate court having affirmed this decree, an appeal has been taken to this court.

Messrs. **Julie F. Brower and Samuel B. King**, for appellant:

The unauthorized sale or pledge by a broker or other bailee, of a security indorsed in blank which has been intrusted to the broker by the person to whom such security was issued, will give a good title to the person to whom such security is wrongfully sold or pledged, provided only that he received it for value, without actual notice of the broker's fraud.

Otis v. Gardner, 105 Ill. 436; Koch v. Willi, 63 Ill. 144; McNeil v. Tenth Nat. Bank, 40 N. Y. 329, 7 Am. Rep. 341; Williams v. Fletcher, 129 Ill. 366, 21 N. E. 783; Johnston v. Lafin, 103 U. S. 805, 26 L. ed. 535; Scollans v. E. H. Rollins & Sons, 179 Mass. 346, 88 Am. St. Rep. 386, 60 N. E. 974; Judy v. Evans, 109 Ill. App. 156.

The recital on the back of the certificate, over defendant's signature, that he had, for value received, bargained and sold the certi-

of to a bona fide purchaser may indeed give him a good title as against the original owner. But so long as the bill of lading remains in the hands of the original party, or of an agent intrusted with it for a special purpose, and not authorized to sell or pledge the goods, a person who gets possession of it without the authority of the owner, although with the assent of the agent, acquires no title as against the principal."

Before the passing of the factors' act, 4 Geo. IV., chap. 83: "It was clearly settled that a factor or agent for sale had no power to pledge, whether he was in possession either of the goods themselves or of the symbol of the goods, and even though the symbol might bear on the face if it some evidence of the property being in himself, as in the case of a bill of lading, in which he was the consignee or indorsee. This was in accordance with the general rule that one who deals with one *ex mandato* can obtain from him no better title than his mandate enables him to bestow." Phillips v. Huth, 6 Mees. & W. 596.

It was held in Phillips v. Huth, supra, that where the owners of a cargo of goods, on the arrival of the vessel, place the bill of lading (indorsed in blank) in the hands of their factor for sale, and the latter enters the goods at the customhouse in his own name, and before the cargo is weighed, and without the owners' knowledge, obtains a dock warrant for it in his own name, and pledges it to secure an advance to himself, under these circumstances it does not sufficiently appear that the factor was intrusted with the dock warrant, within the meaning of the factors' act, 6 Geo. IV., chap. 94, providing "that any person intrusted with

and in possession of any bill of lading, dock warrant, etc., shall be deemed and taken to be the true owner of the goods described and mentioned in those documents, so far as to give validity to any contract or agreement entered into by the person so intrusted and in possession with any other person, for the sale, disposition, deposit, or pledge of such goods, as security for any money or negotiable instrument advanced or given by such other person on the faith of such document, provided he shall not have notice by the document or otherwise that the person so intrusted shall not be the true owner." The court said that it was not enough to show that the owners empowered the factor to possess himself of the warrants whenever he chose; it must be shown that they really intended that the factor should be possessed of them at the time he pledged them, or it must be shown that the owners meant him not merely to have the power which the possession of the bill of lading would give,—of getting the warrants when he liked,—but to exercise that power by obtaining them whenever he in his discretion might think fit; that if either of these intentions were proved, it was sufficient, but if the factor was proved to be in possession of the warrants under such circumstances as that the owners, if they had been informed of the fact, might justly have said, "We never meant this," it is impossible to say that they intrusted the factors with these warrants.

—bonds and mortgages.

One who places a bond indorsed in blank in the custody of another for safe-keeping is

icate, excused plaintiff from inquiring of defendant as to his former title.

Johnston v. Laffin, *supra*; McNeil v. Fifth Nat. Bank, 46 N. Y. 331, 7 Am. Rep. 41; Stewart v. Metcalf, 68 Ill. 114.

Defendant, by the recital over his signature on the back of the certificate, is precluded from asserting title to the certificate.

Osgood v. McConnell, 32 Ill. 77; Wynkoop v. Cowing, 21 Ill. 585; Stewart v. Metcalf, 8 Ill. 109; Ettelsohn v. Kirkwood, 33 Ill. App. 103; 24 Am. & Eng. Enc. Law. p. 58.

A pre-existing debt or obligation is equivalent to a present consideration, as constituting a consideration which will support the title of a purchaser upon such consideration, as against the equities of a prior claimant to the property sold.

Manning v. McClure, 36 Ill. 497; Butters v. Haughwout, 42 Ill. 32, 89 Am. Dec. 401; Bowman v. Millison, 58 Ill. 36; Michigan v. R. Co. v. Phillips, 60 Ill. 194; Koch v. Willi, 63 Ill. 145; Kranert v. Simon, 65 Ill. 344; Otis v. Gardner, *supra*; Nugent v. Clifford, 1 Atk. 463; Doolittle v. Cook, 75 Ill. 59; Schwabacker v. Rush, 81 Ill. 310; McIntire v. Yates, 104 Ill. 491.

stopped to claim as against a bona fide transferee for value from the latter. Marshall v. Ender, 20 Ill. App. 312, affirmed 125 Ill. 370, 17 N. E. 464.

It was said, however, that it cannot be held as a matter of law that the true owner of non-negotiable bonds is guilty of such negligence as will estop him from asserting ownership as against a pledgee of one to whom the instrument was intrusted for safekeeping only, although a signed and acknowledged blank assignment was indorsed on the back, in the absence of evidence showing a custom for such instruments to pass from hand to hand like negotiable instruments. Scollans v. E. H. Rollins & Sons, 73 Mass. 275, 73 Am. St. Rep. 284, 53 N. E. 963.

But if such custom is shown, the owner could be estopped to reclaim the bond. Scollans v. E. H. Rollins & Sons, 179 Mass. 46, 88 Am. St. Rep. 346, 60 N. E. 983.

The limitation stated at the beginning of the note excludes most of the cases involving non-negotiable bonds or mortgages, since they are not ordinarily assigned in blank.

—warehouse receipts.

A vendor of goods represented by warehouse receipts made payable to bearer, who permits them to pass into the hands of his vendee in such a way as to enable him to pledge them, is estopped to claim as against the bona fide pledgee, although as between vendor and vendee title had not yet passed. Fourth Nat. Bank v. St. Louis Cotton Com-
press Co. 11 Mo. App. 333.

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Plaintiff acquired the certificate in "due course of trade."

Otis v. Gardner, 105 Ill. 444; Johnston v. Laffin, *supra*.

The negotiations between the brokers' employee and defendant constituted a sale to the brokers of defendant's right in the certificate.

1 Mechem, Sales, § 484; Dixon v. Yates, 5 Barn. & Ad. 313; Hinde v. Whitehouse, 7 East, 571; Spartalli v. Benecke, 10 C. B. 223; Joyce v. Swan, 17 C. B. N. S. 102.

Mr. Charles H. Aldrich, with Mr. Julius A. Johnson, for appellee:

The certificate is neither a negotiable nor quasi negotiable instrument.

Richmond v. Irons, 121 U. S. 52, 30 L. ed. 872, 7 Sup. Ct. Rep. 788; Turner v. Peoria & S. R. Co. 95 Ill. 134, 35 Am. Rep. 144; Union Trust Co. v. Illinois Midland R. Co. 117 U. S. 434, 29 L. ed. 963, 6 Sup. Ct. Rep. 809; Central Nat. Bank v. Hazard, 30 Fed. 484.

The transfer to McCarthy was of no effect, as the action of the broker was without authority, and was concealed from defendant.

Potter v. Dennison, 10 Ill. 590; Rodri-

—postoffice order.

One who purchases a postoffice money order from an agent sent to cash it by an indorsee who has not himself indorsed it, upon the mere indorsement of such agent, has no redress in case the indorsee again obtains possession of, and obtains the money upon it. Moore v. Skyles, 33 Mont. 135, 3 L.R.A.(N.S.) 136, 114 Am. St. Rep. 801, 82 Pac. 790.

—sealed note.

In Covell v. Tradesman's Bank, 1 Paige, 131, the owner of a sealed note for \$2,425 payable to himself indorsed it in blank and pledged it to another for a loan of \$100, and the latter in turn pledged it to a bank who took without notice of the owner's rights, as security for an antecedent debt of \$1,000 and a fresh advance for \$1,425. The \$100 debt being paid, the owner of the note demanded it of the bank, and the chancellor ruled that he could recover on the ground that the sealed note, being a mere chose in action, was not assignable in law; that the assignee of a chose in action which must be sued in the name of the assignor obtains only an equitable interest, the legal title remaining in the assignor; that the interest of such assignee, being only equitable, could not prevail over the prior equity and legal right of the original owner; and that the bank was not entitled to credit even for the fresh advance of \$1,425, as to which, however, it was conceded that the rule would have been different had the note been negotiable.

R. A. E.

quez v. Heffernan, 5 Johns. Ch. 429; Mechem, Agency, § 994; Berry v. Allen, 59 Ill. App. 149; Bertholf Bros. v. Quinlan, 68 Ill. 297; Gray v. Agnew, 95 Ill. 319; First Nat. Bank v. Schween, 127 Ill. 573, 11 Am. St. Rep. 174, 20 N. E. 681; Clemmer v. Drovers' Nat. Bank, 157 Ill. 206, 41 N. E. 728; Warner v. Martin, 11 How. 209, 13 L. ed. 667; Union Stock Yards Nat. Bank v. Gillespie, 137 U. S. 411, 34 L. ed. 724, 11 Sup. Ct. Rep. 118; Ludden v. Buffalo Battering Co. 22 Ill. App. 415.

The pretended sale to McCarthy was not made for any valuable consideration or in the usual course of business, but was fraudulent and felonious.

Fawcett v. Osborn, 32 Ill. 411, 83 Am. Dec. 278; Central Stock & Grain Exch. v. Bendinger, 56 L.R.A. 875, 48 C. C. A. 726, 109 Fed. 927.

The true owner may reclaim his property from the purchaser or hold him liable for conversion, even though the broker held the *indicia* of ownership as a bill of sale or as consignee in a bill of lading, and the buyer dealt with him believing that he was in fact the owner, and had no notice of his principal's title.

Gray v. Agnew, 95 Ill. 315; Newsom v. Thornton, 6 East, 17; Barnard v. Campbell, 55 N. Y. 457, 14 Am. Rep. 289; Mechem, Agency, § 787; Norton v. Hixon, 25 Ill. 439, 79 Am. Dec. 338; Jackson v. Norris, 72 Ill. 367; Keane v. Robarts, 4 Madd. Ch. 357; Fifth Nat. Bank v. Hyde Park, 101 Ill. 603, 40 Am. Rep. 218.

The certificate on its face notified plaintiff that defendant was the registered and beneficial owner and the only person to whom the quarterly interest could be paid.

Chicago Title & T. Co. v. Brugger, 95 Ill. App. 405, affirmed in 196 Ill. 96, 63 N. E. 637.

The plaintiff is chargeable with notice of all the facts within the knowledge of their own agents, and were bound to know that they were not in fact the owners of the certificate, but only brokers to sell the same in the usual course of business, and account therefor to defendant, who was the real owner.

Williams v. Tatnall, 29 Ill. 534; Holden v. New York & E. Bank, 72 N. Y. 286; Distilled Spirits (Harrington v. United States) 11 Wall. 367, 20 L. ed. 171.

The signature of defendant to the blank assignment and power of attorney, and delivering the certificate to his brokers employed to sell it for his account, does not estop him from claiming that Whipple & Company, were not his assignees for value.

France v. Clark, L. R. 26 Ch. Div. 257; Colonial Bank v. Cady, L. R. 15 App. Cas. 267.

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Dunn, J., delivered the opinion of the court:

The certificate was not an ordinary receiver's certificate issued for money borrowed or a liability incurred by the receiver in the performance of their duties. It was merely evidence of the existence of a debt in favor of the appellee against the corporation whose property the court was administering. It was not a negotiable instrument. The debt, however, of which the certificate was the evidence, was a chose in action, and was assignable in equity. That it was expected and intended that the certificates, which by the order of the court were substituted for the original evidences of indebtedness of the corporation, would be transferred, is manifest from the fact that it was stated on the face of each certificate that it was registered and transferable only upon the books of the company upon surrender of the certificate, that the interest was made payable to the registered holder, and that on the back of the certificate was printed, for convenience of transfer, a form of assignment and power of attorney similar to those ordinarily found on the back of certificates of corporate stock. The effect of an assignment would be to substitute the assignee for the original certificate holder, to enable him to share in any distribution which might be made of the assets, and to enforce his rights in the pending proceeding to the same extent as the original holder. The registration of transfers enables the receivers and all others interested to know who were the parties interested.

Whipple & Company were the agents of Crawford for the sale of his certificate. He contends that he is not bound by their sale because they were brokers, and the sale was beyond their authority because not made in the usual course of business or for cash, but in settlement of an existing indebtedness from themselves to the vendee. There can be no question of the rule that a factor cannot pledge the goods of his principal, that he cannot dispose of them by way of exchange or barter, and that he cannot sell them for a prior debt. And this is so even though the pledgee or vendee does not know that the factor is such, and though the factor is in possession of the goods and sells them as his own. But this case is not to be decided on that principle. The rule is subject to the qualification mentioned by Kent in laying down the doctrine that "to guard against abuse and fraud, it is admitted that if the factor be exhibited to the world as owner with the assent of his principal, and by that means obtains credit, the principal will be liable." 2 Kent, Com. 627. Whenever the factor has bartered or disposed of goods in a manner not within the

ordinary and accustomed modes of transacting the like business, the principal may follow and reclaim the property, and in such case it is wholly immaterial whether the person dealing with the factor knew him to be such or not. But if the principal has by any act of his been the means of imposing upon the person dealing with the factor, and inducing him to believe the factor was clothed with authority to dispose of the goods in the manner in which he did, the principal is bound by such disposition. *Potter v. Dennison*, 10 Ill. 590. In *Williams v. Fletcher*, 129 Ill. 356, 21 N. E. 783, this principle was announced in language quoted from *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341, as follows: "It must be conceded that, as a general rule applicable to property other than negotiable securities, the vendor or pledgee can convey no greater right or title than he has. But this is a truism predicable of a simple transfer from one party to another, where no other element intervenes. It does not interfere with the well-established principle that where the true owner holds out another, or allows him to appear, as the owner of, or as having full power of disposition over, the property, and innocent third parties are thus led into dealing with such apparent owner, they will be protected. Their rights in such cases do not depend upon the actual title or authority of the party with whom they deal directly, but are derived from the act of the real owner, which precludes him from disputing, as against them, the existence of the title or power which, through negligence or mistaken confidence, he caused or allowed to appear to be vested in the party making the conveyance."

The law has been generally established that, as between the parties, the transfer of stock by delivery of the certificate, with power of attorney or indorsed in blank, passes title without transfer on the books of the company, even when the by-laws of the company provide to the contrary. *Otis v. Gardner*, 105 Ill. 436; *Rice v. Gilbert*, 173 Ill. 248, 50 N. E. 1087. Such blank transfer on the back of the certificate, to which the holder has affixed his name, is a good assignment, and the party to whom it is delivered is authorized to fill it up. It may be filled up with the name of a remote transferee, and the name to be inserted concerns only the purchaser. *McNeil v. Tenth Nat. Bank*, supra; *Johnston v. Laffin*, 103 U. S. 800, 26 L. ed. 532; *White v. Vermont & M. R. Co.*, 21 How. 575, 16 L. ed. 221. The form in which the certificate was issued, the usage and practice indicated thereby as to the method of assignment, the appellee's own act in signing the power of attorney, all correspond with the customary rules with

reference to the assignment of similar documents. Though this is not a certificate of stock, it is manifest that it was intended to be assigned in the same manner, and no reason is seen why it may not be so done and with the same effect.

By signing the transfer and power of attorney in blank, from whatever motive, and delivering the certificate so indorsed to Whipple & Company, the appellee clothed them with the customary *indicia* of absolute ownership. He had done all that was necessary for him to do,—all that was possible for him to do,—to indicate to all persons interested that they owned the certificate. With the transfer on the books of the company he had nothing to do. It did not concern him. Its object was the protection and convenience of the assignee or the receivers. Appellee by this positive act enabled Whipple & Company to deceive appellant, as they could not otherwise have done, to induce him to believe they were the owners of the stock, and to sell the stock to him. The certificate, not being negotiable paper, was subject in the hands of appellant to all the equities existing against the certificate itself, to all equities against the original holder or in favor of the maker; but appellee could set up no equities against appellant, because by his writing he had estopped himself from claiming that Whipple & Company were not his assignees for value. In *Otis v. Gardner*, supra, the owner of a certificate of stock in a corporation indorsed it in blank, and delivered it to his brother, taking a receipt in which the brother recited that he had borrowed the stock and agreed to return it on demand. Being indebted, the brother pledged the stock to secure his notes. The owner of the stock having died, his administrator brought suit against the pledgee to recover possession of the stock. In disposing of this question, on page 443 of 105 Ill., the court said: "The intestate placed the certificates in the hands of Chauncey T. Bowen, with a blank assignment written thereon, authorizing an absolute transfer of the stock to the assignee under the by-laws of the company. The exact use the assignee should make of the stock does not appear from anything in the record, but, as the use he might make of it was in no way limited by the terms of the assignment, it is reasonable to presume the assignee was authorized to make any legitimate use of it that a rightful owner might,—that is, he might sell it or pledge it in the usual course of business. That was done in this case. It was pledged to Gardner, in the usual course of business, as collateral security for the indebtedness of the holder, and was taken in good faith, without the slightest knowledge that anyone

other than the pledgeor claimed or had any interest in the stock represented by the certificates. As has been seen, the certificates of stock were placed in the hands of Bowen by the intestate in such condition they could be readily sold or hypothecated by him, and, if his assignee made an improper use of them, the assignor, if living, could get no relief against that which he deliberately authorized to be done, if it would affect injuriously an innocent purchaser for value; and his personal representative can have no relief that could not be granted on a like bill by the intestate, if living. The principle is that when one of two or more persons must suffer loss, upon him whose conduct made it possible for loss to occur should the consequences ultimately rest."

It is claimed that appellant's purchase was not in the usual course of business and for a valuable consideration. The certificate was first delivered to appellant in response to his demand for security to secure the delivery of the railroad stock to him. After some delay, he proposed to take the certificate instead of completing the purchase of the stock. There is no basis in the evidence for supposing this was anything other than an ordinary proposition to buy the certificate, or that there was in it any concealed or unfair purpose. His proposition was accepted, and the \$9,116.30 he had paid for the purpose of being used in the purchase of the stock was applied to the payment for the certificate. Whipple & Company were clothed with all the *indicia* of ownership, and appellant, with no knowledge or reason to suspect any infirmity in their title, purchased the certificate. Under such circumstances, the pre-existing debt is a valuable consideration, and he is entitled to be protected to the same extent as if he had paid a new consideration. *Butters v. Haughwout*, 42 Ill. 18, 89 Am. Dec. 401; *Schwabacker v. Rush*, 81 Ill. 310; *Kranert v. Simon*, 65 Ill. 344.

It is insisted by appellee that appellant's bill and his answer to the cross bill are inconsistent, and that the facts proved do not sustain the bill. The inconsistency is more imaginary than real. The answer sets up the facts more in detail than the bill, but they are not inconsistent. Both concede that the absolute ownership of the certificate was in appellee; that he delivered it to Whipple & Company, not as purchasers or owners, but solely as brokers, to sell for appellee. Both allege the payment of the money to Whipple & Company, the order to buy stock, their failure to do so, their offer to appellant of the certificate instead of the stock, and its acceptance by appellant, and the filling of the blank in the assignment. Both allege that by means 29 L.R.A. (N.S.)

of the premises the appellant became the equitable owner of the certificate. Whether Whipple & Company purported to act as agents of appellee or as owners of the certificate is not alleged in either bill or answer, but the facts are stated with differences only in the extent of detail. There is no substantial difference in the claim attempted to be stated in appellant's different pleadings, and on the evidence he was entitled to the relief prayed for.

The judgment of the Appellate Court and the decree of the Superior Court will be reversed, and the cause remanded to the Superior Court, with directions to enter a decree in accordance with the prayer of the bill upon the payment by appellant, for the use of appellee, of \$1,158.19, with 5 per cent interest from September 11, 1905.

Reversed and remanded, with directions.

Petition for rehearing stricken from files February 5, 1909.

MINNESOTA SUPREME COURT.

OLE B. NELSON et al., Appts.,
v.

CITY OF MINNEAPOLIS et al., Respts.

(— Minn. —, 127 N. W. 445.)

Milk — ordinance subjecting to test — validity.

1. An ordinance of the city of Minneapolis, prescribing as a test of purity and wholesomeness of milk brought into the city for sale, that drawn from cows previously subjected to the tuberculin test and found free from disease, held not in conflict with the statutes of the state, and a valid police regulation.

Same — standard of purity — legislative question.

2. The method to be adopted to insure a supply of pure milk, and the standard by

Headnotes by BROWN, J.

Note. — Validity of statute or ordinance for destruction of food products below prescribed standard or unfit for use.

An ordinance providing for the destruction of milk which is found upon inspection to be below prescribed standards is within the police power, and is not unconstitutional on the ground that it deprives one of his property without due process of law. *Blazier v. Miller*, 10 Hun, 435; *State, Shivers, Prosecutor, v. Newton*, 45 N. J. L. 469; *Deems v. Baltimore*, 86 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; *Kaiser v. Walsh*, 4 Ohio N. P. N. S. 507.

Due process of law is not denied an importer of teas by the provision of the tea

which the same shall be determined, is a legislative, and not a judicial, question.

same—milk below standard—authorization of summary destruction—constitutionality.

3. An ordinance authorizing the summary seizure and destruction of milk not conforming to the standard fixed by law is not violative of the constitutional rights of the citizens, nor a taking of property without due process of law.

(July 29, 1910.)

APPEAL by plaintiffs from an order of the District Court for Hennepin County denying a new trial after judgment in defendants' favor in an action brought to strain the seizing and destroying of milk offered for sale by plaintiffs. Affirmed. The facts are stated in the opinion. Messrs. Gjertsen & Lund, for appellants:

The ordinance under which defendants seek to justify their seizure and destruction of the milk is unreasonable and void.

Cooper v. Marshall, 1 Burr. 260; R. v. Appineau, 1 Strange, 688; Wood, Nuisances, 768, 772; Wright v. Moore, 38 Ala. 3, 82 Am. Dec. 731; State v. Moffett, 1 Greene, 247; Moffett v. Brewer, 1 G. Greene, 348; Arundel v. McCulloch, 10 Ala. 70; 1 Am. & Eng. Enc. Law, 2d ed. 85; Babcock v. Buffalo, 56 N. Y. 208; Aggoner v. South Gorin, 88 Mo. App. 25;

Inspection act, so as to render unconstitutional the act commanding the destruction of meats not exported within six months after their final rejection, as not entitled to admission into the United States because inferior to the government standards. Buttfield v. Stranahan, 192 U. S. 470, 48 L. ed. 5, 24 Sup. Ct. Rep. 349; Buttfield v. Well, 192 U. S. 498, 48 L. ed. 536, 24 Sup. Ct. Rep. 356; Buttfield v. United States, 2 U. S. 499, 48 L. ed. 537, 24 Sup. Ct. p. 356.

Nor is due process of law denied to the owner or custodian of food in cold storage, by a municipal ordinance under which such food, when unfit for human consumption, may be seized, condemned, and destroyed by municipal officers, without a preliminary hearing. North American Cold Storage Co. (Chicago), 211 U. S. 306, 53 L. ed. 195, 29 p. Ct. Rep. 101, 15 A. & E. Ann. Cas. 276. English statutes make provisions upon a subject similar to those found in the laws of the states, but questions as to their validity do not arise, and they have been before the courts only for purposes of interpretation or application. See Mallinson Carr [1891] 1 Q. B. 48; R. v. Dennis [1894] 2 Q. B. 458; Walshaw v. Brighouse [1898] 2 Q. B. 286; Thomas v. Van Os [1900] 2 Q. B. 448; Grivell v. Malpas [1906] 2 K. B. 32; Vinter v. Hind, L. R. 10 L.R.A.(N.S.)

Eckhardt v. Buffalo, 19 App. Div. 1, 46 N. Y. Supp. 204; Joyce, Nuisances, ¶ 346; Hicks v. Dorn, 42 N. Y. 47; 21 Cyc. Law & Proc. p. 401; Dallas v. Allen (Tex. Civ. App.) 40 S. W. 324.

Until the city has affirmatively shown that the milk in question was in fact impure and dangerous to the public health, it had no right to order its destruction. Every municipality, in the exercise of its police power to abate nuisances, is limited to such things as are declared by statute to be a nuisance, or recognized at common law as such.

Bates v. District of Columbia, 1 Mac Arth. 433; Hennessy v. St. Paul, 37 Fed. 565; Wreford v. People, 14 Mich. 41; Joyce, Nuisances, ¶ 347; Smith v. Irish, 37 App. Div. 220, 55 N. Y. Supp. 837; Munn v. Corbin, 8 Colo. App. 113, 44 Pac. 783; McConnell v. McKillip, 71 Neb. 712, 65 L.R.A. 610, 115 Am. St. Rep. 614, 99 N. W. 505, 8 A. & E. Ann. Cas. 898; Judson v. Reardon, 16 Minn. 431, Gil. 387; Bristol Door & Lumber Co. v. Bristol, 97 Va. 304, 75 Am. St. Rep. 783, 33 S. E. 588; Aitken v. Wells River, 70 Vt. 308, 41 L.R.A. 566, 67 Am. St. Rep. 672, 40 Atl. 829; Health Dept. v. Dassori, 21 App. Div. 348, 47 N. Y. Supp. 641; Savannah v. Mulligan, 95 Ga. 323, 29 L.R.A. 303, 51 Am. St. Rep. 86, 22 S. E. 621.

Messrs. Frank Healy, A. O. Finney, and Clyde R. White for respondents.

Q. B. Div. 63; Re Bater [1893] 1 Q. B. 679; Ormerod v. Rochdale, 62 J. P. 153; Wayne v. Thompson, L. R. 15 Q. B. Div. 342.

That the English courts are not unmindful of those private rights which are guaranteed to the people of the United States by the Constitution is, however, indicated in White v. Redfern, L. R. 5 Q. B. Div. 15, where the judge said, referring to the section of the public health act providing for the seizure and destruction of unsound meat: "I feel very strongly the possible injustice that might be done by depriving a man of his property without giving him an opportunity of being heard, and without giving him compensation if not himself in default, and it would require very strong words in an enactment to lead me to the conclusion that it was intended that this might be done."

Decisions upon the validity of statutes providing for the seizure and condemnation of oleomargarin and other substitute commodities, when manufactured and sold as the genuine product, are not included in this note.

As to the power to require the destruction of diseased animals without making compensation therefor, see the note to New Orleans v. Charouleau, 18 L.R.A.(N.S.) 368.

W. A. S.

Brown, J., delivered the opinion of the court:

Action by plaintiffs, dairymen, for an injunction restraining and enjoining defendant city and certain of its officers from seizing and destroying the milk brought by them into the city for sale to their customers. The action was tried in the court below without a jury, and resulted in an order for judgment in defendants' favor. Plaintiffs appealed from an order denying their motion for a new trial.

Acting under the authority of § 1749, Rev. Laws 1905, by which municipalities of this state are empowered to prescribe, among other things, the terms and conditions upon which milk, cream, and butter may be exposed for sale therein, and to affix penalties for a violation of the restrictions imposed, the city council of Minneapolis duly enacted an ordinance, § 10 of which provides, in effect, that no person shall bring into the city for sale, or offer for sale therein, any milk, unless the owner of the cows from which the same is drawn shall first file in the office of the commissioner of health of said city a certificate of a duly licensed veterinary surgeon, stating therein that such cows have been by him inspected and examined, and tested with the tuberculin test, as provided in § 9 of the ordinance, and found free from tuberculosis and other contagious diseases. Section 9 referred to provides for the annual application of this particular test, and the issuance of a license to the owners of cows thus tested and certified as free from disease. The ordinance included other provisions pertinent to this subject and imposed a penalty of fine or imprisonment for a violation thereof. Subsequently, the city council amended the ordinance by adding § 13, by which it was provided that any adulterated milk, or milk drawn from cows not tested in the manner required by § 9, brought into the city and there exposed for sale, might be summarily seized and destroyed by the health department of the city.

The several plaintiffs are engaged, both at wholesale and retail, in selling and disposing of milk in the city of Minneapolis, and handle and dispose of large quantities thereof daily. They secure their supply from cows not inspected and tested as required by the ordinance, and bring the same into the city for distribution among their customers. On April 21, 1908, the officers of the city health department seized and destroyed six cans of milk so brought into the city by the plaintiffs, and threaten and intend to so continue in the future, unless plaintiffs shall in all respects comply with the ordinance. This action was brought

to restrain and enjoin further acts and proceedings in this direction.

1. The purpose of the action being not to restrain a criminal prosecution for a violation of the ordinance, but to enjoin the continued seizure and destruction of milk shipped into the city, the action is brought within the rule laid down in *Cobb v. French* (Minn.) 127 N. W. 415, and may be maintained. The distinction between actions of the character of this one and those brought to restrain prosecutions for the violation of penal laws is clearly pointed out in the opinion referred to, and requires no further discussion.

2. All questions respecting the validity of the ordinance, in so far as it requires the tuberculin test of cows from which dealers in milk obtain their supply, are disposed of by the case of *State v. Nelson*, 66 Minn. 166, 34 L.R.A. 318, 61 Am. St. Rep. 399, 68 N. W. 1066. The power of the city to impose this test as a police regulation was there expressly affirmed. We follow and apply the decision there made.

3. The further question as to the validity of § 13, by which authority is conferred upon the health department to seize and destroy milk taken from cows not inspected and tested under the requirements of the ordinance, was not involved in the *Nelson* Case, and is now before us as an original proposition. It is the contention of plaintiffs that the powers conferred upon the health department in this respect are unreasonable, unnecessary, and in violation of their constitutional rights, and hence unenforceable. In support of this position plaintiffs offered evidence tending to show, and the trial court found as a fact, that the pasteurization of milk will render the same pure and wholesome, and without deteriorating or lessening its food value; that pasteurization consists in heating the milk to a certain temperature, thereby destroying all germs of impurity. But the court further found that pasteurization, while theoretically possible, has not, so far as disclosed by the evidence, become a practicable method of destroying harmful bacteria in milk, when attempted for commercial purposes. A motion to strike out this finding, and insert in its place one to the effect that pasteurization of milk is feasible and inexpensive, was denied. The refusal of the court to so find is assigned as error.

The question of the public health is one of first importance in the regulation and control of human affairs, and all laws or ordinances enacted for that purpose, when not so arbitrary as to be unnecessarily destructive of individual property rights, are uniformly upheld by the courts. Milk constitutes one of the principal articles of

ur food supply, and the purity thereof, and its freedom from disease germs, is of serious concern to consumers. The methods, regulations, and restrictions imposed to attain, so far as may be, results consistent with the public welfare, are purely of legislative cognizance. The courts have no power to determine the merits of conflicting theories, nor to declare that a particular method of advancing and protecting the public health is superior or likely to insure greater safety or better protection than others. The legislative determination of the methods, restrictions, and regulations is final, except when so arbitrary as to be violative of the constitutional rights of the citizen. In the case at bar the city council, duly authorized thereto by legislative grant, determined that the tuberculin test of cows was the most feasible and practicable method of insuring a pure milk supply. This involved a matter of legislative judgment and discretion, and necessarily a comparison with other methods designed to secure the same result, including the theory of pasteurization. The courts cannot make this comparison, weigh the feasibility and the practicability of each, and substitute their judgment and discretion for that of the legislative body whose determination of the question they are called upon to review. *Knobloch v. Chicago, M. & St. P. R. Co.* 31 Minn. 402, 18 N. W. 106; *Duluth v. Mallett*, 3 Minn. 204, 45 N. W. 154; *St. Louis v. Jessing*, 190 Mo. 464, 1 L.R.A. (N.S.) 918, 99 Am. St. Rep. 774, 89 S. W. 611, 4 A. & C. Ann. Cas. 112. It is probable that pasteurization, when placed upon a practicable and workable basis, will be found superior to the annual tuberculin test; but the determination of that must be left to the legislative department. There was, therefore, no error in the findings of the court, or in its refusal to find that the method of pasteurization ought to have been adopted by the city.

Whether the ordinance, in so far as it authorizes a seizure and destruction of milk taken from uninspected cows, and brought within the city for sale, in violation of the ordinance, so violates the constitutional rights of plaintiffs, and constitutes a taking of their property without due process of law, is the important question in the case. It is urged that before destroying the milk the authorities should be required to ascertain whether it is in fact unwholesome and unfit for food, and that to permit them to destroy the same without regard to whether it is or is not free from disease germs authorizes a taking of property for public use without compensation, and is not that due process of law guaranteed by the Constitution. (N.S.)

tution. It is further claimed, with respect to the enforcement of police regulations, that power in the municipal officers, if constitutional rights be respected, must be limited to those methods that will work the least injury to private rights. Counsel's argument in support of their theory of the law is plausible and forceful, but we are unable to concur therein. The council determined that the tuberculin test was a reasonable and the most practicable method of insuring purity in the milk brought into the city. To enforce the regulation, the council had the power to impose such penalties as would render the regulation effective and serve the purpose intended. It provided, in addition to fine and imprisonment, a destruction of the condemned milk. The authorities sustain regulations of this character. It is in fact the only feasible method of preventing contaminated or unwholesome milk from reaching citizens, and to enforce or compel a compliance with the ordinance. A mere fine or imprisonment of the offender would not prevent the milk reaching the consumers; but its destruction when brought into the city is effective for all purposes. This authority must be sustained, unless it is to be held as a matter of law that the city should either determine that the milk is in fact impure, or, in the interests of the dairymen, establish and maintain a pasteurization plant in which all milk brought into the city may be purified and rendered wholesome. Plaintiffs are in no position to insist upon either of these conditions. Dairymen and dealers in milk and cream who persist in their refusal to comply with the inspection ordinance, which answers every purpose of the regulation, and entitles them to unrestricted entrance into the city with their milk, are in no position to urge the establishment of such a plant. They should not be heard to hurl defiance at a regulation in all respects reasonable, and insist that something more convenient to them should be adopted. With reference to the determination of the real character of the milk, it is enough to say that it would be utterly impracticable to so proceed. Whether wholesome or not could not, by the usual tests, be determined short of two months, and in the meantime the milk would become stale and worthless from natural causes.

This view is fully sustained by analogous cases in other states. In states where a particular standard is fixed by law, milk offered for sale which falls below such standard, the courts hold, may be seized and destroyed without notice to the owner, and that such act constitutes neither the taking of property without compensation or without due process of law. *Blazier v. Miller*, 10

Hun, 435; Deems v. Baltimore, 80 Md. 164, 26 L.R.A. 541, 45 Am. St. Rep. 339, 30 Atl. 648; State, Shivers, Prosecutor, v. Newton, 45 N. J. L. 469. The court in Deems v. Baltimore, supra, aptly remarked that "the use of milk as an article of food enters largely, as we all know, in the daily consumption of every household, and there is no more fruitful source of disease than the use of adulterated and unwholesome milk; and if the appellant's contention be right, that the question whether or not milk, which is daily offered for sale in every part of a large and populous city, comes up to the standard prescribed by the ordinance, must be determined by the ordinary process of judicial investigation or by chemical analysis, it would be impossible to prevent the danger to the public health necessarily resulting from impure and unwholesome milk. And it is absolutely necessary, therefore, that the appellee should have the power to provide for its inspection by proper means and instruments, and if, upon such inspection, it shall be found not to come up to the standard prescribed by the ordinance, to direct that the offending thing shall be destroyed." The ordinance here under consideration established as a standard of pure milk that taken from inspected cows,—those which had been subjected to the tuberculin test and found free from disease. It is not a differentiating fact or circumstance that a different standard may have been prescribed by the law before the court in the cases cited. It is clear from the reasoning of the court in those cases that the decisions there made would have been the same, had the standard fixed by this ordinance been there involved. The milk offered for sale failed to meet the required standard, and that was the foundation for the decision that a destruction thereof was not in violation of constitutional rights.

The validity of the ordinance is also sustained by those authorities which hold valid statutes authorizing a summary destruction of property used in express violation of law, such as fishing nets and tackle used for catching fish out of season. Wild game killed out of season may be seized by the public authorities and destroyed, or otherwise disposed of. Lawton v. Steele, 152 U. S. 139, 38 L. ed. 389, 14 Sup. Ct. Rep. 499; North American Cold Storage Co. v. Chicago (C. C.) 151 Fed. 120; Ross v. Desha Levee Board, 83 Ark. 176, 21 L.R.A. (N.S.) 699, 119 Am. St. Rep. 131, 103 S. W. 380. It is probable that the rule sustaining the right of seizure and destruction is founded, to some extent, upon the value of property. If of little value, as compared with the expense of proceedings to determine its real

character, or to condemn it as a nuisance, and the owner may, without inconvenience or hardship, avoid the drastic proceeding by compliance with the law, the courts do not hesitate long in sustaining the summary power of destruction. Lawton v. Steele, supra. In the case at bar the daily supply of milk by several plaintiffs would be necessarily inconsiderable as compared with the cost of cumbersome judicial proceedings to determine that the milk exposed for sale by them was in fact unwholesome and impure, and therefore a nuisance. It is impracticable, therefore, either to determine in advance of destruction the true character of the milk, or institute judicial proceedings to condemn it as a nuisance, and unless the plaintiffs are in a position to insist that the city, by pasteurization, purify the milk for them, it cannot be held that the summary destruction is in violation of their constitutional rights. That they cannot so insist as a matter of right is clear.

The ordinance is not in conflict with the statute of the state upon the same subject. It was so held in the Nelson Case. The case of St. Paul v. Peck, 78 Minn. 500, 81 N. W. 389, is not in point. There the city ordinance imposed an inspection fee upon the owners of dairy herds, and, construing the statutory authority under which the ordinance was enacted, we held that the power to so provide was expressly withheld by the legislature, and that the city had no right to impose an inspection fee. Such is not the situation in the case at bar. The authority conferred by § 1749, Rev. Laws 1905, contains no such restriction.

Order affirmed.

KENTUCKY COURT OF APPEALS.

LEO SCHLICKMAN et al., Admrs., etc. of
William Schlickman, Deceased, Appts.,
v.

CITIZENS' NATIONAL BANK OF COV-
INGTON, Claimant.

(— Ky. —, 129 S. W. 823.)

Executor — power to borrow money.

1. An executor who is empowered by the will to do anything concerning testator's estate which he himself would do if living, leaving it to his judgment how he shall manage "my business," has power, where testator's business is the management of a

Note. — Will special power, other than power of sale, conferred on executor by will, pass to an administrator with the will annexed.

This note, as indicated by the title, does not cover the question whether powers of

corporation of which he is practically the sole stockholder, to borrow money, if necessary, to carry on the business, and bind the entire estate for its repayment.

Same—administrator d. b. n. — authority.

2. Authority conferred upon an executor to carry on testator's business without bond will not, upon his resignation, pass to an administrator *de bonis non* with the will annexed.

Same — administrator with will annexed — statutory authority.

3. A statute providing that an administrator with the will annexed shall exercise all the powers and authority, and possess the same rights and interest, as the executors named therein, does not confer upon such administrator a power conferred by

the will upon the executor, to carry on testator's business without bond.

Will — construction — power of executor.

4. The power conferred upon an executor to carry on testator's business does not pass to an administrator *de bonis non* because of a clause to the effect that the devise to testator's children is subject to the power conferred on the executor, and shall in no case be construed as a limitation upon his power to carry on the business.

(June 17, 1910.)

A PPEAL by the administrators with the will annexed of William Schlickman, deceased, from a judgment of the Criminal, Common law, and Equity Division of the

sale conferred upon executors by will pass to administrators with the will annexed.

Where powers are conferred upon an executor which are discretionary and involve a personal trust, they are held not to devolve upon an administrator with the will annexed by virtue of his appointment; but where the power was clearly not intended to be a personal one, but was evidently conferred upon the executor by virtue of the office, the power is held to pass to such administrator. The question in each case depends largely upon the circumstances and the nature of the power given.

Thus, where a testator named his son who had been connected with him in business as his executor, and authorized him to continue the business for a certain number of years, and at the end of that period gave his sons a right to take the business at a valuation, providing the one who had been connected therewith desired to continue, it was held that the power to continue the business was personal. *Best's Estate*, 22 Lanc. L. Rev. 6. The court said: "In authorizing James B. Best to continue his business, the testator delegated a power inconsistent with that of an executor, whose duty it is to close, and not exploit, a business. Such a responsibility indiscriminately imposed would usually result in disaster to the estate. But few of those qualified to administer on an estate would be competent to manage a business, particularly one relating to the arts or mechanics. It is not likely that one would confer such a power except with reference to the person who is to exercise it."

So, in *Creech v. Grainger*, 106 N. C. 213, 10 S. E. 1032, where the statute provided that an administrator should have all the rights and powers and be subject to the same duties as if he had been named executor of the will, it was held that a direction to the executor to continue the testator's business as long as he should think it profitable, and to pay such of the profits as the executor might think actually necessary for the support of testator's wife and children, created personal trusts which 29 L.R.A. (N.S.)

were discretionary with the executor, and which therefore did not pass to the administrator *c. t. a.*

And it was held in *Lambert v. Rendle*, 3 New Reports, 247, where the testator gave his executors power to carry on his business for a year after his death, that the administratrix could not carry it on, since the power was discretionary with the executors.

In the following cases it was held that the powers conferred were personal to the executor, and that an administrator with the will annexed therefore acquired no authority by reason of them: *Hepburn's Estate*, 8 Phila. 206 (power to divide real estate among certain children so that in the executor's discretion each should have an equally productive part); *Stoutenburgh v. Moore*, 37 N. J. Eq. 63 (trust to invest certain property, pay over interest, and sell and convey at the discretion of executors); *Hinson v. Williamson*, 74 Ala. 180 (direction that estate be kept together under executrix's absolute control, with full power vested in her to purchase or sell, the profits to be invested in making purchases at her discretion and for the benefit of his children); *Beekman v. Bonsor*, 23 N. Y. 298, 80 Am. Dec. 269 (gift to be employed in executors' discretion for the use of charitable societies); *Knight v. Loomis*, 30 Me. 204 (bequest to executor in trust, with direction to put money at interest and pay the proceeds to a given person, the executor being required to give a special bond as trustee); *Belcher v. Branch*, 11 R. I. 226 (power to divide rents, profits, and income in a certain manner); *Maus v. Maus*, 80 Pa. 194 (power to rent property to create a fund for the support of testator's indigent brothers); *Lindsley v. Personette*, 35 N. J. Eq. 355 (direction to furnish testator's wife with everything necessary for her comfort during her natural life); *Givens v. Flannery*, 105 Ky. 451, 49 S. W. 182 (direction to hold a fund and pay the interest and profits to a life tenant, with instructions for disposing of the remainder); *Brush v. Young*, 28 N. J. L. 237 (bequest

Circuit Court for Kenton County allowing a claim of the Citizens' National Bank of Covington against decedent's estate in an action for the settlement of that estate. Reversed.

The facts are stated in the opinion.

Mr. Robert C. Simmons, for appellant:

Schlickman's will did not authorize his executor to subject his individual estate to debts of the Ruttle-Schlickman Packing Company.

Barker v. Parker, 1 T. R. 287; McNeillie v. Acton, 4 DeG. M. & G. 757; Cutbush v. Cutbush, 1 Beav. 184; Ex parte Garland, 10 Ves. Jr. 110; Ex parte Richardson, 3 Madd. Ch. 138; Thompson v. Andrews, 1 Myl. & K. 116; Kirkman v. Booth, 11 Beav. 281; 12 Eng. Rul. Cas. 29; Burwell v. Ca-

wood, 2 How. 560, 11 L. ed. 378; Smith v. Ayer, 101 U. S. 320, 25 L. ed. 955; Jones v. Walker, 103 U. S. 444, 26 L. ed. 404; Laible v. Ferry, 32 N. J. Eq. 792; Citizens' Mut. Ins. Co. v. Ligon, 59 Miss. 312; Brasfield v. French, 59 Miss. 632; Stewart v. Robinson, 115 N. Y. 328, 5 L.R.A. 410, 22 N. E. 160, 163; Schouler, Wills, 510; Jarman, Wills, 706; Willis v. Sharp, 113 N. Y. 586, 4 L.R.A. 493, 21 N. E. 705; Furst v. Armstrong, 202 Pa. 348, 90 Am. St. Rep. 653, 51 Atl. 996.

If Schlickman's executor possessed the power to pledge his general estate for the debts of the corporation, such powers could not be exercised by the administrators with the will annexed.

Wooldridge v. Watkins, 3 Bibb, 349;

of property to an executor in trust for testatrix's son during his life, and on his death to be divided among her daughters).

So, an administrator *c. t. a.* has no power to execute a trust created by a bequest of bank stock for the payment of certain legacies and annuities. Penn v. Fogler, 182 Ill. 76, 55 N. E. 192. The court here said: "Executors are often required by the terms of the will appointing them, to act in a double capacity: First, as executors by virtue of their office, and, second, as agents or trustees under a warrant of attorney. An executor is often charged not only with the duties and liabilities appertaining to that office, but also with certain duties in the execution of a trust which is imposed upon him by the will. The general rule is that the duties and powers of an executor, which result from the nature of his office as executor, devolve upon the administrator with the will annexed. But the duties and powers, which are imposed upon an executor as a trustee are in the nature of a personal trust or confidence reposed in him by the testator, and do not devolve upon the administrator with the will annexed, inasmuch as they cannot be delegated."

And where a testatrix created a trust fund and appointed a certain person to receive and apply the fund, and then nominated the same person executor, it was held that an administrator *c. t. a.* was not entitled to the trust fund, and a trustee was appointed. Ebert's Appeal, 9 Watts, 300.

And in Merritt v. Merritt, 32 App. Div. 442, 53 N. Y. Supp. 127, affirmed in 161 N. Y. 634, 57 N. E. 1117, where the conversion of real estate into personality and a distribution of the proceeds were directed, it was held that the powers which implied a special trust, confidence, and discretion did not pass to an administrator *c. t. a.*, but that he would succeed to all other powers so far as they devolved upon him by virtue of his office.

So, a devise of testator's property to an executor, with power to dispose of it in such a manner as to him should seem meet 29 L.R.A. (N.S.)

for the payment of debts and for the benefit of testator's daughter, does not pass to an administrator *c. t. a.*, and a statute providing that "administrators with the will annexed shall have the same authority to perform every act and discharge every trust as the executor named in the will would have had, and their acts shall be valid and effectual for every purpose," does not give the administrator *c. t. a.* power to execute the devise. Re Besley, 18 Wis. 451.

And where a testatrix gave her executors entire management of her estate, to rent out the real estate, and, after debts and legacies were paid, directed that they pay the proceeds over for a certain charitable purpose, and inserted a provision in the will that, in case the executors died before the trust was executed, it should be carried out by persons to be chosen in a specified manner, an administrator *c. t. a.* has no power to administer the trust. Ingle v. Jones, 9 Wall. 486, 19 L. ed. 621.

It was held in Vardeman v. Ross, 36 Tex. 111, that an administrator *c. t. a.* derived his power from the law, and not from the will, so that he had no authority to carry out the power to invest funds which were given by the testator's will.

As before stated, however, where it appears that the testator did not contemplate the existence of a personal trust in the executor, the power will vest in the administrator with the will annexed.

Thus, where the will shows an intention by testator that instructions directing his executors to keep his property together, to continue his farm, and to purchase another one, should be performed at all events, and not at the executors' discretion, the power devolves upon an administrator *c. t. a.* King v. Talbert, 36 Miss. 367.

So, in Palmer v. Moore, 82 Ga. 177, 14 Am. St. Rep. 147, 8 S. E. 180, where the statute provided that administrators *c. t. a.* "shall have the powers of the executor, except such as manifestly arise from personal trust and confidence in the executor named," a direction to keep an estate together and carry on farming operations was held to authorize an administrator

Brown v. Hobson, 3 A. K. Marsh. 381, 13 Am. Dec. 187; Warfield v. Brand, 13 Bush, 64; Conklin v. Edgerton, 21 Wend. 436; Jivens v. Flannery, 105 Ky. 451, 49 S. W. 182; Major v. Herndon, 78 Ky. 123; Mercer v. Glass, 15 Ky. L. Rep. 713, 25 S. W. 114; Simpson v. Cook, 24 Minn. 180; Scholl v. Olmstead, 84 Ga. 693, 11 S. E. 541; Sheet's Estate, 52 Pa. 266; King v. Denison, 1 Ves. & B. 273; Hinson v. Williamson, 74 Ala. 180; Harrison v. Henderson, 7 Heisk. 48; Mott v. Ackerman, 92 N. Y. 539; Pratt v. Stewart, 49 Conn. 339; Naundorf v. Schumann, 41 N. J. Eq. 14, 2 Atl. 609; Perry, Jr. §§ 496, 501; Hill, Trustees *485; Woerner, Am. Law of Administration, §§ 339 et seq; Gulley v. Prather, 7 Bush, 168; Shields v. Smith, 8 Bush, 604; Smith v. Heywood

(1869) M. S. Op.; Harding v. Weisiger, 33 Ky. L. Rep. 170, 109 S. W. 890; Sims v. Birdsong, 21 Ky. L. Rep. 75, 50 S. W. 993; Kerr v. Long, 28 Ky. L. Rep. 52, 88 S. W. 1068.

Messrs. Schmidt & Holmes, for appellee:

A simple power of direction to carry on the testator's business, where the assets or property embraced in the business are not devised or bequeathed to the executor, is not a special trust, but remains an executorial duty until the estate has been fully administered, and the assets of the business separated and set apart for trust purposes.

Willis v. Sharp, 113 N. Y. 586, 4 L.R.A. 496, 21 N. E. 705; Gandolfo v. Walker, 15 Ohio St. 251; Andrews v. Minor, 22 Ky. L.

c. t. a. to carry on the estate. The court said: "The duty of keeping the estate together and of managing, controlling, and keeping up the farming interest, seems, in the will of Rowland, to appertain to the office of executrix, and could as well be performed by a man chosen by the ordinary as by the widow. Even the discretion of continuing or discontinuing the business might be as soundly exercised. If farming was a business in which it could be supposed the widow had some special skill or tact of management, or some superior judgment in deciding whether to go on with it or suspend it, there would be good reason for treating the power conferred on her as a personal trust; but there is no suggestion in the record on this subject further than what appears on the face of the will. We cannot say that the power in question is such as manifestly arises from personal trust and confidence in the executrix."

And an administrator c. t. a. has authority to purchase guano for the use of the estate and to give his notes therefor, where the testator directed his executors to keep his estate together during the life of his wife, except such as they deemed for the interest of the estate to sell, and directed that his wife and children should be supported out of such estate while it was kept together. Brannon v. Ober & Sons Co. 106 Ga. 168, 32 S. E. 16.

So, under a direction to invest the testator's personal estate in public funds, and to apply the income to the maintenance and education of his children during their minority, the investing of the money at least is incumbent upon the executor as such, and therefore passes to an administrator c. t. a. Hall v. Cushing, 9 Pick. 395. The court said: "The direction in the will, so far as it relates to the investment of the assets, did not devolve any special personal trust on the executors. They were not bound, perhaps, to superintend the education of the children; or, if they were, this would be a personal confidential trust, not appertaining to the office of executor or that of administrator cum testamento annexo. L.R.A. (N.S.)

newo. But the direction to invest was intended for the security and productive value of the assets, and would be binding on anyone intrusted with the execution of the will."

And a direction to an executor to support the testator's father is not a personal trust, and therefore devolves upon the administrator c. t. a. Farwell v. Jacobs, 4 Mass. 634.

So, in Re Baker, 26 Hun, 626, where the testator directed that the executrix "or those administering my estate" should hold a certain sum of money, and use the interest to support his grandchildren and their mother, it was held that an administrator c. t. a. had power to receive the interest and to apply it for the purpose designated.

And a direction to testator's executor or administrator to appropriate his property for the use of his wife and children, and to pay it in certain proportions, devolves upon an administrator c. t. a. Blake v. Dexter, 12 Cush. 559.

So, a trust for holding a certain sum bequeathed to testator's children and for the application of the interest to the children's education has been held to pass to the administrator c. t. a. Creech v. Graininger, 106 N. C. 213, 10 S. E. 1032.

And it has been held that a direction to executors to invest a certain sum "upon bond and mortgage of real estate or such stocks as they may regard safe and permanent," and to pay the interest to designated persons, shows a repose of no personal confidence, and may be executed by an administrator c. t. a. Re Post, 2 Connolly, 243, 9 N. Y. Supp. 449.

In Jones v. Jones, 17 N. C. (2 Dev. Eq.) 387, an administrator c. t. a. was held a trustee to the same extent as if he had been nominated executor, where real and personal property was devised to testator's executors and unto their survivors, in trust for testator's daughter.

It was held in Bain v. Matteson, 54 N. Y. 663, that under the language of statutes, the provisions of which do not appear, a power to lease given to executors passed to an administrator c. t. a. J. T. W

Rep. 561, 58 S. W. 443; *Smith v. Haywood* (1869) M. S. Op.; *Gulley v. Prather*, 7 Bush, 107; *Shields v. Smith*, 8 Bush, 601; *Sims v. Birdsong*, 21 Ky. L. Rep. 75, 50 S. W. 993; *Kerr v. Long*, 28 Ky. L. Rep. 52, 88 S. W. 1068; *Harding v. Weisiger*, 33 Ky. L. Rep. 170, 109 S. W. 890; *Burwell v. Caewood*, 2 How. 560, 11 L. ed. 378.

The authority to carry on the business, on the resignation of the nominated executor, passed to the administrators *de bonis non* with the will annexed.

Harding v. Weisiger, supra; *Gandolfo v. Walker*, 15 Ohio St. 275; 2 *Woerner*, Am. Law of Administration, § 341; *Gulley v. Prather*, 7 Bush, 168; *Shields v. Smith*, 8 Bush, 604; *Warfield v. Brand*, 13 Bush, 96; *Sims v. Birdsong*, supra.

Lassing, J., delivered the opinion of the court:

William Schlickman, a resident of Covington, Kentucky, died in March, 1894. For many years prior to his death, he had been engaged in the pork-packing business, first in partnership with one *Daniel Ruttle* and later as a member of the *Ruttle-Schlickman Packing Company*, a corporation, which was organized about 1890. He and *Ruttle*, his former partner, owned practically all of the stock, and, in 1892, he bought the interest of *Ruttle* in the business, so that, at the time of his death, he owned practically all of the stock of the packing company. A few shares which were not owned by him were held by employees merely for the purpose of organization. He left a will giving all of his property to his children, some of whom were, at the date of his death, quite young. He also provided in his will that his executor, *Fred Pieper*, should take charge of his estate and manage his business; and he gave to said executor power to sell and convey his real estate. He also designated him as guardian of his minor children. Shortly after his death his will was admitted to probate, and *Fred Pieper*, his friend named therein as executor, qualified as such, took charge of the estate, and managed it, and operated the pork-packing business until in April, 1899, at which time he resigned and was succeeded by *H. W. Schlickman* and *J. H. Dorsel*, son and son-in-law of the decedent, as administrators *de bonis non* with the will of *William Schlickman*, deceased, annexed. Thereafter the administrators conducted the business of the *Ruttle-Schlickman Packing Company*, and, as administrators, became the indorsers for said company on several notes to the *Citizens' National Bank* of Covington. The aggregate amount of these notes in 1904, when suit was brought to settle the estate of *William Schlickman*, amounted to 29 L.R.A. (N.S.)

more than \$10,000. Upon the institution of the suit to settle, the case was referred to the master commissioner to hear proof of claims. The bank presented its claim before the master, proven as the law directs, but the master was of opinion that the administrators were without power or authority to bind the estate of their decedent, and he rejected said claim. On exceptions filed to this report, the case was submitted to *Hon. E. L. Worthington*, sitting as special judge, and, upon full consideration, he held that, under the will of *William Schlickman*, his administrators with the will annexed had the power and authority to bind his estate in the way and manner in which they did, and that the claims presented by the *Citizens' National Bank* were good and valid claims against said estate, and he directed and ordered them to be paid. From this finding and judgment this appeal is prosecuted.

Two propositions are raised for our consideration: First, did the will of *William Schlickman* authorize his executor to contract debts and bind his estate for the purpose of carrying on the pork-packing business of the *Ruttle-Schlickman Packing Company*? and, second, if such power is conferred upon the named executor as would authorize the creation of these debts by him, so as to bind the estate therefor, did such authority pass to the administrators *de bonis non* with the will annexed; or was it personal to *Pieper*, the named executor? Said will which we are called upon to construe is as follows:

I, *William Schlickman*, of Covington, Kenton county, Kentucky, being of sound and disposing mind and memory, and recognizing the uncertainty of life, do hereby make this my last will and testament, to wit:

First. I direct my executor, hereinafter named, out of my estate to pay all my just debts.

Second. I hereby bequest and devise unto my children all of my estate of whatsoever kind and wherever situated, to have and to hold share and share alike, the said children being named, to wit, *Emma*, wife of *John Dorsel*, *Henry Schlickman*, *Lea Schlickman*, *Clara Schlickman*, *William Schlickman*, *Mary Schlickman*, *Frederick Schlickman*, *Margaret Schlickman*, and *Norbert Schlickman*.

Third. I hold the title to a house and lot on the west side of *Holman street*, between *Fifteenth* and *Sixteenth streets*, in *Covington, Kentucky*, the lot being conveyed to me by *Crockett*, which property has been mortgaged by me to the *Kentucky Perpetual Building and Loan Association* for \$1,500.

This property belongs to *Mrs. Mary Frecking*, and the title is held by me in

order to borrow said sum from said building association; and I am also the surety on a note for \$400 to Lambert Determan, and the title to this property is held by me to secure the payment of said note, and whenever said building association debt is satisfied and said note paid, so that my estate is relieved from all liability on account of either of said debts, then my executor will by a proper deed convey the said property to said Mary Frecking, giving her free and unencumbered title thereto.

Fourth. I appoint Fred Pieper guardian of my infant and unmarried children, being all of my children hereinbefore named except Emma Dorsel.

Fifth. I hereby nominate as executor of this my will the said Fred Pieper, and ask that he be allowed to qualify and act as such without giving bond, and I hereby fully authorize and empower him, as my executor to do any and all things concerning my estate that I could do if living, leaving it to his judgment and discretion as to how he shall manage the same or carry on my business, and giving to him full power and authority to sell and convey any or all of my real estate when, in his judgment, it may be desirable to do so; and the devise to my children herein is especially subject to the power thus vested in my said executor, that is, the devise to them is in no way to be construed as a limitation on the power of said executor to sell and convey by deed said real estate as to carry on said business.

In witness whereof, I, the said Henry Schlickman, do hereby this 26th day of February, 1894, set my hand in the presence of Henry Linneman and J. W. Bryan, whom I have requested to attest this will.

Wm. Schlickman.

The record discloses that, at the date of the death of William Schlickman, the pork-packing business owed approximately \$22,500. It was the custom of this company to borrow money with which to purchase the hogs which were slaughtered and packed during the fall and winter season, and, when the cured meats, etc., were sold in the following spring and summer, these obligations would be discharged. After the death of William Schlickman, the packing company did not make money, and this is particularly true after the business passed into the hands of the administrators *de bonis* with the will annexed. It cannot be said that this failure of the business to make money was due to any mismanagement on the part of the administrators; but it may more properly be chargeable to the fact that the company, with its limited cap-

ital, was unable to compete with the large packing establishments, which, by reason of their improved business facilities, were enabled to buy upon more favorable terms and sell to better advantage than their less fortunate rivals. The business steadily lost money, and when all of its assets had been exhausted the company was still largely indebted. Of this indebtedness, \$10,080 was due to the Citizens' National Bank, and upon the notes evidencing same, the administrators of the estate of William Schlickman, with the will annexed, had sought to bind his estate as surety.

At the date of the death of decedent, the packing company had assets worth approximately \$40,000, and it was indebted to the First National Bank in the sum of \$22,500, and the estate of decedent was bound therefor. By the fifth clause of his will he authorized and directed his executor, Pieper, to do any and all things concerning his estate which he, if living, could have done. It is conceded that decedent was not engaged in any other business than that of pork packing, and when he referred in his will to "my business," and authorized his executor to "carry on my business," he evidently referred to the pork-packing business, although the business, in fact, was not owned by him in its entirety. He was making provision in his will to enable his executor to manage his estate, and particularly to manage the packing business in such a way as he believed would make it profitable to his estate. He evidently did not desire that it should be precipitately wound up, and for this reason he authorized his executor to carry on his business just as he would himself, if living, have managed and carried it on. Clearly, it was the intention of the testator that his executor should have power and authority to borrow money, if need be, for the conduct of this business, and he understood that, if the executor did so, his estate would be bound therefor. To hold otherwise would be to defeat the clearly expressed intention and desire of the testator.

The entire estate of the decedent was, of course, bound for the payment of notes amounting to \$22,500, which the packing company owed at the date of his death and upon which he was security. These claims were held by the First National Bank. As they matured they were taken up and either paid off by money realized out of the business of the packing company, or furnished by the executor, or else from money borrowed by the packing company, upon its notes, from the Citizens' National Bank, with the executor as surety. So that, in a reasonably short time after the executor took charge of the business of the packing

company, all of its indebtedness to the First National Bank was paid off and fully satisfied, and from that time on, the packing company's account was kept with the Citizens' National Bank, and from it such sums of money as were needed in its business were from time to time borrowed. The old notes were taken up in whole or in part by the execution of new ones. And thus the business was conducted until Pieper resigned and the administrators with the will annexed were appointed. At this time the packing company owed the bank about \$13,000. Thereafter all this indebtedness was discharged, in the same way and manner as the indebtedness to the First National Bank had been discharged, except, perhaps, that, after the administrators with the will annexed took charge of the business, no money was furnished by the estate of decedent.

We are of opinion that the executor, Pieper, was authorized, under the power given him by the fifth clause of the will, to borrow money to carry on the business of the packing company, and that the entire estate of decedent was bound therefor; and it is immaterial whether he signed these notes as principal or as surety, so long as it was to enable the company to raise money necessary to properly carry on its business, or, rather, to carry on the business in a way which he deemed to be proper. The estate, in either event, was bound therefor. He did not find it necessary to bind the estate as principal, in order to raise money for the packing company, but, by endorsing the notes as surety for the packing company, he enabled it to raise such money as it needed. The administrators with the will annexed, upon taking charge of the estate and of the pork-packing business, undertook to conduct it practically as the executor had done. They borrowed money from the appellee bank as it was needed in the business, and, as the manufactured products were sold, the indebtedness was discharged. All of the moneys which the executor had borrowed from the appellee bank were paid off and discharged by the packing company, either from moneys realized by a sale of its products, or else by the execution of new notes. None of the notes presented are signed by the executor, and only one of them was executed within the first twelve months after his resignation. So that, while the executor was, by the terms of the will, authorized and directed to pledge the estate for money needed to carry on the packing business, appellee must fail, unless the power given by the fifth clause of the will is broad enough to invest the administrators

with the will annexed with the same power to bind the estate as the executor had.

What did the testator intend by the use of the language therein employed? That he had the most unlimited confidence in the honesty, integrity, and business capacity of his friend Pieper, is quite evident, for he not only invested him with absolute power as to the management and control of his property and business, but requested that the court should require of him no bond for the faithful execution of the trust reposed in him; and, in addition, he selected him as guardian for his children, most of whom were of tender years. It can scarcely be presumed that he intended, by the language used in this clause of his will, that this unlimited authority as to the management of his estate should be exercised by anyone else. No such presumption should be indulged unless the language employed by the testator, when fairly construed, is susceptible of no other interpretation. The line of demarcation between that class of cases where the duties imposed upon an executor by a testator are such as pass to, and are to be discharged by, his successor, and that other class of cases where the duties imposed are personal to the executor, is not clearly drawn, and, from the very nature of things, cannot be. Each case must be determined by the facts connected therewith. This court has frequently been called upon to determine whether powers given to an executor named in a will pass to, and are to be performed by, his successor, the administrator with the will annexed. This question has usually arisen in cases where there has been an attempt to hold the sureties on an administrator's bond liable for loss of funds growing out of the commission of acts which did not properly or necessarily devolve upon him by virtue of his office of administrator with the will annexed. It has been uniformly held, in such cases, that no liability on the bond existed where the power given was personal to the executor; but, where it was not, such liability invariably attached. *Clay v. Hart*, 7 Dana, 1; *Speed v. Nelson*, 8 B. Mon. 499; *Warfield v. Brand*, 13 Bush, 84; *Givens v. Flannery*, 105 Ky. 451, 49 S. W. 182. This proposition is not disputed by counsel for appellee, but it is earnestly contended that the duties imposed by the fifth clause of the will are purely executorial, and that no trust relation is created by the language used in said clause. The duties of an executor are to collect and preserve the personal estate, pay the debts and costs of administration, and distribute the surplus to those justly entitled thereto, either as directed by the will or provided by law. Other duties may be, and frequently are,

imposed upon the executor by the will, and where these duties look toward reducing real or mixed property to personalty for the purpose of distribution, they are likewise regarded and treated as executorial duties. But when duties are imposed that have an aim further and beyond that of the settlement of the estate, they are treated as personal to the named executor, and looked upon in the nature of a trust, and the executor, in his capacity as such, is not bound for their performance, but only in his capacity as trustee. This being so, the question here under consideration is treated of only in that class of cases where there is an attempt made to charge the administrator's bond for the mismanagement or misappropriation of the funds, for the executor is always primarily liable, and it is immaterial whether as trustee or executor, his liability attaches just the same. Hence, we must look to that class of cases where the circumstances are such as to require the court to deal with the separate duties and responsibilities of executors in their dual capacity of executor and trustee. This distinction is well stated in the case of *Warfield v. Brand*, 13 Bush, 77, where Judge Hofer, speaking for the court, said: "But we think we hazard nothing in saying that when the faithful exercise of the power or performance of the duty is not secured by the form of bond prescribed by the statute, and the power or duty does not relate to the settlement of the estate and its distribution according to the ordinary course of administration, and especially when the estate, after being otherwise ready for distribution to those in interest, is required by the will to be held in the hands of the executors, upon trusts which may extend over a long period, and from their character must be presumed to have been made by the testator because of his personal confidence in the fitness of his executors for the discharge of the duties imposed, such power or duty will not pass, under the statute, to an administrator *de bonis non* with the will annexed." The reason that such duties do not pass is that they are personal to the executor named. The duties imposed upon Pieper by the fifth clause of the will are in no wise executorial. They do not look to the settlement of the estate, but to the operation of the packing company, and it can hardly be seriously contended that the direction on the part of the testator to his named executor to operate a corporation for an indeterminate period was regarded by him as anything short of a personal trust or confidence reposed in his friend, to whom he was given most unusual and extraordinary power and authority over his estate.

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But, it is urged, under § 3392, Ky. Stat. (Russell's Stat. § 3938), these duties passed to and devolved upon the administrator with the will annexed, and hence, whether in their nature in fact executorial or not, being treated as such by the statute, the administrators with the will annexed had authority, under and by virtue of said statute, to bind the estate of decedent in the way and manner in which they did. This same statute was in force when the case of *Warfield v. Brand*, above referred to, was written, and in that case the court held that duties which were purely personal to the named executor did not pass to and devolve upon the administrator with the will annexed, as shown by the following excerpt from the opinion: "The statute was, no doubt, enacted solely to facilitate the settlement of estates, and we are unwilling to believe that the legislature intended to go beyond what was necessary for that purpose, and to confide to administrators *de bonis non* those delicate and responsible trusts which testators sometimes confide to their chosen executors. Powers are sometimes confided to executors, or, more properly, to the person filling the office of executor, as a trustee, which are so delicate, and of such a nature, that even the chancellor cannot execute them. Yet, if the construction contended for by the appellee be adopted, the legislature has, by a dogmatic statute, conferred power for that purpose upon an administrator with the will annexed." And in the later case of *Givens v. Flannery*, *supra*, although the will under consideration imposed certain duties upon the executor, this court held that their execution did not pass to and devolve upon the administrator with the will annexed, as is evident from the following: "It is well settled in this state that the surety in an executor's bond is only liable for the duties which the law imposes upon the executor, and that he is not liable where the executor discharged the duties of a trustee, although the will, in imposing these duties, may not designate him as a trustee." And then, after citing the cases of *Allen v. Kennedy*, 10 Ky. L. Rep. 336, 8 S. W. 882, *Lasley v. Lasley*, 1 Duv. 117, *Neely v. Merritt*, 9 Bush, 346, and *Warfield v. Brand*, 13 Bush, 98, the court said: "We deem the rule too well settled now to be departed from." And in the case of *Major v. Herndon*, 78 Ky. 123, where, in the will under consideration, the testator's wife was named as executrix, with directions that she should carry out the provisions of the will, the court held that, although named as executrix, she was in fact holding the estate which she had administered as trustee, and not as executrix.

Reading the statute under consideration in the light of the construction placed upon it in the foregoing opinions, it is clear that the trouble with counsel for appellant lies in its application. In none of the cases where the application of this statute has been involved has the court held that any duty which rightfully devolved upon the executor as such might not be discharged by the administrator with the will annexed. But it has been distinctly held that many of the duties imposed upon executors are not executorial in their nature, but personal to the executor, and it is this latter class of powers and duties which do not pass to the administrator with the will annexed, and are not covered by the statute. For the statute only provides that the administrator with the will annexed shall exercise all power and authority, and possess the same rights and interest, and be responsible, as the executors named therein, and this court has construed this to mean such power as the executor named in the will has by virtue of his office as executor, but does not pass to the administrator with the will annexed such powers as the person named as executor may have under and by virtue of any trust reposed in him by the will, which did not look primarily to the settlement of the estate. And this is true, even though, in directing him to execute such trust, he is designated in the will as executor, the court being guided in reaching its conclusion rather by the object sought to be obtained by the power, than by the name used to designate the one directed to execute it.

Much stress is laid by appellee upon the phrase in the fifth clause, "and the devise to my children herein is especially subject to the power thus vested in my said executor, that is, the devise to them is in no way to be construed as a limitation on the power of said executor to sell and convey by deed said real estate or to carry on said business." The effect of this sentence in the fifth clause of the will was merely to postpone the period of distribution of the estate until such time as, in the judgment of Pieper, was necessary and proper. Of course, it necessarily follows that, so long as he was operating the packing business or postponing the sale of the real estate, no final distribution could be made.

It is very apparent from even a casual consideration of the will in question that the testator desired to place in the hands of his friend Pieper the management and conduct of his business and the settlement of his estate, because of the confidence which he had in his honesty, integrity, and business ability. This confidence finds expression not only in the fact that he direct-

ed that the court should require of his friend no bond whatever, but in the further fact that no limitation was placed upon his judgment as to the manner in which the business should be conducted, or the length of time it was to be operated by his friend. It cannot be that he contemplated that these extraordinary powers and great confidences were to be discharged by or reposed in anyone other than his friend Pieper, and although in granting same he directs that they shall be discharged by his executor, inasmuch as he named him, these words must be regarded as descriptive of the person, rather than intended to be applied to anyone who might fill the office. So that, while Pieper had the right to operate the business of the packing company, and pledge the estate of decedent for such funds as in his judgment it became necessary from time to time to borrow, these were rights which he possessed and enjoyed under and by virtue of the personal trust reposed in him by the will, and not in his capacity as executor. This being true, these rights and powers did not pass to the administrators with the will annexed, and they were without authority to bind the estate of their decedent in the execution of the notes in question, and their acts in this particular are of no binding force or effect.

The exceptions to the report of claims filed by the Master Commissioner should have been overruled. Judgment reversed and cause remanded, with instructions to do so.

IOWA SUPREME COURT.

INTERNATIONAL HARVESTER COMPANY OF AMERICA, Appt.,

v.

IOWA HARDWARE COMPANY et al.

(— Iowa, —, 122 N. W. 951.)

Attachment — exemplary damages.

1. Exemplary damages may be recovered for suing out an attachment merely because the debtor does not pay money due when

Note. — Exemplary damages in action for malicious prosecution or for abuse of process in suing out attachment for collection of debt only.

General principles.

The action for wrongful attachment is founded upon statute, and in this respect differs from the action for malicious prosecution, which is a common-law action on the case or in trespass. In the latter action both malice and want of probable cause are of the essence, and both must be alleged and proved. In the statutory action for

demanding without any belief that he has any purpose of defrauding his creditor.

Damages — exemplary — wrongful attachment.

2. The allowance of \$500 as exemplary damages and \$300 as counsel fees for the suing out of an attachment to compel payment of \$600 which had matured on notes aggregating \$2,400, without any reason to believe that the debtor intended to defraud the creditor, will not be interfered with on appeal, although the actual damages are only \$40.

Appeal — refused instruction — error.

3. Refusal to give an instruction to correct one which is subject to criticism is not reversible error where it is no more persuasive for that purpose than some which were actually given by the court.

wrongful abuse of process or wrongful attachment, the basis of the action is merely the wrongful and unjustifiable use of the writ of attachment, and it would seem that neither malice nor want of probable cause are essential where the statute gives a right of action merely for a wrongful issuance of an attachment.

The nature of the remedy by attachment is such that a specific remedy by statute has been deemed necessary to prevent abuse of it, and by the great weight of authority it is unnecessary to show both malice and want of probable cause in order to sustain such an action, and many courts hold that neither is necessary. But if the attachment defendant seeks to hold the attachment plaintiff for exemplary damages, then, by all of the authorities, both malice and want of probable cause must be shown.

So, the court in *Culbertson v. Cabeen*, 29 Tex. 247, said: "The remedy by attachment is a harsh one. A party, upon his *ex parte* affidavit, can have the property of his debtor seized and taken from his possession, and thereby subject him to great inconvenience, his business to great interruption, and his credit to great injury. The only security against the abuse of this most stringent and summary remedy is the right of the defendant to require of his adversary a strict compliance with the conditions on which the remedy is granted, and if the remedy is pursued against him maliciously, and without probable cause, to hold the malicious prosecutor responsible in damages or his wrongful use of it."

The question is somewhat complicated by the fact that, under the statutes giving the remedy by attachment, the plaintiff is required to file an attachment bond usually conditioned on the payment of all damages, if the attachment is not prosecuted with effect. And it has been held that an action on the case for suing out an attachment maliciously and without probable cause is maintainable independently of the statutory requirement of the bond, the action on the case being considered a more complete remedy.

Thus, in *Lawrence v. Hagerman*, 56 Ill. 29 L.R.A. (N.S.)

Attachment — wrongful — counsel fees — reasonableness.

4. Counsel fees in case of the malicious suing out of an attachment are not limited to those reasonable with reference to the actual damages sustained, by a statute providing that, for wrongfully suing out an attachment, recovery may be had for the actual damages sustained and reasonable attorneys' fees to be fixed by the court; and if it be shown that the attachment was sued out maliciously, exemplary damages may be recovered.

Appeal — rejected evidence — non-prejudicial error.

5. Refusal to permit a witness to answer a question is not reversible error if an answer as full as could have been obtained in response to the question excluded was

68, 8 Am. Rep. 674, the court said: "The remedies by an action on the case and upon the bond may be concurrent to a certain extent. Actual damages, such as direct loss on the property attached, expenses incurred in defense of the suit, may be recovered in an action on the bond. But for loss of credit, breaking up of business, loss of customers, and injury to reputation, resort must be had, to obtain full indemnity, to an action on the case for malicious prosecution, under the common law."

So, the statute affording a remedy in case of malicious issuance of an attachment does not take away the common-law remedy. *Donnell v. Jones*, 13 Ala. 490, 48 Am. Dec. 59.

In speaking of the remedies of a defendant in attachment, the court in *Jerman v. Stewart*, 12 Fed. 266, said: "I think the defendant in attachment has three remedies: (1) He may sue on the bond and recover according to its condition; (2) he may sue the plaintiff on the facts of the case and recover according to the statute, precisely as if the plaintiff had given a bond; (3) he may sue for malicious prosecution, as at common law, and recover according to the common law, where there has been malice and want of probable cause."

There is considerable conflict on the question whether exemplary damages are recoverable where the action is on the bond rather than on the case or in trespass, but it is essential in all cases in which exemplary damages are sought that malice and want of probable cause be alleged and proved, and under these circumstances the action becomes very similar to the common-law action for malicious prosecution.

Both malice and want of probable cause must be alleged and proved. *Accessory Transit Co. v. McCerren*, 13 La. Ann. 214; *Doll v. Cooper*, 9 Lea, 576.

The principles of law governing an action for the wrongful issuance of an attachment are those common-law principles applicable to actions for malicious prosecutions. *Jacobs v. Crum*, 62 Tex. 401.

Where there is a conflict of evidence in regard to probable cause, it is error to

obtained from him in response to another question.

(October 27, 1909.)

APPEAL by plaintiff from a judgment of the District Court for Clarke County in his favor for a less sum than was demanded in an action brought to recover the amount alleged to be due on certain promissory notes and for an attachment. Affirmed.

Statement by McClain, J.:

Action to recover on promissory notes and for an attachment. Defendant admitted liability to the amount of the notes and

interest, but interposed a counterclaim for damages for a wrongful suing out of the attachment. There was a verdict for plaintiff in the amount of the claim sued on less \$540 allowed defendant by way of damages for the wrongful attachment, and the court allowed by way of costs to defendant \$300 as attorneys' fees. From a judgment on this verdict, the plaintiff appeals.

Messrs. Temple & Temple for appellant.

Messrs. O. M. Slaymaker and J. H. Jamison, for appellees:

The actual and exemplary damages allowed by the jury were not excessive.

Saunders v. Mullen, 66 Iowa, 728, 24 N. W. 529; Union Mill Co. v. Prenzler, 100

withdraw from the jury the question of exemplary damages. Conly v. Wood (Tex.) 12 S. W. 615.

A "wrongful" suing out of a writ of attachment provided for by the Tennessee statute is merely a failure to prosecute it with effect; if malice and want of probable cause are shown in addition, exemplary damages may be awarded. Jerman v. Stewart, supra.

Punitive damages are allowable to the administrator of the defendant in the attachment suit, who died during the pendency of the action, in which the defendant had set up a counterclaim for damages for the wrongful suing out of the writ. Union Mill Co. v. Prenzler, 100 Iowa, 540, 69 N. W. 876.

In some cases the claim for exemplary damages is set up as a counterclaim in the original action. Hurlbut, H. & Co. v. Hardenbrook, 85 Iowa, 606, 52 N. W. 510; Wright v. Waddell, 89 Iowa, 350, 56 N. W. 660.

While in Texas exemplary damages have been allowed under a plea of reconvention in the attachment action. Culbertson v. Cabeen, supra; Wallace v. Finberg, 46 Tex. 35; Jacobs v. Crum, supra; Blum v. Stein, 68 Tex. 608, 5 S. W. 454; Tynberg v. Cohen, 76 Tex. 400, 13 S. W. 315.

So, in Mississippi, the damages are assessed in the main action under a plea of abatement. Fleming v. Bailey, 44 Miss. 132; Roach v. Brannon, 57 Miss. 490; Marquee v. Sontheimer, 59 Miss. 430. But the jury, in trying the issue of abatement, have as large a scope to consider and estimate the damages as in a separate suit on the attachment bond. Fleming v. Bailey, supra.

And in Arkansas, the damages are assessed in the main action. Holliday Bros. v. Cohen, 34 Ark. 707; Patton v. Garrett, 37 Ark. 605; Goodbar v. Lindsley, 51 Ark. 380, 14 Am. St. Rep. 54, 11 S. W. 577.

Exemplary damages in common-law action.

Where a writ of attachment has been maliciously sued out without probable cause, the cases very generally hold that in a com-

mon-law action punitive damages may be awarded to the defendant in a proper action therefor, but that both malice and want of probable cause must be present. Jerman v. Stewart, supra; Tibbler v. Alford, 12 Fed. 282; Tamblin v. Johnston, 62 C. C. A. 601, 126 Fed. 267; Giddings v. Freedley, 65 L.R.A. 327, 63 C. C. A. 85, 128 Fed. 355; Kirksey v. Jones, 7 Ala. 622; Donnell v. Jones, 13 Ala. 490, 48 Am. Dec. 59; Melton v. Troutman, 15 Ala. 535; Seay v. Greenwood, 21 Ala. 491; Brown v. Master, 104 Ala. 451, 16 So. 443; Nachtrieb v. Stoner, 1 Colo. 423; Lawrence v. Hagerman, 56 Ill. 68, 8 Am. Rep. 674; Nordhaus v. Peterson Bros. 54 Iowa, 68, 6 N. W. 77; Hurlbut, H. & Co. v. Hardenbrook and Wright v. Waddell, supra; Byford v. Girtton, 90 Iowa, 661, 57 N. W. 588; Connelly v. White, 122 Iowa, 391, 98 N. W. 144; Morris v. Shew, 29 Kan. 661; Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786; Adams v. Gillam, 53 Kan. 131, 36 Pac. 51; Offutt v. Edwards, 9 Rob. (La.) 90; Wana maker v. Bowes, 36 Md. 42; Cronfeldt v. Arrol, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857; Walser v. Thies, 56 Mo. 89; Reamer v. Morrison Exp. Co. 93 Mo. App. 501, 67 S. W. 718; Carey v. D. Wolff & Co. 72 N. J. L. 510, 63 Atl. 270; Chappell v. Ellis, 123 N. C. 259, 68 Am. St. Rep. 822, 31 S. E. 709; Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co. 138 N. C. 174, 50 S. E. 571, 3 A. & E. Ann. Cas. 720; Barnett v. Reed, 51 Pa. 190, 88 Am. Dec. 574; Walcott v. Hendrick, 6 Tex. 406; Reed v. Samuels, 22 Tex. 114, 73 Am. Dec. 253; Culbertson v. Cabeen, 29 Tex. 247; Wallace v. Finberg, supra; Willis v. McNeill, 57 Tex. 465; Jacobs v. Crum, supra; Farrar v. Talley, 68 Tex. 349, 4 S. W. 558; Blum v. Stein, supra; Rice v. Miller, 70 Tex. 613, 8 Am. St. Rep. 630, 8 S. W. 317; Willis v. McNatt, 75 Tex. 69, 12 S. W. 478; Parks v. Young, 75 Tex. 278, 12 S. W. 986; Kirbs v. Provine, 78 Tex. 353, 14 S. W. 849; Tra-wick v. Martin Brown Co. 79 Tex. 461, 14 S. W. 564; Conly v. Wood, supra; Melvin v. Chaney, 8 Tex. Civ. App. 252, 28 S. W. 241; Epps v. Hazlewood, 40 Tex. Civ. App. 325, 89 S. W. 809; Faroux v. Cornwell, 40 Tex.

wa, 540, 69 N. W. 876; Root v. Sturdi-
unt, 70 Iowa, 55, 29 N. W. 802; Reizen-
ein v. Clark, 104 Iowa, 287, 73 N. W. 588;
therland, Damages, § 393, p. 1095;
ckens v. South Carolina & G. R. Co. 54
C. 498, 32 S. E. 567; Kilmer v. Gallaher,
0 Iowa, 575, 95 N. W. 180; Nockles v.
gspieler, 53 Iowa, 730, 6 N. W. 67.

McClain, J., delivered the opinion of the
urt:

It appears that at the time plaintiff in-
tuted this action defendant was indebt-
to it on various notes in the aggregate
m of about \$2,400, of which only about
00 of indebtedness was matured. The
und of attachment relied upon in this
urt by appellant as having been estab-

lished by the evidence was that defendant
had disposed of its property in whole or
part, with intent to defraud its creditors.

1. Plaintiff's attachment was levied upon
defendant's stock of goods, and the sheriff
took possession thereof on Saturday after-
noon, and the levy was released by the ex-
ecution of a delivery bond by plaintiff be-
fore noon of the following Monday, and the
actual damages shown by defendant re-
coverable in an action on the attachment
bond did not exceed \$40, so that it is ap-
parent the jury allowed at least \$500 by
way of exemplary damages, which, under
the instructions of the court given in ac-
cordance with the provisions of Code,
§ 3885, could only be allowed if it was
shown that the attachment was not only

r. App. 529, 90 S. W. 537; Billingsley v.
wett (Tex. Civ. App.) 39 S. W. 953;
ster v. Campbell (Tex. Civ. App.) 46 S.
876; Smith v. Mather (Tex. Civ. App.)
S. W. 257; Lackey v. Campbell (Tex.
r. App.) 54 S. W. 46; Rainey v. Kemp
ex. Civ. App.) 118 S. W. 330; Dreis; v.
ust, 1 Tex. App. Civ. Cas. (White & W.)
; Schwartz v. Burton, 1 Tex. App. Civ.
s. (White & W.) 698; Bateman v. Mc-
sight, 2 Posey, Unrep. Cas. (Tex.) 309.
So. in Pittsburg, J. E. & E. R. Co. v.
ckfield Hardware Co. supra, the court
d: "The allegation and proof sustaining
that the defendant at the time it caused
attachment to issue knew that the plain-
did not owe it anything, is equivalent
an allegation and proof of want of prob-
e cause, and such proof would entitle
ntiff to recover actual damages. If the
ntiff should go further and satisfy the
y that the attachment was sued out by
defendant wantonly, recklessly, and wil-
ly, for the purpose of coercing the plain-
to pay money it did not owe, that would
equivalent to proof of malice, . . .
l the plaintiff would thereby lay the
ndation to recover punitive damages."

Action on the attachment bond.

There is some conflict on the question
whether exemplary damages are recoverable
in an action on the attachment bond.
In Alabama, even if the action is on the
d. punitive damages are recoverable if
attachment was malicious or wanton, an
ion on the bond being governed by the
e rules as an action on the case. Mc-
Cough v. Walton, 11 Ala. 402; Floyd v.
alton, 33 Ala. 235; Stewart v. Cole, 46
446; Durr v. Jackson, 59 Ala. 203;
kauf v. Morris, 66 Ala. 406; Dothard
Seid, 69 Ala. 135; City Nat. Bank v.
ries, 73 Ala. 183; Jefferson County Sav.
rk v. Eborn, 84 Ala. 529. 4 So. 386; Bal-
v. Walker, 91 Ala. 428, 8 So. 364, sec-
l appeal, 94 Ala. 514, 10 So. 391; Van-
er v. Waller, 143 Ala. 411, 39 So. 136.
The bond does not change the liability of
the party incurred by suing out an attach-
ment. L.R.A.(N.S.)

ment wrongfully and vexatiously. City Nat.
Bank v. Jeffries, supra.

The distinction between an action upon a
bond and one upon the case was stated in
Brown v. Master, 104 Ala. 451, 16 So. 443,
as follows: "An action on the bond may be
prosecuted to the recovery of actual dam-
ages when the writ is wrongfully sued out,
and if sued out maliciously as well as
wrongfully, the jury may in addition give
vindictive damages. But in the action of
malicious prosecution against the plaintiff
in attachment, the attachment must be
wrongful, and must have been sued out with
malice and without probable cause. If not
wrongful, i. e., if the facts justify and au-
thorize its issuance, if a statutory ground
exists, no recovery can be had, though the
defendant was actuated purely by malice in
suing out the writ. If wrongful, but not
malicious, no recovery can be had. If
wrongful and malicious, but with probable
cause, the action will fail. And if wrong-
ful and without probable cause, and also
without malice, no action can be maintained.
There must, in other words, to authorize a
recovery, be a concurrence of the three con-
ditions,—wrong, malice, and want of prob-
able cause."

The same rule prevails in Iowa. Raver v.
Webster, 3 Iowa, 502, 66 Am. Dec. 96; Gad-
dis v. Lord, 10 Iowa, 141; Campbell v.
Chamberlain, 10 Iowa, 337; Union Mill Co.
v. Prenzler, 100 Iowa, 540, 69 N. W. 876;
Tyler v. Bowen, 124 Iowa, 452, 100 N. W.
505; Ahrens v. Fenton, 138 Iowa, 559, 115
N. W. 233.

And in Smith v. Eakin, 2 Sneed, 450, it
was held that the plaintiff might recover all
damages in an action on the bond as, un-
der the circumstances of the case, might
properly be recovered in an action on the
case, the requirement of the bond being in-
tended merely as a check upon the improper
use of the proceeding by attachment.

The measure of damages is precisely the
same in an action upon the attachment bond
as in an action upon the facts of the case,
malice and want of probable cause going
in aggravation. Renkert v. Elliott, 11 Lea,
235.

wrongful, but also maliciously sued out. It is the contention of appellant, stated in different ways, that there was no evidence of a wrongful suing out of the attachment, and, more especially, no evidence that the attachment was malicious. The jury found, in answer to special interrogatories, that the attachment was wrongful and malicious and without reasonable cause, and we think that there was evidence to support such findings. If this is so, the jury was warranted in giving exemplary damages, provided, of course, actual damage to some amount was shown. That some actual damage was established which might be recovered in the counterclaim on the bond, if the jury found the attachment to have been wrongfully sued out and without reasonable

cause, is not questioned. Therefore, the jury was justified in allowing exemplary damages, if there was evidence tending to show that plaintiff, in suing out the attachment, had no reasonable cause to believe the ground upon which it was sued out to be true, but acted maliciously in so doing. On the evidence there can be no serious question but that the jury might properly find plaintiff to have been without reasonable cause to believe that defendant's disposal of its property was with intent to defraud the plaintiff, and that plaintiff had no reasonable cause to believe that any such intention existed. The only serious question under the evidence is as to whether plaintiff acted maliciously.

To constitute the malice necessary to

The same rule of damages applies whether the suit be upon the bond or an action on the case outside the bond. *Jerman v. Stewart*, 12 Fed. 266.

In a suit on an attachment bond, damages actually sustained, and no more, are allowable, unless in a case where the attachment is utterly unfounded and malicious. *Moore v. Withenburg*, 13 La. Ann. 22.

But no action except on the bond lies for the mere wrongful suing out of the bond. *Brown v. Master*, 104 Ala. 451, 16 So. 443, second appeal, 111 Ala. 397, 20 So. 344.

The Tennessee statute expressly provides that vindictive damages may be given if the attachment is sued out maliciously. *Jerman v. Stewart*, *supra*.

So, also, in Alabama the statute provides that exemplary damages may be recovered in an action on the bond. *Dothard v. Sheid*, *supra*.

On the other hand, some cases hold that actual damages only are recoverable in an action on the bond.

Thus, in *Holliday Bros. v. Cohen*, 34 Ark. 707, the court said: "In the assessment of damages upon an attachment bond made in the action, there is no issue of malice or want of probable cause. It is simply the truth of the naked fact which is put in issue,—not whether the plaintiff acted maliciously or wantonly, without probable cause to believe the fact. In such cases damages must be compensatory merely, and confined to the actual loss from deprivation of the property attached or injury to it." And to the same effect were the decisions in *Patten v. Garrett*, 37 Ark. 605; *Boatwright v. Stewart*, 37 Ark. 614; *Adkins v. Lacy*, 68 Ark. 170, 56 S. W. 876.

So, in *Goodbar v. Lindsley*, 51 Ark. 380, 14 Am. St. Rep. 54, 11 S. W. 577, it was held that the recovery in proceedings for the wrongful issue of an attachment is limited to compensatory damages and cannot go beyond. In this action the damages were assessed in the attachment proceeding.

Under the Mississippi statute, only actual or compensatory damages are allowable. 20 L.R.A. (N.S.)

Roach v. Brannon, 57 Miss. 490; *Marqueze v. Sontheimer*, 59 Miss. 430.

In an action on the attachment bond, the plaintiff is confined in his recovery to the actual expenses and costs incurred by him, and such damages as he may have sustained by reason of being deprived of his property or any injury thereto or loss or destruction thereof; for injuries to his credit, or for the derangement of his business, or other such losses, he is confined for his redress to an action on the case. *State use of Roe v. Thomas*, 19 Mo. 613, 61 Am. Dec. 580. And to the same effect were the decisions in *Pettit v. Mercer*, 8 B. Mon. 51; *Reidhar v. Berger*, 8 B. Mon. 160; *Duck v. Hollrook*, 6 Ky. L. Rep. 511; *Mocerf v. Stirman*, 16 Ky. L. Rep. 587, 29 S. W. 324; *State use of Squier v. Watts*, 3 Mo. App. 568; *State ex rel. Bell v. Hill*, 60 Mo. App. 130; *State ex rel. Rigby v. Goodhue*, 74 Mo. App. 162; *Bruce v. Coleman*, 12 Ohio Dec. Reprint, 265.

So, in *Berwald v. Ray*, 165 Pa. 192, 30 Atl. 727, it was held that the damages recoverable on an attachment bond are such as are the natural and usual result of the seizure of goods, as loss of sales and interruption of business, but not such as are indirect or consequential or punitive. And to the same effect was the decision in *Comex rel. Cord v. Magnolia Villa Land & Improv. Co.* 163 Pa. 99, 20 Atl. 793.

Only actual damages can be recovered in an action founded upon the law requiring the bond to be given by the plaintiff. *Wallace v. Finberg*, 46 Tex. 35.

In the following cases it is stated generally that, in an action on the bond, only actual damages are recoverable; but it is not clear whether the court had exemplary damages in mind as well as remote or contingent damages. *Elder v. Kutner*, 97 Cal. 490, 32 Pac. 563; *Thompson v. Webber*, 4 Dak. 240, 29 N. W. 671.

—action against the sureties.

The sureties on a constable's official bond, having had no other part in the transaction

sustain the allowance by the jury of exemplary damages in such cases, it is not necessary to prove more than that plaintiff acted with the intention, design, or set purpose to injure the defendant. *Raver v. Webster*, 3 Iowa, 502, 66 Am. Dec. 96; *Gaddis v. Lord*, 10 Iowa, 141; *Nordhaus v. Peterson Bros.* 54 Iowa, 68, 6 N. W. 77; *Hurlbut v. Hardenbrook*, 85 Iowa, 606, 52 N. W. 510; *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. 876. Without attempting to recite in full the evidence relied upon for defendant as tending to show that the agent of plaintiff, who acted in the enforcement of this claim, caused an attachment to be issued with the purpose of injuring defendant because it did not immediately pay the amount of money due when demanded,

and acted without any reasonable ground to believe that defendant had any purpose of defrauding plaintiff in disposing of its property, it is sufficient to say that the evidence quite strongly tends to show that the action of plaintiff's agent was prompted by his resentment at the defendant for not at once getting and paying over the amount due, rather than by any belief that defendant was actuated by any fraudulent purpose. *P. L. Fowler*, who was in fact carrying on business under the name of the Iowa Hardware Company, and who was made with the company a joint defendant in the action, appears to have had unencumbered property within this state subject to execution, in value exceeding the amount of plaintiff's entire claim, and there is not the

beyond the execution of the bond, cannot, in an action against the constable for malicious abuse of process, be held beyond actual damages. *Faroux v. Cornwell*, 40 Tex. Civ. App. 529, 90 S. W. 537.

So, in *Harkleroad v. Leonard*, 28 Tex. Civ. App. 133, 67 S. W. 127, it was held that if the petition does not allege malice upon the part of sureties on the attachment bond, they cannot be held liable for exemplary damages.

And the sureties on an attachment bond, having had no other part in the transaction beyond the execution of the bond, could in no event be held for anything beyond the actual damages. *Faroux v. Cornwell*, supra.

In *Emerson, T. & Co. v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671, it was held that the sureties upon the attachment bond cannot be held liable for more than the actual damages, although the jury may hold the principal liable for exemplary damages.

The bond creates and limits the liability of the surety, but not that of the attachment plaintiff. *Harkleroad v. Leonard*, supra. This is also true of the sureties on the bond of the attaching officer. *Ibid.*

And in *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565, exemplary damages were recovered against the attachment plaintiffs, who sued out the writ, and actual damages against them and the sureties on their bond and the sheriff who executed the writ.

In *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. 876, the suit was against both the attachment plaintiff and his sureties on the bond, and exemplary damages were recovered; but no point as to the recovery of such damages against the sureties was made.

In a suit upon an attachment bond against a surety, it was held in *Renkert v. Elliott*, 11 Lea, 235, that the surety would be liable only for such damages as could be recovered against the principal, and if the latter acted with malice and a wanton disregard of the rights of the plaintiff, then exemplary damages might be given.
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Circumstances under which exemplary damages are recoverable.

Exemplary damages are allowable where it clearly appears that the plaintiff knew that some of the grounds alleged for obtaining the attachment were false, and it does not appear that he had reason to believe that any of them were true. *Wright v. Waddell*, 89 Iowa, 350, 56 N. W. 650.

So, where the plaintiff knew for two or three months before the writ of attachment was sued out that the defendant contemplated removing from the state, and continued to sell him goods on account, and also took his note, but alleged as a ground for the issuance of the attachment that the contemplated removal was not known at the time the said debt was contracted and the notes executed, it was held in *Hurlbut, H. & Co. v. Hardenbrook*, 85 Iowa, 606, 52 N. W. 511, that the plaintiff was chargeable with malice, and liable for exemplary damages.

Punitive damages are allowable where an attachment was sued out in a case not warranted by law, and on a pretended claim which never existed. *Nachtrieb v. Stoner*, 1 Colo. 423.

And if the plaintiff satisfied the jury that the attachment was sued out by the defendant wantonly, recklessly, and wilfully, for the purpose of coercing the plaintiff to pay money that it did not owe, that would be equivalent to proof of malice, and the plaintiff would thereby lay the foundation to recover punitive damages. *Pittsburg, J. E. & E. R. Co. v. Wakefield Hardware Co.* 138 N. C. 174, 70 S. E. 571, 3 A. & E. Ann. Cas. 720.

And the issue of an attachment against all the property of a man for a nonexisting debt, the seizure by the constable under that writ of the wife's property, and the assent of the executive officers of the defendant to that act, the resistance of the wife's plea for the return of her property, and the interference on the part of the agent of the corporation with the wife's property, and

slightest evidence that this property was being concealed or put beyond the reach of his creditors. Now, while plaintiff had the perfect right to enforce its claim against Fowler, it had no right to do so by suing an attachment, without reasonable ground to believe that the charge of intent to defraud the plaintiff was true, and it had no right to coerce the defendant into payment by the threat of a wrongful attachment. If its agents in charge of its business did attempt to thus coerce Fowler, their action was, within the meaning of the law, malicious; that is, with the intent, design, or purpose to injure him, as above indicated. We think that there can be no doubt under the evidence that the jury might properly find that there was an intent and purpose to injure

Fowler because he did not promptly pay over the money due when demanded, and their finding of exemplary damages was not therefore without support.

2. We have more doubt as to whether the jury did not allow an excessive recovery on defendant's counterclaim by way of exemplary damages. The amount of real damage, as already indicated, was small; but we have recently said that, where it appears the attachment was sued out for the purpose of harassing and annoying the defendant, the jury has a wide discretion in the allowance of exemplary damages. *Tyler v. Bowen*, 124 Iowa, 452, 100 N. W. 505. It is true in that case the court attached importance to evidence indicating that plaintiff's claim was a "trumped up" affair, which

his demand for the return of property to which the defendant could have no claim, was held in *Carey v. D. Wolff & Co.* 72 N. J. L. 510, 63 Atl. 270, to evince a determination to force the payment by the plaintiff of a sum of money not due to the defendant, and to furnish a case for the allowance of punitive damages.

An affidavit alleging nonresidence, sworn to without inquiry and recklessly, and executed by an excessive seizure of property, justifies exemplary damages. *Tiblier v. Alford*, 12 Fed. 262.

So, if the jury is satisfied that the defendants below had sued out an attachment upon a demand that was grossly in excess of what they knew to be due, and had caused it to be levied upon property of great value in a foreign jurisdiction far removed from the debtor's place of residence, the case is one which warrants the assessment of punitive damages. *Tamblyn v. Johnston*, 62 C. C. A. 601, 126 Fed. 267.

The seizure under attachment of exempt property, with knowledge of the exemption, is sufficient to allow the recovery of exemplary damages. *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857.

So, a cause of action entitling the plaintiff to exemplary damages is shown by a petition which alleged the unlawful seizure of the property of the plaintiff which was exempt from seizure, as the defendants knew and were informed, at a time when the plaintiff and his family were upon a journey, and they were compelled to walk a long way in consequence, and this under color of process upon its face void, as issued by a justice of the peace in a case where he had no jurisdiction. *Craddock v. Goodwin*, 54 Tex. 578.

Parties who knowingly and deliberately cause an attachment to be illegally served on Sunday, for the purpose of holding the property within the jurisdiction of the court until, as they suppose, a perfectly legal process can be served on Monday, abuse the process of the court, and are justly liable to be mulcted in exemplary damages. *Morris v. Shew*, 29 Kan. 661.

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The levying of an attachment merely because the debtor failed to pay a debt, and without reference to whether grounds recognized by law as sufficient to authorize it exist, will render the plaintiff in attachment liable to exemplary damages. *Blum v. Stein*, 68 Tex. 608, 5 S. W. 454.

In an action for the wrongful seizure of her property under a process against her husband, the plaintiff is entitled to exemplary damages, if circumstances of aggravation are shown. *Chappell v. Ellis*, 123 N. C. 259, 68 Am. St. Rep. 822, 31 S. E. 709.

Where the evidence disclosed an effort on the part of the plaintiff to extort money from the defendant by removing his property beyond the boundaries of the state, and refusing to return it unless the defendant would comply with the plaintiff's demand to pay for the property which a thief had stolen, and when he refused to submit to this extortion, instituting an attachment proceeding in the jurisdiction to which the property had wrongfully been taken and where the defendant did not reside, and attaching the property there under judicial process which had been obtained by artifice and fraud, it was held in *Reamer v. Morrison Exp. Co.* 93 Mo. App. 501, 67 S. W. 718, that such conduct afforded an appropriate occasion for the award of punitive damages.

Where creditors, after dealing with a man for many years, find him sick nigh unto death, unable to transact business or to consult with anyone in reference to it, and by threats of legal process and intimidation try to induce his wife and daughter to turn over some of his property, and, failing in this, sue out a writ of attachment alleging that the defendant was about to convert his property or a part thereof into money for the purpose of placing it beyond the reach of his creditors, it was held in *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. 876, that, on a counterclaim against the plaintiff and his sureties, the jury were justified in finding that there was no truth whatever in the allegation, but that the real reason for the attachment was that the creditors were afraid that the debtor would

does not appear in the case before us. In *Byford v. Girtton*, 90 Iowa, 661, 57 N. W. 588, we sustained an allowance of \$200 by way of exemplary damages, where it appeared that an attachment was unwarranted and resorted to more as a means of oppression or extortion than for the preservation of legal rights, although, as in the case before us, the actual damage was slight. In *Ahrens v. Fenton*, 138 Iowa, 559, 115 N. W. 233, we reversed a judgment for \$500 by way of exemplary damages in an action on an attachment bond, where the real damage was slight, as in this case; but here the jury had allowed \$800 by way of exemplary damages, and this the court had reduced to \$500, rendering judgment accordingly, and we thought that, as the reduction could only

have been made on the ground that the verdict was the result of passion and prejudice, the trial court should have set aside the entire verdict, instead of reducing it in amount and giving the defendant in the attachment suit the option of taking judgment for the reduced sum. In the absence of any evidence of reasonable ground of belief on the part of plaintiff that defendant Fowler had any purpose to defraud the plaintiff, we are disinclined to interfere with the verdict on the ground that the exemplary damages allowed were excessive, although we confess to a feeling that it went to the very verge of propriety. We reach the same conclusion without further discussion as to the allowance by the court of \$300 by way of attorneys' fees.

die and his property would go into the hands of an administrator, and they would have to wait a year for their money.

To entitle a plaintiff to exemplary damages for wrongful attachment, it must appear that the creditor procured the attachment without any reasonable ground to believe the truth of the matter stated in the affidavit, and with the intention, design, or set purpose of injuring the debtor. *Nordhaus v. Peterson Bros.* 54 Iowa, 68, 6 N. W. 77.

Conditions under which punitive damages are not recoverable.

To justify a recovery of exemplary damages, the act causing the injury must be done with an evil intent, or with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidences a wrongful motive. *Crymble v. Mulvaney*, 21 Colo. 203, 40 Pac. 499.

So, exemplary damages are not allowable where no wrong motive on the part of the attachment plaintiff has been shown. *Ibid.*

And where the jury expressly found that the plaintiff was not actuated by wilful and malicious motives at the time he sued out the attachment, every element of damage beyond that of actual compensation for the wrong done is eliminated from the case. *Plumb v. Woodmansee*, 34 Iowa, 116.

The mere fact that attachment creditors levied upon the goods of a third person under the belief that they belonged to the debtor, and refused to deliver them up to the true owner upon a writ of replevin, is not evidence of malice sufficient to justify exemplary damages. *Kussell v. Jzevor*, 2 Ill. App. 243.

Punitive damages are not allowed where the attachment debtor was a nonresident, and the attachment creditor honestly, though mistakenly, believed that the former was in his debt for a balance due on account. *Kennedy v. Meacham*, 18 Fed. 312.

The mere suing out the process without probable cause and with malice does not 29 L.R.A. (N.S.)

authorize damages of any kind, where no property of the debtor was disturbed. *Biering v. First Nat. Bank*, 69 Tex. 599, 7 S. W. 90.

Exemplary damages are not recoverable for injury to plaintiff's business of keeping a gambling house. *Kauffman v. Babcock*, 67 Tex. 241, 2 S. W. 878.

Exemplary damages where no actual damages are awarded.

No exemplary damages are recoverable where no actual damages are proved. *Hilfrich v. Meyer*, 11 Wash. 186, 39 Pac. 455. Actual damages must be recoverable. *Levy v. Fleischner*, 12 Wash. 15, 40 Pac. 384.

Exemplary damages cannot be awarded unless there are actual damages also,—mere nominal damages are not sufficient. *Connelly v. White*, 122 Iowa, 391, 98 N. W. 144.

Exemplary damages will not be allowed where the allegations as to actual damages are too uncertain and inadequate to admit of proof. *Townsend v. Fontenot*, 42 La. Ann. 890, 8 So. 616.

Liability of principal where attachment was sued out by agent.

A principal is not liable for exemplary damages merely because his agent acts maliciously.

Thus, in *Kirksey v. Jones*, 7 Ala. 622, it was held that a plaintiff in attachment was responsible for the actual damages in the wrongful suing out of an attachment by an agent, but he would not be responsible in any greater degree merely because his agent was influenced by malicious motives.

And if the agent who makes the affidavit and bond acts maliciously in so doing, his malice will not be imputed by presumption to his principals, while his bad judgment in wrongfully suing out the writ will be. *Wallace v. Finberg*, 46 Tex. 35.

So, a plaintiff in attachment who does not know that his agent has wrongfully seized any of the defendant's property is not liable to the latter for exemplary dam-

3. Complaint is made that in three instructions the court left it to the jury to say whether plaintiff had good cause to believe that any of the grounds of attachment were true, with the result, as claimed, that the jury might have understood that plaintiff would be liable if, as to any one of the grounds of attachment alleged, it had not good cause to believe it to be true, although as a matter of fact it had such cause of belief as to other grounds. We think, however, that this criticism is without merit, for in other portions of the instructions the jurors were specifically told that to find for defendant, they must find the attachment wrongfully sued out, without reasonable grounds to believe that any one of the grounds of attachment set out in the petition were true. There might be a possible impropriety as to a portion of one instruction in the respect criticized; but, taking the charge as a whole, there is not the slightest reason to suppose that the jurors

were misled, and it was not necessary therefore to give the instruction asked for plaintiff, which was no more persuasive in his favor than some of those actually given.

4. By some ingenious interpretation of the language of the statute, which we do not perhaps fully appreciate, counsel insist that attorneys' fees are not to be allowed in case of recovery for malicious suing out of attachment, and that the allowance of \$3^(a) attorneys' fees, where the actual damage shown was so small, was on that account excessive; but the cases cited in support of this contention are cases where the action was not on the attachment bond. The counterclaim in this case was specifically predicated upon the attachment bond, and the statute declares that in an action on the bond "the plaintiff therein may recover, if he shows that the attachment was wrongfully sued out, and that there was no reasonable cause to believe the ground upon which the same was issued to be true, the actual

ages. *Heidenheimer v. Sides*, 67 Tex. 32, 2 S. W. 87.

And in *Tynburg v. Cohen*, 67 Tex. 220, 2 S. W. 734, a charge was held erroneous which authorized a verdict for exemplary damages against the principals for the malicious acts of their agent without any knowledge on their part.

And a principal is not liable for punitive damages for attachment sued out by his attorney, where he knew nothing of it until it had been served, and, with the first opportunity, dismissed the same at his cost. *Foster v. Pitts*, 63 Ark. 387, 38 S. W. 1114.

But a principal will be held liable for the malicious acts of his agent in wrongfully suing out an attachment bond, where the evidence shows that he must have known of it and ratified it. *Harkleroad v. Leonard*, 28 Tex. Civ. App. 133, 67 S. W. 127.

So, if the grounds alleged for the writ are false to the knowledge of the agent of the defendant, and the latter ratified and confirmed the acts of the agent, he is liable for exemplary damages. *Jacobs v. Crum*, 62 Tex. 401.

And if an attachment sued out by an agent was wrongful and without probable cause, and the principal with full knowledge ratified the act, then the recovery is not limited to actual damages. *Baldwin v. Walker*, 91 Ala. 428, 8 So. 364, second appeal, 94 Ala. 514, 10 So. 391; *Pollock v. Gantt*, 69 Ala. 373, 44 Am. Rep. 519; *Willis v. McNeill*, 57 Tex. 465.

Liability of corporation for exemplary damages.

An action may be maintained against a corporation to recover damages for wrongfully, maliciously, and without just or probable cause obtaining and levying an order of attachment upon personal property, and exemplary damages may be recovered. 29 L.R.A. (N.S.)

Western News Co. v. Wilmarth, 33 Kan. 510, 6 Pac. 786.

So, a corporation may be liable for exemplary damages in suing out a writ of attachment wrongfully and maliciously, even if it acted through an agent. *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 386; *Emerson & T. Co. v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671.

So, also, in *Carey v. D. Wolff & Co.* 72 N. J. L. 510, 63 Atl. 270, it was held that exemplary damages might be recovered against a corporation for maliciously and without probable cause causing an attachment against the plaintiff's property to issue.

So, also, exemplary damages were allowed against a corporation in *Hurlbut, H. & Co. v. Hardenbrook*, 85 Iowa, 606, 52 N. W. 511.

Liability of attaching officer for exemplary damages.

Exemplary damages may be awarded against attaching officers who, although they have no personal acquaintance with or ill-will against the defendant, wilfully and knowingly allow themselves to become tools of attaching creditors whose object is apparently malicious, in making an unlawful levy in a high-handed and oppressive way. *Giddings v. Freedly*, 65 L.R.A. 327, 63 C. C. A. 85, 128 Fed. 355.

The officer serving the writ may be liable for exemplary damages, if his conduct is oppressive and he levies upon exempt property. *Brown v. Bridges*, 70 Tex. 661, 8 S. W. 502.

The constable serving the writ is liable for exemplary damages in knowingly seizing exempt property. *Cronfeldt v. Arrol*, 60 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857.

But an officer is not liable for exemplary

damages sustained and reasonable attorneys' fees to be fixed by the court; and if it is shown such attachment was sued out maliciously, he may recover exemplary damages." [Iowa Anno. Code, 1897, § 3887.] No authority is cited by counsel for the contention that attorneys' fees are to be limited to those reasonable with reference to the actual damage sustained. Of course, it is necessary to prove actual damages in order to justify the allowance of any attorneys' fees; but where actual damages are shown, and the jury finds the attachment to have been sued out maliciously, and allows exemplary damages on that account, then surely, as we think, the court should fix the attorneys' fees with reference to the entire amount recovered by the defendant. It really could not have been the intention of the legislature to exclude from the consideration of the court, in fixing attorneys' fees, a case where exemplary damages were properly allowed, a reasonable expense, by

way of attorneys' fees, in proving the action to have been malicious, and exemplary damages to have been properly included in the verdict of the jury.

5. Error is assigned in the sustaining of an objection to a question asked of a witness for plaintiff, as to whether he submitted to counsel, as plaintiff's agent, the facts with reference to the attachment as he had stated them in his evidence; the evident purpose being to show advice of counsel as negating malice. But the question was subsequently repeated without objection made, and the answer was apparently as full as it could have been to the question objected to, and we fail to see any possible prejudice to the plaintiff in the ruling.

Finding no error in the record, the judgment is affirmed.

Petition for rehearing denied.

damages for the malicious issuance of a writ, where he took no part therein. *Farx v. Cornwell*, 40 Tex. Civ. App. 529, 90 N. W. 537.

And the mere fact that an attachment is maliciously and wrongfully sued out will not render the officer executing it liable for exemplary damages. *Mayer v. Duke*, 72 N. W. 445, 10 S. W. 565.

Advice of counsel as affecting liability for exemplary damages.

Upon the general subject, Advice of counsel as defense to an action for malicious execution, see note to *Van Meter v. As*, 18 L.R.A. (N.S.) 47.

Punitive damages are not allowable where competent attorney advises the attachment after the attaching creditor has made full and fair statement of the facts to him. *Kennedy v. Meacham*, 18 Fed. 312. So, where an attachment was sued out on the advice of counsel, with the full knowledge of all of the facts of the case, there can be no recovery upon the attachment bond. *Levy v. Fleischer*, 12 Wash. 40 Pac. 384.

But the liability of a plaintiff in an attachment proceeding for exemplary damages is not affected by the fact that he acted on the advice of counsel, unless he had good faith made a full and frank disclosure of all the facts within his knowledge. *Rainey v. Kemp* (Tex. Civ. App.) 5 S. W. 630.

And in *Raver v. Webster*, 3 Iowa, 502, 66 N. Dec. 96, the court sustained an instruction to the jury to the effect that the advice of counsel would go to rebut the idea of malice, but the defendant must prove that he submitted his case to an attorney, and that, on the case submitted, he was advised by the attorney that he had a good case of action and a right to sue out an L.R.A. (N.S.).

attachment; if this defense is proved, it will save him from exemplary, but not from actual, damages.

So, the advice of counsel is not a defense against a claim for punitive damages, unless all of the facts are stated to the counsel. *Union Mill Co. v. Prenzler*, 100 Iowa, 540, 69 N. W. 876.

Although most of the facts on which the attorney advised the plaintiff to sue out the attachment were within his own knowledge, and some of them even unknown to the plaintiff, yet if there were facts within the knowledge of the plaintiff, and not personally known to the attorney, which it was proper and necessary for the plaintiff to state to him in order that he might be fully advised as to all of the facts constituting the plaintiff's claim for an attachment, it was held in *Hurlbut, H. & Co. v. Hardenbrook*, supra, that the advice of counsel would not be a defense to a claim for exemplary damages.

The fact that attaching officers consulted the attorney of the attaching creditor, and acted upon his advice, will not relieve them of liability for exemplary damages in a proper case, especially when they admitted that the circumstances of the case were rather peculiar and required security from the attaching creditor contrary to their custom in such actions. *Giddings v. Freedley*, 65 L.R.A. 327, 63 C. C. A. 85, 128 Fed. 355.

Amount of exemplary damages.

Generally the amount of exemplary damages is for the jury. *Wright v. Waddell*, 89 Iowa, 350, 56 N. W. 650; *Tamblyn v. Johnston*, 62 C. C. A. 601, 126 Fed. 267.

So, the court will not interfere, except in extreme cases, with the amount of exemplary damages, as the matter of allowing such damages and the amount thereof rests peculiarly with the jury. *Union Mill*

Co. v. Prenzler, 100 Iowa, 540, 69 N. W. 876.

And before the court can interfere with an award of exemplary damages, it must appear that manifest injustice has been done. *Walser v. Thies*, 56 Mo. 89.

A judgment for \$2,000 for malicious attachment of property is not excessive where the actual damages amounted to between \$700 and \$1,000, and in addition the plaintiff's business was broken up. *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674.

Five hundred dollars exemplary damages will not be set aside as excessive merely because the actual damages were but \$90, where household goods worth about \$400 were detained from the plaintiff for thirty-four days, and the charges of malice and the purpose to vex, harass, and injure were not denied. *Harkleroad v. Leonard*, 28 Tex. Civ. App. 133, 67 S. W. 127.

One hundred thirty-eight dollars is not excessive for the wrongful and malicious seizure of exempt property of the value of \$75. *Cronfeldt v. Arrol*, 50 Minn. 327, 36 Am. St. Rep. 648, 52 N. W. 857.

Five thousand dollars exemplary damages are not so excessive as to require a reversal of the judgment, although the actual damages were only \$170.00, where the attachment plaintiff acted with great harshness and with a purpose to annoy, harass, and vex the defendant. *Union Mill Co. v. Prenzler*, supra.

A judgment for damages of \$750 will not be disturbed where the defendant sued out an attachment in a case not warranted by law, on a pretended claim that did not exist, and seized and sold property belonging to the plaintiff of the value of about \$300. *Nachtrieb v. Stoner*, 1 Colo. 423.

Attention is also called to several cases fully set out in the opinion.

So, also, in *Eppe v. Hazlewood*, 40 Tex. Civ. App. 325, 89 S. W. 809, a verdict for \$100 exemplary damages was sustained against a constable serving a writ of attachment, where he took the property of one not named in the writ.

But where the actual and consequential damages amounted to over \$1,400, it was held in *Tibbler v. Alford*, 12 Fed. 262, that the defendant was sufficiently admonished, and that no further exemplary or punitive damages were to be allowed, as such damages were not for the purpose of rewarding the injured party, but as a punishment to deter others from like conduct.

In Texas, in considering exemplary damages, the jury may take into consideration such matters as loss of business, mental suffering, etc., which are too remote to be considered under a claim for actual damages. *Trawick v. Martin Brown Co.* 79 Tex. 461, 14 S. W. 564; *Kaufman v. Armstrong*, 74 Tex. 65, 11 S. W. 1048; *Kirbs v. Provine*, 78 Tex. 353, 14 S. W. 849.

So, in *Mayer v. Duke*, 72 Tex. 445, 10 S. W. 565, the court said: "Our courts permit damages by way of punishment in a proper case, but also, in allowing exemplary damages, permit a recovery for losses too 29 L.R.A. (N.S.)

remote to be considered as elements of strict compensation."

Decisions in Washington.

In this state no exemplary damages are allowable in any case at common law (*Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 11 L.R.A. 689, 26 Am. St. Rep. 842, 25 Pac. 1072), so that, although the statute expressly provides for exemplary damages in actions on attachment bonds, such damages are not allowable where the action is at common law, and not upon the bond. *McGill v. W. P. Fuller & Co.* 45 Wash. 615, 88 Pac. 1038.

And the exemplary damages provided for by the statute are held in *Levy v. Fleischer*, 12 Wash. 16, 40 Pac. 384, not to mean damages by way of punishment, but only such actual damages as could not be assessed in the absence of this provision under the general law governing attachment, such as damage to reputation, damage to pride and to feeling, some of which are more or less sentimental.

But in the earlier case of *Seattle Crockery Co. v. Haley*, 6 Wash. 302, 36 Am. St. Rep. 156, 33 Pac. 650, the court said that the court in the *Hoefer* Case did not undertake to say that where the statute expressly provided for them, punitive damages could not be recovered, but the court went on to say: "In such cases the rules laid down in those jurisdictions where the doctrine of punitive damages is accepted should guide the courts and juries of this state."

W. M. G.

ARKANSAS SUPREME COURT.

SPAULDING MANUFACTURING COMPANY, Appt.,
v.

S. A. GODBOLD.

(92 Ark. 63, 121 S. W. 1063.)

Action — parties — partnership.

1. That an action was brought and judgment rendered in the name of a partnership does not render it void where no objection was made thereto.

Deed — partnership — reformation.

2. A deed running to a partnership the name of which does not include the name

Note. — May a partnership sue or be sued in the firm name.

At common law the process and pleadings in every action were required to disclose the Christian name and surname of all the parties thereto, the purpose being to render judicial proceedings certain and conclusive as between the parties, and to give full force and effect to the doctrine of *res judicata*. This rule does not apply to corporations, and in some jurisdictions, by statutory enactment, it no longer applies to partnerships. Cases controlled by these statutory

of one of the partners, while void at law, may be reformed in equity, where the property was in fact purchased by the members of the firm individually, and the deed as taken in the name of the firm by mistake of the draftsman.

Sheriff's deed — reformation.

3. The rule that equity will not aid the effective execution of statutory powers will not prevent its correcting a deed executed by a sheriff after an execution sale, in which partnership rather than the individual members were named as grantee by mistake, where the execution and all proceedings under it were regular in all respects.

Parties — sheriff's deed — correction.

4. The sheriff who made a sale under execution, or his successor in office, is the necessary party in a proceeding to correct deed which names a partnership as

grantee, rather than the members who compose it.

(October 18, 1909.)

APPEAL by plaintiff from a decree of the Columbia Chancery Court dismissing an action brought to recover possession of certain lands to which plaintiff alleged title by virtue of a sheriff's deed. Reversed.

The facts are stated in the opinion.

Messrs. Stevens & Stevens and Arthur C. Lyon, for appellant:

The legal title passed, the conveyance having been made in the firm name.

Wood v. Boyd, 28 Ark. 76.

The ambiguity is latent, and open to explanation by which the real party is dis-

positions are not included herein. Where not changed by statute, the common-law doctrine applies to partnerships, and they are neither sue nor be sued in the firm name, and all suits, either by a partnership or against them, must be in the individual names of all the members of the partnership.

This general doctrine is stated in the following cases: *Phillips v. Holmes* (Ala.) 51 Ala. 625; *Johnston v. First Nat. Bank*, 145 Ala. 378, 40 So. 78; *Richardson v. Smith*, Fla. 340; *Hinman v. Andrews Opera Co.* 111 Ill. App. 135; *Percival v. Groff*, 8 Blackf. 3; *Armstrong v. Robinson*, 5 Gill & J. 3; *Van Natta v. Harroun Real Estate Co.* 11 Mo. 373, 120 S. W. 738; *Haskins v. Alt*, 13 Ohio St. 210; *Smith v. Hoover*, 39 Mo. St. 256; *Harris v. Water & Light Co.* 108 Tenn. 245, 67 S. W. 811; *Houghton Puryear*, 10 Tex. Civ. App. 383, 30 S. W. 3; *Kingsland & D. Mfg. Co. v. Mitchell* (Tex. Civ. App.) 36 S. W. 757; *Western Teleg. Co. v. Hirsch* (Tex. Civ. App.) 84 W. 394; *Olson v. Veazie*, 9 Wash. 481, 1 Am. St. Rep. 855, 37 Pac. 677; *Adams v. Ay*, 27 Fed. 907; *Carnegie v. Hulbert*, 3 C. A. 391, 10 U. S. App. 454, 53 Fed. 10; *Went v. F. C. Austin Drainage Excavator* 174 Fed. 668; *Chapman v. Barney*, 129 S. 677, 32 L. ed. 800, 9 Sup. Ct. Rep. 426; *Great Southern Fire Proof Hotel Co. v. Jones*, 177 U. S. 449, 44 L. ed. 842, 20 Sup. Ct. Rep. 690; *R. v. Harrison*, 8 T. R. 508; *Walker v. Rooke*, 6 Q. B. D. 631.

In Louisiana a suit by a partnership could be in the firm name as appearing on the deed and represented by the individual partners, whose full names should be set out. *Wolf v. New Orleans Tailor-Made Co.* 52 La. Ann. 1357, 27 So. 893.

Johnson v. Smith, *Morris* (Iowa) 105, although recognizing this general doctrine, nevertheless held that, inasmuch as it was a new question in that state, what seemed to the court to be the better rule would be established, and a partnership would be permitted in its firm name to sue an individual on a claim contracted with it in the firm name.

In line with the doctrine of the foregoing **L.R.A. (N.S.)**

cases, where the question has been directly raised by appeal or certiorari, the courts are uniform in holding that, in the absence of statutory authority to that effect, a partnership cannot sue or be sued in the firm name, and that a judgment rendered for or against the partnership will be reversed on appeal. *Rhea v. Rawlings*, 3 Cranch, C. C. 256, Fed. Cas. No. 11,737; *Reid v. McLeod*, 20 Ala. 576 (proceedings quashed on appeal); *Lanford v. Patton*, 44 Ala. 584 (judgment by default in favor of partnership reversed on appeal because in firm name); *Moore v. Burns*, 60 Ala. 269 (facts same as preceding case); *Day v. Cushman*, 2 Ill. 475 (scire facias to foreclose mortgage held fatally defective on appeal); *Livingston v. Harvey*, 10 Ind. 218 (judgment reversed); *Seely v. Schenck*, 2 N. J. L. 75; *Crandall v. Denny*, 2 N. J. L. 137 (judgment reversed on appeal and set aside as null and void); *McCredy v. Vanneman*, 3 N. J. L. 870 (judgment reversed); *Burns v. Hall*, 3 N. J. L. 984 (judgment reversed); *Tomlinson v. Burke*, 10 N. J. L. 295 (reversed on certiorari); *Dunham v. Shindler*, 17 Or. 256, 20 Pac. 326 (reversed on appeal); *Burden v. Cross*, 33 Tex. 685 (default judgment reversed on appeal).

It is reversible error to take a default judgment in the name of a partnership firm, the plaintiffs in the action. *Simmons v. Titehe Bros.* 102 Ala. 317, 14 So. 786; *Lanford v. Patton*, supra.

It is a good ground for demurrer that an action by a partnership is commenced in the firm name and the complaint or declaration is also in the firm name, as each party to the suit must be described accurately by his Christian and surname. *Pollock v. Dunning*, 54 Ind. 115; *Blackwell v. Reid*, 41 Miss. 102; *Lewis v. Cline* (Miss.) 5 So. 112 (bill in equity by partnership); *Bentley v. Smith*, 3 Caines, 170; *Union Wire Co. v. Green*, 62 Misc. 551, 115 N. Y. Supp. 921.

The failure to state the individual names of the partnership firm, where complainants in an action, affords good ground for a special demurrer, but not for a general demurrer. *Rogers v. Verlander*, 30 W. Va. 619, 5 S. E. 847.

closed and the deed treated as if the names were inserted.

Cooper v. Newton, 68 Ark. 151, 56 S. W. 867.

The partners take an equitable title when grantee is the firm name.

Murray v. Blackledge, 71 N. C. 492; *George, Partn.* p. 112; *Percifull v. Platt*, 36 Ark. 456; *Cooper v. Newton*, 68 Ark. 157, 56 S. W. 867; *Walker v. Miller* 139 N. C. 448, 1 L.R.A.(N.S.) 157, 111 Am. St. Rep. 805, 52 S. E. 125, 4 A. & E. Ann. Cas. 601; *Kelley v. Bourne*, 15 Or. 476, 16 Pac. 43.

The deed may be reformed.

Steward v. Pettigrew, 28 Ark. 372; *Tatum v. Croom*, 60 Ark. 487, 30 S. W. 885.

The deed is defective in form merely.

But a suit in the name of an individual, although followed by the abbreviation "& Co.," is good on demurrer, as it does not appear on the face of the proceedings that the suit is by a firm or by more than a single individual; to question a suit on the ground that it is by a partnership in a firm name, the proceedings on their face must show that fact. *Morrison v. Tate*, 1 Met. (Ky.) 569; *Armstrong v. Robinson*, supra; *Brookmire v. Rosa*, 34 Neb. 227, 51 N. W. 840.

A petition by a partnership in the firm name, to intervene in a proceeding, is defective, and special exceptions thereto upon that ground should be sustained. *Behan v. Long* (Tex. Civ. App.) 30 S. W. 380.

A petition in the name of a partnership, without giving in full the individual names of members, is bad, and objection thereto may be raised by general demurrer or motion to dismiss. *Weisz v. Davey*, 28 Neb. 566, 44 N. W. 470.

So, in *Fox v. Blue Grass Grocery Co.* 22 Ky. L. Rep. 1695, 60 S. W. 414; *Davis v. Hubbard*, 4 Blackf. 50; and *Hays v. Lanier*, 3 Blackf. 322, suits by partnerships were dismissed upon motion, because in the firm name.

Except in a limited class of cases affected by statutory provisions, a partnership cannot sue in the firm name, and upon motion an action so brought will be dismissed; such motion may be made the first time in the appellate court. *Mexican Mill v. Yellow Jacket Silver Min. Co.* 4 Nev. 40, 97 Am. Dec. 510.

An appeal cannot be taken by a partnership in the partnership name, and an appeal so taken will on motion be dismissed. *Johnston v. First Nat. Bank*, supra.

A motion to quash or a plea in abatement to a writ and declaration against the partnership in the partnership name will prevail. *Holland v. Butler*, 5 Blackf. 255. And an action by a partnership in the firm name will be quashed on appeal. *Revis v. Lamme*, 2 Mo. 207.

A writ of replevin in behalf of a partnership, issued in the firm name, is a nullity, and will be quashed upon motion of the 29 L.R.A. (N.S.)

Gates v. Gray, 85 Ark. 25, 122 Am. St. Rep. 19, 106 S. W. 947.

Messrs. C. W. McKay and J. G. Lile, for appellee:

The deed was void at law.

Percifull v. Platt, 36 Ark. 456.

The chancery court had no jurisdiction to reform the sheriff's deed.

McCall v. White, 73 Ala. 562; *Ware v. Johnson*, 55 Mo. 500; *Mason v. White*, 11 Barb. 173; *Landon v. Morris*, 75 Ark. 6, 88 S. W. 672; *Tatum v. Croom*, 60 Ark. 487, 30 S. W. 885; *Russell v. Williamson*, 67 Ark. 80, 53 S. W. 561.

The plaintiff admits that he has no valid legal title, and to maintain the action, such a title is necessary.

15 Cyc. Law & Proc. p. 17; *Kirby's Dig.*

defendant. *Smith v. Canfield*, 8 Mich. 493.

The objection that a judgment is not in the name of the plaintiffs, but in the name of a firm, is no cause for error; such an objection should be raised by plea in abatement. *Marshall v. Hill*, 8 Yerg. 101.

The objection that summary process is in the partnership name, and not in the individual names of the plaintiffs, is good if taken by plea thereto, but it cannot be taken by motion for nonsuit. *Martin v. Kelly*, *Cheves*, L. 215.

Amendment.

The failure to set forth the individual names of a partnership, in a suit by or against the partnership, is not necessarily fatal, even where objection to the proceedings for that reason is directly raised, as the defect may be cured by amendment. *Loewenberg v. Gilliam*, 72 Ark. 314, 79 S. W. 1064; *Kleinert v. Knoop*, 147 Mich. 387, 110 N. W. 941; *Morgridge v. Stoeffer*, 14 N. D. 430, 104 N. W. 1112; *Morrison v. Tate*, supra.

A petition by a partnership in the firm name, to intervene in a mechanics' lien proceeding, may, upon objection being made thereto, be amended by stating the full names of the individual members of the firm. *Kleinert v. Knoop*, supra.

A summons in a justice-court proceeding in the name of a partnership is a mere irregularity, and may be amended. *Morgridge v. Stoeffer*, supra.

Waiver.

The objection that the firm name of a partnership, rather than the individual names of the members of the firm, is used in a suit by or against it, may be waived. Thus, where action is brought by a partnership in the firm name, the objection that the individual names of the members of the firm do not appear is waived by going to trial on a plea to the merits. *Foreman v. Weil Bros.* 98 Ala. 495, 12 So. 815; *Brownson v. Metcalfe*, 1 Handy (Ohio) 183; *Mitchell v. Raitlon*, 45 Mo. App. 273; *Porter v. Cresson*, 10 Serg. & R. 257.

§ 2737; *Percifull v. Platt*, supra; *Ashley v. Little Rock*, 56 Ark. 391, 19 S. W. 1058.

Hart, J., delivered the opinion of the court:

The controversy in this case is about the title to certain lands in Columbia county, Arkansas. An action in ejectment therefor was commenced by the Spaulding Manufacturing Company against S. A. Godbold in the Columbia circuit court.

The complaint alleges that the Spaulding Manufacturing Company is a partnership composed of H. W. Spaulding, F. E. Spaulding, and E. H. Spaulding. The deed relied upon to support the action is a sheriff's deed under execution, and is made an exhibit to the complaint. The deed recites

that the execution was issued and came to the hands of the sheriff on the 27th day of July, 1905; that the Spaulding Manufacturing Company obtained a judgment against S. A. Godbold, and that the execution was issued on that judgment; that the levy and sale was made under the execution, and that the Spaulding Manufacturing Company became the purchaser; that the grantee named in the deed was the Spaulding Manufacturing Company. The defendant, Godbold, excepted to the deed for the reason that there was no grantee named in the deed. The circuit court sustained the exception, and ordered that the deed be stricken from the record for the reason that it was not entitled to be used as evidence on the trial of the cause. The plaintiff then

Where a sole survivor of the partnership is served with process, and appears in an action against the firm in the firm name, a judgment rendered therein is valid as against him. *Easterwood v. Burnitt* (Tex. Civ. App.) 126 S. W. 934.

A defendant going to trial on a plea to the merits of an action by a partnership in the firm name, without objecting to the action upon that ground, cannot raise such objection upon error or appeal. *Moore v. Watts*, 81 Ala. 261, 2 So. 278.

A complaint in a suit by a partnership should set forth the names of the individuals composing the firm. Objection to a complaint for such defect, however, cannot be made upon the trial of the case, by objecting to the introduction of any evidence by the plaintiff, on the ground that there is no sufficient designation of the parties plaintiff in the complaint. *Gilman v. Cosgrove*, 22 Cal. 356.

It is not reversible error for the court upon a trial *de novo* on appeal from the justice court, to overrule an objection by the defendant to any evidence in behalf of the plaintiff, on the ground that the action is by a partnership, and is in the name of the firm rather than the individual members thereof. *Conrades v. Spink*, 38 Mo. App. 449.

By pleading the general issue to a declaration by a partnership in the firm name, the defendant admits a right to maintain the suit in such name. *Maret v. Wood*, 3 Branch, C. C. 2, Fed. Cas. No. 9067.

Objection after judgment.

A judgment in favor of or against a firm in their firm name is not void, but is merely irregular. *Meyer v. Wilson*, 166 Ind. 651, 76 N. E. 748; *Hopper v. Lucas*, 86 Ind. 43; *McGaughey v. Woods*, 106 Ind. 382, 7 N. E. 7; *Davis v. Kline*, 76 Mo. 310; *Ketelsen v. Pratt Bros.* (Tex. Civ. App.) 100 S. W. 1172. Hence, an objection that an action was brought in the name of a partnership, instead of the individual names of the members of the firm, may be waived, and will be considered as waived unless made at the 29 L.R.A. (N.S.)

proper time; after judgment it is too late. *Cady v. Smith*, 12 Neb. 628, 12 N. W. 95.

So, objection that an action cannot be maintained against the partnership in the firm name is good if taken in time, but the failure to set up the individual names of the parties is merely an irregularity and is cured by judgment. *Justice v. Meeker*, 30 Pa. Super. Ct. 207; *Seitz v. Buffum*, 14 Pa. 69. A declaration against the partnership in the firm name is good after verdict for plaintiffs, where the defendant pleaded the general issue. *Pate v. Bacon*, 6 Munf. 219. An action by a partnership in the firm name is good after judgment; objection that suit is in the firm name must be raised by plea in abatement in order that it avail. *M'Names v. Huffman*, 3 Harr. (Del.) 425. Compare with *Opelika v. Daniel*, 59 Ala. 211, wherein it is said that it is only the persons that compose a partnership of whom the court can take cognizance and serve their process upon or direct their orders or personal decrees against, and hence when it appears that the name used as a defendant to a bill in equity is not the name of an individual or body corporate, but is that by which a number of unknown persons transact a certain kind of business together, the court has no jurisdiction of such persons or authority to render a decree against them.

Collateral attack.

It is clear that where the parties appear in a suit, either by or against a partnership, in the firm name, a judgment rendered therein is not subject to collateral attack on the ground that the individual names of the partners nowhere appear in the proceedings, as such objection to avail must be pleaded in abatement or raised in some other manner before judgment. *Ives v. Muhlenburg*, 135 Ill. App. 517. And see cases supra under "Waiver."

In Indiana it is held that while a partnership cannot sue or be sued in its firm name, and to do so constitutes error for which a judgment will be reversed on appeal, a judgment rendered in such proceed-

moved that the cause be transferred to equity, and as grounds stated that the land was purchased by the individual partners at the execution sale, and that, by mistake of the draftsman, the firm name, instead of the names of the partners, was written in the deed as grantee. They asked that the deed be reformed, and that, when so reformed or a new deed executed, the possession of the land be given to them. The court granted the motion, and transferred the cause to the chancery court. On motion of the plaintiff, the chancery court ordered that the motion to transfer the cause to the chancery court be made an amendment to the complaint. Whereupon the defendant demurred to the complaint. The court sustained the demurrer, and dismissed the action. The plaintiff has appealed to this court.

It is contended by counsel for appellee that the judgment recited in the sheriff's deed under execution is void for the reason that it was rendered in the firm name, and not in the names of the individuals composing the firm, and that the deed therefore conveys no title. It has been expressly

held in Missouri that judgments rendered in favor of a firm by the firm name are not void. *Davis v. Kline*, 76 Mo. 310. See also *Conrades v. Spink*, 38 Mo. App. 309. In the case of *Frisk v. Reigelman*, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766, the court said: "Bringing the action in the firm name does not render the judgment void, but is a mere defect or irregularity, which is waived unless due objection be made thereto before judgment." See also 15 Enc. Pl. & Pr. pp. 840, 841. Section 6093, Kirby's Dig., provides that the defendant may demur to the complaint where it appears on its face that the plaintiff has not legal capacity to sue. In construing this section in the case of *Pettigrew v. Washington County*, 43 Ark. 33, the court held that the judgment should have been in favor of the state, the obligee in the collector's bond, or of the county treasurer, the real party in interest. The judgment in fact was rendered in the name of the county. The court said: "This was matter of form rather than of substance, and, since the objection to the plaintiff's capacity to sue for this demand was not taken

ing is not void, and hence is not subject to collateral attack. *Mackenzie v. School Trustees*, 72 Ind. 193; *Livingston v. Harvey*, 10 Ind. 218; *Hays v. Lanier*, 3 Blackf. 322.

A judgment by confession in favor of a partnership in the partnership name, while irregular, is not a nullity, and it may be made the foundation of other proceedings. *Jones v. Martin*, 5 Blackf. 351.

A judgment in favor of the plaintiffs in an action by a partnership is not void, and hence not subject to collateral attack. *Smith v. Chenault*, 48 Tex. 455; *Corder v. Steiner* (Tex. Civ. App.) 54 S. W. 277; *Stephens v. Turner*, 9 Tex. Civ. App. 623, 29 S. W. 937; *Bennett v. Child*, 19 Wis. 362, 88 Am. Dec. 692; *Frisk v. Reigelman*, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766.

But a constructive service upon a partnership in attachment proceedings against it in the name of the firm is not sufficient to confer jurisdiction upon the court, where the members of the firm do not individually appear; and a judgment rendered in such a proceeding is void and no protection to a garnishee paying money in a garnishment proceeding based thereon. *Moses P. Johnson Machinery Co. v. Watson*, 57 Mo. App. 629. See to the same effect, *Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co.* 34 Tex. Civ. App. 442, 78 S. W. 966.

Compare with *Ord v. Neiswanger*, post, 287, which holds that service by publication upon a nonresident partner by its firm name, without specifying the individuals composing it, is not void, and hence not subject to collateral attack. And see also note to this case.

Attachment proceedings, although defective because running against the partnership 29 L.R.A. (N.S.)

by its firm name, are nevertheless subject to amendment, and hence cannot be collaterally attacked where the principal case is still open so that an amendment in that respect may be had. *Barber v. Smith*, 41 Mich. 138, 1 N. W. 992.

Where by statute partnerships are prohibited from doing business in a fictitious name, and are required to file in a specified office the names of the members, and are prohibited from maintaining an action in any court in the state until they have complied with this requirement, a judgment rendered in favor of a partnership not complying with this provision is void, and will be set aside at the instance of the debtor or his creditors. *Cobble v. Farmers' Bank*, 63 Ohio St. 528, 59 N. E. 221.

What is sufficient designation.

Although a partnership cannot sue in its firm name, yet it is sufficient to sustain a default judgment if the individual names of the partners are set out in the summons and the complaint states the plaintiff to be a partnership. *Greer v. Liipfert Scales Co.* 156 Ala. 572, 47 So. 307.

A complaint is not subject to demurrer on the ground that it describes plaintiffs, a partnership, in the firm name, where the individual names of the partners are also set out in the complaint. *Hatcher v. Branch*, 141 Ala. 410, 37 So. 690.

In a suit by a partnership it is sufficient that the firm name alone is contained in the citation, where the petition contains the individual names of the partners, the defendant appearing in the action. *Putman v. Wheeler*, 65 Tex. 522; *DeWalt v. Zeigler*, 9 Tex. Civ. App. 82, 29 S. W. 60.

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her by demurrer or answer, it must be deemed to have been waived." From which we deduce that, no objection having been made to the judgment being taken in the name of Spaulding Manufacturing Company in the original suit, the defect of partnership was waived, and the judgment became valid one, upon which execution might issue.

It is next objected that the naming of the Spaulding Manufacturing Company as the trustee in the sheriff's deed under execution renders the deed void. This is not a case like that of *Percifull v. Platt*, 36 Ark. 1, and *Cooper v. Newton*, 68 Ark. 157, 56 W. 867, where the style of the firm included the name of one of the partners, and the court held that the legal title was conveyed to such partner, and that he became in equity a trustee for the other partners to the extent of their interest. In the present case the firm name includes the name of no person. It is the general rule that a conveyance to a partnership by its firm name, which does not include the name of any of the partners, does not vest in it legal title, because the partnership is not recognized in law as a person. Because the deed is void at law, it by no means follows that the same rule applies in equity. The appellant alleges in its amended complaint that the individual members of the firm were the purchasers of the land at the execution sale, and that, by mistake of the draftsman, the name of the firm, instead of the names of the persons who composed the firm, was written in the deed. It is a fundamental principle of equity that it regards and treats that as which in good conscience ought to be done, and, as said by Mr. Pomeroy [Equity, 3d ed. vol. 1, § 378]: "It is only by looking at the intent, rather than at the deed, that equity is able to treat that as which in good conscience ought to be done."

Again, it is contended that a court of equity will refuse to aid the defective execution of statutory powers, and the cases of *Tatum v. Croom*, 60 Ark. 487, 30 S. W. 2d 1, and *Landon v. Morris*, 75 Ark. 6, 86 W. 672, are cited to support that contention. In those cases the mistake was only in the execution of the deed, but in the proceedings anterior to that, and upon which the sale was based. But in the present case it will be observed that there is no irregularity or defect in the execution or the proceedings thereunder, as was the case in *Tatum v. Croom* and *Landon v. Morris*, supra; but under the allegations in the complaint, the execution and the proceedings under it were regular in all respects, and the only mistake was in the

execution of the deed itself. The individuals who composed the firm are alleged to have purchased the lands in question, and the primary object of the action as it now stands under the pleadings is merely to correct the deed by inserting therein the true names of the grantees. The interest in the land of Godbold, the execution debtor, was divested out of him by the sale under the execution and his subsequent failure to redeem within the statutory period; and it would be inequitable to deny appellant the relief prayed for. The sheriff who made the sale, or his successor in office, would be a necessary party to obtain the relief prayed.

The decree is therefore reversed, and the cause remanded, with leave to appellant to make such new parties as they are advised is necessary to do.

KANSAS SUPREME COURT.

THOMAS ORD et al., Appts.,
v.
W. A. NEISWANGER.

(81 Kan. 63, 105 Pac. 17.)

Writ — publication — partnership — validity.

1. Service by publication upon a partnership by its firm name, without specifying the individuals composing it, is not necessarily void.

Judgment — collateral attack — publication service on partnership.

2. Where a mortgage was executed to a partnership composed of John D. and Mary

Headnotes by MASON, J.

Note. — Validity of constructive service upon partnership in firm name.

The precise question as here raised has apparently seldom been presented for adjudication. It involves a somewhat different question than that raised in *Spaulding Mfg. Co. v. Godbold*, ante, 282, as to the right to sue a partnership in the firm name. Of course, that question is involved to the extent that if it should be held that a partnership could not be sued by its firm name, and that a judgment rendered in such a suit against the partnership, in the absence of a general appearance by it, would be absolutely void, that would dispose of the question now under consideration, but as shown in the note to that case and as held in *ORD v. NEISWANGER*, in many jurisdictions at least, such a judgment is not absolutely void, but is irregular merely. In those jurisdictions, the question now raised goes beyond the general question as to the right to sue a partnership in the firm name, and touches the right to make constructive

Knox, the grantees being therein described only by their firm style of "John D. Knox & Co.," and a tax-deed holder thereafter obtained a default decree quieting title to the mortgaged property, based upon service by publication, in an action in which the mortgagees were referred to throughout merely as "John D. Knox & Co.," the judgment is not open to a collateral attack on account of the failure of the publication notice and other portions of the record to name the mortgagees individually or to describe them more definitely.

Tax deed — construction — bid by county — presumptive amount.

3. A recital in a tax deed over five years old, that the land conveyed, when offered at the tax sale, could not be sold for a stated sum, being the whole amount against it, and was bid off by the treasurer for

the county, sufficiently shows the amount for which it was so bid off.

Same — presumptive assignment of certificate.

4. A tax deed over five years old, which recites that property was originally bid in by the county treasurer, that thereafter an individual paid him an amount equal to the cost of redemption, and that the "purchaser" afterwards paid the subsequent taxes, is not rendered void because it contains no recital that the county clerk assigned the tax-sale certificate. That the assignment was made may be inferred from the fact that the person paying the money is referred to as the purchaser.

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service upon a partnership in the firm name. The right to make constructive service of process in any case is statutory, and the statutes authorizing such service are strictly construed, and must be substantially followed; hence the further question raised in such cases is whether constructive service upon a partnership in the firm name is such a compliance with the statute authorizing constructive service as to give the court jurisdiction.

In *Moses P. Johnson Machinery Co. v. Watson*, 57 Mo. App. 629, it was held that constructive service upon a partnership in attachment proceedings against it in the name of the firm was not sufficient to confer jurisdiction upon the court where the members of the firm did not individually appear, and hence a judgment rendered in such proceeding was void and afforded no protection to a garnishee paying money in a garnishment proceeding based thereon.

It was also held in *Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co.* 34 Tex. Civ. App. 442, 78 S. W. 906, that constructive service of process upon a nonresident partnership conferred no jurisdiction upon the court where the process or notice served was in the firm name of the defendants, rather than in their individual names, and the fact that property of the partnership was attached within the state was held not to cure the defect. It was further held that after service the process could not be amended by inserting the individual names of the defendants, without notice to them or service upon them of the amended process. It seems, however, that process in favor of a partnership in the firm name, although constructively served upon the defendants, may be amended by inserting the individual names of the plaintiffs. See *Frisk v. Reigelman*, *infra*.

In *Smith v. Hoover*, 39 Ohio St. 249, constructive service of process on a foreign partnership by attachment of the firm property and publication was also held invalid because in the firm name. It was sought to sustain the proceeding by bringing it within the provision of a special statute authorizing suits against partnerships in

the firm name. This statute, however, was held not to apply, because it contained a special mode for acquiring jurisdiction by service of process in a prescribed manner, which was exclusive and which was not followed.

In *Fox v. Blue Grass Grocery Co.* 22 Ky. L. Rep. 1695, 60 S. W. 414, however, it was said that in a suit against a non-resident partnership in its firm name service of process upon it in such name did not render the proceedings invalid. It was conceded, however, that in such cases process should run against the individuals.

The question was also raised in *George Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103 (cited in *ORD v. NEISWANGER*), wherein constructive service of process upon a partnership in a suit commenced against it in the firm name was held to be in compliance with the Code provisions relative to service in such cases, and hence valid.

It has been held that the defect in proceedings arising from constructive service of process upon a partnership in the firm name may be waived by the partnership. *DeLeon v. Heller*, 77 Ga. 743. This case held that failure to set out an affidavit of attachment in the individual names of a foreign partnership would not defeat and render void the attachment process where the partnership replevied the attached property by the same name used in the affidavit for attachment, the court declaring this to be the equivalent of an appearance by the partnership, and announcing readiness to plead to the declaration when filed.

Constructive service of process in a suit by a partnership, defective because running in the firm name, may be amended before judgment by inserting in the place of the firm name the names of the partners as the plaintiffs in the action. *Frisk v. Reigelman*, 75 Wis. 499, 17 Am. St. Rep. 198, 43 N. W. 1117, 44 N. W. 766. But process against a partnership in the firm name cannot be amended without notice. *Perry-Rice Grocery Co. v. W. E. Craddock Grocery Co.* *supra*.

A. G. S.

APPEAL by defendants from a judgment of the District Court for Finney County foreclosing a mortgage on certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. Foster, Evans, & Dunn for appellee.

Messrs. Wheeler & Switzer, for appellee:

A partnership cannot be proceeded against in the firm name alone, in the absence of a statutory provision so permitting.

22 Am. & Eng. Enc. Law, pp. 75, 76; Moses P. Johnson Machinery Co. v. Watson, 57 Mo. App. 629; Sheffield v. Barber, 14 R. I. 263; Frank v. Tatum, 87 Tex. 204, 25 S. W. 409; Reid v. McLeod, 20 Ala. 576.

The tax deed was void upon its face because it did not show thereon the amount for which the land was bid off to the county.

Robidoux v. Munson, 75 Kan. 207, 88 Pac. 1055.

The tax deed was void because it did not show upon its face that the county clerk ever assigned the tax-sale certificate to the person to whom the deed was issued.

Douglass v. Wilson, 31 Kan. 565, 3 Pac. 330; Duncan v. Gillette, 37 Kan. 156, 14 Pac. 479.

Mason, J., delivered the opinion of the court:

An action to foreclose a real estate mortgage executed to John D. Knox & Co., a partnership composed of John D. and Mary Knox, was brought by W. A. Neiswanger, an assignee of the firm. Thomas Ord and Charles H. Swope defended on the ground that they held under a tax deed, which was good upon its face and had been of record for more than five years, and also under a decree quieting title against the mortgagees. The trial court held that the tax deed was invalid upon its face, and that the decree was void. This proceeding is brought to review the judgment based upon these rulings.

The objection made to the decree quieting title is that it was based upon publication service directed merely to "John D. Knox & Co.," and throughout the proceedings the mortgagees were described in that way, as they were in the mortgage, without further attempt to designate the members composing the firm. Counsel for the assignee of the mortgage rely largely upon *Moses P. Johnson Machinery Co. v. Watson*, 57 Mo. App. 629, 634, which is indeed exactly to the purpose, and supports their contention. That decision, however, is entitled to weight only so far as it is supported by sound reason or authority. Its grounds are thus stated in the opinion: "In the absence of a statute authorizing it, 29 L.R.A. (N.S.)

a firm can only be sued in the individual names of its members. This rule rests on the principle that a firm has no legal existence apart from its members. It is a mere ideal entity." In support of this statement nine cases are cited. One of them (*Mexican Mill v. Yellow Jacket Silver Min. Co.* 4 Nev. 40, 97 Am. Dec. 510) is clearly in point. It holds that an attempt to begin an action in a firm name is a nullity, the pleading being incapable of amendment. The five Missouri cases are explicitly to the contrary, all holding that such a defect can be corrected by amendment. One of them (*Fowler v. Williams*, 62 Mo. 403) adds that the defect is waived unless a timely objection is made, and another (*Conrades v. Spink*, 38 Mo. App. 309) that a judgment will not be reversed even when such objection is made and overruled by the trial court. In each of the other three remaining cases the attack on the judgment was direct.

The argument based upon the theory that a partnership has no legal entity apart from the members composing it is opposed to the modern tendency to give formal recognition to the actual fact that in many respects the firm has an independent status of its own. "While it has been stated broadly that a partnership is but a relation, and is not a legal being distinct from the members who compose it, still the law does take note on a wide scale of partnership as a legal entity, and regards it as a unit both of rights and obligations, and there is a general tendency at this day to complete the recognition of a partnership as a body of itself with its own means appointed to its own debts." 30 Cyc. Law & Proc. p. 422. As early as 1841 the supreme court of Iowa noted this tendency, and expressed its approval in these words: "No very weighty argument against allowing suits to be brought in this manner (in a firm name) can be drawn from any other source than that of precedent. The defendant dealt with the plaintiffs in their partnership capacity and under their partnership name. He could not therefore be surprised by the suit being commenced by them under that name. A recovery in the present action would be quite as effectual a bar to a subsequent suit for the same demand as though the names of the partners had been particularly set forth. Formerly the courts were fastidious in requiring the names of the partners to be particularly set forth and proved, and in regarding a failure in this respect as a fatal defect at any stage of the proceedings; but this strict rule has been continually undergoing modifications, in order to encourage and facilitate the operations of mercantile traffic. If this could

become a new question in the states of the Union, or even in England, we believe the courts would regard mercantile partnerships as persons in law capable of sustaining or defending suits when brought by or against them in that capacity. We are now in that very situation, and we think it better to lay down such a rule in the commencement as will not require continual alteration. This rule will be to permit the plaintiff to make his legal demand for payment under the very name by which the credit was given." *Johnson v. Smith, Morris* (Iowa) 105, 106. The following cases affirm the absolute incapacity of a firm as such to participate in litigation: *Sheffield v. Barber*, 14 R. I. 263; *Reid v. McLeod*, 20 Ala. 576; *Frank v. Tatum*, 87 Tex. 204, 25 S. W. 409. On the other hand, it was said in *Blue Grass Canning Co. v. Wardman*, 103 Tenn. 179, 181, 52 S. W. 137, 138 (although the statement was not necessary to the decision): "The plaintiffs in error were sued in their firm name, and publication was made for them in that name. While it would have been proper, for greater regularity and certainty, that the names of the members of the firm should have been given in the original papers, yet the omission of their names did not make the process void." In *George Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103, a return of foreign service on a firm by notice to one of its members, the others not being named, was held sufficient, and the use of the firm name alone in the designation of the parties has often been held to be a mere irregularity. 15 Enc. Pl. & Pr. pp. 840, 841.

In the present case every practical purpose of a publication summons was subserved by the procedure adopted. The mortgage had been taken by the firm under the designation of "John D. Knox & Co." The published notice addressed in the same manner conveyed the necessary information as well as though the names of the partners had been stated. In this instance it might have been practicable to learn the names of the partners, but in another that might be difficult or impossible. If the service attempted was entirely ineffectual, it must be because the firm, as such, had no capacity to be sued, not because it had not received constructive notice in the manner prescribed by the statute. We think the use of the firm name alone was only an irregularity, and did not render either the service or the judgment void.

Moreover, we conclude also that, in view of the liberal interpretation to which its age entitles it, the tax deed is good upon its face. Two defects are pointed out: That it does not show the amount for which the land was bid in by the county treasurer, 29 L.R.A. (N.S.)

nor that the county clerk ever assigned a tax-sale certificate to the person to whom the deed was issued. The deed, after reciting that the property was offered at the tax sale for the amount due against it, continues: "And; whereas, at the place aforesaid, said property could not be sold for the sum of \$9.42, being the whole amount of tax and charges thereon, the same was bid off by the county treasurer for said county." This sufficiently implies that the land was bid off by a county treasurer for \$9.42, the amount for which it had been offered. The situation is very different from that presented in *Robidoux v. Munson*, 75 Kan. 207, 88 Pac. 1085, where there was nothing to show what amount was chargeable to the land at the time of the sale. The amount due against the delinquent property, the amount for which it is offered, and the amount for which the treasurer bids it in for the county, are necessarily all the same. The statutory form (Gen. Stat. 1901, § 7676) adapted to the conditions here presented provides a blank for stating this amount in dollars and cents in but one place, and that is in connection with the recital of the amount bid by the treasurer. In *Robidoux v. Munson* the statutory form was otherwise followed; but this blank was not filled, nor were the figures given elsewhere in the deed. Here, however, while the figures are not found in the place indicated by the statute, they are volunteered in connection with the statement that the property could not be sold for the amount against it, and the deed therefore supplies all the information required.

The deed recites that, after the property had been bid in by the treasurer for the county, one J. R. Myers paid to the treasurer a sum equal to the cost of redemption, but fails to add that the county clerk assigned the certificate of sale to him. That being a formal recital, relating to a proceeding which is the same in all tax sales of the same class, may perhaps be more readily supplied by inference than if it concerned data applicable to this particular transaction, such as the date or amount of a payment. The suggestion is made that, inasmuch as it was the duty of the clerk to execute an assignment whenever the treasurer received the money, it may be presumed, in aid of the tax deed, that the act was performed. It is not necessary, however, to rely merely upon this presumption. There is a further recital that the taxes for the subsequent years were paid by the "purchaser," manifestly referring to Myers, who was the grantee in the deed. One does not become a purchaser by simply paying a sum of money to the county treasurer, but by making such payment and receiving in

return an assignment of the tax-sale certificate. The recital that the subsequent taxes were paid by the purchaser fairly implies that such an assignment had been made.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the Justices concur.

Petition for rehearing denied.

GEORGIA SUPREME COURT.

MARY COOPER, by Next Friend, Plff. in Err.,

v.

MITCHELL INVESTMENT COMPANY et al.

F. H. MITCHELL et al., Exrs., etc., of Thomas C. Mitchell, Deceased, Plffs. in Err.,

v.

SAME.

(133 Ga. 769, 66 S. E. 1090.)

VIII — devise to children and their children after them — estate created.

1. By one item in his will a testator, who died in 1903, devised and bequeathed certain land and personalty "to my children by my first wife and their children after them." Held, that such devise did not create an absolute fee-simple estate in the daughter of the testator by his first wife, which daughter was living at his death and had one child, who was also in life; it created a life estate in the daughter to such share, with remainder over, there being nothing in the will to show a different intent.

(a) Nothing in the other items of the will indicated a different intention.

(b) A child of the daughter of the testator, in case at the death of the testator, took a vested remainder estate, subject to open and let in children of the daughter born after the testator's death and during the continuance of the life estate.

(c) The presiding judge having held that at a fee-simple interest vested in the daughter of the testator, and that neither child living at the time of the death of the testator nor her children born thereafter and during the lifetime of the life tenant took any interest under the will, and having expressly based his judgment

refusing an injunction on that ground, this was erroneous.

Trusts — trustees for vested remaindermen — executors as — appointment.

2. The executors having discharged their duties, paid the debts of the estate, assented to the legacy, and made a deed to the life tenant, subject to the terms of the will, and the remainder estate of the children of the testator's daughter being vested, though subject to open and admit others during the life estate, there was no reason to appoint the executors trustees or grant an injunction at their instance.

(February 16, 1910.)

ERROR to the Superior Court for Thomas County to review judgments in defendants' favor in suit to enjoin a certain sale and conveyance of land alleged to be unlawful under the will of Thomas C. Mitchell, deceased. First case reversed, second case affirmed.

The facts are stated in the opinion.

Messrs. S. A. Roddenbery and Charles P. Hansell for plaintiffs in error.

Messrs. Bennet & Conyers for defendants in error.

Lumpkin, J., delivered the opinion of the court:

Mary Cooper, by her next friend, brought her equitable petition against the Mitchell Investment Company and her mother, Mrs. Daisy M. Cooper, seeking to enjoin the making of a sale and conveyance in fee simple of certain land, in which it was claimed that Mrs. Cooper had only a life interest, with remainder over to the plaintiff, under the will of Thomas C. Mitchell, who died in 1903. The executors of the testator also filed an equitable petition to enjoin the sale, alleging that children of Mrs. Cooper, born after the death of the testator, took an interest in the remainder. The court refused the injunction in each case, on the express ground that, under a proper construction of the will, Mrs. Cooper, the daughter of the testator, took a fee-simple estate in the property involved in the controversy, and not a life estate with remainder over to her children, so that neither her daughter who was in life when the testator died nor her afterborn children had any interest in the property. The plaintiffs excepted, and brought both cases to this court. The executors had assented to the legacy, and conveyed to Mrs. Cooper a one-seventh undivided interest in what was called the "park property," but specifying that the conveyance was limited to the uses and purposes named in the will of Mitchell. They sought, however, to protect what they claimed to be the rights of the

Headnotes by LUMPKIN, J.

Note. — The question involved in the case was reported, as to the estate created by devise to one and his children after him, covered in a note in 12 I.R.A. (N.S.) 13, on "Children" as a word of purchase limitation.
1 I.R.A. (N.S.)

children of Mrs. Cooper born after the testator's death, and prayed to have the will construed to create a contingent remainder, and that they be appointed trustees to preserve it.

These cases involved two questions: (1) Did the will of Thomas C. Mitchell devise the property in controversy to his daughter, Mrs. Cooper, in fee simple, or did it create a life estate in her, with remainder over? (2) If it created a life estate, with remainder over, did such remainder vest absolutely in her child who was *in esse* at the time of the testator's death, or did children born after the testator's death and pending the life estate take an interest? The clause of the will of Mitchell which was before the court for construction was as follows: "As the deed conveying the Mitchell house property to my first wife and her children does not include the park between the house and Jefferson street, nor the furniture in the Mitchell house, it is my desire the said lot called 'the park' and the furniture in the Mitchell house be valued by three or more disinterested and competent persons, and that these, the furniture and the park, be given at such valuation to my children by my first wife and their children after them, except that the share of William H. Mitchell shall go to his wife for life and after her death to his children by her."

The word "heirs," or its equivalent, is not necessary to create an absolute estate in this state. Every conveyance, properly executed, will be construed to convey the fee, unless a less estate is mentioned and limited in it. If a less estate is expressly limited, the courts will not, by construction, increase such estate into a fee simple, but, disregarding technical rules, will give effect to the intention of the maker of the instrument as far as it is lawful, if such intent can be gathered from its contents. Civil Code 1895, § 3083. Estates tail are prohibited; and, being illegal, the law will never presume or imply such an estate. Civil Code 1895, § 3085. In *Butler v. Ralston*, 69 Ga. 485, a testator devised property to his daughters, and provided that it should not vest in their husbands on marriage, but that what they received should be made over and settled upon them in legal form before the consummation of the marriage, "so that the same may be enjoyed by them and their children after them." At the time of the death of the testator, his daughters had no children. In fact, they were unmarried. It was held that, there being no children *in esse*, under the rule in *Wild's Case*, 6 Coke, 17, 10 Eng. Rul. Cas. 773, the word "children" would be treated as a word of limitation, so that under the English law an estate tail would have been

created, and therefore in Georgia a fee-simple title vested in the first taker. The implication was that the ruling might have been different if there had been children *in esse* at the death of the testator. The instrument there considered antedated the Code (*Ewing v. Shropshire*, 80 Ga. 374, 391, 7 S. E. 554); and, moreover, the statement that a settlement should be made so that the property of daughters should not vest in their husbands, but be settled so as to be enjoyed by them and their children after them, is not so direct a devise as that in the present case to the children of the testator and their children after them. The words now before us are more clearly words of purchase in respect to the children of testator's children. See also references to the *Butler Case* in *Gaboury v. McGovern*, 74 Ga. 145; *Sumpter v. Carter*, 115 Ga. 902, 60 L.R.A. 274, 42 S. E. 324.

The testator was not content with devising the property designated as the "park property" to his children by his first wife. He had some purpose in adding the words "their children after them." There was a child of a daughter living at his death. The question is whether he intended to create an estate tail, which is prohibited by the state of Georgia, or an estate in remainder, which is legal. Even if there be any doubt, shall this court construe those words so as to attribute to the testator the intention of doing a forbidden thing, and therefore by legal effect accomplishing a result which would have been reached without the use of the words above quoted at all? It was argued that the provision, "except that the share of William H. Mitchell shall go to his wife for life, and after her death to his children by her," implied an intention on the part of the testator that a life estate should be created only with respect to the share of William H. Mitchell, and not as to the shares of the testator's other children by his first wife. We think that the inference to be drawn from the exception stated is directly contrary to that thus urged. It rather shows a testamentary scheme to create a life estate in the children of the testator by his first wife, with remainder over. For some reason he saw fit to provide that the share of William H. Mitchell should not go to him for life, with remainder to his children, but to his wife for life, with remainder to his children by her, thus preserving the general scheme, but in the particular instance substituting the son's wife in his stead as the life tenant, with remainder to the son's children by her. The item of the will under consideration did not create an estate tail, and therefore a fee-simple estate in Mrs. Cooper, the daughter of the testator, as to her share,

ut a life estate in her, with remainder to
er children.

Next arises the question whether the re-
mainder was vested or contingent, and
whether children of the testator's daughter
orn after his death took any interest there-
n. In *Wild's Case*, 6 Coke, 17 (edition of
thomas & Frazer, vol. III. 288), 10 Eng.
lul. Cas. 773, land was devised to A for
fe, the remainder to B and the heirs of
is body, the remainder to "Rowland Wild
nd his wife, and after their decease to their
ildren." Rowland and his wife then had
ssue, a son and daughter; and afterwards
he deviser died, and after his decease A
ied, B died without issue, Rowland and
is wife died, and the son had issue, a
aughter, and died. The question was
whether Rowland Wild and his wife took
n estate tail, or an estate for life, with
remainder to their children. "This differ-
nce was resolved for good law, that if A
evises his lands to B and to his children or
sues, and he hath not any issue at the
me of the devise, that the same is an
state tail. . . . But it was resolved
at if a man, as in the case at bar, de-
ses land to husband and wife, and after
eir decease to their children, or the re-
ainder to their children, in this case, al-
ough they have not any child at the time,
et every child which they shall have after
ay take by way of remainder, according
to the rule of the law; for his intent
ppears that their children should not take
mediately, but after the decease of Row-
nd and his wife." As a will does not be-
ome effective until after the death of the
stator, and prior to that time is sub-
ect to be modified or revoked, a devise
es not become absolute and unalterable
til then. In *Goodrich v. Pearce*, 83 Ga.
ll, 10 S. E. 451, it was held that a devise
the testator's son, and after his death
his children, gives a life estate to the
n and a remainder to his child or chil-
en, if he leave any, whether he had a child
the time of the bequest or not. *Plant v.*
ant, 122 Ga. 763, 50 S. E. 961, involved
immediate gift of real estate by deed
a man as trustee for his wife and their
ildren, and it was accordingly held that
ly such children as were in life when the
ed was executed took any interest under
and that after-born children took noth-
g.

Mr. Jarman thus states the rule (2 Jar-
an, Wills, 6th ed. 167, 168 **1010, 1011):
An immediate gift to children (i. e., a gift
take effect in possession immediately on
the testator's decease), whether it be to
children of a living or a deceased person,
and whether to children simply or to all
children, and whether there be a gift
L.R.A.(N.S.)

over in case of the decease of any of the
children under age or not, comprehends
the children living at the testator's death
(if any), and those only, notwithstanding
some of the early cases, which make the
date of the will the period of ascertaining
the objects. . . . Where a particular
estate or interest is carved out, with a gift
over to the children of the person taking
that interest, or the children of any other
person, such gift will embrace, not only the
objects living at the death of the testator,
but all who may subsequently come into
existence before the period of distribution.
Thus in the case of a devise or bequest to
A for life, and after his decease to his
children, or . . . to A for life, and
after his decease to the children of B, the
children (if any) of B living at the death
of the testator, together with those who
happen to be born during the life of A, the
tenant for life, are entitled, but not those
who may come into existence after the
death of A." See also *Olmstead v. Dunn*,
72 Ga. 850; *Crawley v. Kendrick*, 122 Ga.
183, 184, 50 S. E. 41, 2 A. & E. Ann. Cas.
643; *Gardner, Wills*, 447, 449; *Schouler*,
Wills, 3d ed. §§ 529, 530; *Page, Wills*, §
548; 30 Am. & Eng. Enc. Law, 2d ed. p. 721
(b), and citations. In *Crawford v. Clark*,
110 Ga. 729, 36 S. E. 404, *Simmons, Ch. J.*,
said: "It cannot be disputed that a devise
to A, and after her death to her child or
children (whether she has a child or chil-
dren at the time of the devise or not),
would give a life estate to A, with remain-
der in fee to her children then in being
or afterwards born." And after citing
authorities he added: "Such a devise is
entirely different from one to A and her
children, she then having no children, as is
pointed out in *Wild's Case*, and in *Ginger*
ex dem. White v. White, *Willes, Rep.* 353;
Miller v. Hurt, 12 Ga. 357; *Sanford v. San-*
ford, 58 Ga. 259; and *Brown v. Brown*, 97
Ga. 539, 33 L.R.A. 816, 25 S. E. 353." In
the case before us the language is: "To
my children by my first wife and their chil-
dren after them," which we have construed
to create a life estate, with remainder over
to the children of the testator's children by
his first wife.

We are, of course, dealing now with the
question here involved, under the language
employed by the testator creating a life es-
tate with remainder over to children, and
not with the possibility of words being
used by testator which might indicate a
different intent. In the almost infinite
variety of expressions which are employed
in wills, differences in language may indi-
cate differences in intent. Neither is it
necessary to discuss generally cases arising
under wills or deeds which, by their terms,

provide for the ascertainment of who constitute a class at some particular time, or gifts to a class, to be paid as the members became of age, or on the happening of some event. To decide the present case is sufficient, without undertaking to deal with all possible variations which might arise from the employment of different terms.

The law favors the holding of estates to be vested, rather than contingent, in cases of doubt; and in devises of the kind here involved it declares the remainder to be vested in the child or children living at the testator's death, but subject to open and let in after-born children during the continuance of the life estate, rather than that the remainder is contingent. Where a different construction has been placed on a provision of a will, it will be found generally that superadded words have indicated a different intent. Thus in *Smith v. Smith*, 130 Ga. 532, 124 Am. St. Rep. 177, 61 S. E. 114, the remainder was to children of the life tenant "that she may leave in life." 13 Cyc. Law & Proc. pp. 647, 648; *Doe ex dem. Poor v. Considine*, 6 Wall. 458, 18 L. ed. 869.

We hold that the item of the will of Mitchell now under consideration created a life estate in his daughter by his first wife, as to her share, with remainder over, and that her child living at the time of the testator's death took a vested remainder estate, subject to open and let in children of the testator's daughter born during the continuance of the life estate. The presiding judge having based his refusal of an injunction expressly on the ground that the testator's daughter took an estate in fee simple, and her children took no interest, this was error.

In the case brought by the executors, however, it appeared that they had executed the will, paid the debts of the estate, assented to the legacy, and made a conveyance of a one-seventh interest in the property involved in controversy to the testator's daughter, Mrs. Cooper, limiting the title so conveyed to the uses and purposes expressed in the will of the testator. Their only claim to have a right to file the petition and to obtain an injunction against Mrs. Cooper was based on the allegation that the will created a contingent remainder in favor of her children born and to be born, with a prayer that such be decreed to be its legal effect, and that they be appointed trustees for such contingent remaindermen. We have held that the remainder was not contingent, and that it vested in the child of Mrs. Cooper who was in life when the testator died, but that it was subject to open and take in her children afterwards born during the life estate, which still continues. 29 L.R.A. (N.S.)

Having executed their duties as executors, assented to the legacy, delivered the property, and made a conveyance to the life tenant, subject to the terms of the will, we perceive no reason why such complainants should be appointed trustees for the children of the testator's daughter, who hold a legal estate, or why injunction should be granted at their instance. We therefore affirm the denial of their application, though not for the reason assigned by the presiding judge.

Judgment reversed in the first case, and affirmed in the second.

All the Justices concur.

GEORGIA SUPREME COURT.

W. C. HOWARD et al., Exrs., etc., of J. E. Randolph, Deceased, Plffs. in Err.,
v.

M. M. RANDOLPH.

(134 Ga. 691, 68 S. E. 586.)

Definition — "in loco parentis."

1. A person assuming the parental character and discharging parental duties to a minor child, received into his family as a child, and not as a servant, stands in loco parentis to such child.

Parent — adopted child — right to payment for services.

2. Where a person assumes the relation of a parent to a child not of kin, which he takes from an orphanage at the tender age of three years, and faithfully discharges the duties of that relation by receiving such child into his family, and educating and supporting her as if she had been his own child, and where there is no express agreement to pay wages to the child, she cannot maintain an action against the executors of the person who stood in loco parentis, for services rendered while a minor, although the value of the services may exceed the expenses of such education and support.

Same — agreement — burden of proof.

3. One who has been received in infancy as a child into a family not of kin to her, and remains in the household after her majority, and then seeks to recover for services rendered to such family after majority, has the burden of proof to show either an express contract, or circumstances from which a contract, to compensate for such services may be implied.

Same — evidence — admissibility.

4. In elucidating the question whether

Headnotes by EVANS, P. J.

Note. — As to implication of agreement to pay for services rendered by relative or member of household, see note to *Hodge v. Hodge*, 11 L.R.A. (N.S.) 873. Also see *K. Daste*, post, 297.

such services were rendered gratuitously or under an implied promise of compensation, evidence relating to the character and extent of the services, the declarations and conduct of the recipient, the value of the services, and corresponding benefits to the recipient, is admissible.

(June 28, 1910.)

ERROR to the Superior Court for Jackson County to review a judgment in plaintiff's favor in an action brought to recover for personal services alleged to have been rendered to defendants' testator. Reversed.

The facts are stated in the opinion.

Messrs. J. A. B. Mahaffey and John J. Strickland for plaintiffs in error.

Messrs. J. S. Ayres and H. H. Dean for defendant in error.

Evans, P. J., delivered the opinion of the court:

This is a suit to recover upon a *quantum meruit* \$3,949 principal, besides interest, for services alleged to have been rendered to J. E. Randolph, the defendants' testator. The greater part of the recovery sought is claimed for services alleged to have been rendered during the plaintiff's minority. The jury rendered a verdict in her favor for \$3,240.10 principal and \$929.50 interest. The plaintiff voluntarily wrote off from the amount of interest \$343.60. The court refused the defendants a new trial.

We gather from the record that J. E. Randolph, who was without children, and whose household consisted of himself and wife, about the year 1885 took the plaintiff, then a child of about three years, from an orphanage, and received her into his household as a member of his family, where she remained until his death, in 1905. Though of no kin to her, he gave to her his surname, maintained and educated her, and in all respects treated her as a daughter and a member of his household. He was a man in easy circumstances, always provided his household with two servants, and the plaintiff was not called upon to discharge any domestic services, except such as are usually rendered by a daughter under like circumstances. Her education was not confined to the elementary branches of a common-school education, but she was taught music and art, and graduated from an institution of learning about the year 1899. After her graduation in 1899 she taught school five months, and again taught school in 1901 about five months. She was teaching school in 1905, when, about the 1st of February, she was summoned to the bedside of Mrs. Randolph, who died about a month later, and about a month thereafter Mr. Randolph

died. Mr. Randolph owned several small tenant houses near a factory, some store-houses, and some land. He also conducted an undertaking business in Jefferson, a town of 1,500 or 1,800 population. When the plaintiff was about twelve or fourteen years of age, she began to assist Mr. Randolph in dressing coffins as he would sell them, and she assisted in collecting the rents from the small houses, and in keeping his accounts with respect to these matters. To what extent she assisted in the collection of rents, and the character of the accounts which she and Mr. Randolph kept appertaining to the rent and undertaking business, does not appear with much precision in the record. Mr. Randolph was accustomed to use intoxicants, and sometimes got drunk, and the plaintiff always administered unto his wants on these occasions. When ever Mrs. Randolph was sick, she would nurse her. Mr. Randolph left an estate of about \$60,000, and in his will bequeathed to the plaintiff \$1,000 in cash and a third interest in the undertaking business, from which she realized \$450. The whole evidence tended to show that the relations between the plaintiff and Mr. Randolph and his wife were cordial, and such as might be expected between parent and child. No hint of unkind, disrespectful, or inconsiderate treatment from one to the other is suggested.

1, 2. Until majority the child remains under the control of the father, who is entitled to its services and the proceeds of its labor. Civil Code, § 2502. Likewise one who stands *in loco parentis* to such a child is entitled to the proceeds of its labor, and is bound for its care, maintenance, and support. *Eaves v. Fears*, 131 Ga. 820, 64 S. E. 269. A person who means to put himself in the situation of the lawful father of the child stands, with respect to the father's office and duty of making provision for the child, *in loco parentis* to the child. *Brinkerhoff v. Merselis*, 24 N. J. L. 083; *Powys v. Mansfield*, 3 Myl. & C. 359. Sir William Grant said that one sustained this relation "by assuming the parental character and discharging parental duties." *Wetherby v. Dixon*, 19 Ves. Jr. 412. Where a person voluntarily assumes the relation of a parent to a child, whom he is under no obligation to support, and faithfully discharges the duties of that relation by receiving such child into his family and educating and supporting him on the same footing as if the child were his own, in the absence of an express agreement, the child cannot maintain an action against such person for services rendered while a minor, although the value of such services may exceed the expenses of such education and support. Under such

circumstances a promise to pay wages will not be implied. *Williams v. Hutchinson*, 3 N. Y. 312, 53 Am. Dec. 301; *Tyler v. Burrington*, 39 Wis. 376. As was said in *Schrimpf v. Settegast*, 36 Tex. 296: "The weight of authority has established a doctrine that would hold a person who had, through motives of kindness or charity, received an orphan child into his family, whether it be a stepchild or an entire stranger, and treated it as a member of his family, as standing *in loco parentis*, so long as such child should see fit to remain in such family, or so long as it should be permitted thus to remain; and while that relation should exist, the party who stood *in loco parentis* would be bound for the maintenance, care, and education of such child, and would be entitled to his reasonable services, without being liable to pay for the same, only in the way of support, unless there had been an express promise to that effect."

The record is silent as to whether the plaintiff, at the time she was received into the family of the defendants' testator, had father or mother or anyone else to whom she could look for support and maintenance. As she was taken from an orphanage at such a tender age, we may indulge the inference that she was an orphan. Her introduction into the family of Mr. Randolph was as a member of his household. Indeed, the plaintiff only begins to claim remuneration for services rendered after she had been in the household of her benefactor for some eight or nine years. At the time she was taken from the orphanage she was altogether too young to raise any inference that she was to be requited for services. There is no conflict in the testimony that Mr. Randolph faithfully discharged his assumed duty of a foster parent during the minority of the plaintiff; and consequently his estate is not liable for services rendered during her minority. There are several reported cases in this state (*Hudson v. Hudson*, 90 Ga. 581, 16 S. E. 349; *Phinazee v. Bunn*, 123 Ga. 230, 51 S. E. 300) where recoveries were sustained in suits by children against parents upon implied contract; but in these cases compensation was claimed for services rendered after the child's majority.

3. The plaintiff embraced in her suit items for services rendered subsequently to her majority. With respect to her right to compensation for services rendered since her majority, it may be stated as a general rule that, when services are rendered and voluntarily accepted, the law will imply a promise on the part of the recipient to pay for them. There are exceptions to, and limi-

tations upon, this general rule, one of which is that, where services are rendered by members of a family living in one household, no such implication will arise from the mere rendition and acceptance of the service. This exception is not confined to cases where the parties sustain the relation of parent and child, but is extended also to strangers who have been received into the family as members of the household. *Williams v. Hutchinson* and *Tyler v. Burrington*, supra; *Hogg v. Laster*, 56 Ark. 382, 19 S. W. 975; *Scully v. Scully*, 28 Iowa, 548. The reason for the exception is thus stated by Chancellor McGill: "The household family relationship is presumed to abound in reciprocal acts of kindness and good will, which tend to the mutual comfort and convenience of the members of the family, and are gratuitously performed; and where that relationship appears, the ordinary implication of a promise to pay for services does not arise, because the presumption which supports such implication is nullified by the presumption that between members of a household services are gratuitously rendered. The proof of the services and as well as the family relation leaves the case in equipoise, from which the plaintiff must remove it, or fail." *Disbrow v. Durand*, 54 N. J. L. 343, 33 Am. St. Rep. 678, 24 Atl. 545. Therefore, where one who has been received in infancy into a family not of kin to her seeks to recover for services rendered to such family after her majority, the burden is upon her to show either an express contract, or circumstances from which a contract of remuneration for such services may be implied. What circumstances might be sufficient to imply a promise to pay for services rendered would depend upon the special facts of the case, taking into account the nature of the services, the relation of the parties, declarations made at the time indicating an intent of the recipient to compensate for the services rendered, and the like. As the case is to be tried again, we will forbear a discussion of the evidence submitted as a basis for such inference, further than to say that there was sufficient evidence to submit to the jury the plaintiff's right to recover for services rendered after she attained her majority.

4. Error is assigned upon the action of the court allowing certain evidence. The character of the evidence was such as to bring it within the rule announced in the last headnote, and was admissible.

Judgment reversed.

All the Justices concur.

LOUISIANA SUPREME COURT.

RE SUCCESSION OF JEAN DASTE.

EMILY OLSEN, Claimant, Appt.

(125 La. 657, 51 So. 677.)

Foster child — services — presumption.

1. There is a presumption that the kindly services rendered by a foster daughter to her foster father during his last illness are gratuitous, and the law will not allow recovery for such services, in the absence of an express promise to pay for them, or the presence of such circumstances as will be equivalent to such a promise.

Contract — services of foster child — evidence — sufficiency.

2. Parol evidence to prove such a promise, or circumstances from which such a promise can be implied, so as to bind the estate of a dead man, is weak evidence, and should be corroborated to some extent at least.

(February 14, 1910.)

APPEAL by claimant from an order of the Civil District Court for the Parish of Orleans disallowing her claim for services rendered Jean Daste, deceased. Affirmed.

The facts are stated in the opinion.

Mr. Benjamin Rice Forman for appellant.

Mr. Charles F. Claiborne for appellees Daste.

Mr. W. J. Hennissey for appellees executors.

Breaux, Ch. J., delivered the opinion of the court:

Mrs. Emily Olsen claims an amount of \$900 for one year's services rendered, she alleges, to the late John Daste. The account of the executors of the last will and testament of the late John Daste was filed. The succession amounted to about \$26,000. The account did not show that the executors admitted an indebtedness to Mrs. Olsen for any amount. Her name is not mentioned on the final account. The attorney for the succession urged that, although the opponent urged a verbal agreement of employment by the late John Daste, there is no evidence in its support. We have not found any evidence, nor was there a promise to pay her, made by the late John Daste, for the services which opponent claims. Opponent sues

on a *quantum meruit* for services rendered the late John Daste.

She was reared by the late John Daste and his late wife. Mrs. Daste departed this life some years ago. For about two years before John Daste's death, he was feeble and at times ill. Opponent claims that she was sent for by him to come to the city and reside, in order to be near him and give him assistance in his illness. She complied with the request; called on him frequently, she said. She, it seems, was not alone at the house when she called; there was a white cook, who also gave him attention and assistance in his illness. Opponent said that she had a letter, written by one who afterwards became one of the executors of Daste, requesting her to come here to be near him. This executor did not place the claim on the account, and, although she testified as to the correctness of the account, she was never questioned about this letter at all, nor asked why she did not place opponent's claim on the account. The opponent stated that she had lost the letter, and attempted to prove its contents, consisting of the request before mentioned, by her oral testimony alone. The universal legatee, who is unwilling to pay the account of this opponent, urged that the white cook gave to the testator all the attention he needed until about eight months before his death. At that time the universal legatee came over from France to be near his brother during his illness, and he avers that he was with him all the time. The opponent unquestionably rendered some services, although this is denied by the universal legatee. They were appreciated, as the late John Daste frequently spoke of her in kind terms.

Her witnesses testified that she was at the home of John Daste every day and attended to all that he asked her to do. There was a slight inclination on the part of these witnesses to enlarge upon the extent and usefulness of the services rendered. For instance: She had often gone on errands for him. When this was sifted down as a result of cross-examination, it became evident that she had called several times on physicians; again she had gone for the priest. These are insignificant services, and cannot very well be taken account of. They are not sufficiently serious to be considered, under the circumstances, as good cause for charging anything. They are kindly services that do not generally afford ground for a claim. In addition she testified that she bought some linen and other effects for the house. In all this, there is this to be said in her favor, that she rendered faithful account, as we infer. Opponent also claims to have performed housework, and that in his moments of suffering she sought to

Headnotes by BREAUX, Ch. J.

Note. — As to implication of agreement to pay for services rendered by relative or member of household, see note to *Hodge v. Hodge*, 11 L.R.A. (N.S.) 873. See also *Howard v. Randolph*, ante, 294. 29 L.R.A. (N.S.)

soothe his pains and smooth his pillow of suffering. But in this regard she was not always consistent, for at another time she testified that he did not need any nursing.

The claim does not present itself in a favorable light. She was the adopted daughter of the late Mr. and Mrs. Daste, taken by them when she was only fifteen months old; reared, and remained with them until the date of her marriage. They had always been on good terms, and she continued on good terms with them after her marriage. The universal legatee and another member of the family (the latter had no interest), as witnesses, do not agree with the opponent. They testified that the services she rendered were inconsiderable.

There is evidence before us about a check for \$250, which was never signed, although spoken of. The notary who wrote the will of John Daste, and who afterward, as notary, attended to the settlement of the succession, testified as to this check. He said that the deceased spoke of giving a check to opponent, but that afterward he said he would direct his testamentary executor to attend to the request for him. It appears that the testator never made any request about this check. It remained an unsigned check, not explained as to the object or consideration for which it was to be given. This check is not even corroborative of an acknowledgment of indebtedness on the part of deceased.

It appears as part of the case that the late John Daste at different times gave several presents to opponent, among them a valuable brooch. Although this was given to her by the deceased, her foster father, and it had been owned by his late wife, her foster mother, she offered to sell this brooch. It was valued, by persons who pretended to know something about the value of such jewelry, as worth \$300; and others placed the value at \$1,500. She offered to sell it to the universal legatee for \$500, and said that if he chose to pay her that amount for it she would abandon all claims against the succession; so that at most, taking the brooch at its lowest value, she was willing to receive \$200 for all alleged services.

The opponent, as the foster daughter, owed some duty to the deceased. We are not certain that the services were such as would justify a judgment in her favor.

Parol evidence, and that is the only evidence there is in this case, against the estate of a dead man is weak; it should be corroborated to some extent at least. Calhoun v. McKnight, 44 La. Ann. 577, 10 So. 783; Townsend's Succession, 40 La. Ann. 79, 29 L.R.A. (N.S.).

3 So. 488; Bodenheimer v. Bodenheimer, 35 La. Ann. 1007; Hennen's Digest, p. 518, No. 7.

Under the circumstances there arises a presumption of services gratuitously rendered. Ploton's Succession, 36 La. Ann. 211.

In the Fink's Succession, 13 La. Ann. 104, opponent had rendered occasional services. Their extent and character were not shown. The testator in his will had not forgotten opponent. The court said in that case that the services for which opponent claimed seemed to be an afterthought, and were not supported by sufficient data to authorize a judgment for any sum.

Wood on Master & Servant, § 72, says that in all cases where compensation is claimed for services rendered to near relatives, as a father, grandfather, brother, and other relatives, the law will not imply a promise, and no recovery can be had unless an express contract, or circumstances equivalent thereto, is shown.

In a case cited *infra* it was held that to recover for services after an adopted daughter becomes of age no recovery could be had without expressed agreement to establish promise to pay therefor. Andrus v. Foster, 17 Vt. 556; Lunay v. Vantyne, 40 Vt. 501.

There is something to about the same effect in Guenther v. Birkicht, 22 Mo. 439; Lantz v. Frey, 14 Pa. 201; Sharp v. Cropsey, 11 Barb. 224.

The rule is that there is something in the nature of a natural obligation which prevents recovery. Patterson v. Patterson, 13 Johns. 379.

The French authorities also give effect to the ties of kindness as giving rise to services gratuitously rendered.

Considering the facts and circumstances of this case, we are unable to decide that plaintiff is entitled to recover the amount she claims. Prompted by a kindly impulse she rendered services without the least concern about remuneration. She expected, doubtless, to receive an amount larger than she received as a legatee. When it became known that it was not as large as she expected, she then conceived the idea that the services were worth an amount which she had never been heard to mention before her benefactor, in her early days, departed this life.

Under law and authority she is not entitled to relief at the hands of the court.

The law and the evidence being in favor of the executors and against the opponent, it is ordered, adjudged, and decreed that her claim is rejected and her opposition dismissed.

ARKANSAS SUPREME COURT.

ST. LOUIS & SAN FRANCISCO RAIL-
ROAD COMPANY, Appt.,

v.

A. K. BLYTHE.

SAME, Appt.,

v.

ALICE BLYTHE.

(— Ark. —, 126 S. W. 386.)

**Carrier — right to require tickets —
effect of statute.**

A railroad company is not forbidden to make possession of a ticket a condition precedent to entering its train, by a statute requiring nonticket holders to be transported at the regular fare charged for tickets.

(Battie and Frauenthal, JJ., dissent.)

(March 7, 1910.)

Note. — Right of carrier to refuse to accept nonticket holders as passengers.

This title has been strictly adhered to in the preparation of this note, and only such case of the expulsion from trains of nonticket holders have been included, as show that the person expelled was willing to pay cash fare. Obviously the cases of expulsion of nonticket holders for refusal to pay fare, whether the regular fare or an excess fare, present another question.

Nor does the note purport to cover the case of insufficient or invalid tickets or tokens, as distinguished from none at all; cases which turn upon the fact that the passenger was unable to procure a ticket before the train started are also excluded herefrom, as they were considered in the note in 24 L.R.A.(N.S.) 758.

On the cognate question as to the duty of a passenger when, though the fault of other employees of the carrier, he is unable to present to the conductor the proper token of his right to transportation, see the notes in 43 L.R.A. 706; 2 L.R.A.(N.S.) 695; and 5 L.R.A.(N.S.) 779.

A railroad company has a right to establish the rule requiring prospective passengers to procure tickets, and exhibit them to its employees, before entering its cars. Pullman Palace Car Co. v. Reed, 75 Ill. 125, 20 Am. Rep. 232; Chicago, B. & Q. R. Co. v. Boger, 1 Ill. App. 472; Illinois C. R. Co. v. Louthan, 80 Ill. App. 579; Pittsburgh, C. & St. L. R. Co. v. Vandyne, 57 Ind. 570, 26 Am. Rep. 68; Cathey v. St. Louis & S. F. R. Co. (Mo. App.) 130 S. W. 130; Reese v. Pennsylvania R. Co. 131 Pa. 422, 6 L.R.A. 529, 17 Am. St. Rep. 818, 19 Atl. 72.

Such a regulation is not forbidden by statutes requiring the transportation of passengers on due payment of fare legally authorized therefor, and prescribing that when fare is paid on the train a higher 23 L.R.A.(N.S.)

APPEAL by defendant from a judgment of the Circuit Court for Crittenden County in plaintiffs' favor in consolidated actions brought to recover damages for the alleged wrongful ejection of plaintiffs from defendant's passenger train. Reversed.

Statement by Hart, J.:

Alice Blythe and A. K. Blythe instituted separate suits in the Crittenden circuit court against the St. Louis & San Francisco Railroad Company to recover damages for their alleged ejection from one of its passenger trains. By consent of parties, the cases were ordered consolidated and were tried together. The defendant has appealed to this court from the judgment rendered against it.

The facts necessary to a determination of the issues involved, briefly stated, are as follows: On or about October 1, 1908, A. K. Blythe and Alice Blythe, his wife, went to the station of appellant at Big Creek, Arkan-

rate may be exacted than when tickets are purchased. Mills v. Missouri, K. & T. R. Co. 94 Tex. 242, 55 L.R.A. 497, 59 S. W. 874. It should be noted that the case of St. Louis & S. F. R. Co. v. BLYTHE holds that a regulation of this kind is not forbidden by a statute requiring nonticket holders to be transported at the regular fare charged for tickets, and distinguishes St. Louis & S. F. R. Co. v. Kilpatrick, 67 Ark. 47, 54 S. W. 971, which involves the same statute, upon the ground that in the latter case the act complained of was the expulsion of a nonticket holder from the train. From these cases the conclusion is that whether the statute requiring a nonticket holder to be transported upon payment of fare authorizes or forbids an excess fare, the company is not thereby forbidden to exclude such person from entry upon its train, but is only required to transport him if he does in fact get on and is willing to pay the required fare.

The rights and duties of the carrier in such circumstances have been held to be about the same in cases where no statute was involved.

Thus, it is held that a passenger failing to comply with the rule requiring the procurement of tickets in advance may be prevented from getting on a train although he exhibits money to the employee. International & G. N. R. Co. v. Goldstein, 2 Tex. App. Civ. Cas. (Willson) 206.

And, on the other hand, it is held that, after he enters the train, the fact that he has no ticket furnishes no excuse for putting him off, and that the demand upon him must be either for a ticket, or for payment of the cash fare, and if he offers to pay, the railway company ejects him at its peril. Ford v. East Louisiana R. Co. 110 La. 414, 34 So. 585.

It is settled that a carrier may make the procurement of a ticket in advance a

sas, for the purpose of taking passage on one of its passenger trains. The ticket agent was also baggage agent, express agent, and mail clerk. Appellees wished to go from Big Creek to Marked Tree. Big Creek is a junction where the main line of appellant's railroad is intersected by its branch line to St. Louis. A large number of passenger trains arrive and depart from this junction daily. Appellees testified that they applied at a reasonable time at the ticket office in the station to purchase tickets, and that the agent was not there to serve them. They then started to get on the train without tickets. The brakeman demanded their tickets. They explained to him that they were unable to procure tickets because there was no one in the ticket office to sell them. They offered to pay their fares to the brakeman before entering the car. The brakeman informed them that they could not enter without tickets. They again informed him why they had not procured tickets, and the brakeman again told them they could not enter the car without tickets. Mrs. Blythe was on the second step and the brakeman jerked her back, and said, "You can't go

without a ticket," and knocked her back against her husband. They remained in Big Creek from that time, about 5:30 o'clock P. M., to 9 o'clock P. M., when they took another train for home. On behalf of appellant the brakeman testified that he did not use any violence or rough language toward appellees. He said that he told the parties that a rule of the company required passengers to have tickets before entering the cars, and that it was his duty to enforce the rule. The ticket agent testified that he was in his office before the departure of the train, for the purpose of selling tickets, and that he did sell tickets to other persons for passage on the train in question. He also testified that the railroad company had a rule in force at that time requiring passengers to purchase tickets before boarding the train, and that notices to that effect were posted around the station. He stated the rule had been in force for about two months.

Messrs. W. F. Evans and W. J. Orr for appellant.

Mr. J. F. Gantney for appellees.

condition precedent to the right to be transported upon a freight train. *Evans v. Memphis & C. R. Co.* 56 Ala. 246, 28 Am. Rep. 771; *McCook v. Northup*, 65 Ark. 225, 45 S. W. 547; *Chicago & A. R. Co. v. Flagg*, 43 Ill. 304, 92 Am. Dec. 133; *Toledo, P. & W. R. Co. v. Patterson*, 63 Ill. 304; *Illinois C. R. Co. v. Johnson*, 67 Ill. 312; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566; *Law v. Illinois C. R. Co.* 32 Iowa, 534; *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507, 16 Pac. 937; *Brown v. Kansas City, Ft. S. & G. R. Co.* 38 Kan. 634, 16 Pac. 942; *Jones v. Wabash, St. L. & P. R. Co.* 17 Mo. App. 158; *Cross v. Kansas City, Ft. S. & M. R. Co.* 56 Mo. App. 664; *Burlington & M. River R. Co. v. Rose*, 11 Neb. 177, 8 N. W. 433; *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. 373; *Lane v. East Tennessee, V. & G. R. Co.* 5 Lea, 124; *Houston, E. & W. T. R. Co. v. Stell*, 28 Tex. Civ. App. 280, 67 S. W. 537; *Ellis v. Houston, E. & W. T. R. Co.* 30 Tex. Civ. App. 172, 70 S. W. 114. There is no reason why this rule should not be upheld, when a similar rule is permitted in the case of passenger trains. Indeed, an additional reason for upholding it is to be found in the frequent statement of the courts in the foregoing cases, that the carriage of passengers upon freight trains is a matter of choice and not of duty, and that therefore the carrier may impose any conditions in respect thereto that it sees fit.

The carrier may require persons desiring to ride on a freight train to procure a ticket of a specified kind. *Illinois C. R. Co. v. Nelson*, 59 Ill. 110; *Falkner v. Ohio & 29 L.R.A. (N.S.)*

M. R. Co. 55 Ind. 369; *Indianapolis & St. L. R. Co. v. Kennedy*, 77 Ind. 507.

And it may require the procurement of a permit, in addition to the ticket or other evidence of payment of fare. *Thomas v. Chicago & G. T. R. Co.* 72 Mich. 355, 40 N. W. 463; *Greenfield v. Detroit & M. R. Co.* 133 Mich. 557, 95 N. W. 546.

Such rules may, however, be waived by the long, open, and notorious disregard thereof by the employees. *Greenfield v. Detroit & M. R. Co.* supra.

In other words, the company is not liable for the expulsion of a passenger not holding a permit, unless the rule has been so frequently violated as to warrant the conclusion that enforcement thereof has ceased. *Houston, E. & W. T. R. Co. v. Jackson* (Tex. Civ. App.) 61 S. W. 440; *Houston, E. & W. T. R. Co. v. White* (Tex. Civ. App.) 61 S. W. 436.

So, the cases having to do with the carriage of passengers upon freight trains go further than those dealing with passenger trains, and hold that if a person gets on a freight train without the required token, he may be expelled although he is willing to pay a cash fare. *Chicago & A. R. Co. v. Flagg*; *Toledo, P. & W. R. Co. v. Patterson*; *Falkner v. Ohio & M. R. Co.*; *Jones v. Wabash, St. L. & P. R. Co.*; *Burlington & M. River R. Co. v. Rose*; *Cleveland, C. & C. R. Co. v. Bartram*; *Lane v. East Tennessee, V. & G. R. Co.*; and *Ellis v. Houston, E. & W. T. R. Co.*, — supra.

In *McCook v. Northup*, supra, the expulsion was upheld upon the theory that the neglect to get the ticket amounted to a refusal to pay fare. L. A. W.

Hart, J., delivered the opinion of the court:

Counsel for appellant rely for a reversal upon the action of the court in refusing to give to the jury the following instruction: "No. 2. The defendant railroad company had the right to establish a rule requiring passengers to purchase tickets before entering trains. If the jury finds that it had established such a rule, and that the passengers were afforded a reasonable opportunity to purchase tickets before the departure of the train on which they wished to take passage, and did not do so, and the brakeman refused politely to allow the passengers to enter, for the reason that they had not procured tickets, the jury will find for the defendant." It is undoubtedly competent for a railroad company, as a means of protection against imposition and to facilitate the transaction of its business, to require passengers to procure tickets before entering the car, and, where this requirement is duly made known and reasonable opportunities are afforded for complying with it, it may be enforced either by expulsion from the train regardless of a tender of the fare in money, or, as will be seen in the following section, by requiring the payment of a larger fare upon the train than that for which the ticket might have been procured. 2 Hutchinson, Carr. 3d ed. § 1032, and cases cited. See also 6 Cyc. Law & Proc. p. 547.

Such rules are reasonable because they not only facilitate the orderly and convenient conduct by the railroad company of its own business, but promote the safety and comfort of its passengers. That railroad companies, unless prohibited by statute, may make and enforce such regulations, provided they also afford to those desiring to become passengers reasonable opportunity to purchase tickets, is not denied by counsel for appellees; but they content that under our statutes the railroad may not enforce such rules by refusing a person without a ticket the right to enter one of its passenger trains for the purpose of transportation. To sustain their position, they rely upon the case of *St. Louis & S. F. R. Co. v. Kilpatrick*, 67 Ark. 47, 54 S. W. 971, in which § 6613, Kirby's Dig., was construed. It reads as follows: "All passengers who may fail to procure regular fare tickets shall be transported over all railroads in this state at the same rate and price charged for such tickets for the same service." The opinion in the *Kilpatrick* Case must be considered with reference to its own facts. There the one intending to be carried without any intent to defraud or impose upon the carrier, and being ready, able, and willing to pay his fare, was ejected from the train after it had been

put in motion. The issue thus presented for determination was whether or not, under the facts stated, the carrier had the right to expel him from the train. The court held that it did not have that right, because Kilpatrick had become a passenger within the meaning of § 6613, Kirby's Dig. The court said: "We are of the opinion, conceding the facts to be as appellee states them, and as the jury might have found, that appellee was a passenger. In other words, one who in good faith goes to a railroad station, intending to take passage upon one of its regular passenger trains, who is able and intends to pay his fare upon the demand of the carrier, and who enters over the steps of a passageway to a car where passengers ride, and through an entrance unobstructed, which passengers may freely use,—we say one who embarks upon a passenger train under such circumstances is a passenger, although he may not have purchased a ticket, and may not have entered at a place where a porter or brakeman was stationed to inspect tickets, and although he may have passed over to, and may have been found standing temporarily upon, the platform of a coach in which passengers were not permitted to ride. The purchase of a ticket is not a prerequisite to the relationship of passenger and carrier under our statute." Instead of using the language quoted, if the court had intended the broad construction now contended for by appellees, it should have said that the word "passenger," as used in § 6613, Kirby's Dig., meant one going to a train which carried passengers and being able and willing to pay his fare. Section 6613, supra, is part of the act regulating passenger rates; and, when construed with reference to the evident intent of the legislature, the section may be said to have been passed for the purpose of preventing railroad companies from enforcing regulations requiring passengers to purchase tickets before entering trains, by exacting a greater fare from them than from those who purchase tickets. To sustain the contention of appellees would be to hold that § 6613, Kirby's Dig., affirmatively confers upon passengers the right to get on trains without tickets, and thereby deny to a railroad company the right to require of an intended passenger the purchase of a ticket as a condition to entering the train. We do not think such was the intention of the legislature, and that the language used is susceptible of that interpretation when considered with reference to the legislative intent, but are of the opinion that it only intended to prescribe the fare in case the passenger is on the train and pays the conductor. It follows that the instruction should have been given.

Other assignments of error are pressed upon us for reversal, but, as they are in regard to matters that will not likely arise on a new trial, we need not consider them.

For the error in refusing to give instruction No. 2 as requested by appellant, the judgment will be reversed, and the cause remanded for a new trial.

Battle, J., dissenting:

I dissent. I think the court lays down a good rule, but the statute ought to govern.

Frauenthal, J., concurs in the dissent.

PENNSYLVANIA SUPREME COURT.

MARY SHADOWSKI, by Next Friend, et al.,
v.

PITTSBURGH RAILWAYS COMPANY,
Appt.

(226 Pa. 537, 75 Atl. 730.)

Evidence — *res gestæ* — exclamation of bystander.

An exclamation by a bystander, not in the hearing of those in charge of an electric car, as to an impending collision between the car and a child on the track, is not admissible as *res gestæ* in an action for injury to the child.

(January 3, 1910.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Allegheny County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion:

Messrs. James C. Gray, Clarence Bur-

Note.—The question suggested in the foregoing opinion, whether under any circumstances the declarations or exclamations of one not a participant or actor in the accident under investigation are admissible as *res gestæ*, is the subject of a note to Louisville R. Co. v. Johnson, 20 L.R.A.(N.S.) 133. Incidentally, the note cites numerous instances in which the exclamations or declarations of such persons have been admitted as *res gestæ*; and others in which they have been excluded not because of any general rule against the admission of the declarations or exclamations of one not an actor or participant, but because they did not in other respects conform to the requirements of the rule in relation to the admission of declarations or exclamations as *res gestæ*.
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leigh, and William A. Challener for appellant.

Messrs. Rody P. Marshall and Thomas M. Marshall for appellees.

Elkin, J., delivered the opinion of the court:

At the trial in the court below a witness produced by plaintiffs, and in no way connected with the occurrence either as actor or participant, was permitted to testify, under objection, to a voluntary profane exclamatory remark made by himself prior to the happening of the accident, and to no one in particular. The remark was not made in the presence of the motorman, or conductor, or injured child, or other persons standing by at the time or immediately after the accident occurred. The witness was on the sidewalk returning from his work, saw the car rapidly approaching while the little child was running or playing on the track, and made the remark in question. It was offered and admitted as part of the *res gestæ*, and this has been assigned for error. Under the doctrine of *res gestæ* those circumstances which are the undesigned incidents of the occurrence upon which the suit is based may be proven when illustrative of the act about which complaint is made. It is true also that these incidents may be separated from the act by a lapse of time more or less appreciable, but they must grow out of and be in a legal sense immediately connected with the litigated act. They may consist of remarks made at the time by an actor, participant, and perhaps under exceptional circumstances by a bystander, if the party making the remark has to do with or is concerned about the occurrence. It is imperatively required, however, that they should be the necessary incidents of the litigated act in order to make such remarks admissible as testimony. In the case at bar the exclamatory remark did not emanate from the act, nor did it have any causal connection with it. It was not made by an actor, or participant, or by anyone connected with the occurrence. It was made by a person walking on the pavement, a considerable distance from the point of accident, who saw a car approaching and noticed a little child on the track. It was not made after the accident, but before it happened, and not by anyone concerned. For these and other reasons which might be stated, the present case is clearly distinguishable from Coll v. Easton Transit Co. 180 Pa. 618, 37 Atl. 89, principally relied on by counsel for appellees. Again, it may be added, it is an elementary and essential rule of evidence that the best testimony available should be produced in every case. The

direct and positive testimony of the witness who made the exclamatory remark, describing what he saw and what happened at the time of the accident, is the best evidence of what occurred. The appellees have the benefit of the direct and positive testimony of this witness, and should not be permitted to introduce an exclamatory remark in the nature of a partisan serving declaration, when no proper evidential purpose is served by so doing. We find no case in our Reports which, properly understood, can be construed as an authority for the admission of this testimony as part of the *res gestæ*. It would be a dangerous precedent to establish, and would open the door wider than has yet been done for the introduction of this kind of evidence. It should have been excluded on both reason and authority, and it was error not to do so.

Some complaint is made as to the adequacy of that part of the charge which relates to the proper measure of damages. It is unnecessary to discuss this question at length, because, when the case again comes on for trial, counsel and court will have the opportunity to more fully consider and define what is meant by present worth and capitalization of the future in the verdict.

The first assignment of error is sustained, judgment reversed, and a venire facias de novo awarded.

TEXAS SUPREME COURT.

EX PARTE BERNHARD LOHMULLER.

(— Tex. —, 129 S. W. 834.)

Divorce — alimony — allowance after decree.

1. The final adjournment of the term of court at which a divorce was granted does not, if an appeal has been taken, deprive the court of power to award alimony in case conditions have arisen since the decree which require it, under a statute empowering the judge, either in term time or vacation, to allow the wife a sufficient income for her maintenance during the pendency of the suit, "until a final decree shall have been made in the cause."

Appeal — divorce — power to award alimony.

2. The pendency of an appeal does not de-

Note.—As to jurisdiction to award temporary alimony, suit money, or counsel fees pending an appeal in a divorce suit, see note to *Maxwell v. Maxwell*, 27 L.R.A. (N.S.) 712.

As to imprisonment for failure to pay alimony, as violation of constitutional provision against imprisonment for debt, see note to *Ex parte Davis*, 17 L.R.A. (N.S.) 1140.

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prive the trial court of power to award alimony in a divorce suit, where the statute empowers the judge, either in term time or vacation, to award maintenance to the wife during the pendency of the suit, until a final decree shall have been made in the cause.

(June 22, 1910.)

APPPLICATION for a writ of habeas corpus to secure the release of relator from the custody of the sheriff of Bexar County to which he had been committed for contempt of court. Denied.

The facts are stated in the opinion.

Mr. David J. Powell for relator.

Mr. William Aubrey for respondent.

Williams, J., delivered the opinion of the court:

Relator seeks to be discharged from the custody of the sheriff of Bexar county, in which he is held under a commitment from the district court of the thirty-seventh district for contempt of court, consisting in his refusal to obey an order entered in a divorce suit requiring him to pay weekly a sum of money to his wife as alimony. The suit for divorce was brought by him against his wife, and resulted in a judgment granting his prayer, from which the defendant, Mrs. Lohmuller, appealed, after which the term of court was finally ended by adjournment. A few days afterwards, but at the next term, Mrs. Lohmuller applied to the court for an allowance of alimony to be paid pending the appeal, and, after hearing, the order was made for refusal to obey which the relator was afterwards adjudged guilty of contempt and committed. No question is raised as to the sufficiency of the proceedings, except the contention that the court had no power, after having entered the final judgment in the divorce suit and adjourned for the term, to make the further order complained of. Nothing was said concerning alimony in the pleadings or the judgment in the suit. The explanation of the omission, given at the hearing of the subsequent application for alimony, was that relator had made provision for the support of his wife and children up to the time of the trial and judgment, and in his testimony at the trial of the cause expressed his willingness that the children should remain in her custody, as well as his intention to continue to make such provision thereafter, but that, after the court had rendered judgment granting the divorce to him and the custody of the children to the wife, and after she had taken the appeal, he discontinued all contribution to their support.

The rule that judgments, after the expira-

tion of the terms at which they are rendered, pass beyond the power of the court to set aside or alter them is well settled. Whatever they adjudicate remains adjudicated, and the court, although it may afterwards correct certain kinds of mistakes in the entries or grant equitable relief against them, cannot, in general, change their effect as adjudications. But this principle does not necessarily determine what other things the court may lawfully do in a cause after final judgment, since final judgment, while it generally exhausts the jurisdiction of the court over the subject-matter and the parties, does not always and necessarily put an end to the power to make other orders not inconsistent with the adjudication. The jurisdiction sometimes remains to take action authorized by law in the cause for the protection of persons or property in the control of the court, the necessity for which may arise after the judgment has been pronounced, and the proper exercise of which may be entirely consistent with the integrity of the final judgment, and therefore not affected by the rule of law on which relator relies.

The statute concerning divorces empowers "the judge," either in term time or vacation, to allow a wife who has not sufficient income for her maintenance, "during the pendency of the suit for divorce," a sum for her support "until a final decree shall be made in the case." Rev. Stat. art. 2986. This is a power incidental to the jurisdiction over the suit for divorce, in the exercise of which it becomes the duty of the court to see to the proper support and maintenance of the wife until it can be determined in the course of the proceeding whether or not she is to remain a wife. The full accomplishment of the purpose for which the power is granted requires that it last as long as the occasion for its exercise shall last, that is, "during the pendency of the suit," and hence the "final decree"—that is, to put an end to the power—is that "made in the case" (not necessarily that made by the district judge or the district court). The decree of the trial court granting or denying the divorce may be the final decree of that court, but it is not the final decree "made in the case" when an appeal is taken to another tribunal. So long as the appeal is pending the suit is pending, and the occasion specified in the statute for the allowance of alimony continues, and it does not end until that decree is pronounced which puts an end to the case. The nature of the power is such as to make it incompatible with the notion that it can no longer be exercised after the district court has rendered a judgment for divorce and has adjourned, although an appeal has

been taken. The facts remain that the case is still pending, that no final decree has been made in it, and that the wife is still in need of the provision as fully as she was before the judgment; and these are all the facts which the statute requires to make it the duty of "the judge" to exercise the power.

We do not mean to hold that the statute giving the power would justify the disregard of anything adjudicated by the decree of divorce. Nothing of the sort was done here. The action of the district judge was based upon conditions that did not exist, and therefore were not and could not have been passed on when the judgment was rendered, but have arisen since. Hence, we conclude that the principle which forbids a court to change its judgment after the expiration of the term at which it was rendered has no application.

There is another principle, however, to be considered before the question of the validity of the order in question can be determined, which is, that an appeal properly perfected puts the cause under the power of the appellate court, which for most purposes supersedes that of the court *a quo*. This rule, too, has its limitations. For conditions sometimes exist in which, for the protection of the rights or interests of the litigants or the preservation of property connected with the litigation, it becomes necessary for the trial court, even after appeal, to make provisional or conservatory orders which in no wise interfere with or limit the appeal, but are intended rather to aid and make it effectual. It is unnecessary to give other instances of this, besides that furnished by the statute already discussed. If we are not mistaken in our views, the order it provides for is, or may be, and the order in question certainly is, of that nature. Certainly, if the right exists to alimony pending appeal, it must be enforced by an order of some judge or court, and the only judge or court referred to in the statute is the district judge and the district court. It is unnecessary that we go to the extent of holding that under no circumstances could the court of civil appeals allow alimony pending appeal. See *Laredo v. Martin*, 52 Tex. 548; *Waters-Pierce Oil Co. v. State* (Tex. Civ. App.) 106 S. W. 327; *Gulf C. & S. F. R. Co. v. Ft. Worth & N. O. R. Co.* 68 Tex. 103, 2 S. W. 199, 3 S. W. 564. That proposition is not at all essential to the holding that the district court has the power; and we are satisfied that, in all ordinary cases, that court is the one that should be called upon to act. To it parties can have ready access and easily procure evidence, the production of which before an

appellate court would often be both inconvenient and costly.

The views we have adopted are well sustained by many authorities. Those cited by counsel in support of the action of the district court, and which fairly sustain it, are: *Reilly v. Reilly*, 60 Cal. 624; *Hunter v. Hunter*, 100 Ill. 477; *Kesler v. Kesler*, 39 Ind. 153; *State ex rel. Dawson v. St. Louis Ct. of Appeals*, 99 Mo. 216, 12 S. W. 661; *Ross v. Griffin*, 53 Mich. 5, 18 N. W. 534; *McBride v. McBride*, 119 N. Y. 519, 23 N. E. 1065. Others are cited in 2 Bishop, Marr. & Div. §§ 956, 957.

The decision mainly relied on by counsel for relator is *Bassett v. Bassett*, 99 Wis. 344, 67 Am. St. Rep. 863, 74 N. W. 780. In that case the judgment for divorce was granted in 1889, with no provision for alimony. That ended the case, there having been no appeal, and under a statute like ours no subsequent allowance could probably have been made, since the case was at an end. *Pape v. Pape*, 13 Tex. Civ. App. 99, 35 S. W. 480; 2 Bishop, Marr. & Div. § 857. The Wisconsin statute, however, permitted final judgments which allowed alimony to be opened up and changed by subsequent proceedings, which power was invoked in 1897 in the case referred to. The holding was that such statute did not authorize the disturbance of a judgment which had allowed no alimony, which does not conflict with anything we have said.

Ex parte Ellis, 37 Tex. Crim. Rep. 539, 66 Am. St. Rep. 831, 40 S. W. 275, differed from this in three important particulars: (1) The money was allowed for the support of the child, and not the wife; (2) it was ordered to be paid after the termination of the suit without appeal; (3) the order adjudging the party guilty of contempt was entered in vacation. It is not in point.

The conclusion that the District Court acted within its powers requires that the applicant be remanded to the custody of the sheriff of Bexar county. *Ex parte Davis*, 101 Tex. 607, 17 L.R.A. (N.S.) 1140, 111 S. W. 394.

Relator remanded. Mandate to issue at once.

MICHIGAN SUPREME COURT.

JOHN GRIFF, Appt.,

v.

ELLA CLARK, alias Ella Foiles.

(155 Mich. 611, 119 N. W. 1076.)

Mechanics' lien — excessive statement — effect.

An excess of 60 or 70 per cent in the 29 L.R.A. (N.S.)

amount of claim filed to secure a mechanics' lien will prevent the lien from attaching, where the statute requires a just and true statement of the demand due.

(March 3, 1909.)

Note. — Effect of filing an excessive mechanics' lien.

I. Unintentional mistake.

- a. Overstatement of price or value of labor or materials actually furnished, 306.
- b. Omission of credits, 310.
- c. Incomplete performance where entire contract price is claimed, 311.
- d. Inclusion of nonlienable items.
 1. Items ordinarily of a lienable character.
 - (a) Materials or labor not actually furnished, 311.
 - (b) Materials furnished but not used, 312.
 - (c) Materials used in different structure, 312.
 - (d) Miscellaneous, 313.
 2. Items of a nonlienable character.
 - (a) When apparent from face of claim, 314.
 - (b) When not apparent from face of claim, 315.
 - (c) When entire contract price is claimed, which includes lienable and nonlienable items, 316.
 3. Admissibility of parol evidence to segregate lienable and nonlienable items, 316.

II. Intentional or fraudulent overstatement, 317.

III. Specific statutory provisions, 317.

Notwithstanding the statutes of the several states require that a lien claim shall correctly state the sum due the claimant over and above all just credits and set-offs, it is a well-established rule that a mechanics' or materialman's lien will be enforced *pro tanto*, although a larger sum is claimed than is actually due, when such excess is unintentional, and is caused either by the inclusion of an improper charge for labor or materials which, in the particular case, were nonlienable, or which were not furnished, or furnished and partly used, or by the omission of a credit or an honest unintentional overstatement of the sum actually due. But if the excess is due to the inclusion of a charge for which the law does not in any event confer a lien, it will defeat the lien *in toto*, unless the nonlienable charge is separately stated, so that it may be segregated from the lienable portion upon inspection of the lien claim. By the weight of authority, such segregation cannot be made at the trial by parol evidence, although there are a few cases to the contrary. If the larger amount is wilfully or intentionally claimed, or if

APPEAL by complainant from a decree of the Circuit Court for Houghton County in defendant's favor in a suit to foreclose a mechanics' lien. Affirmed.

The facts are stated in the opinion.

Messrs. **Burrill & Burrill** for appellant.

Messrs. **Larson & Galbraith** for appellee.

Brooke, J., delivered the opinion of the court:

The bill in this case is filed to foreclose a contractors' lien. The building was erected under a written contract entered into between the parties on the 12th day of September, 1905. The contract price was \$1,700, subject to the privilege reserved by the de-

fendant to make alterations in the building, she to pay for all extra labor required for such alterations. The building was substantially completed on the 7th day of December, 1905, the defendant refused to make the last payment according to the contract, and, on the 1st day of February, 1906, complainant filed a claim of lien. One thousand dollars of the contract price was paid by the defendant, but payment of the \$700 balance, together with \$190 claimed by the complainant as extras, was refused by defendant. The findings of the circuit judge were in part as follows:

"The undisputed testimony in the case shows that the building was not completed according to the terms of the written contract, that changes were made in the mate-

the correct amount might have been learned by the exercise of reasonable diligence, the lien will be defeated *in toto*; and in some cases it is held that a grossly exaggerated claim, remaining unexplained, will have the same effect. The question of excessive lien claims, however, is regulated by statute in some jurisdictions.

The effect, in subsequent pleadings, to enforce a mechanics' or materialman's lien of an excessive claim as to the sum due, is not considered in this note, which is expressly limited to cases where such a claim is made in the notice filed, as the first step towards perfecting such a lien.

I. Unintentional mistake.

a. Overstatement of price or value of labor or materials actually furnished.

Attention is called to the fact that there is a striking uniformity in the phraseology of the several lien statutes as to the requirement that a mechanic or materialman shall, in order to obtain a lien, file a true and correct claim of the sum due him after deducting all just credits and set-offs.

It is a well-established principle of law, which has been specifically applied in the following cases, where the amount indicated was claimed in excess of that actually due, that an overstatement in a claim for a mechanics' lien of the amount actually due will not, when arising from an honest mistake or an inadvertence free from fraudulent intent, vitiate the lien for the sum actually due, notwithstanding the statute requires that a just and true statement of the amount due after deducting all just credits and offsets be filed; but the lien will be enforced *pro tanto*: *Soule v. Borelli*, 80 Conn. 392, 68 Atl. 979 (\$826.77); *Kiel v. Carll*, 51 Conn. 440 (\$28.67); *Hopkins v. Forrester*, 39 Conn. 351 (\$25); *McCormack v. Phillips*, 4 Dak. 508, 34 N. W. 39 (\$2345.03); *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318, affirming 99 Ill. App. 104 (\$60); *Simmons Bros. Mfg. Co. v. Citizens' State Bank*, 105 Iowa, 264, 74 N. W. 905 (\$42.-29 L.R.A. (N.S.)

65); *Frohlick v. Ashton*, 159 Mich. 265, 123 N. W. 1130 (\$45); *McAllister v. Des Rochers*, 132 Mich. 381, 93 N. W. 887 (\$54); *Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545 (a few dollars); *Scheibner v. Cohnen*, 108 Mich. 165, 65 N. W. 760 (\$665.40); *J. E. Grelick Co. v. Taylor*, 143 Mich. 704, 107 N. W. 712 (\$115.96); *Lamont v. LeFevre*, 96 Mich. 175, 55 N. W. 687 (\$20); *Ittner v. Hughes*, 113 Mo. 679, 34 S. W. 1110 (\$400); *Heamann v. Porter*, 35 Mo. 137 (\$108.20); *Shepard v. Atchison, T. & S. F. R. Co. (Mo. App.)* 129 S. W. 1003 (\$12.60); *Midland Lumber Co. v. Kreeger*, 52 Mo. App. 418 (\$443.98); *Greenwood v. Harris*, 8 Mo. App. 603 (small amount); *Nolan v. Lovelock*, 1 Mont. 224 (\$99); *Camden Iron Works v. Camden*, 64 N. J. Eq. 723, 52 Atl. 477 (\$48.69); *Hall v. Thomas*, 111 N. Y. Supp. 979 (\$609); *Gaskell v. Beard*, 58 Hun, 101, 11 N. Y. Supp. 399 (\$494.87); *Morgan v. Taylor*, 15 Daly, 304, 5 N. Y. Supp. 922, affirmed without opinion in 128 N. Y. 622, 28 N. E. 253 (\$35); *Thomas v. Huesman*, 10 Ohio St. 152 (\$60); *Salt Lake Hardware Co. v. Chairman Min. & Electric Co.* 137 Fed. 632 (\$973).

And in the following cases, in which the amount of the excess does not appear, the court has recognized and applied this doctrine: *Barber v. Reynolds*, 44 Cal. 519; *Rockwell v. O'Brien-Green Co.* 62 Ill. App. 293; *Albrecht v. C. C. Foster Lumber Co.* 126 Ind. 318, 26 N. E. 157; *Hannah & L. Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120; *McMonegel v. Wilson*, 103 Mich. 264, 61 N. W. 495; *Fairbairn v. Moody*, 116 Mich. 61, 74 N. W. 386, 75 N. W. 469; *Black v. Appolonio*, 1 Mont. 342; *Mason v. Germaine*, 1 Mont. 263; *American Mortg. Co. v. Butler*, 36 Misc. 253, 73 N. Y. Supp. 334; *Morrison v. Swarthmore Nat. Bank*, 9 Del. Co. Rep. 573; *Proulx v. Stetson & P. Mill Co.* 6 Wash. 478, 35 Pac. 1067; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106; *Springer Land Asso. v. Ford*, 168 U. S. 513, 42 L. ed. 562, 18 Sup. Ct. Rep. 170, affirming 8 N. M. 37, 41 Pac. 541; *Hooven, O. & R. Co. v. John*

rial used, and other changes were made which decreased the cost of the building.

"The complainant insists by his testimony that the substitution of material and the changes made in the building were all with the consent of the defendant. The defendant denies this. If the changes were made with the consent of the defendant, and if the substitution of material was done with her knowledge and consent, the complainant ought to allow the difference between the cost of the material furnished and that contracted for to the defendant. He has not done so, nor has he offered to do so. He insists that he is entitled to the full contract price, and that the lien upon the premises should be enforced to compel the payment of the full contract price.

"The amount charged for extras upon the building, \$190, is made up of several items. Some of the items were not extras at all, as appears from the testimony, and as to some other of the items the testimony fails to show the value to be that claimed by the complainant. Where there is a difference of value, the difference may arise because the amount is estimated by two different people. I think there can be no question that some of the items charged as extras were known to the complainant, at the time he filed his lien, as not entitled to be included as extras.

"The written contract for the erection of the building mentions the kind of material to be used. The complainant was a contractor of experience, and also a lumberman. He did not show by a fair preponder-

Featherstone's Sons, 49 C. C. A. 229, 111 Fed. 81.

See also cases cited *infra*, subdivision III.

The court in *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 744, 67 N. W. 393, said that if unintentional errors "are to defeat a lien, but few such liens will be established, for it is common that disputes arise upon such accounts, and that investigation leads to corrections. The statement or account of the demand is just and true within the meaning of the statute when it is for labor, materials, machinery, or fixtures furnished, and is believed to be just and true by the person who verifies it. If the party verifying knows that the demand is for other than that for which a lien is allowed, . . . or that it contains charges or omits credits that it should not contain or omit, then surely it is not a just and true statement or account of the demand. A statement or account of the demand, within the statute, that is made and verified in good faith, is just and true, . . . though unintentional errors may be found to exist therein."

So, in *Heamann v. Porter*, 35 Mo. 137, the court said that "if the legislature had intended the right of the lien holder should depend upon the question of his good faith in the statement of his demand, such intention would not have been left to mere construction, but would have been expressed in plain words. The lien is the result of the performance of labor or of furnishing materials, . . . and there is nothing in the law countenancing the proposition that the right thus given is avoided or defeated by reason of the sum claimed being excessive, whether the excess be great or small, or whether the claim be made with knowledge or in ignorance of the true amount due," notwithstanding the statute required that the lienor should file "a just and true account of the . . . demand due him."

But see *contra*, *Kling v. Railway Constr. Co.* 7 Mo. App. 410, *infra* (where there was an overstatement of \$1,000), which holds that a lien must stand or fall substantially as claimed.

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In *Nolan v. Lovelock*, *supra*, where there was an excess of \$99, it was said that a proceeding to enforce a mechanics' lien appealed to the equitable powers of the court, and, in the absence of an express or positive statute, a lien should not be held vitiated *in toto*, unless it clearly appeared that an overstatement was fraudulently intended.

In *Camden Iron Works v. Camden*, 64 N. J. Eq. 723, 52 Atl. 477, modifying and reversing 60 N. J. Eq. 211, 47 Atl. 220, the court said that, in order to sustain a lien, where an excess of \$14,000 over the amount actually due was claimed, it was necessary that the court should be satisfied that such excess was claimed in good faith.

In some cases it has been held that the doctrine that an honest or inadvertent overstatement will not vitiate a lien will be applied only when the error has not operated to the prejudice of anyone. *Simonsen Bros. Mfg. Co. v. Citizens' State Bank*, 105 Iowa, 264, 74 N. W. 905; *Albrecht v. C. C. Foster Lumber Co. and Kiel v. Carll*, *supra*; *Marston v. Kenyon*, 44 Conn. 349; *Soule v. Borelli*; *Kendall v. Fader*; *Midland Lumber Co. v. Kreeger*; and *Morrison v. Swarthmore Nat. Bank*,—*supra*.

It was said in *Springer Land Assn. v. Ford*, *supra*, that, as between a lienor and a property owner, an honest overstatement of the amount due will not affect the validity of a lien. To the same effect is *Nichols v. Culver*, 51 Conn. 177.

In some cases the court has stated that a lienor who acts in good faith is not bound to state in his claim of lien the precise amount finally allowed him. *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325; *Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 422, affirming 61 Ill. App. 310; *Day v. Chapman*, 88 Ill. App. 358; *Green Bay Lumber Co. v. Miller*, *supra*; *Palmer v. McGinness*, 127 Iowa, 118, 102 N. W. 802; *McMonegal v. Wilson*, 103 Mich. 264, 61 N. W. 495; *Black v. Appolonio and Morgan v. Taylor*, *supra*; *Garner v. Van Patten*, 20 Utah, 342, 58 Pac. 284; *Proulx v. Stetson & P. Mill Co.* *supra*.

In *Morgan v. Taylor*, *supra*, it was said that "it but seldom happens that a lienor

ance of the evidence that the changes in the material were made with the consent of the defendant. The weight of the testimony is decidedly with the defendant, that she did not know of the substitution of materials and did not consent to it. Hemlock was substituted for pine and basswood for finishing pine. Some of the lumber used was not of the grade specified in the contract. In every instance where there was a substitution of material a cheaper one was used.

"The complainant insists that because the defendant has failed to show just the difference in the market price of the material used, and just how many feet were substituted, she must pay the full amount of the contract, and her property must be subject to a lien for the full amount. The testi-

mony in the case shows that the building as built by the contractor is worth from \$375 to \$500 less than it would be had it been completed according to the terms of the contract. The contractor knew the price of the material, but has made no deduction whatever on account of the decreased cost, and, while it may well be that the difference in the price of the substituted material and that of the contract material might not amount to \$375, it is evident that the complainant has endeavored to enforce a lien for an amount much greater than he honestly believed to be due him."

Complainant both in his statement of lien filed in the office of the register of deeds and his bill of complaint claims the sum of \$899 as the amount due from the defendant over

files his lien only for the exact amount finally adjudged due him; it is generally made large enough to cover everything to which the lienor may in any event be entitled, for the reason there can be no recovery beyond the amount claimed in the lien filed."

The object of the mechanics' lien statute might be defeated, said the court, in substance, in *Garner v. Van Patten*, supra, if an honest overstatement be held to vitiate the entire lien, as the question whether the amount claimed therein is the sum actually due must be left to the determination of the court.

The doctrine that an honest overstatement in a lien claim of the sum due the lienor, when no fraud is intended, will not vitiate a lien, it being good *pro tanto*, has been applied where, in stating the balance due under a large account, of which neither party had kept accurate data, there was an overstatement of \$2,867, notwithstanding the statute required the amount to be stated as nearly as it could be ascertained (*Kiel v. Carll*, 51 Conn. 440); where an overstatement of \$494.87 was due to the mistake of a person having charge of the details of a lienor's business, and not to a disposition to make an overcharge (*Gaskell v. Beard*, 58 Hun, 101, 11 N. Y. Supp. 399); where, upon a trial, an item of \$400 which was included in the claim of lien was withdrawn (*Ittner v. Hughes*, 133 Mo. 679, 34 S. W. 1110); where, as the result of an unintentional mistake or clerical error on the lienor's ledger, a larger amount was claimed than that actually due (*Soule v. Borelli*, 80 Conn. 392, 68 Atl. 979); where a designated amount was claimed, together with interest (*McMillan v. Seneca Lake Grape & Wine Co.* 5 Hun, 12, reversed on other grounds in 57 N. Y. 215); where the amount of an overcharge was easily separated from that actually due (*Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318, affirming 99 Ill. App. 104; *Midland Lumber Co. v. Greeger*, 52 Mo. App. 418); where the excess consists of a claim for extras (*McMonegal v. Wilson*, supra).

In the last case the court said that the "claim for extras, while it must be reduced, 29 L.R.A. (N.S.)

cannot be said to have been wilfully or fraudulently made. It requires an examination and construction of the specifications to determine how much of the claim for extras shall be allowed or disallowed, and the testimony of witnesses was also required upon this question." *Ibid*.

In *Harrington v. Dollman*, 64 Ind. 255, it was held that the finding by the trial court of a smaller amount than the amount claimed in a notice of lien, which was made in good faith under a mistaken opinion, would not be disturbed upon appeal, where the record did not contain the evidence, and no objections seemed to have been made to the admissibility of the lien notice.

So, it was held in *Hopkins v. Forrester*, 39 Conn. 351, that a subsequent encumbrancer could not complain of an inadvertent overstatement of \$25, which represented interest to become due upon notes given for the lienable amount, as the error harmed no one, its only effect being that it was for less than the record disclosed.

And as against a mortgagee who became such while labor was being performed upon property, an overstatement of \$2,726 will not vitiate the lien *in toto*, when due to the fact that the lienor inadvertently included the amount of certain notes given him by the lienee in payment. *Marston v. Kenyon*, 44 Conn. 349.

So, the fact that a statement of lien, while containing items that were liens against the owner of the property, also contained such as were not liens against an encumbrancer, will not, in the absence of bad faith, defeat the right to a lien against the latter *pro tanto*. *Chase v. Garver Coal Co.* 90 Iowa, 25, 57 N. W. 648.

In *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175, the court said the lien law is a remedial statute, to be liberally construed, and that a substantial compliance with its provisions will be sufficient to uphold the lien, and as it does not declare that an untrue statement of the amount due will render the entire proceeding void, an honest overstatement will not have this effect.

Therefore, it was held in *Hall v. Thomas*,

and above all the legal set-offs. Counsel for complainant makes the following claim in his brief: "The largest amount which the defendant should recover under the pleadings and proofs would be the difference in the value of the material used and that contracted for, which would be from \$75 to \$100, and the difference in the cost of labor, which would be from \$75 to \$100." This would entitle complainant to a decree for \$530 and costs. It will be noted that the difference between this amount and the amount claimed in the lien is \$360, a sum between 60 and 70 per cent in excess of the claim made by complainant's counsel in his brief upon consideration of the record testimony. It is apparent to us that the complainant's statement of lien is not such "a

just and true statement of account of the demand due him over and above all legal set-offs" as is contemplated by the statute, and we therefore hold that the circuit judge was correct in his ruling. See *Gibbs v. Hanchette*, 90 Mich. 657, 51 N. W. 691; *Lamont v. Le Fevre*, 96 Mich. 175, 55 N. W. 687; *Brennan v. Miller*, 97 Mich. 183, 56 N. W. 354; *Scheibner v. Cohnen*, 108 Mich. 167, 65 N. W. 760; *J. E. Greilick Co. v. Taylor*, 143 Mich. 704, 107 N. W. 712. Decree is affirmed.

Grant, Montgomery, Moore, and McAlvay, JJ., concur.

Petition for rehearing denied.

111 N. Y. Supp. 979, that an unintentional overstatement of \$609 would not affect the validity of the lien for the amount actually due.

But it was held in *Finn v. Smith*, 186 N. Y. 465, 79 N. E. 714, affirming 107 App. Div. 630, 95 N. Y. Supp. 1128, that an overstatement of \$2,928 in a claim for materials "furnished and to be furnished" vitiated a lien, notwithstanding the trial court found that it was not wilfully or intentionally exaggerated. The court said that the statute required the claim to state, either explicitly or by plain inference, the value or agreed price of the labor or materials furnished, at the time of filing the notice of lien.

As to grossly exaggerated claims unexplained being sufficient to warrant an inference of fraud, see *infra*, subdivision II.

In *Brennan v. Miller*, 97 Mich. 182, 56 N. W. 354, it was said that it was not permissible to include speculative items in a claim of lien, thereby encumbering the lands of others with untrue and unjust claims; and that when the means of information were within the lienor's reach, he would be held to a greater degree of accuracy than would be necessary in ordinary demands; and that a court of equity would treat as insufficient a claim which was largely excessive, where the statute required that a "just and true statement of the demand over and above all legal set-offs" should be filed.

And in *Kling v. Railway Constr. Co.* 7 Mo. App. 410, the court, in holding that an excessive claim of \$4,000 would defeat an entire lien, said that the law requires that a lien account should be substantially correct and sufficiently definite as to the lienable claims, and that it must stand or fall substantially as made, as it would be oppressive to hold that a lien might be filed for any amount, and be good as to such items as may be established; and that any other construction would be against both the letter and the spirit of the law.

See, however, *Heamann v. Porter*, 35 Mo. 37, *supra*, where it was said that if it had been the legislative intent that the right of

a lienor should depend upon the question of his good faith in stating the amount due him, it would have been expressly stated in the statute, and not left to construction.

And where the statute requires a laborer or materialman, upon failure of a contractor to pay him, to state in his notice of lien the "amount due . . . and demanded," it has been held in New Jersey that an excessive claim is made at peril of the loss of the entire lien. *Reeve v. Elmendorf*, 38 N. J. L. 125; *Taylor v. Wahl*, 69 N. J. L. 471, 55 Atl. 40; *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21; *Donnelly v. Johnes*, 58 N. J. Eq. 442, 44 Atl. 180.

So, in *Camden Iron Works v. Camden*, 64 N. J. Eq. 723, 52 Atl. 477, reversing 60 N. J. Eq. 211, 47 Atl. 220, it was held upon the authority of *Reeve v. Elmendorf*, *supra*, that an overstatement of \$14,000 would vitiate an entire lien sought, under such statute.

However, in *Garrison v. Borio*, 61 N. J. Eq. 236, 47 Atl. 1000, the court, relying upon *Camden Iron Works v. Camden*, 60 N. J. Eq. 211, 47 Atl. 220, which, however, was reversed in 64 N. J. Eq. 723, 52 Atl. 477, held that a lien, under a statute securing payment for labor and materials for public improvements, which required that the "amount of the demand, after deducting all just credits and offsets," should be verified, would not be defeated by claiming an amount in excess of that actually due, which the claimant and his counsel deemed worthy of submission to the court; as the whole claim would not be branded as fraudulent by the disallowance of a portion thereof upon the trial.

So, the lower court decision in *Camden Iron Works v. Camden*, *supra*, was followed in *James P. Hall Incorporated Co. v. Jersey City*, 62 N. J. Eq. 489, 50 Atl. 603 (which was modified upon other grounds in 64 N. J. Eq. 766, 53 Atl. 481), where it was held that a mistake in stating the amount due was not fatal under such statute, unless intentionally made to inflate the claim.

And see *Evans v. Lower*, 67 N. J. Eq. 232, 58 Atl. 294, cited *infra*, under sub-

division, I. d. 2 (b), which holds that an excess of \$6.41 for nonlienable items will not vitiate a lien when mistakenly made.

b. Omission of credits.

It is generally held, although there are decisions to the contrary, that an excessive claim, the result of an honest unintentional omission of a credit, will not vitiate a lien, but that it will be valid *pro tanto*, notwithstanding the statute requires a true statement to be filed after deducting all just credits or set-offs. *Marston v. Kenyon*, 44 Conn. 349; *Turner v. St. John*, 8 N. D. 245, 77 N. W. 340; *Treloar v. Hamilton*, 225 Ill. 102, 80 N. E. 75; *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 315, affirming 99 Ill. App. 104; *Ewing v. Stockwell*, 106 Iowa, 26, 75 N. W. 657; *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 742, 67 N. W. 383; *Fuller v. Nickerson*, 69 Me. 228; *Dyer v. Brackett*, 61 Me. 587; *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034; *Hulburt v. Just*, 126 Mich. 337, 85 N. W. 872; *Heamann v. Porter*, supra; *Kasper v. St. Louis Terminal R. Co.* 101 Mo. App. 323, 74 S. W. 145; *Eau Claire-St. Louis R. Co. v. Gray*, 81 Mo. App. 337; *Hydraulic Press Brick Co. v. McTaggart*, 76 Mo. App. 347; *Hall v. Thomas*, 101 N. Y. Supp. 979; *Cooper Mfg. Co. v. Delahunt*, 36 Or. 402, 51 Pac. 649, 60 Pac. 1; *Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54; *Chamberlain v. Hibbard*, 26 Or. 428, 38 Pac. 437; *Rowland v. Harmon*, 24 Or. 529, 34 Pac. 357; *Rison v. Moon*, 91 Va. 384, 22 S. E. 165.

See also cases cited in subdivision III. *infra*.

This doctrine has been applied in the following cases, where the failure to give credit for materials returned was due to the fact that it was not reported to the proper person (*Green Bay Lumber Co. v. Miller*, supra); where a failure to give credit for a rebate of \$34.49 was due to a salesman of the lienor corporation alone having knowledge thereof (*Hydraulic Press Brick Co. v. McTaggart*, supra); where a lienor was unable to obtain a statement of the amount of a credit (*Kasper v. St. Louis Terminal R. Co.* supra); where less material than required by contract was furnished and knowingly accepted by a property owner, and the lienor failed unintentionally to deduct \$15.80, the difference, from his claim (*Allen v. Elwert*, supra); where the omission of a credit for 50 per cent of the claim was due to the fact that the property owner, and not the lienor, had knowledge of the amount thereof (*Rison v. Moon*, supra); where a failure to give credit for a payment of \$4,600 was due to the lienor, at the time he filed his claim of lien, not being aware that the lienor had delivered checks to that amount to a subcontractor for the lienor's benefit (*Turner v. St. John*, supra); where the omission of a credit was due to an honest dispute as to the correctness thereof (*Hayes v. Hammond*, 162 Ill. 133, 44 N. E. 423, affirming 61 Ill. App. 310, 29 L.R.A. (N.S.)

\$62.29; *Rowland v. Harmon*, supra, \$250; *Cooper Mfg. Co. v. Delahunt*, supra, \$50).

It was said in *Hayes v. Hammond*, supra, that it would be practically impossible to credit in a lien claim the precise amount which might be subsequently allowed by the court, and to say that the lienor must state the exact amount which might be finally allowed, at peril of losing the lien, where he acts in good faith, would be to render the lien statute nugatory.

But, on the other hand, there are decisions which hold that an overstatement of the amount due, the result of omitting a credit, will vitiate a lien *in toto*, where the statute requires the amount claimed to be stated after all just credits have been allowed. *Lane & B. Co. v. Jones*, 79 Ala. 156; *Lynch v. Cronan*, 6 Gray, 531 (\$5); *Hoffman v. Walton*, 36 Mo. 613 (\$160); *Uthoff v. Gerhard*, 42 Mo. App. 256 (\$152.10); *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21 (\$1,000); *Lewis v. Bee-man*, 46 Or. 311, 80 Pac. 417 (\$5); *Nicolai Bros. Co. v. Van Fridagh*, 23 Or. 149, 31 Pac. 288 (\$100); *Equitable Sav. & L. Asso. v. Hewitt* (Or.) 106 Pac. 447.

The reason for this rule has been stated to be that payment is a matter particularly within the knowledge of the lienor, and therefore he is bound to state it truly. *Equitable Sav. & L. Asso. v. Hewitt* and *Lynch v. Cronan*, supra.

It was said in *Nicolai Bros. Co. v. Van Fridagh*, supra, that where a claimant "seeks to enforce his lien against the property of one with whom he did not contract, and to whom he did not furnish labor or material, and in his statement as filed neglects to deduct from the amount of his claim payments which have been made thereon, and thereby puts on record a statement which he knows, or could have known by the exercise of reasonable diligence, was not a true statement of his claim after deducting all just credits and offsets," the authorities, so far as we can ascertain, under statute-like ours, seem to be uniform in holding that he loses his lien."

Thus, under statutes requiring that the claim of lien shall state the amount due after deducting all just credits, the doctrine that the omission of a substantial credit will vitiate the entire lien has been applied, where there was a failure to give a credit of which the lienor must have known, or could have learned by reasonable diligence (*Equitable Sav. & L. Asso. v. Hewitt*, supra); where there was an omission of a credit of \$100, due to the fact that the person filing the lien relied upon the statement of a bookkeeper as to the amount due (*Nicolai Bros. Co. v. Van Fridagh*, supra); where there was an omission of \$1,000, the amount of an order drawn by a lienor upon and paid by the lienor (*McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21); where a credit of \$5 was omitted from a claim of \$24 (*Lynch v. Cronan*, supra); where there was an omission of a credit of \$5, the proceeds of a sale by the

lienor of goods belonging to the licensee, and retained by the former (*Lewis v. Beeman*, supra); where, in order to increase the amount of a lien, there was an intentional omission of a credit (*Lane & B. Co. v. Jones*, supra).

While this doctrine was applied in *Hoffman v. Walton* and *Uthoff v. Gerhard*, supra, where there was an omission of a credit of \$160 and \$152.10, respectively, as a matter of fact, it was expressly provided by statute that the trial court should render judgment in a lien proceeding *pro tanto*, notwithstanding an unintentional omission of a credit.

c. Incomplete performance where entire contract price is claimed.

Where the amount due under an entire contract is claimed in a lien notice, it will not, in the absence of a wilful or intentional falsification, defeat the lien for the amount found actually due. *Ringle v. Wallis Iron Works*, 149 N. Y. 439, 44 N. E. 175 (\$35 disallowed, for work not performed); *Morgan v. Taylor*, 15 Daly, 304, 5 N. Y. Supp. 920, affirmed without opinion in 128 N. Y. 622, 28 N. E. 253 (a less amount than claimed found due, by reason of the fact that the property owner had prevented a complete performance of the contract); *Beattys v. Searles*, 74 App. Div. 214, 77 N. Y. Supp. 497 (\$2,500 found due, where \$9,150 less \$650 for materials not furnished was claimed, the property owner not being thereby injured, as evidenced by his giving a release bond of \$3,000 only); *Mull v. Jones*, 45 N. Y. S. R. 643, 18 N. Y. Supp. 359 (\$27.55, disallowed, for work not performed, the lienor, however, being ready and willing to finish it, but could not until other contractors had finished).

But, on the other hand, there are decisions of the lower courts of New York which hold that where the amount of the lien claim represents an entire contract price, and it appears upon the trial that there has not been a complete performance on the part of the lienor, the entire lien will be vitiated, such overstatement being considered as intentionally made, as the statute requires that the lien notice shall, where the whole of the work has not been performed, state that fact, as well as the amount actually completed. *Brandt v. Verdon*, 44 N. Y. S. R. 885, 18 N. Y. Supp. 119 (\$910 claimed, and \$332 found to be due); *Foster v. Schneider*, 50 Hun, 151, 2 N. Y. Supp. 875 (where the lienor neglected and refused to perform the entire contract); *Close v. Clark*, 15 Daly, 91, 9 N. Y. Supp. 538 (work to the value of \$93 remained uncompleted).

In the case under annotation, *GRIFF v. CLARK*, where a lien was claimed for the entire contract price of a structure, but by reason of the substitution of cheaper materials than the contract called for, the amount claimed was 60 or 70 per cent greater than it should have been, it was held sufficient to defeat the entire lien: because, by the lienor's failure to make deduction of the

difference in the cost of materials, of which he had knowledge, he attempted to enforce a lien for a greater amount than he honestly believed to be due.

As to claiming an entire contract price, when a portion thereof consists of a charge for which the law does not provide a lien, see subdivision I. d, 2 (c).

d. Inclusion of nonlienable items.

1. Items ordinarily of a lienable character.

(a) Materials or labor not actually furnished.

A lien is not vitiated by overstating the amount due, as a result of including, through an honest mistake, a charge for materials not actually furnished. *McAllister v. Des Rochers*, 132 Mich. 381, 91 N. W. 887; *Frohlich v. Carroll*, 127 Mich. 561, 86 N. W. 1034; *Pullis v. Hoffman*, 28 Mo. App. 666; *Schulenburg & B. Lumber Co. v. Strimble*, 33 Mo. App. 154; *Price v. Merritt*, 55 Mo. App. 640; *Uhrich v. Osborn*, 106 Mo. App. 492, 81 S. W. 228; *Cochran v. Baker*, 34 Or. 555, 52 Pac. 520, 56 Pac. 641; *Bolster v. Stocks*, 13 Wash. 460, 43 Pac. 532, 534, 1099.

So, this doctrine was applied in *Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54, where the excess in a lien claim was due to an unintentional charge for materials at contract price, where, as a matter of fact, materials of less value were furnished and accepted by the licensee.

And it was also applied in *Frohlich v. Carroll*, supra, to an overcharge of \$24.79 for work not performed by reason of licensee's failure to provide necessary measurements therefor.

So, it was applied in *Peterman v. Milwaukee Brewing Co.* 11 Wash. 199, 39 Pac. 452, where the excess was a charge for a door not furnished, which by agreement a contractor procured elsewhere.

And in the absence of an intent to defraud, a lien is not vitiated by the mistaken inclusion of a claim for materials not actually furnished, where all claim therefor was abandoned upon the trial. *Bolster v. Stocks*, supra.

But it was held in *Kezartee v. Marks*, 15 Or. 529, 16 Pac. 407, that a lien was vitiated *in toto* by claiming a lump sum for materials used in a building and for the construction of a fence about it, notwithstanding the account was itemized so as to distinguish the lienable from the nonlienable items. The reason stated for this decision was that a lien might be claimed upon either improvement for the materials entering into it, but that none could be claimed upon one of them for materials which entered into the other.

See also cases cited under III. infra.

As to the admissibility of parol evidence to segregate lienable and nonlienable items, see *infra*, I. d, 3.

(b) Materials furnished but not used.

An excessive claim of lien, the result of the inclusion in good faith of items for materials furnished a contractor, and which, without the lienor's knowledge, were not used in the structure on which a lien is claimed, will not vitiate it, but it will be enforced *pro tanto*. *Union Trust Co. v. Casserly*, 127 Mich. 183, 86 N. W. 545; *Hulburt v. Just*, 126 Mich. 337, 85 N. W. 872; *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535; *Western Brass Mfg. Co. v. Mephram*, 64 Mo. App. 50; *Price v. Merritt*, 55 Mo. App. 640; *Uhrich v. Osborn*, 106 Mo. App. 492, 81 S. W. 228; *Goodrich v. Gillies*, 82 Hun, 18, 31 N. Y. Supp. 76, affirmed in 161 N. Y. 631, 45 N. E. 1132; *Pierson v. Jackman*, 27 Misc. 425, 58 N. Y. Supp. 344, affirmed without opinion in 47 App. Div. 625, 62 N. Y. Supp. 1145; *Cochran v. Baker*, 34 Or. 555, 52 Pac. 520, 56 Pac. 641.

The reason for this doctrine has been stated to be the fact that a materialman is not bound to inquire to what extent materials actually furnished by him in good faith have entered into the construction of a structure upon which a lien is claimed. *Eau Claire-St. Louis Lumber Co. v. Wright*, supra; *Fitch v. Howitt*, 32 Or. 396, 52 Pac. 24.

This doctrine was applied in *Hulburt v. Just*, supra, to an overcharge due to the inclusion of the value of materials on hand at the completion of a building, and a further claim amounting to \$1,178.53 which was disallowed by the court.

And it has also been applied where an excessive claim was due to the inclusion of a charge for materials which, without the lienor's knowledge, were rejected by a contractor as unsuitable. *Goodrich v. Gillies*, supra.

But upon an earlier appeal of the last case (see 66 Hun, 422, 21 N. Y. Supp. 400), it was held that the lien was defeated *in toto*, on the assumption that the lienor was aware of the fact that his claim of lien included a charge for materials rejected.

See also cases cited under III. infra.

As to the admissibility of parol evidence to segregate lienable and nonlienable items, see infra, I. d, 3.

(c) Materials used in different structure.

Where an overstatement is due to the honest inclusion of a charge for materials furnished, but which, without the lienor's knowledge, have been used elsewhere than in the structure on which a lien is claimed, such improper charge will be rejected, and a lien declared *pro tanto*. *Marston v. Kenyon*, 44 Conn. 349 (small amount for materials used in another building); *Green Bay Lumber Co. v. Miller*, 98 Iowa, 468, 62 N. W. 742, 67 N. W. 383 (where lienor supposed material was to be used in building on which a lien was sought, where the lienor was improving both); *Allen v. Frumet Min. & Smelting Co.* 73 Mo. 688 (material

materials used in a structure outside of land described in lien notice, which was easily separated from lienable portion, no one being injured by the error); *Fitch v. Howitt*, supra (materials removed by contractor without lienor's knowledge, and used elsewhere); *Whittier v. Stetson & P. Mill Co.* 6 Wash. 190, 38 Am. St. Rep. 149, 33 Pac. 393 (where lienor had reason to suppose that adjoining structures were owned by the lienor).

This doctrine has been applied where there was an overcharge of \$53.99 mistakenly claimed for materials used in another building, but which were separately stated in the claim. *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389.

See also cases cited in subdivision III. infra.

Where all the materials furnished are lienable, a claim for their full value may be filed, and they will be presumed to have been used in the structure on which a lien is claimed, as it cannot be expected that a materialman will be obliged to watch the progress of a building to see that all materials furnished are used therein; and if the lien would be defeated for the amount demanded, the burden rests upon the property owner to prove that a portion thereof, if the accurate amount thereof was incapable of computation in advance, or even that a reasonable quantity, remained unused, or that without his consent they had been removed from the building site. *Fitch v. Howitt*, supra. To the same effect, *Eau Claire-St. Louis Lumber Co. v. Wright*, supra.

So, the mistaken inclusion, by erroneous advice of counsel, of a claim for materials which did not enter into a structure, will not vitiate the lienable portion thereof in the absence of a disposition to demand more than the lienor was actually entitled to. *Gaskell v. Beard*, 58 Hun, 101, 11 N. Y. Supp. 399.

Attention is called to *Deering v. Lord*, 45 Me. 293, where it was held that a lien upon a vessel for materials furnished the shipbuilder will not be defeated by the fact that a portion of those for which the lien was claimed was used upon another vessel, as that portion could be stricken out upon the trial.

Upon the same state of facts, a similar result was reached in *Jones v. Keen*, 135 Mass. 170, where it appeared that the lienor did not wilfully or knowingly claim more than was due him.

But it was held in *Hannah & L. Mercantile Co. v. Mosser*, 105 Mich. 18, 62 N. W. 1120, where a payment of \$75 was credited generally by a materialman upon a contractor's account, and, upon his absconding, \$60 thereof was applied to nonlienable items which did not enter into the construction of the building upon which a lien was claimed, that it was such a fraud as would defeat the lien.

So, where a materialman charges in a general count materials furnished a contractor for use in four buildings owned by

different parties, and applied payments thereon without inquiry as to from whom the contractor received the money, or as to which building it should be credited to, and upon the contractor becoming unable to pay, in his statement arbitrarily fixes \$550 as the amount due upon one of the buildings, but in his petition to enforce the lien, without explaining the discrepancy, admits that the sum due him is \$434, the entire lien will be vitiated, as it does not comply with the statutory requirements that a just and true account of the demand over and above all legal set-offs shall be filed. *J. E. Grelick v. Taylor*, 143 Mich. 704, 107 N. W. 712.

And where a claim of lien covers several parcels of land upon which structures had been erected under contracts with adjoining owners, the entire lien is lost by the inclusion of \$94.40 for articles furnished upon the order of one of the owners only, and which entered into but one of the buildings, as the claim was not a just and true account, as required by law. *McAdow v. Miltenberger*, 75 Mo. App. 346.

But in *Small v. Foley*, 8 Colo. App. 435, 47 Pac. 64, it was held that a lienor would be entitled to a lien for the full amount claimed, notwithstanding \$35 thereof represented materials delivered to a building site, and which, without his knowledge, were removed by the contractor and used elsewhere. The court said it was not the intent of the lien statute to require a materialman to see that all the materials furnished a contractor actually entered into the construction of the building upon which a lien is sought, and if by contract he furnishes material therefor, he is entitled to a lien for the full amount of his claim, irrespective of where it is used.

And in *St. Croix Lumber Co. v. Davis*, 105 Iowa, 27, 74 N. W. 756, a lien was permitted to stand for an amount which included certain materials furnished, but which, without the lienor's knowledge, were not used in the building on which the lien was claimed. *Contra*, *Simmons v. Carrier*, 60 Mo. 581.

This aspect of the question, however, is not intended to be covered in this note.

Some courts apparently apply the doctrine that the inclusion of a charge for materials used in a different structure will not vitiate a lien *in toto* only where the non-liable matters are not so mingled with those that are liable as to preclude their elimination. *Nichols v. Culver*, 51 Conn. 77; *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

And in *McClain v. Hutton*, *supra*, a lien was held to be defeated *in toto* by the inclusion of a charge for materials used in a building not involved in the action, and which could not be segregated from the remainder of the claim.

So, this doctrine was applied where a lump sum was claimed, which included a charge for materials used in the construction of a sidewalk, which was non-liable, it being impossible to determine the lien-

able portion of the claim. *Bradley v. Gaghan*, 208 Pa. 511, 57 Atl. 985.

The intentional inclusion of a charge for materials furnished a contractor and by him used elsewhere than in a structure on which a lien was claimed, and so commingled with those used that it could not be determined what portion entered into the latter structure, will vitiate the lien *in toto*. *Little Bros. Mill Co. v. Baker*, 57 Wash. 311, 106 Pac. 910.

As to the effect of commingling non-liable and lienable charges so that the latter is not apparent, see subdivision I. d, 2 (b).

A lien will be enforced *pro tanto*, notwithstanding an excessive claim which was due to an inadvertent charge for materials which did not enter into the structure on which a lien was claimed, but were used by the property owner's husband. *Soule v. Borelli*, 80 Conn. 392, 68 Atl. 979; *St. Croix Lumber Co. v. Davis*, 105 Iowa, 27, 47 N. W. 756.

And this doctrine was applied in *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633, to similar facts, where the value of the materials furnished the husband was easily ascertained from the claim of lien without a restatement.

As to the admissibility of parol evidence to segregate lienable from non-liable items, see *infra*, I. d, 3.

(d) Miscellaneous.

The following cases hold, notwithstanding a statutory requirement that a true and correct statement of the amount due shall be filed, that an overstatement due to the inclusion of an item which, although ordinarily lienable, for some reason is one that is not lienable in the particular instance, will not, in the absence of fraudulent intent, defeat the entire lien, when the non-liable item is so stated in the claim as to be easily separated from those lienable: *Wolfley v. Hughes*, 8 Ariz. 203, 71 Pac. 951; *Chase v. Garver Coal Co.* 90 Iowa, 25, 57 N. W. 648 (charges barred by lapse of time); *Walden v. Robertson*, 120 Mo. 38, 25 S. W. 349 (claim for labor and improper charge for materials); *Hooven, O. & R. Co. v. John Featherstone's Sons*, 49 C. C. A. 220, 111 Fed. 81; *McLaughlin v. Schawacker*, 31 Mo. App. 365 (items furnished under contract different from that under which lien was claimed); *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389 (charge for water pipe which was non-liable).

This doctrine is recognized in *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318, affirming 99 Ill. App. 104; *Kittrell v. Hopkins*, 114 Mo. App. 431, 90 S. W. 109; *Pullis v. Hoffman*, 28 Mo. App. 606; *Stokes v. Green*, 10 S. D. 286, 73 N. W. 100.

This doctrine was applied in *Chase v. Garver Coal Co.* *supra*, where the claim, while containing no items which were not lienable as against the property owner, contained some which, by reason of lapse of

time, were not lienable against an encumbrancer, the lienor having acted in good faith in making his claim.

And in *Walden v. Robertson*, supra, where a lump sum was claimed for brick furnished and labor performed, the former only being lienable, it was held that the lien would be enforced *pro tanto*, it being possible from the lien claim to compute the amount due for labor.

So, the blending of lienable items with some which remain unproved upon the trial or not proved to their full extent, will not vitiate the lien. *Schulenburg & B. Lumber Co. v. Strimple*, 33 Mo. App. 154; *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535.

In Pennsylvania it has been held that a lien will not be vitiated if the claim contains one valid lienable item. *McCrystal v. Cochran*, 147 Pa. 225, 23 Atl. 444; *Waymard v. Datz*, 30 Pittsb. L. J. N. S. 96.

And in *Simpson v. Cameron*, 3 Pa. Dist. R. 612, this rule was applied where the claim contained an account against the owner of the property as well as one against a subcontractor, which were due under distinct contracts.

See also cases cited under subdivision III. *infra*.

But it was held in *Hughes v. Lansing*, 34 Or. 118, 75 Am. St. Rep. 574, 55 Pac. 95, that a lien was vitiated by claiming a lump sum for materials furnished, where the right to a lien for a portion thereof had been waived, and it was impossible to segregate the lienable and nonlienable items upon inspection of the claim.

So, in *O'Connor v. Current River R. Co.* 111 Mo. 185, 20 S. W. 16, it was held that a laborer's lien was defeated by indistinguishably mingling it, in the amount claimed, with an assigned claim, which, by reason of its assignment before a lien therefor was filed, was nonlienable.

And knowingly to include a claim for nonlienable items will vitiate a lien *in toto*. *Kittrell v. Hopkins* and *Wolfley v. Hughes*, supra.

As to the admissibility of parol evidence to segregate lienable from nonlienable items, see *infra*, subdivision I. d, 3.

2. Items of a nonlienable character.

(a) When apparent from face of claim.

The inclusion in a lien claim of items for which the law does not in any event give a lien will not affect the validity thereof as to the lienable items, in the absence of fraud or bad faith, if the lienable items may be segregated upon inspection of the account, and the lienor is justified in believing himself entitled to the entire amount. *Perkins v. Wilson*, 1 Marv. (Del) 196, 40 Atl. 950; *Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115, affirming 54 Ill. App. 643; *Dennis v. Smith*, 38 Minn. 494, 38 N. W. 695; *Blakey v. Blakey*, 27 Mo. 39; *Kearney v. Wendenman*, 33 Mo. App. 447; *McLaughlin* 29 L.R.A. (N.S.)

v. Schawacker, 31 Mo. App. 365; *Rullis v. Ioffman*, 28 Mo. App. 666; *Maynard v. Ivey*, 21 Nev. 241, 29 Pac. 1092; *Title Guarantee Co. v. Wrenn*, 35 Or. 62, 76 Am. St. Rep. 54, 56 Pac. 271; *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 Pac. 390; *McChrystal v. Cochran*, 147 Pa. 225, 23 Atl. 444; *Waymard v. Datz*, supra; *Walter v. Powell*, 13 Pa. Dist. R. 667; *Simpson v. Cameron*, 3 Pa. Dist. R. 612; *Morrison v. Swarthmore Nat. Bank*, 9 Del. Co. Rep. 573; *Bellingham v. Linck*, 53 Wash. 265, 101 Pac. 843; *Gilbert Hunt Co. v. Parry* (Wash.) 110 Pac. 541; *Duggan v. Washougal Land & Logging Co.* 10 Wash. 84, 35 Pac. 856; *North v. La Flesh*, 73 Wis. 520, 41 N. W. 633.

This doctrine has been specifically applied where the following nonlienable items were apparent from an inspection of the lien claim: \$14.50 for materials used in a fence erected about the structure in which the balance of the materials charged for were used (*Title Guarantee Co. v. Wrenn*, supra); \$3.50 for a wagon tongue broken while drawing lienable materials to a building (*Culver v. Schroth*, supra); \$17.40 for bags (*Walter v. Powell*, supra); \$18 for money expended at the request of and for the lienor's benefit (*Bellingham v. Linck*, supra); a nonlienable claim for damage without fraud included in a claim (*McMonegal v. Wilson*, 103 Mich. 264, 61 N. W. 495); an improper charge for demolishing an old building on the site where a new structure was erected by the lienor (*McChrystal v. Cochran*, supra).

The court said in *Culver v. Schroth*, supra, that "we are of the opinion that the insertion in the lien statement of an item of indebtedness for which the creditor is not entitled to a lien, where the insertion is by mistake and with no wrong intention, and where no party is prejudiced thereby, and especially where the item erroneously inserted is easily separable from the residue of the indebtedness, ought not, of itself, to be held to vitiate the statement and defeat the lien. If the contrary rule should prevail, it would follow that the creditor would in all cases be bound to produce proof sufficient to establish his lien for every item of his account filed, or fail altogether. This would involve a strictness of construction and practice which would go far towards defeating the beneficial ends for which mechanics' lien statutes were enacted."

It was held in *Nancolas v. Hittaffer*, 13 Iowa, 341, 12 L.R.A. (N.S.) 864, 112 N. W. 382, that in order to defeat a lien because of the inclusion in an itemized statement of items not properly lienable in the claim which are apparent upon inspection, it must be so incorrect as to be fraudulent.

Upon this phase of the question, see the cases cited in subdivision III. *infra*.

But it was held in *Truesdel v. Gay*, 1 Gray, 311, that the inclusion in a claim of a lien of an apparent item of a nonlienable character, for fence material, would defeat an entire lien, where the statute requires

that "a just and true account of the demand justly due after all just credits are given" shall be filed as the foundation of the lien.

So, in *McPherson v. Walton*, 42 N. J. Eq. 282, 11 Atl. 21, it was held, following *Reeve v. Elmendorf*, 38 N. J. L. 125, that the inclusion of \$69.74 in a claim for materials, for those furnished for a sidewalk, will vitiate the entire lien, where the statute required the lienor to state accurately the amount demanded by him.

And the inclusion of \$2.55 in a lienable claim for labor for laying such walk, which is nonlienable, will have a like effect. *Ibid.*

So, it was held in *Stubbs v. Clarinda*, C. S. & S. W. R. Co. 65 Iowa, 513, 22 N. W. 654, that a lien was defeated *in toto* by the inclusion of a charge for nonlienable matter, although apparent upon the face of the claim, as it was not a sufficient compliance with a statutory requirement that the claimant should file a "just and true statement" of his demand.

A wilfully false claim in which are included nonlienable items, although apparent upon inspection of the claim, will always vitiate an entire lien. *Barnes v. Colorado Springs & C. C. Dist. R. Co.* 42 Colo. 461, 94 Pac. 570; *Fuller v. Nickerson*, 69 Me. 228; *McMonegal v. Wilson*, supra; *Strandell v. Moran*, 49 Wash. 533, 95 Pac. 1106; *Robinson v. Brooks*, 31 Wash. 60, 71 Pac. 721.

As to the admissibility of parol evidence to segregate lienable from nonlienable items, see subdivision I. d, 3, *infra*.

(b) When not apparent from face of claim.

The general rule seems to be, although there are cases which apparently have not followed it, that when the lienable items and those for which the law does not give a lien are so mingled and blended together that they are not apparent upon inspection of the claim, the entire lien will be lost. *Cannon v. Williams*, 14 Colo. 21, 23 Pac. 456; *Perkins v. Wilson*, 1 Marv. (Del.) 196, 40 Atl. 950; *Kendall v. Fader*, 199 Ill. 294, 65 N. E. 318, affirming 99 Ill. App. 104; *Adler v. World's Pastime Exposition Co.* 126 Ill. 373, 18 N. E. 809, affirming 26 Ill. App. 528; *Peatman v. Centerville Light, Heat, & P. Co.* 105 Iowa, 1, 67 Am. St. Rep. 276, 74 N. W. 689; *Kelley v. Kelley*, 77 Me. 135; *Baker v. Fessenden*, 71 Me. 292; *First Nat. Bank v. Redman*, 57 Me. 405; *Driscoll v. Hill*, 11 Allen, 154; *McMaster v. Merrick*, 41 Mich. 505, 2 N. W. 895; *Edgar v. Salisbury*, 17 Mo. 271; *Schulenburg & B. Lumber Co. v. Strimple*, 33 Mo. App. 154; *Mackler v. Mississippi River & B. T. R. Co.* 62 Mo. App. 677; *John O'Brien Boiler Works Co. v. Haydock*, 59 Mo. App. 653; *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535; *Dugan Cut Stone Co. v. Gray*, 43 Mo. App. 671; *Murphy v. Murphy*, 22 Mo. App. 18; *Nelson v. Withrow*, 14 Mo. App. 270; *Gauss v. Hussman*, 22 Mo. App. 115; *Kershaw v. Fitzpatrick*, 3 Mo. App. 575; *Hughes v. Lansing*, 34 Or. 118, 75 Am. 29 L.R.A. (N.S.)

St. Rep. 574, 55 Pac. 95; *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835, 48 Pac. 355; *Allen v. Elwert*, 29 Or. 439, 44 Pac. 823, 48 Pac. 54; *Harrisburg Lumber Co. v. Washburn*, 29 Or. 150, 44 Pac. 390; *Williams v. Toledo Coal Co.* 25 Or. 426, 42 Am. St. Rep. 799, 36 Pac. 159; *Bradley v. Gaghan*, 208 Pa. 511, 57 Atl. 985; *Murphy v. Guisti*, 22 R. I. 588, 48 Atl. 944; *Dexter Horton & Co. v. Sparkman*, 2 Wash. 165, 25 Pac. 1070; *Gilbert Hunt Co. v. Parry*, (Wash.) 110 Pac. 541; *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36; *Weller v. Shupe*, 6 B. C. 58; *Knott v. Cline*, 5 B. C. 120.

Thus, the doctrine that the inseparable blending of lienable and nonlienable charges will vitiate a lien *in toto* has been applied where a nonlienable charge of 10 per cent was added to all lienable items, for superintending the erection of a structure (*Murphy v. Murphy*, supra; see also *Nelson v. Withrow*, 14 Mo. App. 270, *infra*, I. c); where an entire sum claimed was for labor and materials, the latter not being lienable (*Evans Marble Co. v. International Trust Co.* 101 Md. 210, 109 Am. St. Rep. 568, 60 Atl. 667, 4 A. & E. Ann. Cas. 831); where a claim for labor and materials was made and the right to a lien for the former had been lost by lapse of time (*Murphy v. Gusti*, supra); where a lump sum was charged for labor and the nonlienable use of tools (*Allen v. Elwert*, 29 Or. 428, 44 Pac. 823, 48 Pac. 54); where a lien claim for labor contained indistinguishable nonlienable charges for tools and supplies furnished (*Gilbert Hunt Co. v. Parry*, supra); where a charge included painting a fence and varnishing carpets (*First Nat. Bank v. Redman*, supra); where more than two thirds of a claim consisted of nonlienable items (*Cannon v. Williams*, supra).

In the last case the court said that such an excessive claim might easily deceive, and therefore should be held void *in toto*. *Ibid.*

Where labor and materials have been furnished and a general payment made on the account, without discrimination as to whether it shall be applied to the price of labor or materials, and it was impossible to determine how much remained due for labor or materials separately, and no lien could be claimed for the whole amount, the entire lien will be defeated. *Driscoll v. Hill*, supra.

As to the effect of the indistinguishable mingling of lienable and nonlienable charges, see also the following cases, cited in subdivision I. d, 1 (c), supra: *Nichols v. Culver*, 51 Conn. 177; *McClain v. Hutton*, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622; *Bradley v. Gaghan*, supra; *Little Bros. Mill Co. v. Baker*, 57 Wash. 311, 106 Pac. 910.

But, on the other hand, in the following cases liens have been sustained for the lienable portion of a claim, notwithstanding they do not clearly disclose whether there was a separate statement of the nonlienable charges, where by mistake nonlienable items for tools to be used on a lienable structure, and money advanced by the lienor, were in-

cluded (*Evans v. Lower*, 67 N. J. Eq. 232, 58 Atl. 294); where the whole amount claimed was honestly supposed to be due (*Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325); where a charge for meat supplied laborers was included (*Malone v. Big Flat Gravel Min. Co.* 76 Cal. 578, 18 Pac. 772); where there was a nonlienable charge for extra work (*Palmer v. McGinness*, 127 Iowa, 118, 102 N. W. 802).

And it was held in *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 33 N. J. Eq. 192, that the inclusion of nonlienable items would not vitiate a lien for the amount actually due, under a statute giving a lien against an insolvent corporation for wages only. The court said that "if, in consequence of the intermingling of charges for wages with charges not lienable, serious difficulty should arise in ascertaining how much is due for wages, I think all fair doubts should be resolved against the claimant's right to preference, and he should only be allowed" such sum as clearly appears due him.

(c) When entire contract price is claimed, which includes lienable and nonlienable items.

Where labor and materials are furnished under an entire contract for a fixed sum which is claimed in a lien notice, and there cannot be a lien for the whole thereof by reason of the fact that the law does not give a lien for materials furnished, there can be none for the lienable item of labor. *Peatman v. Centerville Light, Heat & P. Co.* 105 Iowa, 1, 67 Am. St. Rep. 276, 74 N. W. 689; *Evans Marble Co. v. International Trust Co.* 101 Md. 210, 109 Am. St. Rep. 568, 60 Atl. 667, 4 A. & E. Ann. Cas. 831; *Morrison v. Minot*, 5 Allen, 403; *Brewster v. Wyman*, 5 Allen, 405, note; *Graves v. Bemis*, 8 Allen, 573; *Mulrey v. Barrow*, 11 Allen, 152; *Angier v. Bay State Distilling Co.* 178 Mass. 163, 59 N. E. 630; *Gauss v. Hussmann*, 22 Mo. App. 115; *Nelson v. Withrow*, 14 Mo. App. 270; *Rinzel v. Stumpf*, 116 Wis. 287, 93 N. W. 36.

See also cases cited in subdivision III. *infra*.

This doctrine was also applied in *Nelson v. Withrow*, *supra*, where an entire contract price was claimed, which included a nonlienable charge for superintendence. See also *Murphy v. Murphy*, 22 Mo. App. 18, *supra*, I. b.

In *Adler v. World's Pastime Exposition Co.* 126 Ill. 373, 18 N. E. 809, affirming 26 Ill. App. 528, a claim of lien for an entire contract price, which included labor both lienable and nonlienable, was held to be unenforceable where there was no way of ascertaining the lienable portion thereof. And to the same effect, see *Boyle v. Mountain Key Min. Co.* 9 N. M. 237, 50 Pac. 347.

But where both lienable and nonlienable articles are sold under a contract for a given sum which is claimed to be due, which, however, specifies distinctly the price of

each, a lien will be enforced as to the lienable portion thereof. *Bierce v. Hutchins*, 16 Haw. 418.

3. Admissibility of parol evidence to segregate lienable and nonlienable items.

The following cases hold that parol evidence is admissible in order to separate the lienable from those items which, for some exigency of the case, are nonlienable, although ordinarily the subject of a lien, when so mingled in a lien claim as to be indistinguishable. Many of those cases already cited apparently assume the correctness of this doctrine. *Wolfsey v. Hughes*, 8 Ariz. 203, 71 Pac. 951; *Johnson v. Barnes & M. Bldg. Co.* 23 Mo. App. 546; *McLaughlin v. Schawacker*, 31 Mo. App. 365; *Schulenburg & B. Lumber Co. v. Strimple*, 33 Mo. App. 154; *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535; *Powell v. Nolan*, 27 Wash. 318, 67 Pac. 712, 68 Pac. 389; *Duggan v. Washougal Land & Logging Co.* 10 Wash. 84, 38 Pac. 856. See also *Gordon Hardware Co. v. San Francisco & S. R. Co.* 86 Cal. 620, 25 Pac. 125, s. c. on earlier appeals, 22 Pac. 406, 23 Pac. 1025, cited *infra*, subdivision III.

It was said in *Powell v. Nolan*, *supra*, that the mere fact that nonlienable items are included with those lienable is, in itself, insufficient to establish fraud and destroy the entire lien, where such items are included by mistake, or where the whole transaction plainly shows that they were included under an honest belief that they were lienable, and that the court may separate the lienable from the nonlienable items, and render a decree of foreclosure for the amount of the former.

It was held in *Eau Claire-St. Louis Lumber Co. v. Wright*, 81 Mo. App. 535, where a claim was made for more materials than were actually used, that parol evidence was admissible to show what portion of them entered into the construction of a building, even though it was not apparent from the lien statement.

But when there is a commingling of charges for which the law does not give a lien, with lienable charges, and the amount of the lienable items does not appear from the claim, parol evidence is inadmissible to separate them. *Williams v. Toledo Coal Co.* 24 Or. 426, 42 Am. St. Rep. 799, 36 Pac. 159; *Getty v. Ames*, 30 Or. 573, 60 Am. St. Rep. 835, 48 Pac. 355; *Allen v. Elwert*, 29 Or. 445, 44 Pac. 823, 48 Pac. 54; *Nelson v. Withrow*, 14 Mo. App. 270; *Driscoll v. Hill*, 11 Allen, 154.

Contra, *Barnes v. Colorado Springs & C. C. Dist. R. Co.* 42 Colo. 461, 94 Pac. 570, which is apparently supported by the following cases: *McMonegal v. Wilson*, 106 Mich. 264, 61 N. W. 495; *Evans v. Lower*, 67 N. J. Eq. 232, 58 Atl. 294; *Bank of Charleston v. Curtiss*, 18 Conn. 342, 46 Am. Dec. 325; *Malone v. Big Flat Gravel Min. Co.* 76 Cal. 578, 18 Pac. 772; *Page v. Grant*, 127 Iowa, 249, 103 N. W. 124; *Fuller v.*

Nickerson, 69 Me. 228; Wolfley v. Hughes, 8 Ariz. 203, 71 Pac. 951.

II. Intentional or fraudulent overstatement.

The wilful or intentional overstatement in a claim of mechanics' lien of the amount due the lienor will vitiate the lien *in toto*. McCormack v. Phillips, 4 Dak. 506, 34 N. W. 39; GRIFF v. CLARK; Golden v. McCabe, 121 Mich. 666, 80 N. W. 1133; Hannah & L. Mercantile Co. v. Mosser, 105 Mich. 18, 62 N. W. 1120; Brennan v. Miller, 97 Mich. 182, 56 N. W. 354; Hulburt v. Just, 126 Mich. 337, 85 N. W. 872; Uthoff v. Gerhard, 42 Mo. App. 256; Kling v. Railway Constr. Co. 7 Mo. App. 410; Kasper v. St. Louis Terminal R. Co. 101 Mo. App. 323, 74 S. W. 145; Kittrell v. Hopkins, 114 Mo. App. 431, 90 S. W. 109; Mason v. Germaine, 1 Mont. 263; Camden Iron Works v. Camden, 60 N. J. Eq. 214, 47 Atl. 220; Aeschlimann v. Presbyterian Hospital, 165 N. Y. 296, 80 Am. St. Rep. 723, 59 N. E. 148, affirming 29 App. Div. 630, 53 N. Y. Supp. 998; Hecla Iron Works v. Hall, 115 App. Div. 126, 100 N. Y. Supp. 696; Williams v. Daiker, 63 App. Div. 614, 71 N. Y. Supp. 247; American Mortg. Co. v. Butler, 36 Misc. 253, 73 N. Y. Supp. 334; Gaskell v. Beard, 58 Hun, 101, 11 N. Y. Supp. 399; Bohn Mfg. Co. v. Keenan, 15 S. D. 377, 89 N. W. 1009; Culmer v. Caine, 22 Utah, 216, 61 Pac. 1008; Robinson v. Brooks, 31 Wash. 60, 71 Pac. 721; Fuller v. Nickerson, *supra*.

But actual fraud, or facts from which it is necessarily implied, must appear before an overstatement of the amount due will vitiate an entire lien. Mason v. Germaine, *supra*; Strandell v. Moran, 49 Wash. 533, 95 Pac. 1106.

And it has been said that fraud cannot be inferred merely from the fact that a lien is filed for an excessive amount. Black v. Appolonio, 1 Mont. 342; Mason v. Germaine, *supra*.

But in the following cases the grossly exaggerated claims indicated, remaining unexplained, have been held to warrant an inference that a fraudulent augmentation of the debt was intended, sufficient to defeat the lien *in toto*. Gaskell v. Beard, 58 Hun, 101, 11 N. Y. Supp. 399 (overstatement of \$494.87); Hall v. Thomas, 111 N. Y. Supp. 979 (overstatement of \$609.11); New Jersey Steel & I. Co. v. Robinson, 85 App. Div. 512, 83 N. Y. Supp. 450, affirmed in 178 N. Y. 632, 71 N. E. 1134 (overstatement of \$27,000); Hecla Iron Works v. Hall, 115 App. Div. 126, 100 N. Y. Supp. 696 (claim of \$12,000 in excess of amount stated in bills rendered prior to filing notice of lien); Bohn Mfg. Co. v. Keenan, 15 S. D. 377, 89 N. W. 1009 (\$100 more than actually due, claimed in pursuance of an agreement with a contractor to defraud the owner of the property); Brennan v. Miller, 97 Mich. 182, 56 N. W. 354.

And this doctrine has been applied where the only excuse for an excess of \$145 was 29 L.R.A. (N.S.)

that the contract upon which the lien was based was in the possession of the lienor's attorney, it not appearing, however, that any effort had been made to obtain it, and the debtor, who resided in the same town with the lienor, had a duplicate thereof, together with a bill rendered but a short time before the filing of the lien, which showed the true amount due. Gibbs v. Hanchette, 90 Mich. 657, 51 N. W. 691.

GRIFF v. CLARK, the case under annotation, is an example of an intentional or wilful overstatement sufficient to defeat a lien *in toto*.

It was said in J. E. Greilick Co. v. Taylor, 143 Mich. 704, 107 N. W. 712, where there was an excessive claim of 25 per cent, that the law will not permit a reckless claim of the amount due, when made without knowledge of the facts on the assumption that it may be afterwards corrected, as the statute requires a just and true statement, and only an honest mistake will be excused.

Where materials were furnished a contractor for several distinct jobs, and no application of general payments was made upon the several accounts, and upon the contractor becoming unable to pay, the lienor arbitrarily fixed an amount as the proper share of the debt of the contractor, which was to be made a lien on the property of one of the owners, and filed a claim for the balance due, it vitiates the entire lien. *Ibid*.

III. Specific statutory provisions.

In a few states the effect of an excessive claim of lien is regulated by statute. However, no attempt is made to collect them in this note, except as they have arisen in the cases.

Thus, in California it is provided that a wilful inclusion of a claim for work or materials not performed upon, or furnished for, the property upon which a lien is claimed, shall work a forfeiture of the lien (§1202, Cal. Civ. Code).

Such provision, being penal in its nature, must receive a strict construction, and the evidence must be clear and convincing that it was wilfully or intentionally transgressed, in order that an overstatement of the amount actually due shall vitiate the entire lien. Schallert-Ganahl Lumber Co. v. Neal, 91 Cal. 362, 27 Pac. 743; Pacific Mut. L. Ins. Co. v. Fisher, 106 Cal. 224, 39 Pac. 758.

Under this statute it has been held that an honest unintentional overstatement of the amount due will not vitiate a lien, but that it will be enforced *pro tanto*, where \$6,000 for material which did not go into the structure was without fraud erroneously included in claim (Harmon v. San Francisco & S. R. Co. [Cal.] 22 Pac. 407); where there was an overstatement of \$50 (Lucas v. Gobbi, 10 Cal. App. 648, 103 Pac. 157); where, by reason of a clerical error, the amount actually due was overstated, the only penalty for such error being to post-

pone the lien to the claim of other lienors (Snell v. Payne, 115 Cal. 218, 46 Pac. 1069); where, through an error, there was a failure to give credit for a payment (Stockton Lumber Co. v. Schuler, 155 Cal. 411, 101 Pac. 307); where it is found that labor claimed for had not been performed, but that material included in the claim had been actually furnished (Pacific Mut. L. Ins. Co. v. Fisher, 108 Cal. 224, 39 Pac. 758); where claim for packages in which the lienable material was delivered was included (Snell v. Payne, supra).

The bare fact that a claim is made for more material than was actually furnished, or too high a price set upon it, will not, in the absence of fraud as to the overstatement, defeat the lien for the amount actually due. Harmon v. San Francisco & S. R. Co. 86 Cal. 617, 25 Pac. 124, same case on prior appeals, 22 Pac. 407, 23 Pac. 1024; Gordon Hardware Co. v. San Francisco & S. R. Co. 86 Cal. 620, 25 Pac. 125; see also prior appeals of same case, 22 Pac. 406, 23 Pac. 1025.

Under the California statute, it has been held, notwithstanding a lien claim contains in part nonlienable charges, that the lienor will be permitted by proof to segregate them from the lienable portion, unless the overstatement was a wilful attempt to claim a lien for the nonlienable portion. Ibid.

See also supra, I. b.

But where the claim includes materials used elsewhere than upon the property on which a lien is sought, the entire lien will be vitiated where they cannot be segregated from the lienable items. McClain v. Hutton, 131 Cal. 132, 61 Pac. 273, 63 Pac. 182, 622.

It was held in Alabama & G. Lumber Co. v. Tisdale, 139 Ala. 250, 36 So. 618, that a claim for more than was actually due, in the absence of a fraudulent intent or purpose, will not vitiate the lien for the amount actually due, where it is provided by statute that no error in the amount of the demand shall affect the lien. However, the court declined to say what would be the effect if an excessive claim was intentionally made.

By the Massachusetts act of 1855, chap. 431, it was provided that "no inaccuracy in stating the amount due for labor shall invalidate the proceeding, unless wilfully and knowingly" more is claimed than is actually due.

Thus, under such statute, it has been held that a lien will not be defeated as to the lienable portion, where, without wilfulness or knowledge, there was included in a claim a charge for materials and labor of the lienor's servants, which were not the subject of lien (Parker v. Bell, 7 Gray, 429; Whitford v. Newell, 2 Allen, 424; Underwood v. Walcott, 3 Allen, 464); where the entire contract price was claimed, complete performance being alleged, but as a matter of fact it had been prevented by proceedings in insolvency against the lienor (Lewin v. Whittenton Mills, 13 Gray, 100); where the lienor honestly believed he was entitled

to a lien for the nonlienable charge (Hubbard v. Brown, 8 Allen, 590; Whitney v. Joslin, 108 Mass. 103); where there was an unintentional omission of a credit from a claim of lien, although it could be considered as bearing on the question whether it was wilfully omitted (Corbett v. Greenlaw, 117 Mass. 167).

And under the statute of 1872, which was similar to that of 1855 above quoted, an overstatement of the amount actually due will not defeat a lien, unless wilfully and knowingly made. Smith v. Norris, 120 Mass. 58; Sexton v. Weaver, 141 Mass. 273, 6 N. E. 367.

And an overcharge of 10 cents will not be considered as "wilfully and knowingly" claiming more than was due, so as to vitiate an entire lien. McDonald v. The Nimbus, 137 Mass. 360.

So, an inadvertent failure to give a credit in a claim of lien does not impair its validity, where it was not affirmatively shown that anyone was thereby misled. Vickery v. Richardson, 189 Mass. 53, 75 N. E. 136.

In Smith v. Norris, supra, a claim was made for the contract price under an entire contract, where full performance had been prevented by the lienor.

An entire lien is not vitiated by claiming for materials and labor, the latter not being a subject of lien, where it appears that there was no intent to mislead, nor was anyone misled, by the erroneous claim. Devine v. Clark, 198 Mass. 56, 84 N. E. 309.

In Illinois it is provided by statute that a lien shall not be defeated, but shall be enforced *pro tanto*, notwithstanding an error or overcharge, unless it appears to have been made with intent to defraud. See Christian v. Allee, 104 Ill. App. 177.

Thus, where the full amount claimed was not allowed, the entire lien is not vitiated if there was no want of good faith in making the claim, the excess being regarded as surplusage. Day v. Chapman, 88 Ill. App. 358.

So, an overstatement of \$1,727.58 in a statement of lien, not made in bad faith, will not vitiate the entire lien, where it is provided by statute that no incorrect estimate in the statement of the amount due shall affect the validity thereof, unless made in bad faith. Culmer v. Caine, 22 Utah, 216, 61 Pac. 1008.

And it was held in Schroeder v. Mueller, 33 Mo. App. 28, that an excess of \$3 in a lien claim, due to the fact that materials to that extent were wasted, would not vitiate a lien, as the claimant was entitled to the benefit of a statutory saving clause permitting judgment to be rendered for the amount actually due, notwithstanding the unintentional omission of a credit. But see Uthoff v. Gerhard, 42 Mo. App. 256, supra, where the contrary was held.

So, it was held in Fuller v. Nickerson, 69 Me. 228, that the mingling of lienable and nonlienable charges in a lump sum will not vitiate a lien *in toto*, when the result of an honest inadvertent mistake, under a statute providing that a "just, true, and

particular account" of the demand due shall be filed, and that the court shall render judgment for the amount found to be lienable.
W. J. I.

ARKANSAS SUPREME COURT.

PULASKI HEIGHTS SEWERAGE COMPANY et al., Appts.,
v.

J. F. LOUGHBOROUGH.

(— Ark. —, 129 S. W. 536.)

Private sewer — legislative authority — compulsory service.

A corporation which constructs a sewer under legislative authority empowering it to rent or sell the right to use it may be compelled to permit anyone to connect with it who wishes to do so upon payment of a fee which the court approves as reasonable.

(May 30, 1910.)

A PPEAL by defendants from a judgment of the Pulaski Chancery Court restraining them from severing certain sewer connections and fixing a fee for such connections. Modified.

The facts are stated in the opinion.

Mr. R. C. Powers for appellants.

Messrs. Rose, Hemingway, Cantrell, & Loughborough, for appellee:

The sewerage company is estopped to say that parties shall not have right to connect with the sewer upon the payment of a reasonable charge for such connection.

10 Cyc. Law & Proc. pp. 1065, 1068, § 13; Little Rock & N. R. Co. v. Little Rock, M. R. & T. R. Co. 36 Ark. 663; Cleaver v. Mahanke, 120 Iowa, 77, 94 N. W. 279; Wright v. Williams, 25 Ky. L. Rep. 1377, 77 S. W. 1128; Rogers v. Galloway Female College, 64 Ark. 627, 39 L.R.A. 636, 44 S. W. 454.

The enterprise is such a public utility that it would have to be conducted with due regard to the rights of the public. They could not designate arbitrarily, nor could they withhold, the right of any of the public to connect with the sewer.

Munn v. Illinois, 94 U. S. 113, 24 L. ed. 77; 17 Am. & Eng. Enc. Law, pp. 523, 525;

Note. — As to kinds of business affected with a public interest subjecting them to regulation and control in respect of rates or prices, see note to Ratcliff v. Wichita Union Stockyards Co. 6 L.R.A.(N.S.) 834.

As to power of judiciary to fix rates to be charged by public-service corporations, see note to Madison v. Madison Gas & Electric Co. 8 L.R.A.(N.S.) 529.
20 L.R.A.(N.S.)

Leep v. St. Louis, I. M. & S. R. Co. 58 Ark. 416, 23 L.R.A. 204, 41 Am. St. Rep. 109, 25 S. W. 75; Bostick v. State, 47 Ark. 130, 14 S. W. 476; Chicago, B. & Q. R. Co. v. Iowa (Chicago, B. & Q. R. Co. v. Cutts) 94 U. S. 155, 161, 24 L. ed. 94, 95; Spring Valley Waterworks v. Schottler, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48; New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co. 115 U. S. 650, 29 L. ed. 516, 6 Sup. Ct. Rep. 252; Budd v. New York, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468.

In the absence of legislation, it devolves on the judiciary to establish reasonable rates for public utilities.

Chicago, B. & Q. R. Co. v. Jones, 149 Ill. 374, 24 L.R.A. 141, 4 Inters. Com. Rep. 683, 41 Am. St. Rep. 278, 37 N. E. 247; Lough v. Outerbridge, 143 N. Y. 277, 25 L.R.A. 674, 42 Am. St. Rep. 712, 38 N. E. 292; Griffin v. Goldsboro Water Co. 122 N. C. 207, 41 L.R.A. 240, 30 S. E. 319; Zanesville v. Zanesville Gaslight Co. 47 Ohio St. 1, 23 N. E. 55; Indiana Natural & Illuminating Gas Co. v. State, 158 Ind. 519, 57 L.R.A. 761, 63 N. E. 220; Wheeler v. Northern Colorado Irrig. Co. 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 490; Price v. Riverside Land & Irrigating Co. 56 Cal. 431.

Plaintiff was entitled to the injunction restraining an interference with his sewer connection.

Smith v. Birmingham Waterworks Co. 104 Ala. 315, 16 So. 123; Wood v. Auburn, 87 Me. 287, 29 L.R.A. 376, 32 Atl. 906; Sickles v. Manhattan Gaslight Co. 64 How. Pr. 33; McEntree v. Kingston Water Co. 165 N. Y. 27, 58 N. E. 785.

Battle, J., delivered the opinion of the court:

The Pulaski Heights Sewerage Company is a corporation organized under the laws of Arkansas for the purpose of building a sewer in the territory known as Pulaski Heights. Before the sewer was constructed J. F. Loughborough purchased many lots of ground in that territory. After his purchase the sewer was completed. Loughborough built a residence upon a part of his lots and connected his house with the sewer in usual manner. He did so without compensating the sewerage company for the same. On this account the sewerage company severed his connection, and Loughborough thereupon again united, and filed a complaint in the Pulaski chancery court against the Pulaski Heights Sewerage Company and Pulaski Heights Land Company, and asked that defendants be restrained from interfering with his connections with the sewer until the town council of Pulaski Heights has given the sewerage company a

right to operate the sewer and has fixed the fees for connection with the same. An order temporarily restraining the defendants from interfering with the sewer connection was made by the court. The defendants answered.

The only question in the case is: What compensation will entitle Loughborough's house to connection with the sewer of Pulaski Heights Sewerage Company? The chancery court, after hearing the evidence, held that plaintiff was entitled to connect his house with the sewer upon payment of \$50, and made the temporary restraining order perpetual, and the defendants appealed.

The sewerage company contends that it is a private corporation, and no one has a right to connect with its sewer except upon terms to which it shall agree. Is it correct? In *Munn v. Illinois*, 94 U. S. 113, 120, 24 L. ed. 77, 84, it is said: "Property does become clothed with a public interest when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created. He may withdraw his grant by discontinuing the use; but, so long as he maintains the use, he must submit to the control."

"Upon this principle, the legislature can fix the maximum of charges for the storage of grain in public warehouses, and for carriage of freight and passengers by common carriers. From the same source comes the power to regulate millers, bakers, hackmen, ferriers, wharfingers, innkeepers, and the like; and in so doing to fix the maximum of charge to be made for services rendered, accommodations furnished, and articles sold." *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77; *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468; *Dow v. Beidelman*, 125 U. S. 680, 31 L. ed. 841, 2 Inters. Com. Rep. 56, 8 Sup. Ct. Rep. 1028; *Id.*, 40 Ark. 325, 5 S. W. 297; *Mobile v. Yuille*, 3 Ala. 140, 36 Am. Dec. 441. Upon the same principle it was held in *Spring Valley Waterworks v. Schottler*, 110 U. S. 347, 28 L. ed. 173, 4 Sup. Ct. Rep. 48, 'that it is within the power of the government to regulate the price at which water shall be sold by one who enjoys a virtual monopoly of the sale.'" *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 416, 23 L.R.A. 264, 11 Am. St. Rep. 109, 25 S. W. 75.

The sewerage company was organized for the purpose of constructing, maintaining, and operating sewers, and renting or selling the right to connect with and use

the same. It constructed a sewer about 1,200 or 1,300 yards long, or longer. All persons who wish, upon payment of the fee demanded, are allowed to connect with and use it. About one third of it is built upon private property. It is not confined to the use of any particular persons, but all who can are invited to connect with and use it upon the payment of a fee agreed upon. All persons hereafter buying real estate sufficiently near to make it useful, upon paying the fee, may make connection and use it. To the public within reach of it, or that may come within reach of it, it is useful and necessary in many ways. The sewerage company has in this way devoted the sewer to a use in which the public has an interest.

In the absence of legislation as to the maximum of charges for the use of sewers, courts in cases like this can determine what is reasonable. They cannot prescribe rates which shall be charged in the future, and in cases other than that before them; that would be a legislative act. *Munn v. Illinois*, 94 U. S. 133, 134, 24 L. ed. 86, 87; *Salt River Valley Canal Co. v. Nelszen*, 19 Ariz. 9, 12 L.R.A. (N.S.) 711, 85 Pac. 117, 16 A. & E. Ann. Cas. 796.

In *Salt River Valley Canal Co. v. Nelszen*, supra, in which the court determined the amount a corporation should charge, the court said: "In determining what is a reasonable price to be charged for its services by a public-service corporation, an examination must be made not only from the point of view of the corporation, but from that of the one served also. A reasonable rate is not one ascertained solely from considering the bearing of the facts upon the profits of the corporation. The effect of the rate upon persons to whom services are rendered is as deep a concern in the fixing thereof, as is the effect upon the stockholders or bondholders. A reasonable rate is one which is as fair as possible to all whose interests are involved."

In *Covington & L. Turnp. Road Co. v. Sandford*, 164 U. S. 578, 596, 41 L. ed. 569, 566, 17 Sup. Ct. Rep. 198, 205, the question under consideration was: What was a reasonable toll to be charged by a turnpike company? The court said: "It cannot be said that a corporation is entitled as of right, and without reference to the interests of the public, to realize a given per cent upon its capital stock. When the question arises whether the legislature has exceeded its constitutional power in prescribing rates to be charged by a corporation controlling a public highway, stockholders are not the only persons whose rights or interests are to be considered. The rights of the public are not to be ignored. It is alleged here

that the rates prescribed are unreasonable and unjust to the company and its stockholders. But that involves an inquiry as to what is reasonable and just to the public.

. . . The public cannot properly be subjected to unreasonable rates in order simply that stockholders may earn dividends.

. . . If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them, which the Constitution does not require to be remedied by imposing unjust burdens upon the public. So that the right of the public to use the defendant's turnpike upon payment of such tolls as, in view of the nature and value of the service rendered by the company, are reasonable, is an element in the general inquiry whether the rates established by law are unjust and unreasonable." See also *Smyth v. Ames*, 169 U. S. 466, 544, 42 L. ed. 819, 848, 18 Sup. Ct. Rep. 418; *San Diego Land & Town Co. v. National City*, 174 U. S. 739, 757, 43 L. ed. 1154, 1161, 19 Sup. Ct. Rep. 804; *Missouri P. R. Co. v. Smith*, 60 Ark. 221, 5 Inters. Com. Rep. 348, 29 S. W. 752.

The evidence in this case fails to furnish a satisfactory standard to determine what compensation for connection of plaintiff's residence with the sewer of Pulaski Heights Sewerage Company would be reasonable and just to all parties. The nearest approach is the average cost of connections with sewers in Little Rock. The sewer in question is in the vicinity of that city. In Little Rock the average cost is about \$50 or \$60 for a connection, mostly \$50. One charge was as high as \$83. As the cost of the sewer in question was expensive, more so than the average in Little Rock, we think that \$60 should be allowed for a connection with it in this case, the highest average in Little Rock; and it is so ordered.

Decree modified in accordance with this opinion.

KENTUCKY COURT OF APPEALS.

PALMER TRANSFER COMPANY, Appt.,
v.

CHARLIE SMITH, by Guardian.

(137 Ky. 319, 125 S. W. 725.)

Master — injury by servant — scope of employment — liability.

1. The owner of a bus is liable for injury to a boy who, without knowledge of the owner, is invited to ride, free of charge, by the driver, and injured by the latter's negligence, although the owner had forbidden the boy to ride on the bus.

Damages — broken leg — amount.

2. Nine hundred dollars is not excessive to award as damages to a boy whose leg is

broken above the knee by another's negligence, in consequence of which he is compelled to stay in bed for four months, and go on crutches for three more, and is finally left with the injured leg shorter than the other.

(March 2, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for McCracken County in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Mr. J. D. Mocquot for appellant.

Messrs. Hendrick & Corbett and Burns & Burns, for appellee:

The child riding upon the invitation of the driver, was a passenger, and entitled to protection as such.

Hutchinson Carr. § 1020; Southern R. Co. v. Lee, 30 Ky. L. Rep. 1360, 10 L.R.A. (N.S.) 837, 101 S. W. 307; *Louisville Home Teleph. Co. v. Beeler*, 125 Ky. 376, 101 S. W. 397; *Louisville & N. R. Co. v. Scott* (*Louisville & N. R. Co. v. Weaver*) 108 Ky. 392, 50 L.R.A. 381, 56 S. W. 674.

Clay, C., delivered the opinion of the court:

The appellant, Palmer Transfer Company, owns and operates a bus line in the city of Paducah. Charlie Smith, while riding on one of appellant's buses, was thrown therefrom and his leg broken. Charging that the injury was due to the negligence of appellant, he, by his guardian, instituted this action to recover damages. The jury returned a verdict in his favor for \$900. From the judgment based thereon, this appeal is prosecuted.

Appellant asks a reversal of the judgment upon the following grounds: (1) Error of the court in refusing to peremptorily instruct the jury to find for appellant. (2) The court erred in refusing to permit appellant's officers to testify that they had forbidden appellee to ride on the bus. (3) The verdict of the jury is excessive.

The accident occurred on February 6, 1908, under the following circumstances: John Crowell, who was in charge of appellant's omnibus as driver, invited Charlie Smith to ride with him to the Union Station and return. While waiting at the sta-

Note. — The cases on liability of a railroad company for injury to persons wrongfully on train by collusion with train employees are gathered in the note to *Grain v. International & G. N. R. Co.* 5 L.R.A. (N.S.) 1025; and for a note on duty and liability of proprietors of public hacks or cabs, see *Lewark v. Parkinson*, 5 L.R.A. (N.S.) 1069.

tion, Crowell and a driver of a cab belonging to appellant made a wager as to who could return to town first. They then began to drive rapidly back to town, Crowell going on the left of the street, while the driver of the cab proceeded on the right. The bus on which Crowell and Charlie Smith were riding collided with a street car, and Charlie Smith was thrown from the bus and his leg broken. The evidence for appellee is to the effect that both the bus and cab proceeded up town at a very rapid rate. When they arrived at the intersection of Twelfth and Caldwell streets, going eastwardly on Caldwell, one block from the scene of the collision, appellee called Crowell's attention to the sparks emitted from the trolley of the car which was on Eleventh street, between Norton and Caldwell streets, and approaching Caldwell street. The car was going from the city to the station. The omnibus was going in the opposite direction. When the omnibus reached Twelfth street, Charlie Smith said to the driver, "Cross over, John. The car is coming." Smith then attempted to take hold of the lines, but the driver took them out of his hands. At the same time the driver said: "You are a liar. I left the car at the station." As the car was approaching the corner and turning around the same, the gong was being sounded. As the driver of the bus approached the corner he began to whip up faster. Smith then told him that they could not make it over. The driver then attempted to turn straight across the track in order to get out of the way of the car. The car was proceeding slowly at the time. When the motorman saw that a collision was about to take place, he attempted to stop the car. The car and the bus collided, and appellee was thrown to the ground. His left leg was broken between the knee and the hip. He was confined to his bed for four months. His leg is somewhat shorter than it was before the accident. After he left his bed, he had to use crutches for three months. He contracted to pay his physician \$50.

The evidence for appellant is to the effect that the driver of the bus proceeded up town at the usual rate of speed. At the time of the accident he was not going fast. The gong of the car was not being sounded as they turned the corner. The driver was taken unawares, and did the best he could to avoid the accident. It is manifest that, if appellant is liable at all, there was abundant evidence upon which to submit to the jury the question of negligence. Counsel for appellant insists, however, that the driver of the bus, without authority from appellant and without its knowledge or consent, simply invited appellee to ride on

the bus; that appellee was therefore simply a guest of the driver, and not a passenger to whom appellant owed any duty. Such doctrine, however, is not in force in this state. This court in the case of *Louisville & N. R. Co. v. Scott* (Louisville & N. R. Co. v. Weaver) 103 Ky. 392, 50 L.R.A. 381, 56 S. W. 674, held that one who rides on a passenger train by courtesy of the conductor without paying fare, although in violation of the rule of the company, is entitled to the same care which is due a passenger for hire. In *Thompson on Carriers of Passengers*, p. 44, the rule is thus stated "The simple fact that an agent of the carrier violates his duty, or invites a person to ride free, without a collusion on his part with the agent to defraud the carrier, will not operate so as to deprive him of his remedy as a passenger, if he is injured through the carelessness of the carrier's agents." In *Wilton v. Middlesex R. Co.* 107 Mass. 110, 9 Am. Rep. 11, the driver of a horse car invited a person to get on the car, and while thus traveling he was injured. The court said: "A master is bound by the acts of his servant in the course of his employment. They are deemed to be the act of the master." In *Hutchinson on Carriers*, § 1020, it is said: "A child riding on a street car upon the invitation of the driver is a passenger, and entitled to protection as such." In 6 Cyc. Law & Proc. p. 541, the rule is thus stated: "While it would seem reasonable that new boys or children who are permitted to ride on a car gratuitously, with knowledge that the employee giving the permission has no authority to do so, are not passengers, such doctrine is not supported by the weight of authority, and there are many cases holding that a child accepting the invitation of a person in charge of a railroad or street car to ride thereon, without any payment of fare being intended, becomes a passenger, with reference to whose safety the carrier has the same liability as with reference to a paying passenger." This doctrine finds support in the following cases: *Little Rock Traction & Electric Co. v. Nelson*, 66 Ark. 494, 52 S. W. 7; *Brennan v. Fair Haven & W. R. Co.* 4 Conn. 284, 29 Am. Rep. 679; *Buck v. People's Street R. & Electric Light & P. Co.* 108 Mo. 179, 18 S. W. 1090; *Danbeck v. New Jersey Traction Co.* 57 N. J. L. 403, 31 Atl. 1038.

Applying the doctrine above announced to the facts of this case, we find that the driver was in charge of the bus, and as such was authorized to receive passengers. He invited the appellee, a hunchback negro boy, who was only fifteen years of age, to ride with him. This act was within the

scope of his employment. The boy was not merely the guest of the driver, but became a passenger to whom appellant owed the same duty that it did to other passengers. When, therefore, appellee was injured by the driver's negligence, appellant became liable in damages. The doctrine announced in the case of *Corrigan v. Hunter* (Ky.) — L.R.A.(N.S.) —, 122 S. W. 131, has no application to this case. *Corrigan* was not a common carrier. His trainer was authorized to place upon his horses only such boys as had been selected and employed for that purpose. The trainer had no authority to select and employ boys. His act in placing upon a horse a boy who had not been selected or employed for that purpose was not within the scope of his employment. In the case at bar the appellant was engaged in the business of carrying passengers. Its driver had a right to accept passengers. When he invited the boy to ride with him, it then became appellant's duty to exercise towards the boy the same care that the law requires in case of passengers who pay their fare. Nor do we think the court erred in excluding the testimony to the effect that appellant's officers had forbidden appellee to ride on the bus. When appellant placed Crowell in charge of its bus, it gave to him the same authority to accept or receive passengers that its officers possessed. It is therefore no defense to appellee's cause of action that one of appellant's officers forbade him to ride on the bus, when another employee of appellant, who was at the time in charge of the bus and who had the authority to invite passengers to ride with him, invited appellee to do so. When a boy's leg is broken at a point between the knee and the thigh, and he is compelled to remain in bed for about six months and to walk on crutches for three months more, we cannot say that a verdict for \$900 is excessive. We have sustained verdicts for much larger sums in cases of broken limbs. *Danville, & N. Turnp. Road Co. v. Stewart*, 2 Ky. (Ky.) 119; *Louisville v. Adams*, 30 Ky. L. Rep. 1120, 100 S. W. 218. Perceiving no error in the record prejudicial to the substantial rights of appellant, the judgment is affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

WILL CLARK, Appt.,

v.

STATE OF TEXAS.

— Tex. Crim. Rep. —, 128 S. W. 131.)

larceny — asportation — unfastening garment from model.

Unfastening a dress which is on a display model.

play model, and pushing it to the bottom of the figure for the purpose of removing it, is not sufficient asportation to constitute larceny, where the dress can be removed from the figure only over the top, and the figure itself has not been removed from its accustomed place.

Evidence — crime — other offenses.

2. In a prosecution of one found committing theft in a house into which he had broken, evidence is not admissible of other burglaries committed in the neighborhood the same night.

(May 4, 1910.)

APPEAL by defendant from a judgment of the District Court for Bexar County convicting him of theft. Reversed.

The facts are stated in the opinion.

Mr. John A. Mobley for the State.

Davidson, P. J., delivered the opinion of the court:

Appellant was convicted of theft; and his punishment assessed at two years' confinement in the penitentiary.

The evidence discloses that appellant had been convicted of burglary, and his punishment assessed at three years' confinement in the penitentiary, the indictment in this case being for the alleged theft committed in connection with that burglary. Plea of former conviction was interposed, but not considered, upon the trial of this case. The action of the court in this matter was correct. Under our statute a party can be convicted of burglary as well as of the offense committed after the burglarious entry. The conviction of one cannot be pleaded in bar of the other. It is further disclosed that appellant was found in the store burglarized, by an officer, and arrested. In a showcase in the store was the figure of a woman used for the display of goods. On this figure was a dress and a cloak,—the cloak being valued at \$40 and the dress at \$85. Appellant had taken the cloak from the figure, rolled it up and laid it on the floor, and was trying to take off the dress, at the time the officer arrested him, but had not succeeded. The dress, as testified by the owner of the store, had been pulled down to the bottom of the figure, but had not been removed. He further testified that the dress could not be removed in that manner, that it would have to be taken off over the head of the figure. This, in substance, is the state's case.

1. Among other contentions made is that the evidence does not support the verdict of the jury. We are of opinion that this contention is correct in so far as a felony

Note.—See note to *State v. Rozeboom*, ante, 37, as to what constitutes asportation.

conviction is concerned. If appellant had removed the cloak from the figure and had gotten possession of it in this manner, this would constitute theft, but we are of opinion, with reference to the dress, that he could not be convicted of theft. In order to constitute theft the thief must have complete control of the thing sought to be stolen. Mr. Bishop in his *New Criminal Law* (§ 795) says: "This control must be of such importance that no imperfect control, whether brief or protracted, will be sufficient." He further says: "Where goods in a shop were tied to a string attached at one end to the counter, a thief who carried them as far away as the string would permit was held not to have committed larceny of them, because of their being thus attached." The same rule was applied where a purse, fastened by a string to a bunch of keys in the pocket, was taken therefrom, while the keys remained. In the footnotes quite a number of cases are cited supporting the text. In *Harris v. State*, 29 Tex. Crim. Rep. 101, 25 Am. St. Rep. 717, 14 S. W. 390, this court approvingly quoted the doctrine laid down by Mr. Bishop, using this quotation: "The doctrine is that any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient, while nothing short of this will do. Therefore, if the thief has the absolute control of the thing but for an instant, the larceny is complete." The *Harris* Case has been followed in subsequent cases by this court. The same doctrine is laid down in *Tarrango v. State*, 44 Tex. Crim. Rep. 385, 71 S. W. 597, 14 Am. Crim. Rep. 423, in an opinion written by Judge Brooks, and was followed in *Rodriguez v. State* (Tex. Crim. Rep.) 71 S. W. 596, 14 Am. Crim. Rep. 424. The latter was a case of theft from the person. The owner testified that he felt something pulling at his shirt front, and upon looking around to ascertain what it meant, saw someone undertaking to unscrew from his shirt a valuable diamond pin. The party had succeeded in about half unscrewing it when the owner caught his hand, and held him until an officer came. The court says: "We agree with appellant that this is not sufficient evidence to show a taking. It was unquestionably an attempt to get possession, but it is as clearly evident that by reason of the owner's interference appellant did not obtain such possession. It was not removed from the shirt front, but at the time of appellant's arrest it still remained fastened to the shirt." This seems to be the doctrine of the cases in the different jurisdictions in regard to the question of theft; that is, that a party must obtain complete control of the property under-

taken to be stolen, and that it must be segregated in such way that it passes entirely into the control of the thief. In *People v. Meyer*, 75 Cal. 383, 17 Pac. 431, this doctrine was announced and followed. The court stated the facts in that case about as follows: Lewis Joseph testified: "I had, as usual, placed and buttoned an overcoat upon a dummy which stood on the sidewalk outside of my store. I was inside the store, and heard the chain of the dummy rattle, and on coming outside found defendant with said coat unbuttoned from the dummy and under his arm, the same being entirely removed from the dummy, and about 2 feet therefrom and from the place where it had been originally placed on the dummy by me, and the accused was in the act of walking off with said coat when grabbed by me, he being prevented from taking it away because said coat was chained to the dummy by a chain which ran through the coat sleeve, and the dummy was tied to the building by a string." The court further says: "This was the only evidence introduced to prove the charge of larceny." On this evidence a conviction was obtained. The court, approving the language used by Mr. Bishop, held that this was not such a taking as would constitute the crime of theft. It is evident from the testimony in this case, as introduced by the state, that appellant had not reduced the dress to his control so as to constitute a taking. It had not been removed from the figure, nor had the figure been removed from its accustomed place. If appellant had succeeded in getting the dress off the figure or had detached the figure from its place, and reduced it to control or removed it, then whatever was upon the figure might have been reduced to possession by this means. We believe the doctrine to be sound that in order to constitute a taking there must be a reduction of the property to the complete control of the taker; otherwise it would not be theft as defined by our statute. It is not necessary, under our statute, that the property be carried away, but there must be a reduction to the control and possession of the thief. In this case we are of opinion that the dress had not been reduced to such possession, and therefore, so far as that article was concerned, the state failed to make a case. Omitting the dress from the computation of value, the cloak is shown to be worth only \$40. Therefore the taking of the cloak would be but a misdemeanor. Appellant, under this view, would not be guilty of a felony, but of a misdemeanor.

2. There is another question in the case to which we call attention. Objection was urged during the trial to the introduction of evidence with reference to another bur-

glary committed the same night. This was also a store, and some distance from that entered by appellant, which forms a predicate for this case. Appellant was found in possession of some property which the state sought to show came from the burglary of the other house. The objection is so urged that we would scarcely feel authorized to reverse the judgment on account of the introduction of this testimony, on the ground stated. In fact, there was but one ground stated, to wit, that the testimony was prejudicial. Whether this be sufficient or not, upon another trial this evidence should not be permitted to go to the jury. Under the facts of the case it is not brought within any of the exceptions. Evidence of this character is sometimes admissible on the theory of system to develop the *res gestæ*, or on question of identity, but none of those matters occurred in this case. The evidence is clear and unequivocal that the house of the alleged owner was broken into, and appellant found in the act of committing theft. Therefore the testimony in regard to the burglary of the other house was not admissible. It served no purpose, either of identification, system, or developing the *res gestæ*. The case was made out by positive evidence here, and there was no legal authority for resorting to this character of testimony to make out this case.

For the reasons indicated, the judgment is reversed, and the cause is remanded.

WEST VIRGINIA SUPREME COURT OF APPEALS.

J. C. NORVELL, Plff. in Err.,
v.

KANAWHA & MICHIGAN RAILWAY COMPANY.

(— W. Va. —, 68 S. E. 288.)

Carrier —voluntary riding on platform — negligence.

1. It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured in it, he cannot recover damages.

Same — crowded train — acquiescence of carrier.

2. To ride on a car platform is not always a negligent act. If the train is so crowded that one cannot reasonably enter a car, it is not negligent to ride on the platform when the carrier acquiesces in the use of such accommodations by collecting fare for the same or by some other indicative act.

Same — duty to passenger on platform.

3. The carrier owes to a passenger invol-

untarily, necessarily, and rightfully riding on the platform, the high degree of care commensurate with the circumstances and its act in undertaking to carry him there.

Same — passenger rightfully riding on platform — injury — negligence.

4. Injury to a passenger while excusably riding on the platform because of the overcrowding of the train usually constitutes a prima facie case of negligence on the part of the carrier.

Same — when carrier not liable.

5. The liability of the carrier to one excusably riding on the platform is not absolute. If it used reasonable diligence to provide cars for his safe carriage, and, with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform, it is not liable for injury to him.

Same — when liable.

6. If a railroad company negligently and unreasonably fails to provide sufficient cars, so that passengers are compelled to ride on the platforms, and then accepts passengers for carriage in such hazardous places, it is liable for damages to one injured therein, unless he has contributed to the injury by negligence on his part.

Same — liability for conductor's act.

7. The conductor of a train represents the railroad company in relation to the transportation of passengers on his train,

Note. — Riding on platform of railroad car as negligence.

This note does not include street car cases, which will be found in notes appended to Capital Traction Co. v. Brown, 12 L.R.A. (N.S.) 831, and Lobner v. Metropolitan Street R. Co. 21 L.R.A. (N.S.) 972. Nor does it include cases involving injury to a passenger while riding on the platform of a railway car, through accident to the train or car, as they are treated in the note to Miller v. Chicago, St. P. M. & O. R. Co. 17 L.R.A. (N.S.) 158; nor cases involving injuries to passengers on platform of vestibuled train, for which see notes to Johnson v. Yazoo & M. Valley R. Co. 22 L.R.A. (N.S.) 313, and Clanton v. Southern R. Co. 27 L.R.A. (N.S.) 253; nor cases of where the passenger goes upon platform or steps of car just before reaching his station, as these cases are covered by the note to Heinze v. Interurban R. Co. 21 L.R.A. (N.S.) 715.

While the statement sometimes made by the courts that it is negligence for a passenger unnecessarily to stand upon the platform of a railroad train while it is in motion is doubtless correct as an abstract proposition of law, the question as to when one will be deemed to have been on the platform unnecessarily is to be determined largely from the circumstances of each particular case; and while the court is justified in some cases in saying, as matter of law, that a passenger was negligent in riding on the platform, in the greater number of cases

and his act in receiving and carrying passengers on the platforms when the train is overcrowded binds the company.

Trial — conflicting evidence — direction of verdict.

8. The court cannot properly direct a verdict in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict for either party would be sustained.

Release — fraud — accord and satisfaction.

9. A written release or acquittance of a claim for personal injury will not sustain a plea of accord and satisfaction in the premises, if its execution was obtained by deception and fraud.

(May 3; 1910.)

ERROR to the Circuit Court for Mason County to review a judgment entered upon a directed verdict for defendant in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Reversed.

The facts are stated in the opinion.

the question of the passenger's contributory negligence is left for the jury to determine, and this is frequently done where it would seem that the presence of the passenger upon the platform was clearly unnecessary. Under the following circumstances, it was held to be negligence, as matter of law, for a passenger to be upon the platform:

—where the passenger failed to go inside the car when warned by the conductor. *Fisher v. West Virginia & P. R. Co.* 39 W. Va. 366, 23 L.R.A. 758, 19 S. E. 578, a second appeal of which is found in 42 W. Va. 183, 33 L.R.A. 69, 24 S. E. 570; *Louisville & N. R. Co. v. Bisch*, 120 Ind. 549, 22 N. E. 662.

—where plaintiff was on the platform of a caboose while switching was being done, and there was ample room inside. *Smotherman v. St. Louis, I. M. & S. R. Co.* 29 Mo. App. 265;

—where a train man requested plaintiff to leave the platform and go inside the car, though it had been customary to violate the rule forbidding riding on the platform. *Houston & T. C. R. Co. v. Bryant*, 31 Tex. Civ. App. 483, 72 S. W. 885;

—where plaintiff went on the front platform of an express car, and could not get into the train, and was thrown off after becoming chilled. *Ohio & M. R. Co. v. Alender*, 47 Ill. App. 484.

But the question of contributory negligence was left for the determination of the jury under the following circumstances:

—where plaintiff, who boarded the front end of a train, stopped on a platform on his way through the train to a seat, and went down on the steps for the purpose of expectorating. *St. Louis, I. M. & S. R. Co. v. Leftwich*, 54 C. C. A. 1, 117 Fed. 127;

—where plaintiff fell from a platform 29 L.R.A. (N.S.)

Messrs. Somerville & Somerville and Charles E. Hogg, for plaintiff in error:

Where one signing a release is deceived into signing it by the belief that he is signing something else, he may attack the instrument in an action at law.

Chicago City R. Co. v. Uhter, 212 Ill. 174, 72 N. E. 195; *Och v. Missouri, K. & T. R. Co.* 130 Mo. 27, 36 L.R.A. 442, 31 S. W. 962; *Brundige v. Nashville C. & St. L. R. Co.* 112 Tenn. 526, 79 S. W. 1027; *Lumley v. Wabash R. Co.* 22 C. C. A. 60, 43 U. S. App. 476, 76 Fed. 73; *Chicago, R. I. & L. R. Co. v. Williams*, 37 Tex. Civ. App. 198, 83 S. W. 248; *Girard v. St. Louis Car Wheel Co.* 123 Mo. 358, 25 L.R.A. 514, 45 Am. St. Rep. 556, 27 S. W. 648; *Bjorklund v. Seattle Electric Co.* 35 Wash. 439, 77 Pac. 727, 1 A. & E. Ann. Cas. 443; 4 *Thomp. Neg.* 3854.

A carrier is negligent in its duty to passengers who are compelled, because of an insufficient number of cars, to stand upon the platform.

Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac.

where he went to vomit, not being able to get into the closet. *Brice v. Southern R. Co.* (S. C.) 27 L.R.A. (N.S.) 768, 67 S. E. 243;

—where plaintiff went on the car platform to witness the efforts of the train men in putting tramps off the train, and was accidentally shot by a revolver in the hand of the conductor as the latter was remounting the car steps after the train had started. *Gerstle v. Union P. R. Co.* 23 Mo. App. 361;

—where a passenger was so intoxicated as to be unable to care for himself, and the conductor accepted him as a passenger in this condition, it being held that the question of contributory negligence did not arise in such a case. *Price v. St. Louis, I. M. & S. R. Co.* 75 Ark. 479, 112 Am. St. Rep. 79, 88 S. W. 575;

—where a drunken passenger went on the platform with the knowledge of a porter, and fell off. *Paris & G. N. R. Co. v. Robinson* (Tex. Civ. App.) 127 S. W. 294.

The majority of the cases involving this question arise where the passenger was upon the platform because of the overcrowded condition of the train. And the contributory negligence of the injured passenger was held to be for the jury to determine under the following circumstances:

—where the train was so crowded that plaintiff was obliged to stand on the platform. *Burriss v. Pere Marquette R. Co.* 9 Ont. L. Rep. 259; *Pennsylvania Co. v. Paul* 62 C. C. A. 135, 126 Fed. 157; *International & G. N. R. Co. v. Williams*, 20 Tex. Civ. App. 587, 50 S. W. 732; *Trumbull v. Donahue*, 18 Colo. App. 460, 72 Pac. 684; *Central R. Co. v. Brown* (Ala.) 51 So. 563; *Holloway v. Pasadena & P. R. Co.* 130 Cal. 177, 62 Pac. 478; *Lake Shore & M. S. R.*

631; Patterson, Railway Acci. Law, §§ 271, 272; Benedict v. Minneapolis & St. L. R. Co. 86 Minn. 224, 57 L.R.A. 639, 91 Am. St. Rep. 345, 90 N. W. 360.

For a passenger to stand upon the platform of a car of a crowded train is not negligence *per se*, and where he is thrown from the car by its sudden lurch, the questions of negligence are for the jury.

Graham v. McNeill, *supra*; Chicago & W. I. R. Co. v. Newell, 212 Ill. 332, 72 N. E. 416; Hutchinson, Carr. 2d ed. 652; Willis v. Long Island R. Co. 34 N. Y. 670; Werle v. Long Island R. Co. 98 N. Y. 650; Graham v. Manhattan R. Co. 149 N. Y. 336, 43 N. E. 917; Merwin v. Manhattan R. Co. 113 N. Y. 659, 21 N. E. 415; Marquette v. Chicago & N. W. R. Co. 33 Iowa, 564; Meesel v. Lynn & B. R. Co. 8 Allen, 234; McIntyre v. New York C. R. Co. 43 Barb. 332; Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406; Patterson, Railway Acci. Law, §§ 271, 272; Augusta Southern R. Co. v. Snider, 118 Ga. 148, 44 S. E. 1005; Holloway v. Pasadena & P. R. Co. 130 Cal. 177, 62 Pac. 478; Mitchell v.

Southern P. R. Co. 87 Cal. 62, 11 L.R.A. 130, 25 Pac. 245; Prescott & N. R. Co. v. Smith, 70 Ark. 179, 67 S. W. 865; Chesapeake & O. R. Co. v. Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Gerstle v. Union P. R. Co. 23 Mo. App. 361; Louisville & N. R. Co. v. Head, 22 Ky. L. Rep. 863, 59 S. W. 23; Lynn v. Southern P. Co. 103 Cal. 7, 24 L.R.A. 710, 36 Pac. 1018; Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891; Jackson v. Natchez & W. R. Co. 114 La. 981, 70 L.R.A. 294, 108 Am. St. Rep. 366, 38 So. 701; St. Louis, I. M. & S. R. Co. v. Leftwich, 54 C. C. A. 1, 117 Fed. 127.

A railway company's rule against passengers standing on the platform of cars is waived when the company fails to provide a suitable seat for a passenger inside its coaches, and yet receives him on its train.

Graham v. McNeill, *supra*.

A passenger is not guilty of contributory negligence by standing on the platform while the cars are in motion, if there is no vacant seat for him within the car.

Co. v. Kelsey, 180 Ill. 530, 54 N. E. 608, affirming 76 Ill. App. 613; Chicago & W. I. R. Co. v. Newell, 212 Ill. 332, 72 N. E. 416 (appeal dismissed in 198 U. S. 579, 49 L. ed. 1171, 25 Sup. Ct. Rep. 801); Lynn v. Southern P. Co. 103 Cal. 7, 24 L.R.A. 710, 36 Pac. 1018; Yazoo & M. Valley R. Co. v. Byrd, 89 Miss. 308, 42 So. 256; Williams v. International & G. N. R. Co. 28 Tex. Civ. App. 503, 67 S. W. 1085;

—where the seats were filled and many were standing in the aisles, and plaintiff took a place on the platform with others. Werle v. Long Island R. Co. 98 N. Y. 650;

—where the train was so crowded that plaintiff could not get inside without using force. Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 444;

—where the train was overcrowded and plaintiff became faint, and after going upon the platform to get air, became unconscious and fell off. Morgan v. Lake Shore & M. S. R. Co. 138 Mich. 626, 70 L.R.A. 609, 71 N. W. 836;

—where the train was overcrowded, and it did not appear that plaintiff knew, when he took the train, that it was so crowded that he could not get in the car. Chicago & A. R. Co. v. Dummer, 161 Ill. 190, 43 N. E. 698, affirming 60 Ill. App. 93;

—where the car was so crowded that the plaintiff had to stand on the steps of the platform, though he did not try to crowd into the car after several passengers had left the train. Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406, affirming 38 Ill. App. 33;

—where the testimony was conflicting as to whether plaintiff was prevented from entering the car by its crowded condition, or was on the platform negligently. Giovanelli v. Erie R. Co. 228 Pa. 33, 76 Atl. 424; 29 L.R.A. (N.S.)

—where plaintiff surrendered his seat to ladies, and went upon the platform because of the crowded condition of the car. Trumbull v. Erickson, 38 C. C. A. 536, 97 Fed. 891; Shrum v. Cincinnati & M. Valley R. Co. 10 Ohio S. & C. P. Dec. 246;

—where the seats were all filled, though there may have been standing room inside. Chesapeake & O. R. Co. v. Lang, 100 Ky. 221, 38 S. W. 503, 40 S. W. 451, 41 S. W. 271; Choate v. Missouri P. R. Co. 67 Mo. App. 105; International & G. N. R. Co. v. Welsh (Tex. Civ. App.) 24 S. W. 854; Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631.

A larger number of cases, however, hold that a passenger is negligent in standing upon the platform when he can obtain standing room inside, though the train is crowded. Worthington v. Central Vermont R. Co. 64 Vt. 107, 15 L.R.A. 326, 23 Atl. 590; Rolette v. Great Northern R. Co. 91 Minn. 16, 97 N. W. 431, 1 A. & E. Ann. Cas. 313; Camden & A. R. Co. v. Hoosey, 99 Pa. 492, 44 Am. Rep. 420; Meyere v. Nashville, C. & St. L. R. Co. 110 Tenn. 166, 72 S. W. 114; Goodwin v. Boston & M. R. Co. 84 Me. 203, 24 Atl. 816; Quinn v. Illinois C. R. Co. 51 Ill. 495; Chicago & N. W. R. Co. v. Carroll, 5 Ill. App. 201.

And it was so held in Cleveland, C. C. & St. L. R. Co. v. Moneyhun, 146 Ind. 147, 34 L.R.A. 141, 44 N. E. 1106, where a boy was riding in a car, the seats and aisles of which were filled, but in which there was standing room for him, and he went out upon the steps because he felt sick and thought he would be compelled to vomit.

R. L. S.

Memphis & C. R. Co. v. Benson, 85 Tenn. 627, 4 Am. St. Rep. 780, 4 S. W. 5; Nolan v. Brooklyn City & N. R. Co. 87 N. Y. 63, 41 Am. Rep. 345; Beach, Contrib. Neg. 2d ed. § 149; Wood, Railroads, § 308.

Where the number of passengers who have a right to take a certain train are in excess of its capacity, the railroad company must exercise the same degree of care, vigilance, and forethought in providing additional cars as it is bound to exercise in its other relations to its passengers.

Chicago & A. R. Co. v. Dumsar, 161 Ill. 190, 43 N. E. 698; Reed v. Louisville & N. R. Co. 104 Ky. 603, 44 L.R.A. 823, 47 S. W. 591, 48 S. W. 416; Beach, Contrib. Neg. § 144.

The company is bound to guard a passenger excusably riding on the platform from danger incident to the position arising from its own acts.

Oliver v. Louisville & N. R. Co. 43 La. Ann. 804, 9 So. 431; Lynn v. Southern P. Co. supra.

The question of plaintiff's negligence is solely for the jury.

Chicago & W. I. R. Co. v. Newell, supra; Pennsylvania Co. v. Paul, 62 C. C. A. 135, 126 Fed. 157; Chicago & W. I. R. Co. v. Newell, 113 Ill. App. 263; Sweetland v. Lynn & B. R. Co. 177 Mass. 574, 51 L.R.A. 783, 59 N. E. 443; Rolette v. Great Northern R. Co. 91 Minn. 16, 97 N. W. 431, 1 A. & E. Ann. Cas. 313; Choate v. Missouri P. R. Co. 67 Mo. App. 105; Ft. Worth & D. C. R. Co. v. Rogers, 24 Tex. Civ. App. 382, 60 S. W. 61; St. Louis Southwestern R. Co. v. Ball, 28 Tex. Civ. App. 287, 66 S. W. 879; Graham v. McNeill, 20 Wash. 466, 43 L.R.A. 300, 72 Am. St. Rep. 121, 55 Pac. 631; Ward v. Chicago, M. & St. P. R. Co. 102 Wis. 215, 78 N. W. 442; Chicago & A. R. Co. v. Fisher, 141 Ill. 614, 31 N. E. 406; 6 Cyc. Law & Proc. pp. 653, 654.

Messrs. Brown, Jackson, & Knight for defendant in error.

Robinson, P., delivered the opinion of the court:

Norvell, the plaintiff, riding on a platform of a crowded train, fell therefrom and was injured. He sued the railroad company for damages. The company defended upon the ground that there was no negligence on its part; that plaintiff's injury was caused by his own negligence; and that, at any rate, full accord and satisfaction for the injury had been made. The case came on for trial and all the evidence was adduced before the jury. The defendant moved the court to direct a verdict in its favor. The motion was granted, verdict for the defendant was returned, and judgment entered.

ment upon the same was entered. The plaintiff asks a reversal of that judgment.

Was the case one for jury determination? It is contended that the evidence was conflicting and that therefore the case should have been submitted to the jury. The pleadings made the case to involve two main inquiries,—whether negligence on the part of defendant in the overcrowding of its cars caused plaintiff's injury, and, if so, whether accord and satisfaction therefor had been made. A conflict of evidence as to each of these propositions is claimed.

It is negligence in a passenger, under ordinary circumstances, to stand upon an open platform of a rapidly moving railroad car. If one voluntarily and unnecessarily takes such position and is injured while there, he cannot recover damages. His contributory negligence bars recovery. But to ride in such place is not always a negligent act. Whether it is negligent to ride on the platform may depend on circumstances. If the train is so crowded that one cannot reasonably enter a car, and no safer place on the train is reasonably obtainable, it is not negligent to ride on the platform when the circumstances thus force the passenger to do so, and the carrier acquiesces in the use of such accommodations by collecting fare for the same, or by some other indicative act. What other choice has a passenger but to ride on the platform when the carrier, negligently or unavoidably, fails to provide safer accommodations for him? Must he forego his journey and the engagements dependent upon it, or his return to home at the expected time? It is not reasonable to say that he is obliged to do so. He may accept such accommodations when they are the best offered to him, and rely upon the carrier to take the greater care and diligence in transporting him, which are commensurate with the increased dangers of the situation in which it has placed him as a passenger. The carrier's duty to him in such situation is to use the high degree of care which its act in undertaking to carry him on the platform demands. If it fulfils that duty, and is free from negligence in other particulars, it may be absolved from damages, if he is injured. Its liability for injury to him in the premises is not absolute. But injury to him in such dangerous situation, if he is obliged to take that place of carriage for want of a safer one, may make a prima facie case of liability. The liability will not exist, however, when the carrier shows that it exercised reasonable diligence to provide cars for his safe carriage, and, with a fair excuse for failure to provide them, used the increased care demanded by the lack of a safer place

for his transportation. Nor will the liability exist when it appears that the passenger, by not conducting himself with the care and prudence which his position on the platform required, did that which was the proximate cause of his injury. Baldwin, *Am. Railroad Law*, 309; Moore, *Carriers*, 856; Hutchinson, *Carr.* 3d ed. §§ 1197, 1198; 6 *Cyc. Law & Proc.* pp. 623, 653.

If a railroad sees fit to earn a revenue by offering to the public hazardous accommodations on the platform, why should it not assume liability for the dangers incident to its own act in so doing? In justice and reason it must do so, unless it shows that it provided the best accommodations that it could under all the circumstances attending the running of its train, and then exercised the degree of care that it owed to those it undertook to carry in those accommodations. This is neither a strict nor an unjust rule. If the carrier is taken unawares by unusual and unexpected demand for passage, and has not safe accommodations to offer, it may justly and without liability decline to take on board more than the room within its cars will admit. The conductor in charge of the train may refuse to receive passengers that, by reason of unavoidable circumstances, cannot be given safe places of carriage. To do this is surely within the line of his authority. He is in charge of the train, and must necessarily represent the carrier in the transportation of passengers thereon. On the other hand, when he permits passengers to ride on the platform because there is no room for them inside, and recognizes them as passengers, and not trespassers, by accepting fares for such carriage, or by doing some other act indicative of the fact, he also indeed represents the company. It is within the line of his duty and authority, and he binds the company by the act. Baldwin, *Am. Railroad Law*, 311. What weight can be given the notice which is usually posted on the cars that "passengers are not allowed to stand on the platform," if in fact passengers are allowed to stand there for the convenience of the company? Surely none. The company waives this notice and the rule which it recites, when, for its own convenience and gain, it receives passengers as such on the platform,—uses the platform to earn a revenue. It is nonsensical to give force to such rule when the company does not enforce the same, but violates the rule for its own purposes. Of course, the question whether in a particular case the rule is violated for the convenience or gain of the carrier is always an important question to be considered and determined.

A railroad company knows the usual
29 L.R.A. (N.S.)

amount of travel on any one of its trains. The sale of tickets and the reports by the conductor or train auditor give it accurate basis of information, upon which it can furnish cars to meet all usual demands for passage. And when it is advised of an occasion that will make demand upon any of its trains for more than the usual accommodations, it owes a duty to the public to take reasonable precaution to furnish the same. Particularly is this so when excursion occasions are advertised by the railroad company and excursion tickets sold. If it is made to appear that an overcrowding of cars was so great that passengers were compelled to ride on the platforms, that the lack of sufficient room was due to the negligence of the company itself, that the passengers were accepted for carriage on the platforms, and that such conditions and acts caused injury to a passenger, why should not the company be liable in the premises? Railroad companies seek and demand much from the public. They are entitled to the good will and fair consideration which the people, through right views and just laws, should always give them. They are the great commercial arteries which indeed feed our prosperity and give life and vitality to our riches and comfort. But they owe a reciprocal relation to the public. They are in duty bound to render good and reasonable service, and at all times to refrain from neglect, carelessness, and imposition in their operations. They peculiarly owe a duty to provide safe and sanitary accommodations for passengers,—to refrain from imposing conditions that cause the inconvenient and dangerous overcrowding of trains, and the unhealthy and barbarous use of filthy stations.

Since it depends upon the circumstances of each particular case whether the act of a passenger in using the platform as a place of carriage is negligence on his part, the question is usually one for jury determination. 6 *Cyc. Law & Proc.* p. 654. It is always a question for the jury, and is not determinable by the court as a matter of law, when circumstances reasonably excusing the passenger for riding there are not admittedly shown. If the alleged necessity for riding on the platform is based on an overcrowding of the train, and evidence supporting the fact of overcrowding is introduced, which is met with other evidence tending to disprove the fact, a conflict is presented which it is the province of the jury to settle. Again, if there are conflicting facts and circumstances in relation to the excuse of the carrier for its alleged failure to provide ample places of safe carriage, or in relation to the degree of care which it used for the transportation of one necessarily

on the platform, the jury should pass upon them. It is the province of the jury to pass upon conflicting oral testimony of witnesses which is given in their presence, and that province should not be invaded. But when the evidence, though orally given in the presence of the jury, and though conflicting as a whole, embraces uncontradicted facts or circumstances which cause the case admittedly to turn in favor of one of the parties, so that a verdict against him would be set aside, the court may properly direct a verdict in his favor. The court cannot properly direct a verdict, however, in a case turning on a conflict of evidence which makes the material facts so doubtful that a verdict in favor of either party would be sustained. *Ketterman v. Dry Fork R. Co.* 48 W. Va. 606, 37 S. E. 683; *White v. L. Hoster Brewing Co.* 51 W. Va. 259, 41 S. E. 180; *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385, and other cases.

Now, in the case before us, the first pertinent inquiry in relation to the alleged negligence of the railroad company is whether a safe place of carriage was provided for plaintiff. Was plaintiff, as he claims, compelled, by insufficient passenger accommodations, to ride on the platform? Or did he voluntarily and unnecessarily ride there, so that his own act in thus doing was the proximate cause of his injury? Then, if the overcrowding was so great that plaintiff was excusable for taking passage on the platform, was that overcrowding the fault of the railroad company in failing to provide ample accommodations? Or was the overcrowding so unexpected and unusual that provision reasonably could not be made to prevent it? Did the company accept and receive plaintiff as a passenger on the platform of its train for lack of space in the cars? If so, and if it was excusable therein, did it then exercise the degree of care that was due to plaintiff in the hazardous position in which he was permitted to ride? Readily is it to be seen that a charge of negligence involving so many questions of fact must make, in practically every instance, a case for the jury. The determination of any of these questions would usually and naturally turn upon a mass of conflicting facts and circumstances. So it is in this case. A substantial conflict of testimony is involved. No decisive facts are so admittedly shown as to make the general issue determinable as one of law. Many facts and circumstances tend to prove that plaintiff made a reasonable effort to enter the cars, that he was prevented by the overcrowding from doing so, and that he was thus compelled to ride on the platform. Other facts and circumstances tend to prove that here was am-

ple room in the cars, and that he took passage on the platform from choice. If this primary issue should be determined in favor of plaintiff, then conflicting facts and circumstances appear which must be settled in order to determine whether the company was negligent by an inexcusable failure to provide ample cars; and, if not so negligent, whether it then failed to take the degree of care that it owed plaintiff because of the unsafe position in which he was obliged, through unforeseen and unavoidable circumstances, to ride. It is not our purpose to multiply words by a recital of the particular facts pertaining to this case. It suffices to say that witnesses, as to controlling facts and circumstances on the proposition of negligence, are in direct contradiction.

To support its plea of accord and satisfaction, the defendant railroad company introduced a receipt for \$75, signed by the plaintiff, which recites in substance that the sum is paid by the company and accepted by plaintiff in full payment of any liability for his injury. Plaintiff admitted that the signature thereto is his own. He, however, introduced evidence tending to prove that he was deceptively induced to sign the receipt by representatives of the company at a time when he was in the hospital suffering from the injury, lying on his back, with his senses deadened by pain and narcotic medicines; that he was made to understand and believe that the company was gratuitously giving him the amount for the purpose of paying the hospital charges, and for none other; that the paper which he was asked to sign was falsely represented to him as a check for that purpose; and that the paper was so folded when presented to his reclining position for signature that he was deceived, excusably on his part, as to its real character and purport. The evidence of his witnesses in this behalf is flatly contradicted by the company's physician, in whose hospital he was, and who was present at the time the receipt was obtained. Thus, we have a conflict of testimony in this branch of the case also. If the paper was obtained by deception and fraud, it cannot sustain the plea of accord and satisfaction. If the receipt was fraudulently obtained it is no bar to this action. 24 Am. & Eng. Enc. Law, pp. 308, 309. While it is admitted that plaintiff did not read the paper before signing it, yet there is evidence tending to prove that he used as much prudence and circumspection as a man ordinarily would under the circumstances stated as existing at the time. Whether he did exercise such prudence and circumspection, whether he was incapacitated so that he was thrown

off his guard, were questions to be determined by the jury. The disputed questions of fact relating to the validity and binding force of the terms of the paper claimed to be a release should have been submitted to the jury, under proper instructions by the court as to the law in the premises.

The case was improperly taken from the consideration of the jury. It involved in its material points such disputed questions of fact that a case was not presented for the court's action in directing a verdict. Jury trial in cases to which it rightly belongs is sacredly guaranteed to all. This fundamental right must not be curtailed. The judgment will be reversed, the verdict set aside, and a new trial granted.

Petition for rehearing denied June 11, 1910.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, Resp.,
v.

L. J. ROSENFELD et al., Appts.

(— Minn. —, 126 N. W. 1068.)

Constitutional law —prohibiting minors to frequent dance house — complaint — sufficiency — instructions — evidence.

The defendants were convicted of the offense of permitting, contrary to Rev. Laws 1905, § 4936, a person under the age of twenty-one years to be and remain in a dance house conducted by them. Held, that the statute is a proper exercise of the police power; that it is not class legislation; that a "dance house," as the term is used in the statute, is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation; that the complaint states a cause of action; that the trial court did not err in its instructions to the jury; and that the verdict is sustained by the evidence.

(July 1, 1910.)

APPEAL by defendants from an order of the Municipal Court of Minneapolis denying a new trial after verdict of guilty in a prosecution for permitting a person under twenty-one years of age to remain in a dance hall. **Affirmed.**

The facts are stated in the opinion.

Headnote by START, Ch. J.

Note.—An exhaustive search has disclosed no other decisions upon the constitutionality of an ordinance or statute forbidding the admission of minors to dance halls.

29 L.R.A. (N.S.)

Mr. George W. Caldwell, for appellants:

The act, unless the legislature intended that the word "dance house" should be interpreted in its guilty meaning, is invalid as being an infringement on personal liberty.

Freund, Pol. Power, §§ 259, 445, 457; Ex parte Smith, 135 Mo. 223, 33 L.R.A. 606, 58 Am. St. Rep. 576, 36 S. W. 628; Hechinger v. Maysville, 22 Ky. L. Rep. 486, 49 L.R.A. 114, 57 S. W. 619; State ex rel. Wyatt v. Ashbrook, 154 Mo. 375, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Chicago, B. & Q. R. Co. v. State, 47 Neb. 549, 41 L.R.A. 481, 53 Am. St. Rep. 557, 66 N. W. 624; People v. Havnor, 149 N. Y. 195, 31 L.R.A. 689, 52 Am. St. Rep. 707, 43 N. E. 541, 170 U. S. 408, 42 L. ed. 1087, 18 Sup. Ct. Rep. 631; Re Morgan, 28 Colo. 415, 47 L.R.A. 52, 77 Am. St. Rep. 269, 58 Pac. 1071.

The statute discriminates between women who have arrived at the age of majority, under the age of twenty-one and those over the age of twenty-one.

Gastanau v. Com. 108 Ky. 473, 49 L.R.A. 111, 94 Am. St. Rep. 386, 56 S. W. 705; People v. Williams, 189 N. Y. 131, 12 L.R.A. (N.S.) 1130, 121 Am. St. Rep. 854, 81 N. E. 778, 12 A. & E. Ann. Cas. 798; State ex rel. Wyatt v. Ashbrook, 154 Mo. 378, 48 L.R.A. 265, 77 Am. St. Rep. 765, 55 S. W. 627; Rossmiller v. State, 114 Wis. 169, 58 L.R.A. 93, 91 Am. St. Rep. 910, 89 N. W. 839.

Knowledge was essential to a conviction. Stuart v. State (Tex. Crim. Rep.) 60 S. W. 554.

Messrs. Frank Healy and John A. Dahl, for the State:

The act is a legitimate and reasonable exercise of the police power of the state.

People v. Ewer, 141 N. Y. 135, 25 L.R.A. 794, 38 Am. St. Rep. 788, 36 N. E. 4; Freund, Pol. Power, ¶ 259; State v. Donaldson, 41 Minn. 74, 42 N. W. 781; State v. Corbett, 57 Minn. 345, 24 L.R.A. 498, 4 Inters. Com. Rep. 694, 59 N. W. 317; Rippe v. Becker, 56 Minn. 100, 22 L.R.A. 857, 57 N. W. 331; St. Paul v. Haugbro, 93 Minn. 59, 66 L.R.A. 441, 106 Am. St. Rep. 427, 100 N. W. 470, 2 A. & E. Ann. Cas. 580; State v. Stroschein, 99 Minn. 251, 109 N. W. 235; Butler v. Chambers, 36 Minn. 72, 1 Am. St. Rep. 638, 30 N. W. 308; State v. Tower, 185 Mo. 79, 68 L.R.A. 402, 84 S. W. 10; Baumgartner v. Hasty, 100 Ind. 575, 50 Am. Rep. 830; North Chicago City R. Co. v. Lake View, 105 Ill. 207, 44 Am. Rep. 788; Harmon v. Chicago, 110 Ill. 400, 51 Am. Rep. 698; People ex rel. Lockwood v. Grand Trunk Western R. Co. 232 Ill. 292, 83 N. E. 839.

The act is not partial or class legislation

in that it discriminates between adult women of different ages, merely because it fixes an age limit.

Allen v. Pioneer-Press Co. 40 Minn. 120, 3 L.R.A. 532, 12 Am. St. Rep. 707, 41 N. W. 936; *Cameron v. Chicago, M. & St. P. R. Co.* 63 Minn. 388, 31 L.R.A. 553, 65 N. W. 652; *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249, 41 N. W. 974; *Herrick v. Minneapolis & St. L. R. Co.* 31 Minn. 11, 47 Am. Rep. 771, 16 N. W. 413; *Barbier v. Connolly*, 113 U. S. 27, 28 L. ed. 923, 5 Sup. Ct. Rep. 357; *Powell v. Pennsylvania*, 127 U. S. 678, 32 L. ed. 253, 8 Sup. Ct. Rep. 992, 1257; *State v. Smith*, 58 Minn. 35, 25 L.R.A. 759, 59 N. W. 545; *Curryer v. Merrill*, 25 Minn. 4, 33 Am. Rep. 450.

Start, Ch. J., delivered the opinion of the court:

The defendants were charged by complaint in the municipal court of the city of Minneapolis with the offense of permitting, on March 20, 1909, a person under the age of twenty-one years to be and to remain in a dance house owned and managed by them. The prosecution was based upon Rev. Laws 1905, § 4936, which is as follows: "Whoever permits any person under the age of twenty-one years to be or remain in any dance house, concert saloon, place where intoxicating liquors are sold or given away, or any place of entertainment injurious to the morals, owned, kept, or managed by him in whole or in part, . . . shall be guilty of a misdemeanor. . . ." There was a trial by jury, and a verdict of guilty against each of the defendants, and they appealed from an order denying their motion for a new trial.

1. The first contention of the appellants is that the complaint does not charge a public offense. The here material allegations of the complaint are these: On March 20, 1909, within the corporate limits of the city of Minneapolis, the defendants did unlawfully permit Marie O'Connors to be and to remain in the premises known as No. 401 Washington avenue south, then being a dance hall owned, kept, and managed by them, and Marie O'Connors then being a person under the age of twenty-one years, to wit, of the age of sixteen years, contrary to the form of the statute in such case made and provided.

It is urged that the complaint does not in any way describe the character of the dance house, nor does it allege that it was a place injurious to morals; hence it does not charge a public offense, for the reason that the statute applies only to dance houses in which intoxicating liquors are sold and to those which are injurious to morals. The statute cannot be so construed, for its ex- 29 L.R.A. (N.S.)

press language makes it an offense to permit persons under the age of twenty-one years to be or remain in any one of the four specified places, namely, a dance house, a concert saloon, a place where intoxicating liquors are sold or given away, and any place of entertainment injurious to morals. If the offense be for permitting a minor to remain in a place other than a dance house or concert saloon, it is clear that the complaint must charge, either that intoxicating liquors were sold or given away at such place, or that the place was one injurious to morals. But it is clear from the language of the statute that dance houses and concert saloons are within its prohibition, whether or not in fact they are conducted in a manner injurious to morals. It is evident that the legislature, in enacting the statute, was satisfied that the tendency of dance houses and concert saloons as ordinarily conducted was the corruption of youth, and in the exercise of the police power of the state it decided that, without reference to the manner in which they might be conducted, young persons should not be permitted to be or remain therein. It is true, as claimed by defendants' counsel in this connection, that the statute does not define a dance house; but in the absence of such a definition the term must be construed in accordance with its ordinary usage. So construing it, a dance house is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation. The gist of the offense, as defined by the statute, is the permitting of persons under twenty-one years of age to be or remain in a dance house. This is a sufficient definition of the offense. The complaint charges the offense in the language of the statute, and thereby sets forth all the essential elements necessary to constitute the offense; hence the complaint states a cause of action if the statute is a valid one. *State v. Abrisch*, 41 Minn. 41, 42 N. W. 543; *State v. Howard*, 66 Minn. 309, 34 L.R.A. 178, 61 Am. St. Rep. 403, 68 N. W. 1096.

The defendants, however, contend that the statute is unconstitutional, because it is not a proper exercise of the police power. It clearly is. "Public dance halls easily become centers of vice, and are made the subject of special provisions, . . . and may be entirely forbidden." *Freund*, Pol. Power, § 250.

Again, it is urged that the statute is class legislation, and unconstitutional, in that it "discriminates between women who have arrived at the age of majority, under the age of twenty-one, and those over the age of twenty-one." The purpose of the statute is to protect the youth of the state

from corrupting influences, and it was necessary for the legislature to fix an age limit. It was a matter of legislative discretion whether such limit should be the common-law limit of minority, and apply alike to the youth of both sexes, or whether a distinction should be made of females by fixing the age limit of females at eighteen years, the statutory limit of minority of females. The fact that the legislature did not make such distinction affords no ground for inferring that the statute is an arbitrary exercise of the police power, or an improper classification, for it applies alike to all persons, male and female, under the age of twenty-one years. It follows that the statute is constitutional, and that the complaint charges a public offense.

2. It is also contended that the evidence was not sufficient to sustain the verdict of guilty. There was evidence tending to show that public dances were conducted, at the place named in the complaint, by the defendants personally as proprietors and managers, for several months; that promiscuous crowds gathered at such dances, sometimes as many as 200; that the dances were open to all women, without admission fee or escort, and they came and went without inquiry or restraint during the hours for dancing, which were between 8:30 o'clock P. M. and midnight; that Marie O'Connors, the person named in the complaint, who was less than seventeen years of age, attended the dances regularly for some three months, to the personal knowledge of both defendants, and usually remained until closing time; that she was present at the dance on the evening named in the complaint, to the personal knowledge of the defendant Brooks, but it does not appear from the evidence that the defendant Rosenfield was present at the dance on this particular night; that there were no restrictions as to who should be admitted to the dances, except the men alone were charged an admission fee; and, further, that the associations of this particular dance house were vile. It is insisted that the evidence is wholly insufficient to warrant the conviction of the defendant Rosenfield, because he was not present at the dance on the night alleged in the complaint. He was, however, one of the proprietors and managers of the dance house, and had been frequently in charge of the dances when Marie O'Connors was present. The evidence is sufficient to sustain the verdict as to each of the defendants.

3. The last alleged error to be considered is that the trial court erred in refusing certain requested instructions and in its charge as given. The defendants requested the 29 L.R.A. (N.S.)

court to give, with other similar requests, the following:

"In order that you may find both of the defendants guilty, it will be necessary that you find that both of them knew that the minor, Marie O'Connors, was present in the dance hall on the night of March 20, 1909; that they were both present themselves, and permitted her to be or remain therein.

"In order that you may find either of the defendants guilty, it will be necessary for you to find that such guilty party knew, or ought to have known, from the appearance of the witness Marie O'Connors, that she was a minor.

"If you do not find that the defendants, or either of them, intended to violate the law, you cannot find them, or either of them, guilty."

These requests were properly refused; for it was not, under the evidence, necessary as a matter of law, in order to convict both defendants, that both should have been physically present and have known that Marie O'Connors was present at the dance on the night of March 20, 1909. The other two requests did not state the law of the case, for the statute does not make the knowledge of the defendants an essential element of the offense. *State v. Heck*, 23 Minn. 540; *State v. O'Connor*, 58 Minn. 193, 59 N. W. 999; *State v. Sodini*, 84 Minn. 444, 87 N. W. 1130; *State v. Edwards*, 94 Minn. 225, 69 L.R.A. 667, 102 N. W. 697; *State v. Quackenbush*, 98 Minn. 515-521, 108 N. W. 953.

The instructions given, to which exception was taken by the defendants, were not erroneous.

Order affirmed.

WASHINGTON SUPREME COURT.

R. W. SHAW, Appt.,

v.

ROSA LOBE, Exrx., etc., of E. Lobe, Deceased, Respt.

(— Wash. —, 108 Pac. 450.)

Account stated — retention of rendered account.

1. Mere retention of an account rendered is not sufficient to constitute it an account stated.

Appeal — rejected evidence — error.

2. Rejection of competent evidence is not reversible error if with it in the record the evidence would not be sufficient to establish the issue which it was offered to support.

Same — expert book account.

3. Rejection of testimony of an expert

as to what is shown by certain account books is not reversible error if the books themselves were before the court and failed to show facts sufficient to establish the issue which they are offered to establish.

(April 29, 1910.)

A PPEAL by plaintiff from a judgment of the Superior Court for King County in defendant's favor in an action brought to recover an amount alleged to be due on an account stated or for an accounting as to a certain partnership. Affirmed.

The facts are stated in the opinion.

Mr. G. Ward Kemp, for appellant:

The question of what is a reasonable time for making objections is a matter of law.

Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Dows v. Durfee, 10 Barb. 213.

Statements of account, whether taking the form of periodical balances on the firm's books or of formal documents interchanged among the partners, are generally conclusive upon the partners, unless impeachable because of fraud or mutual mistake.

2 Lindley, Am. ed. pp. 421, 422; 30 Cyc. Law & Proc. p. 448; Lockwood v. Thorne, 11 N. Y. 175, 62 Am. Dec. 81; Gage v. Parmelle, 87 Ill. 329.

Where an account as stated would have been opened for fraud or mistake if prompt action had been taken, after long delay the relief will be denied on the ground of laches.

30 Cyc. Law & Proc. pp. 704, 705; Wilshaw v. Leland, 128 Ill. 304, 21 N. E. 588;

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I. Scope and introduction.

This note is concerned solely with the question of the effect of retention of a statement of account, and therefore does not include cases as to the effect of a failure to 29 L.R.A. (N.S.)

object to an account or to certain items thereof, upon a personal presentation.

For a discussion of the entire question, What constitutes an account stated, references may be made to a note on that subject in 27 L.R.A. 811.

Before entering upon the subject here under discussion, it seems desirable at the outset to call attention to two things:

First, that the rule, which, as will presently appear, is of equitable origin, has a different operation in a court of equity than in a court of law. In equity, it is a form of the doctrine of laches, while in law it simply embodies a presumption. Thus, as in one of the cases which follow (Pratt v. Boody, 55 N. J. Eq. 175, 35 Atl. 1113), a failure to object, while giving rise to a presumption of assent, may at the same time not give the party rendering the account immunity from a proceeding in equity for an accounting. Conversely, while no presumption of assent may arise from the retention of an account as between partners, the acquiescent partner may be precluded thereby from obtaining an accounting in a court of equity (see cases under heading, "Persons between whom rule applies," infra).

Second, that two presumptions arise in the cases which fall within the scope of this note, between which, for the purpose of appraising their evidentiary force, it becomes necessary to distinguish. The first is the presumption of assent, necessary to the conversion of the account rendered into an account stated, which may or may not be of sufficient strength to impose upon the opposite party the necessity of offering evidence in rebuttal. The second is the presumption of correctness, which arises in all cases where an account has become stated, whether expressly or by implication, and which therefore will be perceived to be based, not upon the failure to make objection, but upon the fact of an account stated. This presumption puts the burden of disproving correctness upon the disputant. Some of the courts, however, as will hereinafter appear, have loosely spoken of the

Dorsett v. Ormiston, 53 App. Div. 620, 65 N. Y. Supp. 931.

Accounts settled between partners by the delivery of a statement and admission, or where there is mere acquiescence in its correctness by the other, will not be opened up.

Heartt v. Corning, 3 Paige, 566; **Atwater v. Fowler**, 1 Edw. Ch. 417; **Stretch v. Talmadge**, 65 Cal. 510, 4 Pac. 513; **Dobbins v. Tatem** (N. J. Eq.) 25 Atl. 546; **Albee v. Wachter**, 74 Ill. 173; **Stickler v. Giles**, 9 Wash. 147, 37 Pac. 293; **Sturgeon v. Wrightman**, 32 Wash. 195, 72 Pac. 1045; **Marvin v. Yates**, 26 Wash. 50, 66 Pac. 131.

Mr. Richard Saxe Jones, for respondent:

What circumstances determine that an

presumption of correctness as arising from the failure to object to an account rendered.

II. The general rule.

While the mere rendition of an account by one party to another does not show an account stated (Irvine v. Young, 1 Sim. & Stu. 333; Toland v. Sprague, 12 Pet. 334, 9 L. ed. 1107; Rowland v. Donovan, 16 Mo. App. 554; Emery v. Pease, 20 N. Y. 62; Guernsey v. Rexford, 63 N. Y. 631; Keppeling v. Bitzer, 10 Lanc. L. Rev. 332; Robertson v. Wright, 17 Gratt. 534; **SHAW v. LOBE**), it is well settled that the rendition of an account and its retention by the party to whom sent, without objection within a reasonable time, give it the force and effect of a stated account. **Tickel v. Short**, 2 Ves. Sr. 239; **Sherman v. Sherman**, 2 Vern. 276; **Wiggins v. Burkham**, 10 Wall. 129, 19 L. ed. 884; **Cooper v. Coates**, 21 Wall. 105, 22 L. ed. 481; **Standard Oil Co. v. Van Etten**, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178; **McLaughlin v. United States**, 36 Ct. Cl. 138, s. c. on subsequent appeal, 37 Ct. Cl. 150; **Bainbridge v. Wilcocks**, **Baldw.** 536, **Fed. Cas. No. 755**; **Baker v. Biddle**, **Baldw.** 394, **Fed. Cas. No. 764**; **Bradley v. Richardson**, 2 Blatchf. 343, **Fed. Cas. No. 1786**; **Hopkirk v. Page**, 2 Brock. 20, **Fed. Cas. No. 6697**; **Richmond Mfg. Co. v. Starks**, 4 Mason, 296, **Fed. Cas. No. 11,802**; **Marye v. Strouse**, 6 Sawy. 204, 5 **Fed.** 483; **Talcott v. Chew**, 27 **Fed.** 273; **Edwards v. Hoeflinghoff**, 38 **Fed.** 635; **Eichel v. Sawyer**, 44 **Fed.** 845; **Wittkowski v. Harris**, 64 **Fed.** 712; **Porter v. Price**, 26 C. C. A. 70, 49 U. S. App. 295, 80 **Fed.** 655; **Long-Bell Lumber Co. v. Stump**, 30 C. C. A. 260, 57 U. S. App. 546, 86 **Fed.** 574; **McKenzie v. Poorman Silver Mines**, 31 C. C. A. 409, 60 U. S. App. 1, 88 **Fed.** 111; **Allen-West Commission Co. v. Patillo**, 33 C. C. A. 194, 61 U. S. App. 94, 90 **Fed.** 628; **Patillo v. Allen-West Commission Co.** 65 C. C. A. 508, 131 **Fed.** 680; **Baltimore & O. R. Co. v. Berkeley Springs & P. R. Co.** 168 **Fed.** 770; **Langdon v. Roane**, 6 Ala. 518, 41 **Am. Dec.** 60; **Ryan v. Gross**, 48 Ala. 370; **Hirschfelder v. Levy**, 69 Ala. 351; **Burns v. Camp-**

bell, 71 Ala. 271; **Sloan v. Guice**, 77 Ala. 394; **Ware v. Manning**, 86 Ala. 238, 5 So. 682; **Rice v. Schloss**, 90 Ala. 416, 7 So. 802; **Joseph v. Southwark Foundry & Mach. Co.** 99 Ala. 47, 10 So. 327; **First Nat. Bank v. Allen**, 100 Ala. 476, 27 L.R.A. 426, 46 **Am. St. Rep.** 80, 14 So. 335; **Loventhal v. Morris**, 103 Ala. 332, 15 So. 672; **Hunt v. Stockton Lumber Co.** 113 Ala. 387, 21 So. 454; **Brown v. Brown**, 16 Ark. 202; **Lawrence v. Ellsworth**, 41 Ark. 502; **Dunavant v. Fields**, 68 Ark. 534, 60 S. W. 420; **Allen-West Commission Co. v. Hudgins**, 74 Ark. 468, 86 S. W. 289; **Terry v. Sickles**, 13 Cal. 427; **Auzerais v. Naglee**, 74 Cal. 60, 15 Pac. 371; **Mayberry v. Cook**, 121 Cal. 588, 54 Pac. 95; **National Cycle Mfg. Co. v. San Diego Cycle Co.** 135 Cal. 335, 67 Pac. 280; **Shively v. Eureka Tellurium Gold Min. Co.** 5 Cal. App. 236, 89 Pac. 1073; **Visser v. Wilbur**, 5 Cal. App. 562, 90 Pac. 1065, rehearing denied in 5 Cal. App. 573, 91 Pac. 412; **Martyn v. Arnold**, 36 Fla. 446, 18 So. 791; **Daytona Bridge Co. v. Bond**, 47 Fla. 136, 36 So. 445; **Field v. Reid**, 21 Ga. 314; **Lewis v. Utah Constr. Co.** 10 Idaho, 214, 77 Pac. 336; **Miller v. Bruns**, 41 Ill. 293; **McCord v. Manson**, 17 Ill. App. 118; **Mackin v. O'Brien**, 33 Ill. App. 474; **House v. Beak**, 43 Ill. App. 615; **Atlas R. Supply Co. v. Forster, W. & Co.** 123 Ill. App. 558; **Northwestern Fuel Co. v. Western Fuel Co.** 144 Ill. App. 92; **Ingle v. Norrington**, 126 Ind. 174, 25 N. E. 900; **Schoonover v. Osborne Bros.** 108 Iowa, 453, 79 N. W. 263; **Henderson Cotton Mfg. Co. v. Lowell Machine Shops**, 86 Ky. 668, 7 S. W. 142; **Little & H. Invest. Co. v. Pigg**, 29 Ky. L. Rep. 809, 96 S. W. 455; **Ledoux v. Porche**, 12 Rob. (La.) 543; **White v. Henderson**, 2 La. Ann. 241; **Freeman v. Howell**, 4 La. Ann. 196, 50 **Am. Dec.** 561; **Mansell v. Payne**, 18 La. Ann. 124; **Blanc v. Scruggs**, 26 La. Ann. 208; **Darby v. Lastrapes**, 28 La. Ann. 605; **Flower v. O'Bannon**, 43 La. Ann. 1045, 10 So. 376; **Brodnaux v. Steinhardt**, 48 La. Ann. 682, 19 So. 572; **Wood v. Gault**, 2 Md. Ch. 433; **White v. Campbell**, 25 Mich. 463; **Rossman v. Bock**, 97 Mich. 430, 56 N. W. 777; **Pabst Brewing Co. v. Lueders**, 107 Mich. 41, 64 N. W. 872; **I. L. Elwood Mfg-**

account has been stated depends altogether upon the evidence.

Ault v. Interstate Sav. & L. Asso. 15 Wash. 627, 47 Pac. 13.

Fullerton, J., delivered the opinion of the court:

The appellant, as the assignee of one Lee D. Gilmer, brought this action against the respondent to recover a balance claimed to be due on an account stated between Gilmer and E. Lobe, the devisor of the respondent. The complaint carried a prayer in the alternative for a partnership accounting in case the court should fail to find the existence of an account stated. After issue had been joined, a trial was had before the court without a jury, which re-

sulted in a judgment in favor of the respondent. This appeal is taken therefrom.

Two principal questions are presented, the first of which is that the court erred in failing to find an account stated between Gilmer and Lobe. The record discloses that these persons were partners from December, 1901, until March, 1905, engaged in the insurance, real estate, mining, and loan business, and the business of selling oil on commissions. They were not equal partners. Gilmer, by writing, executed June 24, 1902, expressly waived any interest in the real estate and mining business done by the firm, and it seems to have been orally understood that the commissions received from the insurance business were to be divided on a basis of two thirds and one third, the larger

proportion to go to the partner at whose solicitation the insurance was procured. The active work of the partnership was done by Lobe, while Gilmer did the office work and kept the books. The firm as a firm had no joint bank account. All money received belonging to the firm was turned over to Lobe, who deposited it in his own name, and drew checks thereon from time to time as the exigencies of the business required. On the dissolution of the partnership, Gilmer made out a statement from the books by which he showed a balance in his favor of some \$2,986.51. The statement contained an account of the receipts of the firm during the time of the partnership from the various businesses in which it was engaged, the proportionate share thereof claimed by Gil-

Co. v. Betcher, 72 Minn. 103, 75 N. W. 113; Allen v. Uplinger, 98 Minn. 242, 107 N. W. 1131; Stebbins v. Niles, 25 Miss. 267; Coopwood v. Bolton, 26 Miss. 212; McCall v. Nave, 52 Miss. 494; Powell v. Pacific R. Co. 65 Mo. 658; Ward v. Farrelly, 9 Mo. App. 370; Missouri P. R. Co. v. B. F. Coombs & Bro. Commission Co. 71 Mo. App. 299, a. c. on subsequent appeal, 89 Mo. App. 182; Alexander v. Scott (Mo. App.) 129 S. W. 991; Rich v. Eldredge, 42 N. H. 153; Austin v. Ricker, 61 N. H. 97; State, Weigel, Prosecutor, v. Hartman Steel Co. 51 N. J. L. 446, 20 Atl. 67; Phillips v. Belden, 2 Edw. Ch. 1; Weissner v. Denison, 10 N. Y. 68, 61 Am. Dec. 731; Lockwood v. Thorne, 11 N. Y. 170, 62 Am. Dec. 81; Lockwood v. Thorne, 18 N. Y. 286; Smith v. Marvin, 27 N. Y. 137, 25 How. Pr. 317; Bullard v. Raynor, 30 N. Y. 197; Stenton v. Jerome, 54 N. Y. 480; Lambert v. Craft, 98 N. Y. 342; Samson v. Freedman, 102 N. Y. 699, 7 N. E. 419; Manchester Paper Co. v. Moore, 104 N. Y. 680, 10 N. E. 861; Spellman v. Muehlfeld, 166 N. Y. 245, 59 N. E. 817; Towseley v. Denison, 45 Barb. 490; Avery v. Leach, 9 Hun, 106; Allen v. McConihe, 58 Hun, 605, 34 N. Y. S. R. 994, 12 N. Y. Supp. 232; Burlingame v. Shelmire, 59 Hun, 615, 35 N. Y. S. R. 161, 12 N. Y. Supp. 655; Delabarre v. McAlpin, 101 App. Div. 468, 92 N. Y. Supp. 129; Little v. McClain, 134 App. Div. 127, 118 N. Y. Supp. 916; Austin v. Wilson, 33 N. Y. S. R. 503, 11 N. Y. Supp. 566; Campbell v. Campbell, 40 N. Y. S. R. 817, 16 N. Y. Supp. 165; Lawson v. Douglass, 43 N. Y. S. R. 356, 17 N. Y. Supp. 4; Case v. Hotchkiss, 37 How. Pr. 283, 1 Abb. App. Dec. 324, 3 Abb. Pr. N. S. 381, 3 Keyes, 334; Carpenter v. Nickerson, 7 Daly, 424; Bottum v. Moore, 13 Daly, 464; Livermore v. St. John, 4 Robt. 12; Allen v. Stevens, 1 N. Y. Leg. Obs. 359; Hawkins v. Long, 74 N. C. 781; Marks v. Ballance, 113 N. C. 28, 18 S. E. 75; Copland v. American De Forest Wireless Teleg. Co. 136 N. C. 11, 48 S. E. 501; Davis v. Stephenson, 149 N. C. 113, 62 S. E. 900; Dyer v. Isham, 4 Ohio C. C. 429; Goodhart v. Rastert, 7 Ohio N. P. 534; Keys v. Baldwin, 10 Ohio Dec. 268; 29 L.R.A. (N.S.)

Truman v. Owens, 17 Or. 523, 21 Pac. 665; Holmes v. Page, 19 Or. 232, 23 Pac. 961; Fleischner v. Kubli, 20 Or. 328, 25 Pac. 1086; Howell v. Johnson, 38 Or. 571, 64 Pac. 659; Crawford v. Hutchinson, 38 Or. 578, 65 Pac. 84; Nodine v. First Nat. Bank, 41 Or. 386, 68 Pac. 1109; Gorman v. McGowan, 44 Or. 597, 76 Pac. 769; Darlington v. Taylor, 3 Grant, Cas. 195; Phillips v. Tapper, 2 Pa. St. 323; Thompson v. Fisher, 13 Pa. 310; Porter v. Patterson, 15 Pa. 229; Ruch v. Fricke, 28 Pa. 241; Sergeant v. Ewing, 30 Pa. 75; Verrier v. Goullou, 97 Pa. 63; Buckley v. Maryland Paving Co. 132 Pa. 572, 19 Atl. 341; Peirce v. Peirce, 199 Pa. 4, 48 Atl. 689; Colket v. Ellis, 1 W. N. C. 246; Greene v. Harris, 11 R. I. 5; Johnson v. McCampbell, 11 Heisk. 27; Godbe v. Young, 1 Utah, 55; Benites v. Hampton, 3 Utah, 369, 3 Pac. 206; Burraston v. First Nat. Bank, 22 Utah, 328, 62 Pac. 425; Tharp v. Tharp, 15 Vt. 105; Goldsmith v. Latz, 96 Va. 680, 32 S. E. 483; Smith v. Kennedy, 1 Wash. Terr. 55; Ault v. Interstate Sav. & L. Asso. 15 Wash. 627, 47 Pac. 13; Ruffner v. Hewitt, 7 W. Va. 585; Shrewsbury v. Tufts, 41 W. Va. 212, 23 S. E. 692; Engfer v. Roemer, 71 Wis. 11, 36 N. W. 618.

The history of the rule under discussion is thus given in Anding v. Levy, 57 Miss. 51, 34 Am. Rep. 435: "The earliest mention we have been able to find of this rule is in Sherman v. Sherman, 2 Vern. 276, decided in the year 1692, where the rule is stated by Lord Hutchins thus: that 'among merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post.' Lord Hardwicke, in Willis v. Jernegan, 2 Atk. 251, spoke of the rule thus: 'Even where there are transactions, suppose between a merchant in England and a merchant beyond sea, and an account is transmitted here from the person who is abroad, it is not the signing which will make it a stated account, but the person to whom it is sent keeping it by him any length of time without making any objection, which shall bind him, and prevent his entering into an open account

mer, and the balance after deducting certain losses of the firm and the sums withdrawn by Gilmer on his personal account. No deduction was made for rents or operating expenses, although the books show that the latter amounted to a considerable sum. This statement was delivered to Lobe, who afterwards paid Gilmer in instalments the sum of \$1,150, the last payment being made on May 26, 1906. After the statement was received by Lobe, he had it checked over by the bookkeeper who succeeded Gilmer, and that person testifies that he disputed a number of the items going to make up the account. The statement was found after Lobe's death among his effects, and it is this statement that the appellant contends constituted an account stated be-

tween Gilmer and Lobe, but manifestly the evidence was insufficient to make it such. To impart to an account the character of an account stated, it must be mutually agreed between the parties that the balance struck thereon is the correct amount due from the one party to the other on the final adjustment of their mutual dealings to which the account relates. The mere rendition of an account by one party to another does not show an account stated. There must be some form of assent to the account,—that is, a definite acknowledgment of an indebtedness in a certain sum. 1 Enc. L. & P. 688-693. True assent may be implied from the circumstances and acts of the parties, but it must appear in some form. We are

afterwards.' Chancellor Kent, in *Murray v. Toland*, 3 Johns. Ch. 569, mentioned the rule in these words: 'It has been often held that if a party receives a stated amount from abroad, and keeps it by him for any length of time (one case says two years) without objection, he shall be bound by it,' citing *Willis v. Jernegan*, ubi supra, and *Tickel v. Short*, 2 Ves. Sr. 239, in which last case Lord Hardwicke said: 'If one merchant sends an account current to another in a different country, on which a balance is made due to himself; the other keeps it by about two years without objection; the rule of this court and of merchants is that it is considered as a stated account.' The Supreme Court of the United States, in *Freeland v. Heron*, 7 Cranch, 147, 3 L. ed. 297, spoke of the rule as 'a rule of the chancery court and of merchants,' and defined it to be thus: 'When one merchant sends an account current to another residing in a different country, between whom there are mutual dealings, and he keeps it two years without making any objections, it shall be deemed a stated account, and his silence and acquiescence shall bind him, at least so far as to cast the *onus probandi* on him.' It is thus seen that, in its inception, the rule that the reception of an account rendered, and the keeping of it for any considerable time without objection, made it an account stated,—that is, an account so admitted to be just and correct that it relieved the party rendering it from the necessity of proving it, and cast the burden on the party receiving it to show by affirmative evidence that it was unjust,—was a rule of the chancery court applied only in controversies between merchants."

The principle of the decisions is that if the account has been kept so long that it must be inferred that the party receiving it had time to examine it and object to it if it was wrong, he must be presumed to have acquiesced in it if he remains silent. *Dows v. Durfee*, 10 Barb. 213.

In *Lodge v. Heron*, 3 Phila. 356, it is said: "Every man who receives a paper which professes to set forth the state of accounts between himself and the party from

whom he receives it is bound to object specifically at the time, if he means to object afterwards, or else to explain how he came to be silent when good faith required him to speak."

But to give an account rendered the force of an account stated because of silence on the part of the person receiving it, the circumstances must be such as to justify an inference of assent on his part to its correctness. *Champion v. Recknagel*, 6 App. Div. 151, 39 N. Y. Supp. 819.

If the party to whom the account is rendered objects within a reasonable time, there is no room for inferring an admission of its correctness. *White v. Campbell*, 25 Mich. 463.

An illiterate person will not be bound by the retention of an account of the contents of which he had no knowledge. *Guenivet v. Perret*, 18 La. Ann. 356.

In *Bewick v. Butterfield*, 60 Mich. 203, 26 N. W. 881, it was held that where it was shown that defendant received a bill from plaintiffs, and afterwards presented a bill to plaintiffs upon which the first-mentioned bill was credited, the plaintiffs were entitled to an instruction that the defendant was bound thereby unless fraud or mistake was shown.

In *McCormack v. Sawyer*, 104 Mo. 36, 15 S. W. 998, an action for the balance due upon account stated, where it appeared that not only was the account delivered to defendant and no objection made thereto, but also that he stated that if he was able to pay he would, it was held error to sustain a demurrer to the evidence.

Retaining the statement of the account without objection, and using the check sent to pay the balance, will render the account stated as against the receiver. *Davenport v. Wheeler*, 7 Cow. 231; *Schuyler v. Ross*, 37 N. Y. S. R. 805, 13 N. Y. Supp. 944.

Where a person, on receiving an account, took it with him, promising to look it over, but neglected to do so, in the meantime writing that he would pay the balance, and trying to fix some terms of credit, it was held to have become a stated account. *Powell v. Noye*, 23 Barb. 184.

unable to find that there was such an agreement shown by the record here.

On the question whether the evidence shows a balance in the appellant's favor, disregarding the account stated, the record is not so satisfactory; still we think it justifies the conclusion of the trial court. Since Gilmer was a party in interest he was disqualified from testifying (Rem. & Bal. Code, § 1211), and the only evidence pertinent to the inquiry was the books of the partnership. These the court found were kept by Gilmer, and were so far incomplete as to fail in themselves to show the terms of the partnership or its status at the time of its dissolution, particularly whether or not there was a balance owing at that time from the deceased partner to Gilmer. Our own investigation of the books convinces us that no different conclusion could be reached without, at least, much explanation on the part of someone who was familiar with the partnership business. The record, however, fails to disclose anyone having the requisite information to make this explanation other than the surviving partner, and, since he is disqualified from testifying, the case must fail for want of proofs.

The appellant complains that the court

erred in excluding certain testimony offered by him in the course of the trial, particularly in excluding the statement on which he based his claim of an account stated, and testimony of an expert who had examined the books, and stated that he could testify as to certain balances shown by them. But while we think the court could have properly admitted the testimony, its refusal to do so was not error requiring reversal. The statement tended to support the appellant's allegation of an account stated, but with it in the record we still think the evidence insufficient to establish the fact. The evidence of the expert could but show what appeared in the books. This would not help the appellant's case. It is what the books fail to show that makes it impossible to determine the status of the partnership, and this could not be supplied by the testimony of the witness. While his evidence might have saved us some labor, we are unable to see how it could change the result.

The judgment appealed from will stand affirmed.

Rudkin, Ch. J., and Chadwick and Gose, JJ., concur.

In *Avery v. Leach*, 9 Hun, 106, it was held that rendering an account to a father for goods purchased by his son, and its retention by him without objection, made it an account stated as to him, which would preclude the objection that the son had no authority to bind him by the purchase.

In *Burnham v. Black*, 121 N. Y. Supp. 616, where it appeared that the plaintiff not only retained statements of his account sent to him by his brokers, without making objection to them, but wrote to them asking them to hold the stock which they were carrying on a margin for his account, it was held that the defense of an account stated was abundantly established.

In *Mackay v. Kahn*, 44 N. Y. S. R. 286, 17 N. Y. Supp. 503, where it was proved that monthly statements of an account for labor and materials were rendered the defendant, and that no objection was offered to any of them, and that he afterwards verbally conceded his indebtedness for a certain amount, and gave a certain paper acknowledging indebtedness and the correctness of the account before rendered, it was held that there was sufficient evidence of an account stated.

In *Robbins v. Downey*, 45 N. Y. S. R. 270, 18 N. Y. Supp. 100, where it appeared that statements of account were rendered from time to time, as well as a statement of balance due, to which balance defendant made no objection, but on the contrary repeatedly promised to pay it, and that he did not challenge the correctness of the itemized bills or of the monthly statement, it was held that there was ample proof of an account stated.

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But in *Porter v. Lobach*, 2 Bosw. 188, it was held that an account rendered could not be regarded as having become an account stated, where, upon objection made to its accuracy, no claim was made that it was too late to take that ground, or that the account was to be treated as a stated and settled account, but on the contrary a request was made that it might be allowed to stand as it was until the return from Europe of a person concerned in the transactions.

In *Pratt v. Boody*, 55 N. J. Eq. 175, 35 Atl. 1113, it was held that evidence that statements of each transaction in stocks were reported to their customer by the brokers as soon as made, that monthly statements were submitted to him showing the state of the accounts or balances at the time, and that he in his lifetime frequently examined the accounts and made no objection to them, while sufficient to establish such an admission of their correctness as would make them *prima facie* correct, was not sufficient to establish an account stated, which would be given effect in a proceeding in equity for an accounting.

III. Requisites of account rendered.

a. In general.

An account rendered does not by acquiescence become an account stated, where it is not rendered by a person having authority. *Harvey v. West-Side Elev. R. Co.* 13 Hun, 392.

Where the presentation of an account is by mail, the person sought to be charged must in terms be a party to the account, or

the grounds upon which it is sought to hold him as a debtor should be clearly made known to him, and a demand for payment made,—otherwise no presumption arises from his silence in relation thereto. *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445.

In cases in which there is no claim that the alleged account stated is the result of an express assent or agreement to its correctness by the person sought to be charged thereby, such person must in terms be a party to the account, or the grounds upon which it is sought to hold him as a debtor should be clearly made known to him, and a demand for payment should be made. *Penites v. Hampton*, 3 Utah, 360, 3 Pac. 206.

An account rendered which does not pretend to be a final adjustment and settlement of the transaction between the parties will not become an account stated by mere failure to object to it. *Glasscock v. Rosengrant*, 55 Ark. 376, 18 S. W. 379.

The rule does not apply where the statement rendered was not for the purpose of having a claim ascertained, adjusted, and agreed upon, but was simply for the purpose of giving information. *Harrison v. Henderson*, 67 Kan. 202, 72 Pac. 878.

If it is clearly shown that the party rendering the account did not understand that there had been any final adjustment of respective demands, the account rendered cannot by acquiescence be regarded as having become an account stated, it being necessary that the minds of both parties must meet and concur. *Lockwood v. Thorne*, 18 N. Y. 286.

An account which is not rendered for the purpose of asserting a claim or of establishing the balance due thereby cannot by acquiescence become an account stated. *Harvey v. West-Side Elev. R. Co.* supra

b. Form of statement.

The fact that the account rendered begins with a balance brought forward from other accounts will not prevent the application of the rule. *Union Bank v. Knapp*, 3 Pick. 96, 15 Am. Dec. 181; *Dows v. Duffee*, 10 Barb. 213; *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086.

The rule is applicable to an account rendered, notwithstanding it has at the bottom thereof the initials E. & O. E.,—errors and omissions excepted. *Fleischner v. Kubli*, supra; *Kent v. Highleyman*, 28 Mo. App. 614.

The action of a saloon keeper in retaining without objection a pass book in which an account of daily deliveries of beer was kept, the book being taken to the brewery at the end of each month to be balanced, tends to establish an admission of its correctness. *F. J. Dewes Brewery Co. v. Kerwin*, 107 Ill. App. 620.

The rule was also applied to a pass book in which a merchant kept an account with his customer, in *Ruch v. Fricke*, 28 Pa. 241; to a pass book kept by an employee in which entries were made from time to

time by the employer's bookkeeper, in *Burke v. Wolfe*, 6 Jones & S. 263; and to a pass book in which transactions between a broker and his customer were entered, in *Marye v. Strouse*, 6 Sawy. 204, 5 Fed. 483.

And the following cases sustain the proposition that the entry of the debits and credits in a depositor's pass book by a banking institution, striking a balance, and then delivering the book to the customer with his canceled checks, constitutes a rendition of account, so that the retention of the book so balanced by the customer for an unreasonable time, without objection to the account as rendered, will constitute an account stated: *Pauly v. Pauly*, 107 Cal. 8, 48 Am. St. Rep. 98, 40 Pac. 29; *Peddicord v. Connard*, 85 Ill. 102; *Benton County Bank v. Walker*, 85 Iowa, 728, 51 N. W. 241; *Schoonover v. Osborne Bros.* 108 Iowa, 453, 79 N. W. 263; *Hardy v. Chesapeake Bank*, 51 Md. 502, 34 Am. Rep. 325; *Shepard v. Bank of State*, 15 Mo. 143; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173; *Farry v. Farmers' & M. Bank* (N. J. Eq.) 58 Atl. 305; *Weisser v. Denison*, 10 N. Y. 76, 61 Am. Dec. 731; *Welsh v. German American Bank*, 73 N. Y. 424, 29 Am. Rep. 175; *Frank v. Chemical Nat. Bank*, 84 N. Y. 213, 38 Am. Rep. 501; *Shipman v. Bank of State*, 126 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371; *Hutchinson v. Market Bank*, 48 Barb. 302; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956, 1 N. Y. Supp. 139; *Clark v. Mechanics' Nat. Bank*, 11 Daly, 239; *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109; *Craighead v. State Bank*, 7 Yerg. 399; *Williamson v. Williamson*, L. R. 7 Eq. 542.

In *Leather Mfrs. Nat. Bank v. Morgan*, 117 U. S. 96, 29 L. ed. 811, 6 Sup. Ct. Rep. 657, which was an action by a bank depositor to recover the amount which the bank had paid out on forged checks, the court said it was a suit by the depositor in effect to falsify a stated account to the injury of the bank; but the case is not decided on the principle of account stated, but upon that of estoppel and the general rules governing the relations of bank and depositor.

But in *McGraw v. Trader's Nat. Bank*, 64 W. Va. 509, 63 S. E. 398, it was held that while the rule may be applicable as between merchants and principal and agent with mutual accounts, it is not as a general proposition applicable to transactions between banker and customer.

In *Ex parte Randleson*, 2 Deacon & Ch. 534, it was said that a banker's pass book delivered to a customer, in which the entries were on one side only, is not evidence of a settled account between the parties, although the customer keeps the book without making any objection to the entries contained in it.

In *Mosse v. Salt*, 32 Beav. 269, and *Clancarty v. Latouche*, 1 Ball. & B. 428, it was held that acquiescence in banker's balances does not amount to a statement of account.

IV. *Persons between whom the rule applies.*

a. *In general.*

The earlier rule in law upon the subject of accounts stated was that it was applicable to merchants only; but the needs of modern business have so enlarged it that it may be properly applied to all classes of business men. *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086; *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84; *Nodine v. First Nat. Bank*, 41 Or. 386, 68 Pac. 1109.

In *Shepard v. Bank of State*, 15 Mo. 143, it is said there is no reason why the doctrine should not prevail between any persons with whom are accounts current, or accounts in transactions in the ordinary course of business. And see, to the same effect, *Brown v. Kimmel*, 67 Mo. 430.

In all cases where the relation of debtor and creditor exists, an account rendered, and not objected to within a reasonable time, is to be regarded as at least *prima facie* correct. *Missouri P. R. Co. v. Palmer*, 55 Neb. 559, 76 N. W. 169.

In *Ault v. Interstate Sav. & L. Asso.* 15 Wash. 627, 47 Pac. 13, it is said: "The old decisions to the effect that this rule applied only to transactions between merchants have become obsolete, and it is now held to apply to all classes, uninfluenced by their relation to each other, except that such relation will be taken into consideration in determining as to what is a reasonable time within which a failure to object will be held to have amounted to a consent that the account is correctly stated."

But in *Rich v. Eldredge*, 42 N. H. 153, it is said that while the rule that where an account transmitted to a debtor is not objected to by him, it is, after the lapse of a reasonable time within which to communicate with his creditor, deemed an account stated, is not applicable in cases of persons who are not merchants, yet some presumption of assent to the correctness of an account rendered, from the silence and acquiescence of the party, without making any objection after a reasonable opportunity has elapsed for its examination and a reasonable time for objecting, arises with more or less force in the case of all persons who can be properly regarded as men of business, considering the nature of their business and education, their local situation, and other circumstances, such presumptions applying with most force in cities and being slightly regarded in the country.

The principle of account stated was applied in *McCulloch v. Judd*, 20 Ala. 703, where the debtor came to the office of an attorney in whose hands a number of accounts had been placed for collection, and, after examining the one against him, made no objection to it.

Where an author receives from a publisher a statement of his account, and promises to examine it and correct it, he will become liable upon it as an account stated, if he retains it for several weeks without objection. *L.R.A. (N.S.)*.

jection, and then gives an acceptance for the amount. *Weed v. Dyer*, 53 Ark. 155, 13 S. W. 592.

The rule is applied not only to accounts of matters within the peculiar knowledge of the party receiving the account,—as of goods furnished to him,—but to the general account between merchants, to an agent for selling and leasing lands and receiving the consideration moneys and the rents, and to accounts of sales rendered by commission merchants. *Dows v. Durfee*, 10 Barb. 213.

So, also, as between a factor or commission merchant and his principal. *Harris v. Ely*, *Selden's Notes*, 37; *Ledoux v. Porche*, 12 Rob. (La.) 543; *Sentell v. Kennedy*, 29 La. Ann. 679; *Flower v. O'Bannon*, 43 La. Ann. 1042, 10 So. 376; *Smedley v. Williams*, 1 Pars. Sel. Eq. Cas. 359; *Bevan v. Cullen*, 7 Pa. 281; *Thompson v. Fisher*, 13 Pa. 310; *Hall v. Sloan*, 9 Phila. 138; *Talcott v. Chew*, 27 Fed. 273.

So, also, as between attorney and client. *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84.

The rule is applicable to a private corporate body engaged in trade and conducting its affairs through the instrumentality of officers and agents, as well as individual natural persons carrying on business in the same way. *Bradley v. Richardson*, 23 Vt. 720.

In *Reading F. Ins. & T. Co. v. Reading Iron Works*, 137 Pa. 282, 21 Atl. 169, 170, it was held that where accounts were furnished annually by a corporation to its stockholders, showing the state of their accounts with the company, a stockholder who annually for eight years received such a statement without intimating that it was incorrect must be considered as consenting to its accuracy.

The rule applies to an account rendered by auctioneers to their employers. *Townes v. Birchett*, 12 Leigh, 173.

As to the applicability of the rule in the case of banker and depositor, see cases under heading, "Form of statement," *supra*.

b. *As against minor.*

An account rendered to a minor cannot become an account stated upon his retaining it without objection, as he cannot be bound by any implied assent. *Dunavant v. Fields*, 68 Ark. 534, 60 S. W. 420. And see also *Southwick v. Southwick*, *infra*.

c. *As against executor or administrator.*

The mere silence of an administrator or failure to object when an account against his intestate is presented to him is not sufficient to authorize the inference that he has thereby stated the account, and so relieved the claimant from establishing it in the usual way; or to put upon the estate the burden of affirmatively establishing mistake or error. *Withers v. Sandlin*, 44 Fla. 253, 32 So. 820.

In *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780, it is held that the presentation

of a claim against a decedent's estate, followed by inaction, the executor or administrator neither admitting nor rejecting it, does not bind the estate as upon an account stated, the court saying: "But the doctrine has, from the nature of the case, a much more restricted application when the plaintiff relies upon the silence of an executor to whom a claim against the estate he represents has been presented. He is not presumed to be personally cognizant of the transactions out of which the claim arose. It would subject the estates of decedents to great danger if mere silence of the executor should be regarded as an admission of a claim presented, and relieve the claimant from establishing it in the ordinary way, and put upon the estate the burden of affirmatively establishing mistake or error. The office of executor or administrator is one exceedingly necessary and useful, and must, in frequent instances, be assumed by persons unskilled in legal matters; and to infer from mere silence on the part of the executor or administrator an agreement that the claim was just, and a promise to pay it, would often contradict the real intention and tend to subject estates of decedents to the payment of unfounded claims."

d. As between husband and wife.

In *Southwick v. Southwick*, 1 Sweeney, 47, it was held that the rule under discussion should not be applied to married women or infants in cases arising between them and their husbands or guardians, because in those cases the parties do not stand equal, and are not presumed to have equal knowledge of their respective rights or of the true state of the accounts.

e. As between persons in confidential relations.

The rule is not applicable in the case of an accounting trustee, for the reason on which it rests is not present. The *cestui que trust* has not the means of verifying the account within his reach, except as to such items as may relate to himself personally; and his failure to object is fairly referable to his want of knowledge. *Ahl's Appeal*, 129 Pa. 26, 18 Atl. 471.

In *Vanuxen v. New York L. Ins. Co.* 122 Fed. 109, it was held that accounts for money collected by one bound to account therefor do not belong to the class contemplated by the rule, as in such case the party receiving the account is not in a position to ascertain its correctness.

In *Mellon v. Campbell*, 11 Pa. 415, it was held that an account of rent received by an agent, in which commissions were charged, could not by acquiescence become an account stated.

But in *Powell v. Powell*, 10 Ala. 900, it was intimated that an account stated by a trustee to his *cestuis qui trustent*, who were *sui juris*, and acquiesced in for some time, would bind them, at least so far as to cast on them the burden to surcharge and falsify it.

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f. As between partners.

"The doctrine, as between debtor and creditor, of an implied promise, resulting from the preparation and rendition of an account by one party, which is received and retained by the other in silence, cannot reasonably be applied to a partnership account. In the one case, the account is rendered for the specific purpose of informing the debtor of the creditor's demand and of obtaining payment. It is expected that such an account will, with reasonable promptitude, be scanned, and either paid if found to be accurate, or disputed if found to be inaccurate. If it be retained for a considerable period without objection, the inference may properly be drawn that the debtor has no objection to offer, and that he intends to pay the balance. An entirely different attitude is assumed with regard to a partnership account. That is simply one partner's summary of the partnership dealings and his version of the partnership status. The receipt of such an account suggests no immediate demand. The implication is that it is offered merely as a basis for subsequent liquidation. It has no element of finality. It leaves the person who receives it entirely free to seek further information before questioning his partner's figures." *Hughes v. Smither*, 23 App. Div. 590, 49 N. Y. Supp. 115 (affirmed without opinion in 163 N. Y. 553, 57 N. E. 1112).

In *Killam v. Preston*, 4 Watts & S. 14, it was held that an account delivered by one partner to another, and retained for some time without objection, would not, of itself, raise a sufficient legal presumption that the accounts had been settled between the parties, so as to support an action of assumpsit.

And in *Geyer v. Carpenter*, 15 Phila. 172, it was held that a liquidating partner could not maintain assumpsit against his former partner upon a statement of account between them, which the other merely took and retained without comment or objection.

There is, however, no inconsistency between these cases and such cases as *Atwater v. Fowler*, 1 Edw. Ch. 417, or *Keys v. Baldwin*, 10 Ohio Dec. Reprint, 268, in which equitable relief is denied to an acquiescent partner upon the ground of laches.

V. Reasonable time as question for court or jury.

The Federal courts, and some others which have followed their lead, hold that what is a reasonable time is, where the facts are clear, always a question exclusively for the court. Where the proofs are conflicting, the question is a mixed one of law and fact. *Toland v. Sprague*, 12 Pet. 300, 9 L. ed. 1093; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *Standard Oil Co. v. Van Etten*, 107 U. S. 325, 27 L. ed. 319, 1 Sup. Ct. Rep. 178; *McLaughlin v. United States*, 36 Ct. Cl. 138, s. c. on subsequent appeal, 37 Ct. Cl. 150; *Talcott v. Chew*, 28 Fed. 273; *Edwards v. Hoeflinghoff*, 38 Fed. 635; *Charlotte Oil & Fertilizer Co. v. Hartog*, 29 C. C. A. 56, 42 U. S. App. 716, 85 Fed. 150;

Long-Bell Lumber Co. v. Stump, 30 C. C. A. 260, 57 U. S. App. 546, 86 Fed. 574; Daytona Bridge Co. v. Bond, 47 Fla. 136, 38 So. 445; Martyn v. Arnold, 36 Fla. 446, 18 So. 701; Brown v. Kimmel, 67 Mo. 430; McKeen v. Boatmen's Bank, 74 Mo. App. 281; Fleischner v. Kubli, 20 Or. 328, 25 Pac. 1086; Howell v. Johnson, 38 Or. 571, 64 Pac. 659; Crawford v. Hutchinson, 38 Or. 578, 65 Pac. 84; Nodine v. First Nat. Bank, 41 Or. 386, 68 Pac. 1109; Ault v. Interstate Sav. & L. Asso. 15 Wash. 627, 47 Pac. 13.

In Ottoby v. Winsor, 137 Mo. App. 272, 119 S. W. 40, it is said to be a question for the jury whether an account rendered was retained by the debtor without objection a sufficient length of time to give it the status of an account stated; but the context plainly shows that the opposite was meant.

In Cusick v. Boyne, 1 Cal. App. 643, 82 Pac. 935, an instruction that if the jury should find from the evidence that a statement of account had been rendered, and that more than three months had elapsed thereafter without any objection being made by defendant, the account became an account stated, the items of which were no longer open to inquiry, in the absence of allegation and proof of fraud or mistake, was held not to be open to objection, either as incorrectly stating the law or as being a charge in respect to a matter of fact.

On the other hand, it has been held in several jurisdictions that the question is one of fact.

Thus, in Lewis v. Utah Constr. Co. 10 Idaho, 214, 77 Pac. 336, an instruction that it is for the jury to determine what is a reasonable time within which an objection to an account rendered should be made, under all the circumstances, considering the nature of the business, the distance of the parties from each other, and the means of communication between them, was held correctly to state the law.

Whether silence of a party to whom an account has been rendered amounts under the circumstances to an admission of its correctness, and whether the delay in objecting thereto was unreasonable, are questions of fact for the jury. Moran v. Gordon, 33 Ill. App. 46.

Whether there was such an acquiescence by lapse of time as that there was an account stated, and, if there was, whether the items of the account were correct, are questions for the jury. Hollenbeck v. Ristine, 105 Iowa, 488, 67 Am. St. Rep. 306, 75 N. W. 355.

What is a reasonable time within which objection must be made to an account rendered is a question for the jury. Peter v. Thickstun, 51 Mich. 589, 17 N. W. 68; Austin v. Ricker, 61 N. H. 97.

As a rule, the question as to what is a reasonable time within which to object to an account rendered is for the jury. Little v. McClain, 134 App. Div. 197, 118 N. Y. Supp. 916.

VI. Length of time necessary.

What is a reasonable time within which

objection must be made to an account rendered, in order to preclude a presumption of acquiescence therein, will depend upon the relation of the parties and the usual course of their business. Darby v. Las-trapes, 28 La. Ann. 605; Freeman v. Howell, 4 La. Ann. 196, 50 Am. Dec. 561; Lockwood v. Thorne, 12 Barb. 487; Harris v. Ely, Selden's Notes, 37; Howell v. Johnson, 38 Or. 571, 64 Pac. 659; Porter v. Patterson, 15 Pa. 229; Colket v. Ellis, 1 W. N. C. 246; Ault v. Interstate Sav. & L. Asso. 15 Wash. 627, 47 Pac. 13; Bainbridge v. Wilcocks, Baldw. 536, Fed. Cas. No. 755.

What will amount to a stated account from the presumed acquiescence of the parties, arising from a lapse of time and their failure to object to the same within a reasonable period, must depend upon circumstances to be adjudged of by the nature of the transaction and the habits of business and courses of trade. White v. Hampton, 10 Iowa, 238.

Where an account was made up and presented to one who went over it and made no objection to it from the time it was presented in August until after suit was brought, which was on November 25th, there was a sufficient acquiescence from which to imply an assent. Hendy v. March, 75 Cal. 566, 17 Pac. 702.

In Freas v. Truitt, 2 Colo. 489, it was held no error to give an instruction that if defendant, after having received accounts rendered, allowed several mails to pass after he examined the same, without making any objection to their correctness, then the plaintiff had a right to infer that the defendant admitted the correctness of the accounts.

One who has retained an account rendered in the month of February till the fall of the following year, without objection to the prices charged therein for supplies, or without having questioned its correctness, must be held to have waived the right to make such objection. Dudoit v. Spencer, 2 Haw. 493.

Leaving an account with the defendant five years before trial, and repeatedly importuning him for payment, he at no time making any objection to any item in the account and finally going out of business, is sufficient to justify a finding of account stated. House v. Beak, 43 Ill. App. 615.

In Litcher & M. Lumber Co. v. Kells, 108 Ill. App. 156, evidence showing that statements were sent by mail from time to time during a period of three years, which were received and retained without objection for some three years longer, was held sufficient to justify a court in finding in favor of the plaintiff as on an account stated.

In J. S. Phelps & Co. v. Plum, 17 Ky. L. Rep. 817, 32 S. W. 753, where the employer of several agents to solicit shipments of tobacco, the agents to agree among themselves what statements should be credited to each, delivered to one of them in the presence of the others a statement showing the amount of commissions due him, it was held that his failure for nearly four and one-half years to make any objection thereto

should be treated not only as an estoppel, but as conclusive evidence of the correctness of the account.

In *Union Bank v. Planters' Bank*, 9 Gill & J. 439, 31 Am. Dec. 113, where it appeared that no objection had been made to an account rendered by one bank to another for a period of over five years, and that it was the usage of the banks to notify one another at once of any discrepancy in the account, it was held error to refuse to instruct the jury that they were at liberty to infer from the silence of the defendants their acquiescence in the correctness of the account rendered.

In *American Nat. Bank v. Bushey*, 45 Mich. 135, 7 N. W. 725, it was held that where a depositor was notified by a bank of a balance in his favor, and without inquiry or objection drew out the admitted balance, and for nearly two years made no claim of error in his account, there was such a presumption in favor of its correctness as would throw upon the depositor the burden of impeaching it.

In *Raub v. Nisbett*, 118 Mich. 248, 76 N. W. 393, it was held that where an account rendered was retained without objection during a period of nearly three years, nearly one year of which both parties were residents of the same town, there was a strong presumption of the accuracy of the account, which, when taken in connection with the fact that no distinct error in the account was shown, should be held controlling.

In *I. L. Elwood Mfg. Co. v. Betcher*, 72 Minn. 103, 75 N. W. 113, where it appeared that defendant kept the account rendered at the time of the sale, without questioning its correctness for nearly one year, it was held to be evident that the objection thereto was not made within a reasonable time.

In *Shepard v. Bank of State*, 15 Mo. 143, it was held that where the account of a depositor in a bank was shown to have been balanced from time to time during the period of four years; that a memorandum had been made by the parties of the fact of the correctness of the account; and that no objection had been made to its correctness for more than three years after the account was closed, the court below was justified in finding that an account had been stated.

In *Brown v. Kimmel*, 67 Mo. 430, it was held that where plaintiff testified that he mailed an account to defendant in December, that no objection had been made there to until the following May, about a week before the trial, and that plaintiff and defendant saw each other three or four times a week, it was error to sustain a demurrer to the evidence as insufficient to establish the account.

In *Mulford v. Cesar*, 53 Mo. App. 263, it was held that evidence of defendant's silence for a period of two weeks after receiving an account, of his several payments on account thereafter, and of his statement that he would pay as he could, and that he owed the balance, all tended to show an account stated.

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In *Kenneth Invest. Co. v. National Bank*, 103 Mo. App. 613, 77 S. W. 1002, it is said that while ten days may not be arbitrarily fixed in every case as the time within which a depositor is bound to examine his bank book after it has been balanced, it is a reasonable time in which to make the examination, when the depositor resides in the same town or city in which the bank is located.

In *Rich v. Eldredge*, 42 N. H. 153, it was held not to be improper to instruct the jury that if they should find that the creditor exhibited to the debtor his books, and presented to him a detailed statement of the accounts between them, and that this statement was received and examined by the debtor without objection, and retained by him for a year and a half afterward, they might find that he had assented to the correctness of the account.

Between merchants at home, an account which has been presented, and no objection made thereto after the lapse of several posts, is treated under ordinary circumstances as being by acquiescence a stated account. *Brown v. Vandyke*, 8 N. J. Eq. 795, 55 Am. Dec. 250.

In *Atwater v. Fowler*, 1 Edw. Ch. 417, it was held that if a partner in a single partnership transaction receives from the other partner a statement of accounts between them, and is silent for thirteen years afterward, it amounts to an acquiescence.

In *Murray v. Toland*, 3 Johns. Ch. 569, it was held that chancery would not decree an account to be taken after the lapse of five years from the rendition of an account to which no objection was offered, but would leave the party to his remedy at law.

In *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81, it is said that the lapse of nine months after receiving an account, before the commencement of the action, there having been made in the meantime no objection or complaint, would have been abundant to authorize the legal inference of acquiescence; particularly as the proximity of the parties to each other secured them a daily opportunity of communication by mail.

In *Harley v. Eleventh Ward Bank*, 7 Daly, 476, affirmed without opinion in 76 N. Y. 618, it was held that where a bank received a check for collection and forwarded it to its correspondent, from which it received a notification of its payment, and credited the amount to its customer, but was afterward informed that the check was not paid, and attempted to charge it back to the customer, who would not permit it, and accounts were then rendered for two years without any mention of it,—there was an account stated, which precluded the bank from afterward looking to the customer for the amount.

In *Knickerbocker v. Gould*, 115 N. Y. 533, 22 N. E. 573, where brokers on December 26th mailed an account to a customer with notice that if it was not paid by December 31st they would bring suit, and suit was brought on January 14th, it was held that the account had become stated.

Keeping the rendered account three or

four years after receiving it without objection will make it a stated account. *Bruen v. Hone*, 2 Barb. 586.

In *Dows v. Durfee*, 10 Barb. 213, where no objection was shown to have been made to an account as rendered, except by defending the suit thereon commenced about two months thereafter, it was held that the referee was justified in treating such account as an account stated.

In *Towsley v. Denison*, 45 Barb. 490, where it appeared that an account rendered was retained without objection for nearly six years before the commencement of the action, it was held that the referee should have held the account rendered a stated account.

In *Hutchinson v. Market Bank*, 48 Barb. 302, where a bank depositor failed to object for nearly six years after a statement of account, to a failure to allow him a certain credit, it was held to be so plainly a stated account that it was not under the evidence a question proper for consideration by the jury, whether the delay was sufficiently accounted for.

In *Donald v. Gardner*, 44 App. Div. 235, 60 N. Y. Supp. 668, where it appeared that an account rendered had been retained without objection from July 30th till September 11th, when the action was commenced, it was held to be no error to refuse defendant's request to go to the jury on the question as to whether the account had been stated definitely between the parties.

An account rendered and detained without objection for more than a month cannot be said as a matter of law not to have been assented to. *Little v. McClain*, 134 App. Div. 197, 118 N. Y. Supp. 916.

In *Dickerson v. Scheuer*, 1 N. Y. Supp. 419, where it appeared that a bill rendered at least nine months before was never disputed, though payment thereof had been often requested, it was held that there was sufficient evidence to call for the submission of the case to the jury as one upon an account stated.

Where the account was rendered to the defendant, and no objection was ever made to it in respect to the amount or otherwise prior to the commencement of the action, which was more than a year, and the trial was had over two years, after such presentation, the account was properly regarded as an account stated. *Case v. Hotchkiss*, 37 How. Pr. 283.

Failure to object to an account during a period of three months will be regarded as an admission of its correctness by the party charged. *Hawkins v. Long*, 74 N. C. 781.

In *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086, where an account was rendered nearly six months before any objections were heard on the subject, and the party charged made a remittance to be applied on account after its rendition, without suggesting any objections to the account, it was held that the assent of the party charged to the account as rendered must be presumed, and that it was the duty of the court to inform the jury that such was the law.

In *Nodine v. First Nat. Bank*, 41 Or. 386, 29 L.R.A. (N.S.)

68 Pac. 1109, where it appeared that when a depositor's bank book was first balanced, he insisted that the bank had failed to give him certain credits, but the officers of the bank contended that he was mistaken and refused to make any change in the account; that for the succeeding ten years the bank continued to render him monthly or bi-monthly statements of his account, which were received and retained by him without objection, and that he retained without objection for nearly six years a statement rendered when his account was closed,—it was held that the account must be regarded as an account stated.

In *Gorman v. McGowan*, 44 Or. 597, 76 Pac. 769, where it appeared that the defendant had kept the accounts rendered for a full month without apparent objection thereto, and that no such objection was made or offset claimed until he was drawn upon, it was held that there was sufficient legal evidence upon which to base a finding for an account stated.

In *McMullin v. Reid*, 213 Pa. 338, 62 Atl. 924, where it appeared that a statement was sent by a stock broker to his customer, with a demand for payment and notice that collateral held by the broker would be sold in fifteen days, and that the defendant had made no answer to the statement when suit was brought, twenty-five days thereafter, it was held that there was evidence from which the jury were warranted in finding an account stated.

In *Hall v. Sloan*, 9 Phila. 138, it was held that where a commission merchant rendered an account of sales to his consignor, who drew upon him for the proceeds, the silence of the consignor for more than six months thereafter raised a legal presumption of his assent.

In *Colket v. Ellis*, 1 W. N. C. 246, it was held that a delay of four months in objecting to an account rendered, on which were credited the proceeds of certain collateral, consisting of stock the market value of which had greatly risen in the meantime, was unreasonable.

In *Pratt v. Weyman*, 1 M'Cord, Eq. 156, it is said that in some cases where an account is sent by one merchant to another, with a balance stated against him, and he keeps it by him for two or three years, it is considered as a settled account between them.

Equity will not compel an accounting where a statement of account had been retained without the least objection by plaintiff's ancestor for ten years, after the lapse of twenty years more since his decease. *Tharp v. Tharp*, 15 Vt. 105.

An account current sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated, and throws the burden of proof upon him who received and kept it without objection. *Freeland v. Heron*, 7 Cranch, 147, 3 L. ed. 297.

In *Baker v. Biddle*, Baldw. 394, Fed. Cas. No. 764, it was held that equity would not compel an accounting ten years after the

rendition of an account which had been acquiesced in.

In *White v. Macon*, 3 Cranch, C. C. 250, Fed. Cas. No. 17,553, the court instructed the jury that if they believed from the evidence that defendant received an account rendered about three years before the commencement of the suit, and there was no evidence that he objected to its amount, they might infer that it was correct.

In *Marye v. Strouse*, 6 Sawy. 204, 5 Fed. 483, where it appeared that an account rendered had been retained more than a year without objection, it was held to warrant fully a presumption of acquiescence therein.

In *Allen-West Commission Co. v. Patillo*, 33 C. C. A. 194, 61 U. S. App. 94, 90 Fed. 628, it was held that a failure for two years to object to a statement of account rendered by a factor, which included a charge for commissions on property not shipped to him, but on which he claimed commissions under his contract, rendered the account a stated one.

In *Tickel v. Short*, 2 Ves. Sr. 239, it was said by the lord chancellor: "If one merchant sends an account current to another in a different country, on which a balance is made due to himself; the other keeps it by about two years without objection; the rule of this court and of merchants is that it is considered as a stated account."

In *Sherman v. Sherman*, 2 Vern. 276, it was held that equity will not entertain a bill for an accounting, where there has been an acquiescence for several years after the dealings ceased, the court saying: "Amongst merchants it is looked upon as an allowance of an account current, if the merchant that receives it does not object against it in a second or a third post."

In *Holstcomb v. Rivers*, 1 Ch. Cas. 127, it was held, where fourteen years had elapsed since an account was rendered, and there was no clear proof of any exception to it until two years after its rendition, although a request was made that any exception should be immediately taken, "that the account should not be raveled into."

In *Parkinson v. Hanbury*, 2 DeG. J. & S. 450, it was held that where an account was delivered to a person entitled to take out administration, who raised questions upon it which were answered at the time, and she became administratrix seven years afterwards, and filed her bill for an accounting seven years after taking out administration, equity would not entertain the bill.

On the other hand, in the following cases lapse of time was held under the circumstances to be insufficient to raise any presumption of assent:

A retention for thirty-five days of an account involving tax transactions running through nine consecutive years, involving in the aggregate between six and seven hundred thousand dollars, is insufficient to raise a presumption of acquiescence in its correctness. *Lott v. Mobile County*, 79 Ala. 69.

In *Follansbee v. Parker*, 70 Ill. 11, it was said a failure to object to an account 29 L.R.A. (N.S.)

rendered until nearly three months thereafter would not preclude defendant from disputing it, where he was in ignorance of the real facts.

In *McKay v. Myers*, 168 Mass. 312, 47 N. E. 98, it was held that a silence of eighteen months after receiving an account did not preclude the recovery of an amount shown to have been credited thereon without authority.

In *Ault v. Interstate Sav. & L. Asso.* 15 Wash. 627, 47 Pac. 13, where it appeared that an attorney mailed to his client a statement of account, to which the client replied about twenty days later by calling for information in reference thereto, it was held that in view of the course of business between the parties such delay was not, in itself, so unreasonable as to warrant the assumption that the account had been approved.

VII. Sufficiency of objection.

Where a person to whom an account has been rendered objects only to a single item, this is an implied admission of the correctness of the rest of the account. *Burns v. Campbell*, 71 Ala. 271; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *Joseph v. Southwark Foundry & Mach. Co.* 99 Ala. 47, 10 So. 327; *Power v. Root*, 3 E. D. Smith, 70; *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *McLaughlin v. United States*, 36 Ct. Cl. 138.

As to the effect, generally, of a dispute as to certain items of an account upon assent to other items, reference may be made to a note in 7 L.R.A. (N.S.) 924.

An account rendered may be regarded as stated so far as the quantity therein charged is concerned, where the only objection made thereto was in regard to the price. *Dakin v. Walton*, 85 Hun. 561, 33 N. Y. Supp. 203.

While it is true that when one disclaims all liability upon an account rendered, he is not bound to examine all the items of the account, or be taken to have assented to them if he does not object, this disclaimer must be something more than a mental operation on the part of the person receiving the account. If he is to receive the benefit of this rule, he must express his disclaimer of any liability, and then, as the greater includes the less, he is not obliged to object to specific items. *Little v. McClain*, 134 App. Div. 197, 118 N. Y. Supp. 916.

A refusal to pay or settle in accordance with an account is effective in preventing a raising of an implied presumption of its correctness because of its retention. *Peoria Grape Sugar Co. v. Turney*, 58 Ill. App. 563.

Where the party to whom a statement of account has been rendered objects that the charge should not be against him personally, but against a corporation of which he is an officer, it cannot be regarded as an account stated. *Love v. Ramsey*, 139 Mich. 47, 102 N. W. 279.

In *Dudley v. Geauga Iron Co.* 13 Ohio

St. 168, where it appeared that certain items charged in accounts rendered from year to year were objected to at the time and thereafter, and at a time when other items of account were adjusted between the parties it was agreed that the giving of a receipt should not operate to prevent a contest of the validity of the charges so disputed, it was held that the account so rendered did not become as to the disputed items an account stated.

In *Taber Lumber Co. v. O'Neal*, 87 C. C. A. 498, 160 Fed. 596, it was held that where a claim or charge was made by letter, to which objection was made by letter dated four days later, there could be no presumption of acquiescence.

VIII. Applicability of rule.

a. Where account barred by statute of limitations.

In *Bryan v. Ware*, 20 Ala. 687, the rule was held not to apply where the account rendered had become barred by the statute of limitations, the court saying: "Where a man is present and states an account with another, with whom he has had dealings, both parties, of course, admit expressly the correctness of the several items and the balance then struck, and if the account was then barred by the statute of limitations, doubtless such a stated account would remove the bar. But are we to carry this doctrine to cases where an account made up by one man and sent to another at a distance is retained by the latter for a length of time without objection? We have been referred to no case, and upon principle we hold the thing not to be tenable. If you infer the original correctness of the account from such a state of facts, and the authorities seem to counteract that idea, it is going, in my opinion, full far enough, if not too far, except in special cases. But to infer from such a state of facts not only the original correctness of an account barred by the statute, but also to go on piling inference on inference, and next infer a present willingness to pay such account, would be wholly inconsistent with the object and end of the statute of limitations, which is said to be to give repose against stale demands."

And in *Schutz v. Morette*, 146 N. Y. 137, 40 N. E. 780, it was held that, even assuming the rule that an account rendered becomes by acquiescence an account stated to be applicable to the case of an account presented to an executor or administrator, no inference from his silence can be drawn, where the account presented was barred by the statute of limitations.

b. Where no liability exists.

It is uniformly held that where there is no pre-existing debt or liability, the rendering of an account to one who keeps it without objection does not make an account stated.

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In *National Cycle Mfg. Co. v. San Diego Cycle Co.* 135 Cal. 335, 67 Pac. 280, it was held that a statement of account rendered to a member of a partnership to whom the other member had turned over the firm assets and certain individual assets, in which an individual indebtedness of the retiring partner appeared as a debt due from the firm, the failure to object thereto did not render the party receiving it liable for the individual indebtedness.

In *Sonnenschein v. Max Malter Co.* 144 Ill. App. 183, it was held improper to give an instruction to the effect that retention of an account rendered, without objection within a reasonable time, is evidence of an account stated, where the issue was whether the plaintiff had sold any goods to the defendant.

The mere sending and retention of an account for services rendered will not give a cause of action, unless an employment to render the services mentioned in the action is also established. *Kellogg v. Rowland*, 40 App. Div. 416, 57 N. Y. Supp. 1064.

An account stated cannot be based on bills made out to a defendant long after the sale of goods to another party, merely because he retained them without objection. *Brush & S. Co. v. Ross*, 51 Misc. 44, 99 N. Y. Supp. 796.

Where there was no account between the parties, nor had there been any dealing, an account stated cannot be inferred from failure to object to a bill rendered. The doctrine cannot be made the instrument to create *per se* a liability where none before existed. *Austin v. Wilson*, 33 N. Y. S. R. 503, 11 N. Y. Supp. 565.

The sending of statements of account to one who did not incur the debt will not render him liable therefor. *William Allen & Co. v. Somerset Hotel Co.* 88 N. Y. Supp. 944.

Retention by one person of a statement of account in which he is charged with items of indebtedness incurred by a third person, for which he was not responsible, will not make the account conclusive against him as an account stated. *Spangler v. Springer*, 22 Pa. 454.

The retention without objection of a statement rendered will not make it an account stated where there was no liability existing on the part of the parties sought to be charged. *Davis v. Seattle Nat. Bank*, 19 Wash. 65, 52 Pac. 526.

Where there is no pre-existing debt or liability, the rendering of an account to one who keeps it without objection does not make an account stated. *Cooper v. Upton*, 60 W. Va. 648, 64 S. E. 523.

In *Cobb v. Arundell*, 26 Wis. 553, it was held that where the party sought to be charged had declined to receive the goods forming the subject of the account, saying that he had never ordered them, and only allowed them to be stored in his warehouse for the convenience of the seller's agent, his failure to protest against a bill thereafter rendered could not make him liable as upon an account stated.

In *Engfer v. Roemer*, 71 Wis. 11, 36 N. W. 618, it was held that where the owner of premises informed the builder of a barn thereon, when he presented his bill, that he must look to the tenant for his pay for the barn, because she did not authorize it to be built and did not want it, the mere fact that she retained the bill for a long time would not warrant the inference that she assented to it or acknowledged her liability to pay for the barn.

c. Where parties have previously disagreed.

The rule does not apply if, when the account is sent, the parties already disagree, so that assent from silence cannot reasonably be inferred. *Goodhart v. Rastert*, 7 Ohio N. P. 534; *Edwards v. Hoeffinghoff*, 38 Fed. 635.

In *Columbia River Packing Co. v. Talant*, 133 Fed. 990, it was held that where liability had theretofore been denied upon the ground that any indebtedness which might exist had already been satisfied, the rule did not apply.

In *Quincey v. White*, 63 N. Y. 370, it is intimated that to give an account delivered the force of an account stated because of silence on the part of the party receiving it, the circumstances must be such as to justify an inference of assent upon his part to its correctness. Where he has disclaimed all liability upon the account, he is not bound to examine the items upon its delivery to him, and his omission to object will not be taken as an admission of their correctness.

In *Jacobs v. Cohn*, 46 Misc. 115, 91 N. Y. Supp. 339, it was held that where the alleged debtor had in a personal interview denied any liability, his silence with regard to an account thereafter sent him could not be regarded as an admission on his part of its correctness.

Where all liability is disputed, the retention of a bill without any answer for several months cannot create an obligation. *Benedict v. Jennings*, 47 Misc. 134, 93 N. Y. Supp. 464.

In *Hall v. Morrison*, 3 Bosw. 520, it was held that an account rendered did not become an account stated when, before it was rendered, the amount of the alleged balance was stated to the other party, who refused to accept it, and after it was rendered failed to acquiesce therein.

Nor does this rule apply where there is a dispute as to the construction of the contract under which the transactions mentioned in the account took place. *Howell v. Johnson*, 38 Or. 571, 64 Pac. 659.

d. Where special contract exists.

In *Kusterer Brewing Co. v. Friar*, 90 Mich. 190, 58 N. W. 52, it was held that where the defendants had agreed to pay a less price for beer than that charged, the mere rendering of a statement of account from time to time, and entries in a pass book, in which the beer was charged at a 29 L.R.A. (N.S.)

greater price, would not make an account stated, though no objection was made.

While bills rendered for lumber furnished under a contract may, if received and kept without objection, have the effect of accounts stated so far as the question of the quantities of lumber therein mentioned is concerned, they cannot have such effect as to prices which are controlled by the contract. *Robson v. Bohn*, 22 Minn. 410.

So, also, in *Valley Lumber Co. v. Smith*, 71 Wis. 304, 5 Am. St. Rep. 216, 37 N. W. 412, it was held that the principle has no application where the claim for which an account is rendered is the subject of a special contract.

e. Where earlier account has been rendered.

In *Cartwright v. Greene*, 47 Barb. 9, it was held that where a factor transmitted to his principal accounts of two different sales of the same goods, the principal, after having approved the first, was not bound to notice or object to the second at the peril of its being taken as a stated account and held to be binding upon him.

f. Miscellaneous.

The rule is applicable although the person sought to be charged may have an offset thereto arising out of some independent transaction. *Ware v. Manning*, 86 Ala. 233, 5 So. 682; *Filer v. Peebles*, 8 N. H. 226; *Crawford v. Hutchinson*, 38 Or. 578, 65 Pac. 84.

The rule is inapplicable to a claim for damages for breach of contract. *Charnley v. Sibley*, 20 C. C. A. 157, 34 U. S. App. 705, 73 Fed. 980.

The rule is inapplicable where the party retaining the account is unaware of his own interest therein,—as where the accounts between an illiterate grantor and the trustee of a trust created by him casually fell into the hands of a beneficiary of the trust, who examined them solely with a view of informing the grantor of their contents, and without being aware at the time that his own interests were involved in their accuracy. *Andrews v. Hobson*, 23 Ala. 219.

The rule that acquiescence in an account after its delivery, by failing to make objections thereto within a reasonable time, makes it an account stated, does not apply where a party renders an account under a mistake or misapprehension. *Polhemus v. Heiman*, 50 Cal. 438.

In *Miller v. Northern Bank*, 28 Miss. 81, it was held that where a statement of account was handed to the junior member of a firm, who stated that he would prefer not to settle it in the absence of the senior member, his not objecting thereto did not render the account a stated one, it appearing that he was not cognizant of the transaction.

In cases where the prices are not agreed upon, or where they are not fixed by the market, but depend solely upon personal services, the value of which is to be de-

terminated by the principle of *quantum meruit*, the rule in question does not necessarily prevail. *Burlingame v. Shelmire*, 59 Hun, 615, 35 N. Y. S. R. 161, 12 N. Y. Supp. 655.

IX. Operation of rule.

An account is to be considered as liquidated when rendered, if no objections are made to it within a reasonable period. *Shaw v. Oakey*, 3 Rob. (La.) 361; *Walden v. Sherburne*, 15 Johns. 409; *Beers v. Reynolds*, 12 Barb. 288; *Cooper v. Coates*, 21 Wall. 105, 22 L. ed. 481.

Receiving an account rendered without objection will not preclude a party from showing an unobserved error which had passed without notice by the common blunder of all parties. *Jones v. Dunn*, 3 Watts & S. 109.

And such retention will not prevent the correction of a clerical error. *Dudoit v. Spencer*, 2 Haw. 493.

Acquiescence in an account in which usurious interest is charged will not preclude the debtor from recovering such interest. *Keane v. Branden*, 12 La. Ann. 20.

The retention without objection of an account rendered will not estop the debtor from pleading the statute of limitations as a bar. *Verrier v. Guillou*, 97 Pa. 63.

But the debtor cannot, for the purpose of invoking the statute of limitations, claim that an account has become stated by his retention without objection of a statement of account sent to him; but he must show some word or act marking or implying that he assented to the account. *White v. Campbell*, 25 Mich. 463; *Payne v. Walker*, 26 Mich. 60.

Where the person charged has assented to the rendered account impliedly by his failure to object thereto, the creditor cannot thereafter elect to sue upon the items separately. *Marks v. Ballance*, 113 N. C. 28, 18 S. E. 75; *Copland v. American De Forest Wireless Teleg. Co.* 136 N. C. 11, 48 S. E. 501.

X. The presumption of correctness.

a. In general.

As in the case of an account which has become stated by express agreement of the parties, so also where assent is implied from a failure to object to an account rendered, the account is regarded as prima facie correct. See, *inter alia*, *Gooch v. Vaughan*, 92 N. C. 610; *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483; *McLaughlin v. United States*, 36 Ct. Cl. 138.

An account which has become a stated account by having been rendered to and received by one who made no objection thereto within a reasonable time is only prima facie evidence of the correctness of the items and of the liability of the party therefor, which may be repelled and overcome by the party sought to be charged upon it. *Daytona Bridge Co. v. Bond*, 47 Fla. 136, 36 So. 445.
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And it is error to charge that if an account presented is retained without objection for an unreasonable time, the law conclusively presumes that the account is correct. *Rice v. Schloss*, 90 Ala. 416, 7 So. 802.

In some cases the courts appear to have confused the presumption of acquiescence arising from a failure to object to an account rendered, with the presumption of correctness which attaches to an account stated, speaking of failure to object as evidence of correctness, rather than as evidence of assent.

Thus, in *Bailey v. Bensley*, 87 Ill. 556, it is said that an account rendered and unobjected to may be regarded as prima facie evidence of the correctness of the account.

So, also, in *Jones v. De Muth*, 137 Wis. 120, 118 N. W. 542, failure to object within a reasonable time to an account rendered is spoken of as prima facie evidence of correctness.

And in *Spangler v. Springer*, 22 Pa. 454, it is said that mere acquiescence in an account rendered is very slight evidence of its correctness.

And in *Verrier v. Guillou*, 97 Pa. 63, it is said: "At most it can only be inferred that the account was correct, because no objections were made within a reasonable time. An account rendered to a party indebted by his creditor, and not objected to in a reasonable time, is prima facie evidence against the party to whom it is rendered."

So, in *Hirschfelder v. Levy*, 69 Ala. 351, it is said that the inference of correctness arising from the retention without objection of an account rendered is more or less strong according to the circumstances of the particular case.

b. Effect on burden of proof.

The onus of showing error or fraud in such an account is on the party who has retained it. *Powell v. Powell*, 10 Ala. 900; *Andrews v. Hobson*, 23 Ala. 219; *Ledoux v. Porche*, 12 Rob. (La.) 543; *Philips v. Belden*, 2 Edw. Ch. 1; *Lockwood v. Thorne*, 11 N. Y. 170, 62 Am. Dec. 81; *Lambert v. Craft*, 98 N. Y. 342; *August v. Fourth Nat. Bank*, 15 N. Y. S. R. 956, 1 N. Y. Supp. 139; *Gooch v. Vaughan*, 92 N. C. 610; *Townes v. Birchett*, 12 Leigh, 173.

An account which has come to be regarded as stated by reason of its retention without objection can always be opened upon proof of mistake or fraud, and the only effect of the debtor's silence is to put upon him the burden of showing that the account as stated was the result of fraud or mistake. *Shipman v. Bank of State*, 128 N. Y. 318, 12 L.R.A. 791, 22 Am. St. Rep. 821, 27 N. E. 371.

XI. The presumption of assent.

a. As open to rebuttal.

The presumption of acquiescence in an account rendered, arising from its retention

without objection after the lapse of a reasonable time, is not conclusive, but only evidence of an admission, and is therefore subject to disproof. *Wiggins v. Burkham*, 10 Wall. 129, 19 L. ed. 884; *Hopkirk v. Page*, 2 Brock. 20, Fed. Cas. No. 6,697; *Sloan v. Guice*, 77 Ala. 394; *Ware v. Manning*, 86 Ala. 238, 5 So. 682; *First Nat. Bank v. Allen*, 100 Ala. 476, 27 L.R.A. 426, 46 Am. St. Rep. 80, 14 So. 335; *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325; *McKeen v. Boatmen's Bank*, 74 Mo. App. 281; *Kenneth Invest. Co. v. National Bank*, 96 Mo. App. 125, 70 S. W. 173; *Rich v. Eldredge*, 42 N. H. 153; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Guernsey v. Rexford*, 63 N. Y. 631; *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161; *Samson v. Freedman*, 102 N. Y. 600, 7 N. E. 419; *Spellman v. Muehlfield*, 166 N. Y. 245, 59 N. E. 817; *Burlingame v. Shelmire*, 59 Hun. 615, 35 N. Y. S. R. 161, 12 N. Y. Supp. 655; *Champion v. Recknagel*, 6 App. Div. 151, 39 N. Y. Supp. 819; *Austin v. Wilson*, 33 N. Y. S. R. 503, 11 N. Y. Supp. 565; *Sergeant v. Ewing*, 30 Pa. 75; *Buckley v. Maryland Paving Co.* 132 Pa. 572, 19 Atl. 341; *Peirce v. Peirce*, 199 Pa. 4, 48 Atl. 689; *Benites v. Hampton*, 3 Utah, 369, 3 Pac. 206; *Jones v. DeMuth*, 137 Wis. 120, 118 N. W. 542.

In *Lockwood v. Thorne*, 18 N. Y. 286, it is said that there is no arbitrary rule of law which renders an omission to object in a given time equivalent to an actual agreement or consent to the correctness of the account rendered; but it is merely competent evidence, subject to be rebutted by circumstances from which counter inferences may be drawn, such as the absence from home of the party to whom the account was rendered, his expectation of seeing the other party within a few days, or the happening of some unforeseen casualty which prevented or delayed the expected meeting.

As the basis of liability is the supposed meeting of the minds of the parties upon the correctness of the account, so any circumstance which tends legitimately to throw light upon that question is competent to rebut that inference. *Austin v. Wilson* and *Guernsey v. Rexford*, supra.

It is liable to be repelled by showing that the error or fraud complained of was not discoverable by the exercise of reasonable care and diligence, or that there was no such appearance of things as to excite the suspicion of a reasonable man, or that for any reason the party had not had an opportunity to examine the account. *Hardy v. Chesapeake Bank*, 51 Md. 562, 34 Am. Rep. 325.

It may be met by proof of mistake undiscovered while the account was so retained, and the question then becomes one of fact for the jury. *Sharkey v. Mansfield*, 90 N. Y. 227, 43 Am. Rep. 161.

Whether the omission to transmit the objections to an account rendered within a reasonable time is satisfactorily explained is a question for the jury, and not for the court. *Lockwood v. Thorne*, supra.

b. Inherent force.

It appearing, then, that the presumption of assent is a rebuttable one, the question next arises whether, in the absence of evidence in rebuttal, the inference is necessarily conclusive upon the triers of the fact.

Although the presumption is sometimes spoken of as a "legal presumption," as in *Hall v. Sloan*, 9 Phila. 138, or as "a rule of law," as in *Ingle v. Norrington*, 126 Ind. 174, 25 N. E. 900, or as "an implication of law," as in *Charlotte Oil & Fertilizer Co. v. Hartog*, 29 C. C. A. 56, 42 U. S. App. 716, 85 Fed. 150, these cases do not seem to be intentionally at variance with the predominating view, which regards the rule merely as a principle for the guidance of the triers of the fact. This view, it may be pointed out, is consistent with the origin of the rule, which, as has hereinbefore been said, was first laid down by courts of equity as according with the custom of merchants.

So, it is generally held, as the following cases will demonstrate, that the weight to be given to the retention of an account without objection is, just as in the case of other evidential facts, ordinarily for the jury, except where, upon the state of fact presented, the presumption of assent is so strong as to preclude a contrary conclusion.

The retention without objection of an account rendered is evidence of more or less weight according to the length of time, the business, character, education of the parties, and the circumstances of the case. *Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co.* 80 Ark. 438, 97 S. W. 284; *Quincey v. White*, 63 N. Y. 370; *Talcott v. Chew*, 27 Fed. 273; *Allen-West Commission Co. v. Patillo*, 33 C. C. A. 194, 61 U. S. App. 94, 90 Fed. 628.

In *Martyn v. Arnold*, 36 Fla. 446, 18 So. 791, it is said that the presumption of the party's acquiescence from his silence depends in a large measure for its force upon the circumstances of the case,—whether the party is a man of business, considering the nature of his business and education, the local situation of the parties, customary dealings with each other, and other circumstances; and that what is a reasonable time within which the person to whom an account is rendered must object or become bound depends upon the relations of the parties and the usual course of business between them.

The Illinois cases appear to support the view that as between merchants an account rendered and not objected to within a reasonable time becomes a settled account, which is conclusive as between the parties unless some fraud, mistake, omission, or inaccuracy is shown; and that while as between other parties no such conclusive presumption may arise, the retention without objection of an account rendered is at least evidence of an implied admission of its correctness. *McCord v. Manson*, 17 Ill. App. 118; *Mackin v. O'Brien*, 33 Ill. App. 474; *B. S. Green Co. v. Smith*, 52 Ill. App.

158; Peoria Grape Sugar Co. v. Turney, 58 Ill. App. 563; Weigle v. Brautigam, 74 Ill. App. 285.

In Miller v. Bruns, 41 Ill. 293, an instruction that the retention of an account rendered without objection to its correctness was a circumstance to be taken into account by the jury in determining whether or not the defendants had admitted its correctness was approved.

In McCord v. Manson, 17 Ill. App. 118, it was held that the retention without objection by a principal of an account rendered by his agent was evidence of an implied admission of its correctness.

In Bee v. Tierney, 58 Ill. App. 552, it was held that where it was shown that a statement of account was mailed to defendant and that no objection was made thereto, there was some presumption of an account stated.

The rendition of an account with its retention by the debtor without objection is but a circumstance to be submitted to the trier of fact, to determine whether there has been an account stated. Harrison v. Henderson, 67 Kan. 202, 72 Pac. 878.

In Thompson v. Mylme, 4 La. Ann. 206, it is said that though acquiescence in an account rendered is not considered *per se* an agreement to it, it is evidence from which it may be inferred.

In Union Bank v. Flanders' Bank, 9 Gill & J. 439, 31 Am. Dec. 113, it was held error to refuse to instruct the jury that they were at liberty to infer from the silence of the defendants their acquiescence in the correctness of the account rendered.

In Anding v. Levy, 57 Miss. 51, 34 Am. Rep. 435, it is said that the weight to be given to the rendition of an account and its retention without objection, as between other parties than merchants, is for the consideration of the jury under all the circumstances of the case, including the carefulness, accuracy, and promptness in business matters of the party to whom the account was rendered, his intelligence, or the want of it, his opportunities of examining the account and of ascertaining its correctness, his dependence on his creditor, or the contrary, his confidence in the honesty and accuracy of the party who rendered the account, the opportunities of making objections, the course of previous dealings between the parties, and all other circumstances attending the rendering and retention of the account.

In Brown v. Kimmel, 67 Mo. 430, it is said that the rule, at best, is a very flexible one, and undoubtedly depends in its application upon the circumstances of each case, to be judged by the nature of the transaction, the habits of the business in which it occurs, and the course of trade. In a general way, an account rendered by a creditor to his debtor, and not objected to within a reasonable time, is regarded as evidence of an account stated; in some cases being very slight evidence of the correctness of the account, and in others con-

clusive, except where fraud or mistake is shown. It simply establishes a prima facie case, throwing the burden of contradiction or explanation on the adverse party.

In Kent v. Highleyman, 17 Mo. App. 9, it was held that an instruction is rightly refused which contains an absolute direction to the jury to find for plaintiff if they should find that the defendant retained the account without objection during the period therein stated.

In Missouri P. R. Co. v. B. F. Coombs & Bro. Commission Co. 71 Mo. App. 299, the failure to object within a reasonable time to an account rendered is spoken of as "evidence of an account stated."

In Hendrix v. Kirkpatrick, 48 Neb. 670, 67 N. W. 759, it is said that, although many cases go to the extent of holding that, by the mere failure to object to an account rendered, it becomes a liquidated and unimpeachable demand, the sound rule is believed to be that such fact is admissible as an acknowledgment of the correctness thereof, the weight or sufficiency of such proof being a question of fact to be determined by the jury.

In Quincey v. White, 63 N. Y. 370, it is said: "The rule is not an arbitrary or artificial one. It is based upon the ordinary conduct of men in protecting their own interests. If a charge is made against a person, or an assertion of indebtedness, under such circumstances that, if not true, such person would naturally deny it, the inference may be drawn that, by not denying, he assented to it. This species of proof, that is an inference from silence, is, of course, far from conclusive, and not always very satisfactory, but it is sufficient often, in the absence of contradictory evidence, to establish the fact sought to be proved."

Without a denial *in toto* or in part of an account rendered, the jury may infer an admission of its correctness, and a promise to pay the balance. Webb v. Chambers, 25 N. C. (3 Ired. L.) 374.

Between merchants dealing together and merchants having mutual accounts, if an account is furnished by one to the other, which is retained for a long time without objection, it is good evidence in action of an account stated. Mellon v. Campbell, 11 Pa. 415.

Where a purchaser of goods makes no objection to a bill rendered, after reasonable time for examination, his conduct may fairly be regarded as an admission that the account rendered is correct, which may be given in evidence against him when he is called upon to pay for the goods, and will make a prima facie case against him. Ahl's Appeal, 129 Pa. 26, 18 Atl. 471.

In Payne v. Nicholas, 2 Phila. 220, it is said that nothing short of an estoppel, or which rises no higher than mere evidence, should have more weight in mercantile transactions than accounts rendered by one man to another followed by acquiescence, and above all by subsequent dealings of the same nature.

Failure to object within a reasonable time to an account rendered is not conclusive as an admission of its correctness, but is to be weighed with other evidence submitted to the jury. *Johnson v. McCampbell*, 11 Heisk. 27.

In *Baxter v. Waite*, 2 Wash. Terr. 228, 6 Pac. 429, it was held error to instruct the jury that if they believed the plaintiffs from time to time sent to the defendants statements of the accounts between them, which were received by defendants, and that they did not within a reasonable time object to said statements and notify the plaintiffs of said objections, then, as a matter of law, the jury should regard the defendants as admitting that the accounts were correctly stated, and that the defendants would be bound by them, unless showing by a preponderance of the evidence that there was some error or mistake in the accounts as rendered to them, of which they were not informed at the time they so consented to them, or unless they should show some satisfactory excuse for not objecting.

In some cases the presumption of acquiescence may be so strong as to render it unnecessary or improper to submit to the jury the question whether or not the party to whom the account was rendered should be deemed to have assented thereto.

Thus, in *Donald v. Gardner*, 44 App. Div. 235, 60 N. Y. Supp. 668, it was held no error to refuse defendant's request to go to the jury on the question as to whether the account had been stated definitely between the parties.

In *Fleischner v. Kubli*, 20 Or. 328, 25 Pac. 1086, it was held that where the transaction was between merchants, the account was rendered nearly six months before any objections were heard on the subject, and the defendants made a remittance to be applied on account after its rendition, without suggesting any objections thereto, under these facts the assent of the defendants to the account as rendered must be presumed, and that it was the duty of the court to inform the jury that such was the law.

In *Goldsmith v. Latz*, 96 Va. 680, 32 S. E. 483, it was held error to refuse an instruction that if the jury should believe that the plaintiff received from the defendants a statement of the account between them showing the exact amount of compensation for his services, and accepted the same without complaint or objection, and thereafter continued for more than a year in the employment of the defendants without objection or complaint of the amount of profits awarded him in the statement, such conduct, without satisfactory explanation, raises a strong presumption that he had agreed to the correctness of such settlement, which, unless rebutted, would require a finding for the defendants.

Some courts seem to have understood the rule as meaning that, as between merchants, failure seasonably to object is necessarily conclusive of the fact of an account stated; though none appear actually to have given 29 L.R.A. (N.S.)

it so extreme an application. Their statements are made in connection with controversies between persons other than merchants, and in such cases they hold that the failure to make objection is to be regarded merely as evidence.

Thus, in *Anding v. Levy*, 57 Miss. 51, 34 Am. Rep. 435, it is said that the rendition of an account and its retention without objection will not, as a matter of law, render it a stated account, except in transactions between merchants; but as between other parties than merchants, such circumstance is admissible in evidence to show an implied admission and acquiescence in its correctness.

A similar doctrine seems to have been recognized in Illinois. See *McCord v. Manson*, 17 Ill. App. 118; *Mackin v. O'Brien*, 33 Ill. App. 474; *B. S. Green Co. v. Smith*, 52 Ill. App. 158; *Peoria Grape Sugar Co. v. Turney*, 58 Ill. App. 563; *Weigle v. Brautigam*, 74 Ill. App. 285. E. S. O.

SOUTH DAKOTA SUPREME COURT.

JAMES MEE, Appt.,
v.

E. O. CARLSON et al., Respts.

(22 S. D. 365, 117 N. W. 1033.)

Note — fraud — indorsement — bona fides.

1. The offer for sale by a comparative stranger residing out of the state, to an individual, of a note indorsed by him "without recourse," which had been procured from

Note. — What circumstances are sufficient to put a purchaser of negotiable paper on inquiry, in order to secure rights of a bona fide holder.

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- XV. Stolen notes, 385.
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- XVII. Patents, 385.
- XVIII. Negotiable instrument statutes, 386.
- XIX. Summary, 388.

I. Dealing with an agent.

In the discussion of the question as to what circumstances are sufficient to put

the maker by fraud, at a place other than that of the residence of the maker, in whose vicinity are several banks, is a circumstance calculated to arouse suspicion in the mind of a prudent person, so that his purchase without inquiry may destroy his bona fides, and prevent his enforcing the note against the maker.

Same — defense — benefit.

2. The maker from whom a note executed to cover the purchase price of a horse is fraudulently obtained is not, in order to defeat a recovery thereon by an indorsee, required to show that the sale was rescinded or the animal returned, where it does not appear that it was ever delivered or accepted, or that he had received any benefit from it.

Witness — impeachment — credit.

3. The testimony of a witness who is impeached on cross-examination need not be

taken as true by the jury, although he is not contradicted, nor his reputation for truth and veracity impeached.

Note — purchase — notice.

4. A purchaser of a note with actual notice of suspicious circumstances sufficient to put a prudent person on inquiry as to its validity is charged with notice of all facts which such inquiries would have elicited.

Same — inquiries — sufficiency.

5. The purchaser of a note from an indorser who indorses "without recourse" may be found not to have fulfilled his duty in merely inquiring as to its validity from his indorser, so as to entitle him to hold the maker thereon, where the instrument was obtained from the maker by fraud, and he obtained it at a tempting discount.

(October 16, 1908.)

a purchaser of negotiable paper on inquiry, it will be well to bear in mind the rule in *Gill v. Cubitt*, 3 Barn & C. 466, which held that circumstances calculated to arouse the suspicion of a prudent man must be followed up and inquiry made. This was overruled in *Crook v. Jadis*, 5 Barn. & Ad. 909, which held that this would destroy the commercial character of the paper, and that the circumstances must be so strong that, if ignored, they will establish bad faith on the part of the purchaser. The Federal courts and most of the states follow the latter doctrine. In some cases this is affected by statute.

The fact that an agent uses for his own individual purpose paper belonging to his principal will not put the purchaser on inquiry, where the purchaser has no knowledge of such misuse, or where the paper itself does not show that fact.

A note broker used as collateral for his own debt a customer's note held for discount, and prior thereto one of the makers had called at plaintiff's bank and vouched for the broker. It was held that there were no suspicious circumstances that would put the bank on inquiry. *Hamilton Nat. Bank v. Upton*, 100 App. Div. 105, 91 N. Y. Supp. 475. In this case the court said: "Though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title, according to settled doctrine, will prevail."

And the fact that a broker (who misapplied the proceeds of a note left with him to be discounted) kept an account "as agent" with the bank taking the paper, and was known to be embarrassed, was held insufficient to put the bank on inquiry, although the broker used this paper as collateral. *Farmer's & C. Nat. Bank v. Noxon*, 45 N. Y. 762.

And the fact that a note for which a bank clerk exchanged township orders given to the township treasurer individually by a purchaser at a tax sale, was held

insufficient to put him on inquiry. *Chapman v. Remington*, 80 Mich. 552, 46 N. W. 34. In this case the court said: "It cannot be said that this was sufficient to put the plaintiff upon inquiry as to how Mr. Wenban procured the note, and that a failure to make this inquiry was evidence of bad faith."

Brokers were customers of a bank, and held a note of their clients which they used at the bank as a collateral renewal of their own note, and subsequently used two other similar notes to take up this collateral. On a suit on the latter by the bank, it was claimed that these brokers held these notes only for discount. It was held that the bank was not put on inquiry, as the brokers' concern was a customer of the bank and this was an ordinary transaction. *American Exch. Nat. Bank v. New York Belting & Packing Co.* 148 N. Y. 698, 43 N. E. 168.

A county treasurer who was also a bank cashier was pressed to settle with the state comptroller, and gave him a New York draft, drawn by him as cashier, on the bank's correspondent, which was paid. The cashier absconded, and his bank brought suit to have the state refund the money. It was held that the comptroller was not put on inquiry as to whether or not the cashier was using the bank's money to pay his own debts. *Goshen Nat. Bank v. State*, 141 N. Y. 379, 36 N. E. 316.

A grain firm sent by its cashier its \$10,000 draft on New York to a bank, to be deposited. The cashier retained the \$10,000 draft, and exchanged it for a New York draft made by the bank to the order of a fictitious person. The exchange clerk, as the transaction was out of the common run, consulted with one of the vice presidents, who authorized the exchange. The name of the fictitious party was forged and both drafts were paid. In an action by the grain firm against this bank for the amount of the draft, it was held that suspicion of defect of title, or knowledge of circumstances that would excite sus-

A PPEAL by plaintiff from a judgment of the Circuit Court for Union County in defendants' favor in an action brought to recover upon a promissory note. Affirmed.

The facts are stated in the opinion.

Messrs. Alan Bogue, Jr., and H. M. Wallace for appellant.

Messrs. Ericson & Stickney and Keith & Keith, for respondents:

The transferee must show that he purchased the note in good faith.

Knowlton v. Schultz, 6 N. D. 417, 71 N. W. 551; Kirby v. Berguin, 15 S. D. 444, 90 N. W. 856; Giberson v. Jolley, 120 Ind. 301, 22 N. E. 306; Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281; Ray v. Baker, 165 Ind. 74, 74

pcion in the mind of a prudent man, would not defeat the bank's title. There was no bad faith. *Lampson v. Illinois Trust & Sav. Bank*, 62 Ill. App. 371.

In *Peckham v. Hendren*, 76 Ind. 47, it was said it was claimed "that as the payee lived in a distant state, the appellant should, before buying the note, have inquired into the circumstances under which it was given. The law imposed upon him no such burden. He had a right to assume that the note was valid, and founded upon a valid consideration." The court must have meant "maker" when it used "payee," as the note was made in Indiana, payable to a New York company, indorsed there to its president, and indorsed and guaranteed by him to another resident of New York, who brought suit, and who claimed to know nothing of the consideration. It was claimed that as the corporation was bound by the acts of its agent, the president, the guarantor, was also bound. The court said: "But Newton was not the agent of Preston, the president of the company, nor were his acts the acts of Preston; nor would the latter, simply because he was the president of the company, be chargeable with notice of the acts of Newton when transacting business for, and as the agent of, said company. Notwithstanding the fact that Preston was president of the company, it had the right to sell, and he to buy, any note which belonged to it; and, in buying the note in suit, Preston would not be acting as its president, but for himself."

And the fact that the holder of a note was an attorney at law was held not sufficient to put the purchaser of the note on inquiry as to whether or not he held the note as agent for collection, or held it in his own right. *Greneaux v. Wheeler*, 6 Tex. 515.

And where a note made by a farmer was written upon tracing paper, and it did not appear whether the payee was a corporation, firm, or individual, and the plaintiff purchased it without evidence as to

N. E. 619; *Kenny v. Walker*, 29 Or. 41, 44 Pac. 501.

Corson, J., delivered the opinion of the court:

This action was instituted by the plaintiff as second indorsee of a promissory note, alleged to have been executed by the defendants to one Henry Lefebure, for the sum of \$800, with interest at the rate of 6 per cent per annum, payable July 1, 1906, to recover from them the amount due thereon. Verdict and judgment being in favor of the defendants, the plaintiff has appealed.

The complaint is in the usual form, and after alleging the execution of the note, and giving a copy of the same, the plaintiff alleges: "That after the execution and de-

the authority of the agent to indorse it, it was held that the maker was liable thereon to a purchaser for value, before maturity, without notice of any defect, even if the maker misunderstood the legal effect of the instrument, or was induced by fraudulent representations to execute it, and this without regard to the question of negligence. *Rowland v. Fowler*, 47 Conn. 347.

And where the directors of a bank joined individually in executing a note payable to another bank, to obtain money, and intrusted such note to their president, who used it as collateral to obtain from the payee bank money for his own use, it was held that the fact that it was made to the order of plaintiff was not sufficient to put plaintiff on inquiry. *American Exch. Nat. Bank v. Ulm*, 21 Mont. 440, 54 Pac. 563.

A bank holding a note of \$5,000, indorsed by a bank through its cashier, took a renewal note of \$10,000, and paid the difference to the cashier. The new note was payable to Pratt, the cashier, and indorsed "Pratt" and the bank, by Pratt, its cashier. It was held that the form of the indorsements or the amount did not put the indorsee on inquiry. *Merchants' Nat. Bank v. McNeir*, 51 Minn. 123, 53 N. W. 178.

And in a controversy between indorsee and indorsers where forged notes had been negotiated by one bank to another, indorsed by the president of the bank individually, it was held that the magnitude of the transactions would not necessarily put the indorsee on inquiry, where each was plausibly and reasonably explained by the president of the bank. *State ex rel. Carroll v. Corning Sav. Bank*, 139 Iowa, 338, 115 N. W. 937.

And where a debtor owed a wine firm \$5,000, and brought to them two Bank of England notes, one for £500 and one for £200, and offered them, requesting that they credit him with the amount, and lend him \$200 of the same, it was held that the firm was not bound to make in-

livery of the said note, and before the maturity thereof, the said Henry Lefebure, the payee mentioned in the said note, for a good and valuable consideration, and in the usual course of business, duly sold, indorsed, and delivered to A. J. Struble the said note; that thereafter, and before the maturity of said note, the said A. J. Struble, for a good and valuable consideration, and in the usual course of business, duly sold, indorsed, and delivered to this plaintiff the said note, and said plaintiff is now the legal owner and holder thereof." The defendants, in their answer, admit that they signed the promissory note in question, together with two other promissory notes, each in the sum of \$800, payable, respectively, July 1, 1905, July 1,

1906, and July 1, 1907, but deny that any of said notes, including the note in suit, were ever delivered to Henry Lefebure, or to any other person for him, and deny upon information and belief that the note in this action was ever indorsed and transferred for value before maturity thereof, either to A. J. Struble or to the plaintiff before named, and deny that said note described in plaintiff's complaint was acquired by said Struble, or by the plaintiff, in the ordinary course of business, and deny that the plaintiff is now the legal holder and owner thereof. And the defendants allege, in substance, that said notes were never delivered to said Lefebure, but were fraudulently obtained from the defendant Carlson, who had the possession

quiry, although these bills had been deposited with this debtor as bailee by a third party. *Steinhart v. Boker*, 34 Barb. 436. The trial judge charged the jury that the holder was not put on inquiry if there were no "suspicious" circumstances. This was held error.

But where it is known that an agent is using for his individual purpose paper belonging to his principal, the purchaser will be put upon inquiry; and the same was held where money was paid to one acting as agent.

A note was purchased in a peculiar way, under peculiar circumstances, and with knowledge that the note had been issued for some particular purpose, not disclosed, but that he who had disposed of it was not the owner, and had the right to use it as collateral merely. It was held that the purchaser was not a bona fide holder. *Re Hopper-Morgan Co.* 156 Fed. 525. This was on the ground that circumstances may be such as to impose an active duty of inquiry and investigation, and if such duty is not performed, it may be conclusive evidence of bad faith; that is, the law may charge the party with knowledge which was at hand, available, and to which he willfully shut his eyes; that is, he might have known the truth, ought to have known the truth, had good reason to suspect the truth, and did, but willfully refused to become fully acquired with it.

And where it was the custom of brokers in London to mix their customers' bills with their own, and discount them all at once, it was held to be a proper question for the jury whether a holder of such a bill, who had taken it in this manner, took the same with due care and caution, and in the ordinary course of business. *Foster v. Pearson*, 1 Crompt. M. & R. 849.

A draft was made, and the acceptor signed "agent." It was held that the holder was put on inquiry only as to the authority of the agent to accept. *Weeks v. Fox*, 3 Thomp. & C. 354.

Where a managing agent having power to indorse commercial paper for an associa-

tion indorsed it for the accommodation of a third party, it was held that a purchaser of such paper, having the suspicions of a prudent man, would be required to inquire as to the agent's power. Following *Hamilton v. Marks*, 52 Mo. 78, 14 Am. Rep. 391, overruled in 63 Mo. 167; *Edwards v. Thomas*, 2 Mo. App. 282.

And a bank's knowledge that an agent had paper properly indorsed, which was to be negotiated for the principal, was held to put it on inquiry, although subsequently, at the time of purchase, the agent claimed the right to negotiate the same for his own use. *Merchants' & M. Nat. Bank v. Ohio Valley Furniture Co.* 57 W. Va. 625, 70 L.R.A. 312, 50 S. E. 380.

The treasurer of an association sold a mortgage note belonging to the association, and payable to the treasurer, and the sale was made to take up his individual debt. It was held that the purchaser was put upon inquiry. *Wisconsin Yearly Meeting v. Babler*, 115 Wis. 289, 91 N. W. 678. In this case the note was non-negotiable because it provided for entering a confession judgment.

And, where brokers received from a president of a bank its draft to pay his margins on stocks, and the draft was on the bank funds, it was held that the brokers were put on inquiry as to the authority of the president of the bank to use such draft for his own purpose. *Lamson v. Beard*, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30.

In *Hathaway v. Delaware County*, 103 App. Div. 179, 93 N. Y. Supp. 436, an ex-county treasurer forged the name of the treasurer to a county note, and a bank gave him a draft, payable to the treasurer, who accepted the same as a credit on the ex-county treasurer's account. In an action against the county by the bank, it was held that the face of the draft was not notice sufficient to put the treasurer upon inquiry as to the truth of the holder's claim that he had purchased the draft. This was reversed in 185 N. Y. 368, 13 L.R.A. (N.S.) 273, 113 Am. St. Rep. 909, 78 N. E. 153, on the ground that the former treasurer had no apparent title to the draft, and was

of the same for these defendants, by one Headley, agent of the said Lefebure, and by him delivered to the said Lefebure without the consent of the said defendants. At the close of the evidence the plaintiff moved for the direction of a verdict in his favor, and against the defendants, upon the grounds: (1) That the evidence in the case shows that A. J. Struble, the first indorsee of the note, was a bona fide holder of the note in good faith and for value, in the usual course of business, without notice of any infirmity or any defense to the said note; (2) that the plaintiff is a bona fide holder and owner of said note, having received the same from said Struble, and having paid a valuable and fair consideration therefor in the usual course of busi-

ness, and without notice or information of any infirmity or defense to the said note; (3) that the note in suit was given in part payment of the purchase price of a stallion; that the evidence shows that said stallion was delivered to one Bredall, one of the defendants in this action, at about the time the notes were executed to said Lefebure; that the said Bredall has continually kept the said horse on his premises, without any arrangement being made therefor between him and the said Lefebure; that the evidence in the case shows that neither of the defendants had in any way attempted to rescind the said contract and return said stallion to the said Lefebure, for which the said note was given; that there is no evidence in the case to

only an agent of the bank for the purpose of delivering it to the county; and the draft imported on its face that the money was the property of the bank.

An agent of a foreign firm, having authority to indorse checks received for depositing in bank for the principal, indorsed checks and deposited them with his brokers for collection, and used the proceeds for speculation. It was held that the bank collecting these checks and paying the proceeds to the brokers was not liable to the principal, as these checks were not forged under the New York negotiable instruments law 1897, chap. 612, § 42. But it was said the brokers would be liable if sued, as they were put on inquiry, knowing the indorser was only the agent of the principal. *Salen v. Bank of State*, 110 App. Div. 636, 97 N. Y. Supp. 361.

A draft was made, signed by an insurance adjuster, "upon acceptance," directing that a bank pay the beneficiary named for losses. This was accepted by the insurance company, through the president. Another bank paid the beneficiary, the party introducing him also indorsing. Payment was stopped on account of fraud of beneficiary. In an action by the bank against the acceptor, it was held that ignorance of the financial condition of the indorsers, and the address of the beneficiary, the condition "upon acceptance," and that the drawer was known to be an agent, imposed inquiry on the part of the bank. *Royal Bank v. German-American Ins. Co.* 58 Misc. 563, 100 N. Y. Supp. 822. The fact most relied upon was that the draft was not unconditional.

An attorney receiving insurance policies for his client, a business man, gave his check to the insurance agent, signed, "Rochester & Charlotte Turnpike Co. M. H. Briggs, measurer." It was held that the check gave notice of a suspicious fact, and invited inquiry. *Rochester & C. Turnp. Road Co. v. Paviour*, 164 N. Y. 281, 52 L.R.A. 790, 58 N. E. 114.

The cashier of a bank gave his individual note for his individual debt, and indorsed it in his name, "cashier." It was held the 29 L.R.A. (N.S.)

form of the paper carried notice to a purchaser of a possible want of power to make the indorsement, and was sufficient to put him on his guard. *West St. Louis Sav. Bank v. Shawnee County Bank* (West St. Louis Sav. Bank v. Parmalee) 95 U. S. 557, 24 L. ed. 490.

And where the indorsee of notes indorsed them back to the payee "for collection," a subsequent indorsee was held to be put on inquiry in regard to title. *Merchants' Nat. Bank v. Hanson*, 33 Minn. 40, 53 Am. Rep. 5, 21 N. W. 849.

A purchaser of a note was held put on inquiry where the payee had the word "attorney" suffixed to his name. *Hazeltine v. Keenan*, 54 W. Va. 600, 102 Am. St. Rep. 953, 46 S. E. 609.

And the receipt of a check signed, "Agent Glass Buildings," in payment of an individual debt, was held sufficient to put the receiver on inquiry as to the power of the agent to use the fund. *Gerard v. McCormick*, 130 N. Y. 261, 14 L.R.A. 234, 29 N. E. 115.

And the indorsement of a bill, "per procuration," was held to put upon the indorsee the duty of ascertaining that the indorser acted within his authority. *Alexander v. Mackenzie*, 6 C. B. 766.

And the same was held in regard to an acceptance. *Attwood v. Munnings*, 7 Barn. & C. 278, 4 Eng. Rul. Cas. 364.

A commissioner made a court sale, and took a note payable to himself, and filed it with the clerk of the court. The clerk procured the payee to indorse the note so he could collect it, and then sold it to a party to whom he was largely indebted, and who knew that it had been taken in the sale. It was held that he was put on inquiry as to the authority to negotiate the note. *Bunting v. Ricks*, 22 N. C. (2 Dev. & B. Eq.) 130, 32 Am. Dec. 690.

And where a note was payable to the order of the makers, and indorsed by them, and then accidentally left in a broker's office, it was held that the officers of a bank, receiving such note from the broker, without making any advances thereon, but simply as collateral for a previous demand

show that the defendants in this action have in any way been damaged by the purchase or sale of the said stallion, or by giving the said note in suit. This motion was denied by the trial court, and its ruling excepted to. It is contended by the plaintiff that the court erred in denying the motion for the direction of a verdict on the grounds stated, and this presents the principal question to be considered on this appeal.

Evidence was introduced by the defendants tending to prove that, in the fall of 1903, Henry Lefebure, who was named as the payee in the note, was engaged in the business of importing and selling horses, mostly Belgian stallions; that some time previous to December 15, 1903, he entered

into a contract with twenty-four farmers in Union county to sell to them a Belgian stallion, known as "Bristol," for the sum of \$2,400; that on December 15th there was a meeting of a number of the signers of the contract, and three notes were executed by nineteen of the persons who had signed the contract; that it was agreed between Lefebure and the parties who signed the notes that the notes should not be delivered until signed by twenty-four responsible farmers of said Union county, and that the notes should be left with the defendant Carlson, and should have no validity as notes, nor be delivered to Lefebure, until signed by the twenty-four persons designated; that one Headley, who was the agent of Lefebure,

loan, and not indorsed by the broker, should have been on their guard, and inquired as to the title. *Merriam v. Granite Bank*, 8 Gray, 254.

And where a trust deed had been released to the extent of one half the property securing the same, on the payment of \$4,000, to be credited on the original note, it was held that a purchaser of this note was put on inquiry, especially where his attorney had knowledge of this payment. *Hulbert v. Douglas*, 94 N. C. 122.

Under S. D. Rev. Code, § 2452, providing that every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself, it was held that where the agent of the plaintiff in the purchase of the note had knowledge that the note was procured by fraud, the plaintiff was put upon inquiry. *Rochford v. Barrett*, 22 S. D. 83, 115 N. W. 522. See *McBain v. Seligman*, 58 Mich. 294, 25 N. W. 197, subd. IV.; *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. 592, subd. IX.; *Pope v. Bank of Albion*, 57 N. Y. 126, subd. IX.

II. Dealing in partnership paper.

A person who discounts paper appearing to bind a partnership, with the knowledge that a partner is applying the security of the firm to his individual use, and is apparently exceeding his authority, and thereby committing a fraud on the other partners, is held to be put upon inquiry.

So, one who discounted a draft, knowing that a firm's indorsement thereon was not made in the usual course of business, was held bound to inquire as to the authority to make the indorsement. *Bank of Vergennes v. Cameron*, 7 Barb. 143.

A bank agreed to advance a party money on his procuring an acceptance by a firm, and a bill was written. This was returned by the borrower to the bank with such acceptance. The cashier knew that the money was for the use of the borrower. 29 L.R.A. (N.S.)

It was held that inquiry should have been made as to the authority of the party accepting to act for a firm. *Bloom v. Helm*, 53 Miss. 21.

And where notes were made by a member of a firm without the knowledge of the other member, and without his consent, and the party selling the same was known to be insolvent, it was held that a party who discounted the notes relying on the standing of the other partner was put upon inquiry. *Roth v. Colvin*, 32 Vt. 125.

And in *Dickson v. Primrose*, 2 Miles (Pa.) 386, it was said that a payee could not recover on a bill made by a firm in St. Louis on a Pennsylvania firm, which was executed and accepted in the name of each firm, by one person, who was a member of both firms, and who used the bill for his own debt. This would put an indorsee on proof of good faith.

The purchaser of a note was held put on inquiry where the maker executed it in his own name, payable to his firm, and indorsed it in the firm's name, and had it discounted to his own credit in bank. *Brown v. Pettit*, 178 Pa. 17, 34 L.R.A. 723, 56 Am. St. Rep. 742, 35 Atl. 865.

And where the maker of a note indorsed by a firm had it discounted, it was held that the purchaser should, at its peril, ascertain the authority of one partner to sign the firm's name for accommodation. *Lemoine v. Bank of North America*, 3 Dill. 44, Fed. Cas. No. 8, 240.

A person taking a note indorsed by a member of a firm, in the firm name, in payment of an individual debt of such member, was held required to inquire as to the authority of such member to use the firm's name for such purpose. *New York Firemen Ins. Co. v. Bennett*, 5 Conn. 574, 13 Am. Dec. 109.

And where a note was in the hands of the maker, and indorsed by one partner in the name of his firm, the party that discounted the note for the maker was held presumed to know that the indorsers were only sureties. He was bound, under law, to inquire into the character of the indorsement, and as to the authority of the

asked permission of Carlson to make a copy of the names upon the notes, for the purpose of ascertaining how many of the persons who had signed the contract had signed the notes; that he, after looking over the notes, and without the consent or permission of Carlson, placed them in his pocket, refusing to return them to Carlson when requested, and retained the notes, and immediately left Carlson's house with the notes. It is quite clear that the jury was warranted by the evidence in finding that the notes were never delivered to Lefebure or his agent, Headley, and that they were fraudulently obtained from the possession of Carlson. The note a controversy, therefore, being fraudulent in its inception, the burden was upon the

partner in the premises, or take the note at his peril. *Hendrie v. Berkowitz*, 37 Cal. 13, 99 Am. Dec. 251.

And where a note appeared to be signed by a firm as surety, a party taking the paper as indorsee was held to have such notice that he was put on inquiry as to whether the note had been given in the course of partnership business. *Marsh v. Thompson Nat. Bank*, 2 Ill. App. 217.

A note was made by the Marine Lumber company by its president, and payable to firm of which the president was a member, and by him indorsed in the firm's name. It was held the duty of a purchaser to ascertain the indorser's authority. *Hird Nat. Bank v. Marine Lumber Co.* 4 Minn. 65, 46 N. W. 145.

And where a bank prevailed upon the drawer of a protested check to give a note in the name of a firm, to take up the check, it was held that the bank was put on inquiry as to the authority of a member of the firm to execute a firm note for his individual debt. *Union Nat. Bank v. Unruh*, 21 Hun, 178.

And where a note was payable to the maker's order, and indorsed by him, and so by a member of a firm, in the firm's name, but not in the course of partnership business, it was held that if the indorsee had reasonable cause to believe that the member of the firm did not consent to the indorsement, he would be put on inquiry. *Bank v. Rider*, 58 N. H. 512. This case followed *Wagner v. Freschl*, 56 N. H. 495, which held that when one partner in a firm borrowed money, representing that it was for the use of the firm, and gave a note of the firm therefor, without the knowledge of his copartners, but appropriated the money to his own use, the firm would be liable, unless the creditor knew he had reasonable ground to believe the money was not borrowed for the use of the firm, or the circumstances were such as to put him upon inquiry, and he neglected to inquire.

A power of attorney was made by A, authorizing B to draw notes in the name of A. He made a note of this kind, payable to L.R.A. (N.S.)

plaintiff to show that he was a purchaser in good faith for value, and without notice, in the regular course of business. *Landauer v. Sioux Falls Improv. Co.* 10 S. D. 205, 72 N. W. 467; *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066; *Kirby v. Berguin*, 15 S. D. 444, 90 N. W. 856; *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402.

Plaintiff introduced evidence tending to prove that, some time before the note in controversy in this action became due, the same was purchased by said Struble of the said Lefebure, and that he paid the said Lefebure therefor the sum of \$425 in cash, and a team of driving horses valued at about \$350, the note being indorsed by said Lefebure "without recourse;" that subse-

able to a firm of which he was a member, and then indorsed the note in the firm name, to pay his own debt. This was held to be out of the ordinary course of business, and to put the holder on inquiry. *Stainer v. Tysen*, 3 Hill, 279.

A firm name was "Empire Garden;" one of the firm borrowed some money for his individual use, and gave a note, signing it, "Iba & Green," the names of the members of the firm. It was held that the use of a firm name differing from that required by the partnership articles, and not in common use, required an inquiry as to the authority of the party using the same. *Lucker v. Iba*, 54 App. Div. 566, 66 N. Y. Supp. 1019.

And the holder of a bill was held put upon inquiry, where it was made by one of a firm, in the firm's name, and indorsed by him for his individual debt. *Cooper v. McClurkan*, 22 Pa. 80.

A creditor taking a firm note from a partner, for his individual debt, is put on inquiry. *King v. Faber*, 22 Pa. 21.

A bank discounting a note was held put on inquiry, where a partner made an accommodation indorsement in the firm name on a note, and used it for personal purposes. *Tanner v. Hall*, 1 Pa. St. 417.

And taking a note as collateral, having an indorsement of a firm made by the debtor, was held to put the receiver on inquiry as to the debtor's authority to indorse. *United States Exch. Bank v. Zimmerman*, 113 N. Y. Supp. 33.

And where a member of two firms made a note, signed in the name of one firm, and indorsed in the name of the other firm, it was held that a bank discounting the note, knowing that he was using the firm's name for his individual purpose, was put on inquiry as to his authority. *Creighton v. Halifax Bkg. Co.* 18 Can. S. C. 140.

In *Stall v. Catskill Bank*, 18 Wend. 478, it was said: "If, therefore, it appears upon the face of the paper, that the partnership name is signed as a mere surety for some other person, the party who takes the note from such person has actual notice of the fact that it is not signed in the ordinary

quently to the delivery of the same to said Struble, but before the maturity of the note, said Struble indorsed the same to the plaintiff in this action, "without recourse," he claiming that he paid the sum of \$800 therefor, either in cash or by canceling certain indebtedness of Struble to him, and that he took the same for himself individually, and not on account of his bank, of which he was president. It is contended by the defendants that both Struble and the plaintiff had notice of sufficient facts to put them upon inquiry, as prudent men, as to the validity of the said note. This was evidently the view taken by the trial court in denying plaintiff's motion for the direction of a verdict in his favor, and the view evidently taken by the jury in find-

ing a verdict in favor of the defendants. Upon a careful examination of the evidence we are inclined to take the view that the court was right in denying plaintiff's motion, and that there was evidence from which the jury might reasonably draw the inference that neither Struble nor the plaintiff were purchasers in good faith, and without notice of the existence of any defense to the notes, but had knowledge of such facts as would have put prudent men upon inquiry as to whether or not there was any defense on the part of the makers to the note. The fact that Lefebure indorsed the note "without recourse" was a circumstance calculated to arouse suspicion in the mind of a prudent person, and the further facts disclosed by the evi-

course of partnership business. He must, therefore, at his peril, make the necessary inquiries, and ascertain that there was some special authority for one partner to sign the partnership name as such surety, either express or implied."

A bank discounting a note was held to be put on inquiry, where the note was made by a firm to a member, who indorsed it, and procured another firm to indorse it also, and then had it discounted for his own benefit. *First Nat. Bank v. Weston*, 25 App. Div. 414, 49 N. Y. Supp. 542. This was on the ground that accommodation indorsements by a firm should put a purchaser on inquiry.

In *Snith v. Weston*, 159 N. Y. 194, 54 N. E. 38, a note was made payable to J. K. Van Campen, administrator, signed by Geo. Van Campen & Sons. It was indorsed first by the administrator and then by "Weston Brothers." A party who received this note from one of the makers was held to be put on inquiry as to the authority of the firm indorsement. In *Second Nat. Bank v. Weston*, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080, this case was distinguished on the ground that the notes were presented to the purchaser by a party who would not have them in his possession unless they were accommodation paper.

A corporate note was made by the secretary and president to a third party, and indorsed to a firm of which the president was a member, and then indorsed by the firm, and delivered by the president to a third party, as collateral for cash advanced. It was held that the holder was not put on inquiry. *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 59, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701. On the second trial, in 28 App. Div. 81, 50 N. Y. Supp. 1067, the evidence differed from that on the former trial. There the extent, character, or condition of the previous loan was not shown. On the new trial it was shown that when the loan of \$30,000 was asked, the borrower was owing \$75,000, and the lender advanced \$30,000 without asking any questions as to the unpaid notes.

In *Cheever v. Pittsburgh, S. & L. E. R. Co.* 28 App. Div. 81, 50 N. Y. Supp. 1067, on a new trial the court directed a verdict for plaintiff; on appeal, this was reversed, on the grounds that there were material questions for the jury, the court saying: "We think all the facts bearing upon that question were for the jury,—the character and appearance of the paper, upon its face; its possession by the railroad company's president; the complete ignoring of the intervening indorser, Bruen; the lack of inquiry even as to the corporation itself, as to its bonds; the previous relations between Frost and Brooks; the speculative nature of the former's business; his constant borrowing of money from Brooks for use in that business; his large existing indebtedness to Brooks, matured and unpaid; the failure, under the circumstances, to make the simplest and most natural inquiries; the neglect to present or protest the paper at maturity; and the failure for years thereafter, without plausible excuse, to ask for payment."

But in the following cases it was held that the circumstances connected with the transaction did not put the purchaser of the paper on inquiry:

So, where notes were delivered to the plaintiff, to whom apparently they had been delivered by the firm, as makers, in the usual course of business, it was held that the purchaser was not put on inquiry as to the authority of the firm signature. *Second Nat. Bank v. Weston*, 161 N. Y. 520, 76 Am. St. Rep. 283, 55 N. E. 1080, reversing 31 App. Div. 403, 52 N. Y. Supp. 315. It was claimed that the firm signature was fraudulently made after the dissolution of the firm.

Notes were made payable to a firm, and then indorsed by a member of that firm to a purchaser, for advances made to another firm, of which the indorser was also a member. It was held that the purchaser was not put on inquiry as to the right of a member of the firm to use its assets for another. *Walker v. Kee*, 14 S. C. 142.

And where partners indorsed a bill of exchange in the course of their business,

dence that Lefebure resided out of the state, that there were a number of banks in his vicinity, and in the vicinity of the defendants, and that he was comparatively a stranger in Centerville, were calculated to create doubts in the minds of ordinarily prudent persons as to the validity of this note. Mr. Struble and the plaintiff were witnesses on the trial, and the jury had full opportunity to observe their demeanor, manner of testifying, and were the proper judges of the weight to be given their testimony. The fact that no inquiries were made by either Struble or plaintiff, and the manner in which they answered the questions propounded to them by the attorneys for the defendants, was not calculated to favorably impress a court

or jury as to their good faith in taking the note. We have not deemed it necessary to reproduce the evidence on the part of the plaintiff, as no useful purpose would be served by the reproduction of the same in this opinion.

The law applicable to this case is thus stated in Kirby v. Berguin, supra, as follows: "As we have seen, a party who takes a note procured by fraud from the maker must not only show that he is a purchaser for value before maturity, without notice, but that he purchased it in good faith. If, therefore, there were circumstances connected with the transaction which would arouse the suspicion of an ordinarily prudent man, and he failed to make the inves-

a silent partner was held liable. Swan v. Stale, 7 East, 210. Ellenborough, Ch. J. said: "It would be a strange and novel doctrine to hold it necessary for a person receiving a bill of exchange indorsed by one of several partners to apply to each of the other partners to know whether he assented to such indorsement; or otherwise, that it should be void. There is no doubt that, in the absence of all fraud on the part of the indorsee, such indorsement would bind all the partners."

Where a banking partnership issued a certificate of deposit, and this was taken by another savings bank, started in the same room, and renewed from time to time, it was held that if the party receiving this certificate was put on inquiry as to whether the banking firm had a deposit with the savings bank, it would not have affected him as a bona fide holder, because the books of the bank would have shown a large credit to the banking firm, although the credit was fictitious. Citizens' Sav. Bank v. Blakesley, 42 Ohio St. 645.

In Union Nut & Bolt Co. v. Doherty, 32 Misc. 247, 65 N. Y. Supp. 786, affirmed in 32 Misc. 496, 66 N. Y. Supp. 405, it was said: "On account of knowing that a firm is engaged in the transportation business, and failing to make inquiries as to whether a note given by the firm in payment of a bicycle purchase was within their usual course of business, does not constitute bad faith, not even carelessness."

In Edwards v. Thomas, 66 Mo. 468, where commercial paper was indorsed by an agent who was the sole financial manager of a partnership, and it was claimed that the indorsement put a purchaser on inquiry as to the power of the agent, it was held that something more was necessary,—"there must be evidence of mala fides."

That a note was drawn by Jeremiah Taylor & Company per E. Bast, to the order of Emanuel Bast, and indorsed by the latter, who was a member of the firm making the note, was held insufficient to put the purchaser on inquiry. Potts v. Taylor, 140 Pa. 601, 21 Atl. 443.

Adams made a note to Whitten & Com-
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pany, of which firm he was a member, and after the latter indorsed it he also indorsed upon it the name of another firm of which he was also a member. The note was sold by a broker; it was held that the purchaser was not put on inquiry. Moorehead v. Gilmore, 77 Pa. 118, 18 Am. Rep. 435.

And the fact that the name of a firm constituted the second signature to a note was held insufficient to put a purchaser on inquiry as to the liability incurred on the consideration. Union Nat. Bank v. Neill, 10 L.R.A. (N.S.) 426, 79 C. C. A. 417, 149 Fed. 711. This was on the ground that all the signers of a note were presumed to be makers.

The fact that a member of a payee firm was also president of a bank that indorsed the note after the firm indorsed the note was held insufficient to put the purchaser on inquiry as to whether the note belonged to the bank. Kaiser v. First Nat. Bank, 124 C. C. A. 88, 41 U. S. App. 637, 78 Fed. 281. See Second Nat. Bank v. Weston, 172 N. Y. 250, 64 N. E. 949, subd. XII.; Bank of Covington v. Cannon, 133 Ga. 779, 67 S. E. 83, subd. XVIII.

III. Corporation paper.

A person taking corporation paper is put upon inquiry, where he knows that such paper is being used for the individual purposes of the indorser.

So, the holders of notes were held to be put on inquiry when they knew that the person who assumed to indorse them in the name of the corporation was its treasurer, and that the use made was solely for his advantage and that of his partner. Pelton v. Spider Lake Sawmill & Lumber Co. 132 Wis. 219, 122 Am. St. Rep. 963, 112 N. W. 29, former trial, 117 Wis. 569, 98 Am. St. Rep. 946, 94 N. W. 203.

And, where a trust company accepted from its debtor a check payable to a corporation, which he indorsed as its president, it was held that the trust company was put on inquiry as to his authority to negotiate such check, although he and the secretary owned all the stock in the company. Ward

tigation suggested by these suspicions, he cannot be said to be a purchaser in good faith."

The case of Canajoharie Nat. Bank v. Diefendorf, supra, is very analogous to the case at bar; and, in view of the fact that the motion for the direction of a verdict was denied by the trial court, and verdict rendered in favor of the defendant, and the decision of the trial court reversed by the general term, and the decision of the latter court reversed by the court of appeals, and that the opinion of the court of appeals was the unanimous opinion of the court, we have deemed it proper to quote quite largely from the same. The court, after quite fully stating the facts in the case and the evidence, says: "At the close of the evidence, the plaintiff requested the

court to direct a verdict for it upon the ground 'that upon the undisputed evidence in the case, plaintiff purchased the notes before maturity, paid value therefor, and without notice of any facts constituting a defense to the notes.' This request was denied, and the plaintiff excepted. The trial court submitted the case to the jury under instruction that, if they found the notes were procured from Diefendorf by fraud, and under such circumstances as would not entitle the payee thereof to recover against him, then they should consider the further question whether the plaintiff purchased said notes for value, and in good faith, and if it did not, that the defendant was entitled to a verdict. The jury found for the defendant. Upon appeal, the judgment entered on this verdict was

v. City Trust Co. 192 N. Y. 61, 84 N. E. 585, reversing 117 App. Div. 130, 102 N. Y. Supp. 50. The court said: "The duty of inquiry extended to all the facts and defects suggested by the form of the check, and hence went beyond the question of authority, and included the rights of creditors."

And where checks belonging to a corporation were indorsed by the manager, and no authority was shown, and they were cashed by a saloon keeper and deposited in a bank, it was held that the taker of such paper was put on inquiry as to the authority to indorse. Railway Equipment & Pub. Co. v. Lincoln Nat. Bank, 82 Hun, 8, 31 N. Y. Supp. 44.

And an indorsee of a note from an officer of a corporation was held put on inquiry as to the authority of the officer to make the indorsement, in Davis v. Rockingham Invest. Co. 89 Va. 290, 15 S. E. 547.

In Kipp v. Smith, 137 Wis. 234, 118 N. W. 848, it was said: "Can a person be said to be a holder in due course who, without inquiry, takes from an officer of a corporation, in payment of a private debt, a negotiable note which appears on its face to be the property of the corporation? In order to be a holder in due course he must take it 'in the usual course of business.' Is such a transaction in the usual course of business, in view of the principle that one who takes in payment of a private debt the promissory note of a corporation, executed by the debtor as an officer of the corporation, is charged with notice of any fraud or irregularity that may exist in its execution?"

And, one who takes corporation bonds from its president and treasurer as collateral security for their individual debt, and who has notice of a resolution authorizing an acceptance of their bid, on the president being satisfied with their compliance with their bid, was held to be put on inquiry as to whether they had authority to pledge the bonds for individual or corporate purposes. Germania Safety-Vault & 29 L.R.A. (N.S.)

T. Co. v. Boynton, 19 C. C. A. 118, 37 U. S. App. 602, 71 Fed. 797.

So, where the indorser executes paper in the corporation name, for his own benefit, the holder of such paper will be put upon inquiry.

A president of a bank certified checks drawn on the bank by himself. It was held that any holder of such checks would be put on inquiry as to their validity. (Clafin v. Farmers' & C. Bank, 25 N. Y. 293.)

And a purchaser of a note was held put on inquiry as to the authority of the holder, where the paper was executed by an officer of a corporation, and payable to himself. Stough v. Ponca Mill Co. 54 Neb. 500, 74 N. W. 868; Randall v. Rhode Island Lumber Co. 20 R. I. 625, 40 Atl. 763.

And where a treasurer of a corporation made notes signed by him as treasurer payable to himself individually, and indorsed them individually, it was held that a bank taking the same from another, as collateral, was put upon inquiry as to the authority of the treasurer. Chemical Nat. Bank v. Wagner, 93 Ky. 525, 40 Am. St. Rep. 206, 20 S. W. 535.

And the same rule generally applies where accommodation indorsements of a corporation are used by the holder for his own purpose.

In Citizens' Bank v. Rung Furniture Co. 76 App. Div. 471, 78 N. Y. Supp. 604, where an accommodation note was made by a corporation which received no consideration it was held: "First, that the note in suit was not a valid obligation against the defendant corporation, except in the hands of a bona fide holder; second, that the circumstances which were within the knowledge of the plaintiff were sufficient to put it upon inquiry in respect to the validity of the note and that it was chargeable with all the facts such inquiry would have revealed. Those facts being established, and the plaintiff having failed to show that it made an inquiry or investigation in respect to the validity of the obligation as against the appellant, the plaintiff was not entitled to recover."

versed upon questions of law, and a new trial ordered. The ground upon which is result was reached was said to be at there was no evidence of bad faith in the purchase of the notes on the part of the plaintiff, and that the trial court erred not directing a verdict for the plaintiff. The plaintiff claims that the proof showing purchased the notes before maturity, paying value therefor, conclusively establishes character as a bona fide holder, and entitles it to recover, in the absence of proof showing that it had notice, or knowledge of facts constituting a defense to the action. The plaintiff's contention eliminates the element of good faith from the transaction, and assumes that the language, 'a holder for value,' as used in the

authorities, is satisfied by proof that the notes were purchased before maturity, and value paid therefor. We think this contention is contrary to the weight of authority in this state, even if it is not wholly unsupported by it. The payment of value for negotiable paper is a circumstance to be taken into account with other facts in determining the question of the bona fides of the transaction, and, when full value is paid, is entitled to great weight; but that fact is never conclusive, except in the absence of evidence tending to show notice or bad faith. Those who seek to secure the advantages which the commercial law confers upon the holders of bank bills or negotiable paper must bring themselves within the conditions which that law prescribed to

Where an officer had no power to execute accommodation paper in the corporate name, was held that a purchaser failing to make inquiry as to the indorsement or consideration or authority could not hold the corporation. *Pelton v. Spider Lake Sawmill & Lumber Co.* 117 Wis. 569, 98 Am. Rep. 946, 94 N. W. 293.

Where a corporation gave its notes to its secretary as collateral for advances he had made, and he used this collateral with bank, obtaining money for his own use by discounting the same, and at that time indorsed the corporation name, it was held that the purchaser with knowledge of these facts was put on inquiry as to his authority to negotiate the notes. *Security Bank v. Kingsland*, 5 N. D. 263, 65 N. W. 697.

In *National Park Bank v. German-American Mut. W. & Secur. Co.* 116 N. Y. 281, 5 R.A. 673, 22 N. E. 567, where a corporation note was made payable to the order of the maker, and also was indorsed by a corporation, by its president, without authority, it was said: "The fact that the maker of a promissory note procures it to be discounted for his own benefit is, if unexplained, notice to the discounteer that the indorsement is not in the usual course of business, but it is for accommodation of the maker."

And a trust company receiving a check payable to the order of a corporation, indorsed in the name of the corporation, by its president, to the trust company, to pay a personal loan, was held to be put on inquiry. *Ward v. City Trust Co.* 192 N. Y. 61, 84 N. E. 585, reversing 117 App. Div. 130, 102 N. Y. Supp. 50.

And in an action by an indorsee against the indorser of a bill of exchange drawn by a banking association under the general banking law, it was held that the purchaser would be put on inquiry whether or not the institution was a bank under the general law, and was prohibited from issuing such paper. *Smith v. Strong*, 2 Hill, 241.

Where a note was signed "Merchant's Loan & Trust Company, Sioux City, Iowa," by W. E. Higman, President, F. C. Swan, Secy. & Treas., "it was held that an as-

signee before maturity had such notice from the signature as to suggest inquiry whether or not it was intended to bind the company, and not the individual. *Capital Sav. Bank & T. Co. v. Swan*, 100 Iowa, 718, 69 N. W. 1065.

The fact that a note made in the name of a corporation by an officer was made payable to such officer as an individual was held to constitute a sufficient circumstance of itself to put a prudent man on notice that such note was made without authority, and therefore not binding upon the corporation. *Capital City Brick Co. v. Jackson*, 2 Ga. App. 771, 59 S. E. 92. This was under Ga. Code, § 3699, providing: "Any circumstances which would place a prudent man upon his guard in purchasing negotiable paper shall be sufficient to constitute notice to a purchaser of such paper before it is due."

But the failure to inquire, or negligence in any degree, was held insufficient to make a purchaser guilty of bad faith, although the note was offered for sale by the promisor, which should have excited the suspicion that the note was for accommodation, and the manager of the trading corporation making the note had no authority to issue accommodation notes. But a corporation having power to issue negotiable paper, it will be presumed that a purchaser of the same is a bona fide holder. *Ex parte Estabrook*, 2 Low. Dec. 547, Fed. Cas. No. 4,534. It was held that negligence would not invalidate the title unless the purchaser had actual notice, or was guilty of a wilful negligence amounting to fraud. This case was criticized in *National Park Bank v. German-American Mut. W. & Secur. Co.* supra, saying, it "is opposed to these authorities, but this case is in conflict with the decisions in this state, and we believe it to be without the support of any well-considered case."

Corporation indorsements for accommodation were held not to put a purchaser on inquiry, in *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640, 33 S. W. 344. It was further held that Tex. Stat. art. 589, providing that no corporation created under

establish the character of a bona fide holder. They are entitled to the benefits of that rule only when they have purchased such paper in good faith, in the usual course of business, before maturity, for full value, and without notice of any facts affecting the validity of the paper. This has been the law in this state since the case of *Bay v. Coddington*, 5 Johns. Ch. 54, 9 Am. Dec. 268; *Coddington v. Bay*, 20 Johns. 637, 11 Am. Dec. 342. The fact that they took the paper before maturity, and paid the full value thereof, in the absence of other facts, undoubtedly affords a presumption of the good faith of the transaction; but, where it further appears that such property has been fraudulently or illegally obtained from its owner or maker, and under such

circumstances that the person putting it in circulation could not maintain an action thereon, it is incumbent upon the holder, in order to succeed, to go farther and show the circumstances under which it came into his possession, and that he has acted in good faith in the transaction." That court, after a very exhaustive review of the cases decided in that state, concludes as follows: "A sufficient number of authorities have been cited to show the uniformity with which the cases in the highest courts of the state hold that, upon proof by the defendant that his obligations have been fraudulently or illegally obtained, and put in circulation, the person seeking to recover upon them must show not only that he bought before maturity, and paid value

this title shall employ its assets or other property for any other purpose than to accomplish the legitimate objects of its creation, did not change the rule. These bills were drawn by Bemis & Company, payable to their order, and indorsed specially to Sulphur Lumber Company, and therefore could not pass without the indorsement of the latter company. They were also indorsed by the Jefferson Lumber Company, but this would not show that the Sulphur Lumber Company was an accommodation indorser.

Where the bills were authorized to be issued, it was held that a purchaser need not inquire as to other matters.

A note was made in the name of a railroad corporation, and signed by its president, who had the authority to execute such a note. This note, indorsed by the payee, was used by the president as collateral, for the benefit of his mercantile firm, and was indorsed by his firm, and bought by another party. It was held that though he may have been negligent in taking the paper, and omitted precautions which a prudent man would have taken, nevertheless, unless he acted mala fide, his title would prevail. *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 59, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701. On a new trial, plaintiff recovered a verdict and judgment. This was affirmed in 50 App. Div. 423, 64 N. Y. Supp. 65, and 169 N. Y. 531, 62 N. E. 1094.

In *Wright v. Bartholomew*, 66 App. Div. 357, 72 N. Y. Supp. 706, *Cheever v. Pittsburgh, S. & L. E. R. Co.* 150 N. Y. 59, 34 L.R.A. 69, 55 Am. St. Rep. 646, 44 N. E. 701, was distinguished, the court saying: "It is simply held in that case that a person purchasing negotiable paper is not bound at his peril to be on the alert for circumstances which might possibly excite the suspicion of wary vigilance; that such a person does not owe the party who puts the paper afloat the duty of active inquiry in order to avert the imputation of bad faith; that the test is of honesty and good faith, and not a speculative one as to his diligence or negligence. It is concededly the rule that the test is of good faith, and 29 L.R.A. (N.S.)

not of negligence, but such concession does not impair the holding in the *Dieffendorf Case*, which is cited in the case last mentioned, that gross negligence may amount to evidence of bad faith."

Where the directors of a general trading company authorized the chairman to accept bills drawn on the company by a party upon his depositing certain securities, and the acceptances were made on an insufficient number of securities, it was held that a bona fide holder of some of these bills was not bound to inquire as to the securities having been furnished. *Re Lord Credit Co. L. R. 4 Ch. 460*. This was under companies act 1862, § 47, providing that a note or bill shall be deemed to have been made on behalf of any company, if made, accepted, or indorsed in the name of the company, by any person acting under the authority of the company.

The fact that a note bears the indorsement of a former president of a company, who is transferring the same, is not notice to the purchaser of any infirmities which may exist, where the party at the time of the transfer has ceased to be president, although the transfer may be for the individual interest of the former president. *Jones v. Stoddart*, 8 Idaho, 210, 67 Pac. 651.

And where a president of a corporation, who was authorized to have general charge of the affairs of the corporation, and to sign all contracts, made his note to the corporation, and indorsed it in the name of the corporation, it was held that the purchaser was not bound to inquire whether the corporation knew it or not. *Hiawatha Iron Co. v. John Strange Paper Co.* 103 Wis. 111, 81 N. W. 1034. The authority of the president was given by the articles of incorporation.

A purchaser of a note, knowing that it was being used individually, was held not put on inquiry, where the note was made by a corporation, signed by its president, payable to its order, and indorsed by the president to plaintiff, where inquiry would have found a corporate resolution authorizing the execution of such note for the salary of the president. *Wilson v. Metro*

but also the circumstances under which he acquired the paper, with the view of enabling the jury to determine whether he acted in good faith or not. It makes no difference in the question presented whether the plaintiff pursues the orderly course of first presenting and proving his note, relying upon the presumption of bona fides which accompanies the possession of the paper, and delays making proof of the circumstances of his purchase until after the defendant gives evidence of his defense, or, as in this case, he makes the proof of such circumstances a part of his affirmative case. The burden of making out good faith is always upon the party asserting his title as a bona fide holder, in a case where proof shows that the paper has been fraud-

ulently, feloniously, or illegally obtained from its maker or owner. Such a party makes out his title by presumptions, until it is impeached by evidence showing the paper had a fraudulent inception; and when this is done, the plaintiff can no longer rest upon the presumptions, but must show affirmatively his good faith." *Giberson v. Jolley*, 120 Ind. 301, 22 N. E. 306; *Ray v. Baker*, 165 Ind. 74, 74 N. E. 619; *Kenny v. Walker*, 29 Or. 41, 44 Pac. 501.

The contention of the plaintiff that the contract as to the stallion was never rescinded and the same returned to Lefebure is not, in our view of the case, material, as it was not shown that the horse was ever delivered to the defendants, or that they ever accepted the same, or that

politan Elev. R. Co. 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

In *Wilson v. Metropolitan Elev. R. Co.* 14 Daly, 171, 6 N. Y. S. R. 234, it was said: "When a corporation gives a note for goods bought or services rendered, it cannot be possible that a person who takes the note for value, before maturity, is bound to inquire whether the goods were bought or the services were rendered, and we think this an elementary principle of law."

That a note payable to a corporation was indorsed by a former president, who was authorized so to do by the board, for the benefit of the company, was held insufficient to put a purchaser on inquiry. *Jones v. Stoddart*, supra.

In *Re Land Credit Co.* supra, Selwyn, L. J., said that in *Fountain v. Carmarthen R. Co.* L. R. 5 Eq. 316, 22 Eng. Rul. Cas 132, it was said: "In the case of a registered joint stock company, all the world, of course, have notice of the general act of Parliament, and of the special deed which has been registered pursuant to the provisions of the act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank v. Turquand*, 6 El. & Bl. 327, the directors have power and authority to bind the company, but certain preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of *Lord Campbell's* judgment in *Royal British Bank v. Turquand*."

The purchaser of paper was held to be under no obligation whatever, in taking the same, to inquire whether the indorsement which purported to be that of a corporation was so or not. *Lafayette Sav. 29 L.R.A. (N.S.)*

Bank v. St. Louis Stoneware Co. 4 Mo. App. 276. The court said: "Parties buying paper thus indorsed were under no obligation to inquire whether the indorsement was made for value; and if any representation in this matter was necessary, it was made in the very act of offering the paper for discount; for the offering of the note to a purchaser before maturity was a declaration that the indorsement was for value, and in good faith." This paper was negotiated by the financial manager, who was in charge of the financial business of the company.

And where the paper was for the benefit of the corporation, or the circumstances indicated that it was in the regular course of its business, the holder would not be put upon inquiry.

So, where it was claimed that it was the duty of the purchaser of corporation paper to have made inquiry into the consideration, and as to the power of the treasurer to execute the same, it was held that such inquiry would have shown that the company had the benefit, and inquiry would only have strengthened the presumption in favor of the paper. *Re Great Western Teleg. Co.* 5 Biss. 363, Fed. Cas. No. 5,740.

A bank made a loan to a firm, and took notes of a corporation as collateral specially pledged for its payment. The firm had large dealings with the corporation in furnishing it with materials. It was claimed that, as the president of the bank, in a casual talk with a member of the firm, had knowledge that they carried \$600,000 of the company's paper, the bank was put on inquiry as to whether this was accommodation paper. But it was held that representations made at the times of discount, that this was business paper offered to the bank, and the large business dealings between the firm and the company, showed good faith in the bank. *National Bank v. Young*, 41 N. J. Eq. 531, 7 Atl. 488.

And the mere fact that one corporation purchased all the property of another was held not sufficient to require a purchaser of paper issued by the former in payment of the stock of the latter corporation

they have in any manner received any benefits from its possession by Bredall. As the company was never organized, and the horse never accepted, the defendants were clearly injured and damaged by the fraudulent acts of Headley as the agent of Lefebure, and by the acts of Lefebure in putting the note into circulation, knowing that the same was fraudulently obtained from the defendants.

The contention of the plaintiff that, as the testimony of Mr. Struble was not contradicted, and his reputation for truth and veracity was not impeached, his testimony must be taken as true by the jury, is not tenable, for the reason that, while his testimony was not directly contradicted, and no witness was called to testify as to

his character for truth and veracity, he was impeached by his cross-examination, which is one of the methods by which the testimony of a witness may be impeached. He admits on his cross-examination that, notwithstanding the existence of facts calculated to arouse the suspicion of an ordinarily prudent man as to the validity of the note in the hands of Lefebure, he made no inquiries of Lefebure, or any other person, as to the nature of the transaction resulting in the giving of the note, or as to the delivery of the same by the makers for the defendants. He said: "I did not think it strange that Lefebure indorsed that note 'without recourse.' Everybody indorses a note 'without recourse' when he sells it, if they know how to do business." The an-

to inquire as to the legality of the transaction. *National Salt Co. v. Ingraham*, 74 C. C. A. 479, 143 Fed. 805.

In some cases it is held that a director passing paper of the corporation is not controlled by the same rule as an officer of the company.

In *Orr v. South Amboy Terra Cotta Co.* 113 App. Div. 103, 98 N. Y. Supp. 1026, reversing 47 Misc. 604, 94 N. Y. Supp. 524, it was held that one purchasing a note made by a corporation to one of its directors was not put on inquiry, as the rule was held to be different from that where a note was made payable to one of the officers.

The holder of notes taken by him as collateral on a loan to a corporation of \$30,000, which notes had been given for subscription for stock, was held not bound to inquire as to the transaction or consideration of the notes, although he was a director of such corporation, and it shortly failed and became bankrupt. *Reilly v. McKinnon*, 86 C. C. A. 268, 159 Fed. 78. This was on the ground that one could be a bona fide holder and yet be grossly negligent.

Mere suspicion or negligence is held insufficient to put a purchaser on inquiry.

The facts that the notes were for large sums, and were made payable to the president of the corporation, and were used by him to secure his individual debt, while sufficient to put an ordinarily prudent person upon inquiry, failure to make which would amount to gross negligence, yet it was held that in the Federal court they would not prove bad faith on the part of the purchaser. *Doe v. Northwestern Coal & Transp. Co.* 78 Fed. 62. It was held that the purchaser did not wilfully abstain from making inquiry from the fear that he would discover facts which might impeach the validity. It was said that the rule in New York and Michigan, Kentucky, Virginia, and New Mexico, was different.

In *Fillebrown v. Hayward*, 190 Mass. 472, 77 N. E. 45, where a former treasurer of a corporation sold her stock to her successor, which was paid for by him with checks signed by him, as treasurer, it was held 29 L.R.A. (N.S.)

that she was a bona fide holder. The court said: "There is no evidence that at any time she was possessed of any knowledge of what undoubtedly to a certain extent was an embezzlement on his part, or that, having doubts as to how he obtained the money, she deliberately decided for her own advantage not to make any inquiries to ascertain why, instead of paying with checks drawn on a bank account of his own, or in money, he used checks issued by him as treasurer, although if such conduct had been shown, then it might be inferred that she ignored significant facts with a purpose [not] to know anything more, and this would have been enough to indicate that, suspecting something was wrong, she intended to avoid the effect of the evidence."

That a note was payable to one corporation from another, and made by one who was president of both corporations, was held insufficient to put a purchaser on inquiry. *St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055. In this case the secretary of the corporation also signed it. This ruling was because mere suspicion or negligence is held insufficient in this state to put a purchaser on inquiry, though such assignee be in possession of facts or circumstances sufficient to arouse suspicion in the mind of a person of ordinary prudence, and though he is guilty of negligence in not first following up such information for the purpose of discovering the fraud or illegality to which the suspicious circumstances may seem to point.

The treasurer of a cement company had a note of a corporation made to his company without the knowledge of the directors, and had the same discounted at a heavy discount, for his own use, and the discount at this bank was out of the course of the cement company's business. The bank knew that the borrower was also president of an insurance company, which was known by the bank to be embarrassed. These facts within the knowledge of the cashier were held insufficient to render the purchase mala fides. *Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 668, 42 Atl. 1006. In

swer of Mr. Struble to the question propounded to him is somewhat remarkable, and would indicate that he did not have a very clear idea as to the effect of the failure of Lefebure to indorse the note in the usual manner; Lefebure being a comparative stranger to him, residing in another state, and the defendants being residents of a county other than the one in which the alleged sale occurred. The purchase, he claimed, was made in May or June, 1904. It is true that he says in the preceding January he had a conversation with Headley in regard to the note, and that Headley told him it was all right, but it nowhere appears from his testimony that he made any inquiry of Headley or Lefebure as to any of the circumstances

attending the giving of the note, and he seems to have studiously avoided making any inquiries of them in relation thereto.

Section 2451 of our Revised Civil Code provides that "constructive notice is notice imputed by the law to a person not having actual notice." Section 2452 provides: "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." As before stated, we are of the opinion that Struble had actual notice of circumstances sufficient to put a prudent man upon inquiry, and hence he must be deemed to have had constructive notice of all the facts

this case the court said: "The title of the bank must prevail, unless it had knowledge of facts which of themselves impeach the transaction,—in this case fraud,—and not facts which only tend to prove fraud or to excite suspicion. *Credit Co. v. Howe Mach. Co.* 54 Conn. 384, 1 Am. St. Rep. 123, 8 Atl. 472. Apparently the trial court was influenced to some extent by the doctrine in *Gill v. Cubitt*, 3 Barn. & C. 460. That doctrine was approved in *Hall v. Hale*, 8 Conn. 30, but the case has been overruled in *Brush v. Scribner*, 11 Conn. 399, 29 Am. Dec. 303, and *Credit Co. v. Howe Mach. Co.* supra. No vestige of the doctrine remains."

And the fact that notes made by a corporation were indorsed by its president and secretary to the president individually, and by him to the secretary and treasurer individually, and by them through another party to a firm, was held not sufficient to put a subsequent purchaser on inquiry as to whether the proceeds were to be used by an officer for his individual benefit. *Re Troy & C. Shirt Co.* 136 Fed. 420, affirmed in 73 C. C. A. 523, 142 Fed. 1038.

A transfer clerk of a corporation issuing certificates of stock offered 100 shares to brokers, to be sold for his account. The brokers sent the certificates to the corporation office to satisfy themselves before offering the same for sale or guaranteeing the same, and received assurance that they were all right. They were bogus, but on regularly signed certificates. The brokers, refunding to their customer, were held entitled to recover from the corporation. *Jarvis v. Manhattan Beach Co.* 148 N. Y. 652, 31 L.R.A. 776, 51 Am. St. Rep. 727, 43 N. E. 68.

A purchaser of irrigation bonds from the president of the corporation issuing the bonds was held not bound to inquire into the circumstances, where they were in the name of the president, and he was not prohibited from buying the bonds. It was held that, "in order to render the transaction invalid, facts must have come to the notice of the defendant in error or his agent of such a nature that to refrain from pursuing further inquiry would of itself

amount to evidence of bad faith." *Perris Irrig. Dist. v. Thompson*, 54 C. C. A. 336, 116 Fed. 832.

IV. Paper held by trustees, administrators, and guardians.

The fact that paper is payable to a "trustee" or "guardian" and the like will generally put the purchaser on inquiry. But in Tennessee and California it is held that this fact will not require inquiry if the trustee is only nominal, and the word is used only as descriptive, and without any legal significance.

An executor, by an order from his co-executor, caused bonds belonging to an estate to be registered in the name of a party making this executor an individual loan. It was held that this party making the loan was put on inquiry. *Gottberg v. United States Nat. Bank*, 131 N. Y. 595, 30 N. E. 41.

And that a note was payable to a "trustee" was held sufficient to put the purchaser on inquiry as to the title. *Third Nat. Bank v. Lange*, 51 Md. 138, 34 Am. Rep. 304.

And where a certificate of stock was held as "trustee," and was pledged by such trustee for his individual debt, it was held that the creditor was put upon inquiry as to the title. *Shaw v. Spencer*, 100 Mass. 384, 1 Am. Rep. 115, 97 Am. Dec. 107.

In *Re Troy & C. Shirt Co.* 136 Fed. 420, the case of *Shaw v. Spencer*, 100 Mass. 382, 1 Am. Rep. 115, 97 Am. Dec. 107, holding that a purchaser of a certificate of stock in the name of "A. B., Trustee," was put on inquiry, was distinguished, the court saying: "But here, even if such indorsements gave rise to suspicion, this was not enough to charge the International Trust Company with actual knowledge, on the theory that, upon inquiry, it would have obtained knowledge of all the facts."

And where stock showed that it was held "as trustee," and the trustee used the same as collateral for his individual debts, the holder was put on inquiry. *Duncan v. Jaudon*, 15 Wall. 175, 21 L. ed. 145.

which such inquiries would have elicited. As a purchaser of the note, therefore, in order to constitute him a purchaser in good faith, he should have made such inquiries of Lefebure in regard to the making and delivery of the note, as would, if they had been truly answered by Lefebure, have placed him in possession of the facts showing that the note in the hands of Lefebure was invalid and worthless; for we have a right to presume that Lefebure would have answered the inquiries made of him truly, as, if untrue, his answers might have subjected him to a prosecution for obtaining money from Struble under false pretenses. The purchaser of a negotiable note, as we have seen, cannot rely alone upon the fact that he has no information of

any defense to the same, in order to constitute him a purchaser in good faith, but he must go further, and show that he used the means that an ordinarily prudent man would use to ascertain the manner in which the note was obtained from the makers. He is not permitted to refrain from making inquiries, but the burden is upon him to show that he has used the ordinary means to ascertain whether or not the note is a valid note in the hands of the vendor.

It was stated in the opinion in the case of Canajoharie Nat. Bank v. Diefendorf, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402, from which we have quoted: "The notes were apparently for unusual amounts for a farmer in ordinary circumstances to give,

And a purchaser of time certificates of deposit payable to a "trustee" was held put upon inquiry where the trustee had no power to dispose of them. Ford v. Brown, 114 Tenn. 467, 1 L.R.A.(N.S.) 188, 88 S. W. 1036. This was held to be equivalent to actual notice under Tennessee negotiable instrument law, § 56, providing that to constitute notice of the infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity, or of such facts that his taking the instrument amounted to bad faith.

Where a trustee transferred to another, to pay a personal debt, a note payable "to him" "as trustee," it was held that the purchaser was put on inquiry as to the right of the *cestui que trust*. Alexander v. Alderson, 7 Baxt. 403.

And where U. S. bonds held under a will were made payable to the executor or assignee, and the public administrator exchanged them for new bonds, payable to a bank, it was held that anyone who knew the history of the bond would be put on inquiry as to the title. Covington v. Anderson, 16 Lea, 310. The court said: "Can Anderson, not being the executor or trustee named in Woodward's will, sell? These suggestions would have led at once to an inspection of the records, which would have discovered that Anderson had no right whatever to manage or control the bonds, and that his purposes were anything but honest."

In Tradesmen's Nat. Bank v. Looney, 99 Tenn. 278, 38 L.R.A. 837, 63 Am. St. Rep. 830, 42 S. W. 149, the cases of Alexander v. Alderson and Covington v. Anderson, supra, and Caulkins v. Memphis Gaslight Co. 85 Tenn. 684, 4 Am. St. Rep. 786, 4 S. W. 287, were distinguished, the court saying: "All of these cases involve controversies between the owners of trust funds and parties who set up a title to such funds by transfer from trustees in fraud of their trusts, and where the paper transferred or assigned on its face gave notice of the existence of a trust."

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And where the word "Syndic" was attached to the name of an indorser, it was held that the purchaser was put on inquiry as to the authority of the indorser to make the indorsement. Nicholson v. Chapman, 1 La. Ann. 222. The court said: "The indorsement, 'G. W. Pritchard, Syndic,' is notice that the note belonged to this estate, and that it could not be discounted without an order of court. Whether that order existed or not, the person purchasing the note was bound to ascertain. The indorsement was sufficient to put him on inquiry. It was positive information that the note was not an ordinary one, negotiable at the risk of its holder, but formed part of a fund which did not belong to the party holding it, but to those whose depository he was."

And where a note was payable to an administrator, and secured by a mortgage to the probate judge, and indorsed by the latter to secure his individual debts, it was held that the purchaser was put on inquiry. Freeman v. Bailey, 50 S. C. 241, 27 S. E. 686. In this case the holder took the note overdue.

And, where the payee of a note had died, and his representatives sent the note without any indorsements thereon for collection, it was held that the party collecting the note had such notice as to put him on inquiry as to the title. Newman v. Tillman, 71 Miss. 26, 13 So. 934. In this case, the party sending the note was a member of a firm which was indebted to the collecting agent, and the firm was credited with the proceeds.

And the fact that a husband of an administratrix used a note payable to her as administratrix, as collateral for his debt, was held sufficient to put the holder on inquiry as to the title of the note. McConnell v. Hodson, 7 Ill. 640.

A purchaser of a note payable to the order of a guardian was held to be put on inquiry as to the trust. Strong v. Strauss, 40 Ohio St. 87.

And a bank purchasing notes from a guardian was held put on inquiry, where the note showed that the ward had an in-

nd would naturally have excited curiosity in those who knew him as to the circumstances under which such an indebtedness was incurred. The plaintiff's cashier, however, studiously refrained from acquiring any information in regard thereto, even such as might be, under many circumstances, desirable for the bank to have. He made no inquiry as to the consideration of these large notes, the influences which had taken him farther so far from home, or the circumstances attending their execution. He asked no questions as to the responsibility, employment, or associations of his vendor. . . . Greater caution in avoiding the most natural information could not have been exhibited by the plaintiff if the cashier had known the notes were obtained by

fraud or crime, and desired to remain in ignorance of those facts. His conduct indicated something more than negligence. He exhibited a studious desire to avoid any information which might throw light upon the origin of the notes, or the existence of equities in favor of their maker." This language is equally applicable as to Struble and the plaintiff.

It is quite clear from the facts as disclosed by the evidence in this case that Struble was not a purchaser in good faith, and entitled to the protection which the law gives to a good-faith purchaser. The plaintiff is clearly in no better position than Struble. He took the note indorsed by Struble "without recourse," and the only inquiries he claims to have made were of

rest in the same. *Langdon v. Baxter Nat. Bank*, 57 Vt. 1, 52 Am. Rep. 113.

And where debts not connected with a guardian's account were paid for by checks signed "guardian," it was held that the person receiving the same was put on inquiry as to the improper use of the fund. *Shufeld v. Tanenbaum*, 176 N. Y. 126, 98 N. St. Rep. 653, 68 N. E. 141, reversing App. Div. 310, 68 N. Y. Supp. 1023.

But where an inquiry would have discovered that the word "trustee," attached to payee's name in the note, was purely descriptive and without any legal significance, it was held that this fact did not put a purchaser on inquiry. *Tradesmen's Nat. Bank v. Looney*, supra.

In *Brewster v. Sime*, 42 Cal. 139, 14 Or. Min. Rep. 573, it was held that the word "trustee" was not sufficient to put purchaser on inquiry as to the purchase of stock. The court said: "All that is to be decided is, that the mere mention of the word 'trustee' after the name on the certificate is not, in this state, of itself, nothing more appearing, to be deemed constructive notice of the equities of a secret owner of the stock. If it is intended that the so-called trustee shall not have power to sell or hypothecate the stock, without the express consent of the equitable owner, it is an easy matter to limit his authority by apt words in the certificate."

In *Gerard v. McCormick*, 130 N. Y. 261, 1 L.R.A. 234, 29 N. E. 115, it was said: "California it is held that a certificate of shares running to 'A. B., trustee,' without disclosing the beneficiaries, or the particulars of the trust, is not sufficient to put proposed purchaser upon inquiry. *Brewster v. Sime*, supra; *Thompson v. Toland*, Cal. 99. The two cases last cited are in accordance with the current of authority, and do not, as we think, lay down a rule best adapted to protect the interests of owners, as well as dealers in such securities."

Notes were indorsed in blank and left to another party, who indorsed them "for the use of the holder," and used them as collateral security. It was held that the holder was

not put on inquiry. *Paulette v. Brown*, 40 Mo. 52. This action was by the payee to recover the notes, and it was claimed by defendant that the curator of plaintiff's children had no interest in the same.

V. Husband and wife.

Whether or not the wife's interest in negotiable paper will put a purchaser on inquiry depends largely on the nature of that interest, and the statute of the state giving her power to contract.

So, where a purchaser of a note had knowledge that it was made by a married woman, it was held that he was put on inquiry as to whether it had been subscribed in a case in which the authority of the husband might be dispensed with. *McComas v. Green*, 6 La. Ann. 121.

And under La. Rev. Civ. Code § 2390, providing that a wife, with the authorization of her husband, may sell her separate property, and give the proceeds to her husband, it was held in such a case a party might discount a mortgage as part of the purchase price of her estate, where there was nothing to create suspicion or put the capitalist on his guard. *Walker v. Limongy*, 26 La. Ann. 324.

And where a note was made out by a married woman, and this was shown on its face, this was held sufficient to put a purchaser on inquiry as to whether it could be charged against her separate estate. *Pilcher v. Kerr*, 7 La. Ann. 144; *De Gaalon v. Matherne*, 5 La. Ann. 495.

A transfer of negotiable paper to a third party to pay several creditors, and the balance to be paid to the indorser's wife, was held to be out of the ordinary course of business, and did not render a holder bona fide. *Roberts v. Hall*, 37 Conn. 205, 9 Am. Rep. 308.

An indorsement of a wife's note by her husband as "agent," and an appropriation of the same to pay his debt, were held sufficient to put the holder on inquiry as to his power and title. *McBain v. Seligman*, 58 Mich. 294, 25 N. W. 197.

A note secured by mortgage was assigned

Struble, who said to him the note was all right. He admits that he would not have taken the note for his bank without the indorsement of Struble in the usual manner. Though he claims to have paid value for the note to Struble, he is unable, although purchasing some time before the trial, to state in what manner he paid Struble for it, whether in money or by cancellation of indebtedness due him from Struble. He admits that he gave no check to Struble for the note, but is unable otherwise to explain the consideration paid by him, and says in his testimony that Struble made a good discount on the note, and when asked the question: "Q. Would your bank have taken that note with an indorsement

from the payee of the note when it was made to the order of the payee 'without recourse?'" His answer was: "No, sir." "Q. And you were willing to take a chance that the bank would not have taken on this note? A. Yes. Q. You knew there was a chance in taking it? A. There was a good rate of interest; there was a good discount." The good faith of the parties in the purchase of the note being in issue, the jury might properly draw the inference from the evidence that neither of these parties purchased the note in good faith, even if the rule contended for by counsel should be adopted by this court, that, where facts are testified to by a witness, and there is no conflict in the evidence, the jury

to a wife by her father, and her husband, without her consent, used the same as collateral in a bank for his debt. It was held that the bank collecting the same was put on inquiry as to his title to the note. *Norfolk Nat. Bank v. Nenow*, 50 Neb. 429, 69 N. W. 936. The indorsements were disputed, and not shown, as the note was delivered to the maker, but the bank had prevailed on the wife to assign the mortgage to it, the wife claiming that this was only for collection for her.

And where a note, "I promise to pay," was signed by a husband and wife, and a mortgage was given to secure the same, the purchaser was held required to make inquiry as to the relationship of the parties as to principal and surety. *Fuller v. Quesnel*, 63 Minn. 302, 65 N. W. 634. The defense was that the wife signed as surety, and was released by extension.

But the fact that a note was indorsed by a wife with the blank unfilled, to be used for a particular purpose by the husband, was held insufficient to put the purchaser on inquiry, where he sold goods to the husband, and took the note in payment. *Frank v. Lilienfeld*, 33 Gratt. 390.

A bill was properly accepted and was made payable to a married woman, and her husband forged her indorsement, and also indorsed it. In an action by the wife to restrain the holder from suing the acceptor, it was held that the holder was not put on inquiry, and could not be restrained from using the rights acquired by the indorsement of the husband. *Dawson v. Prince*, 2 De G. & J. 41. The court said: "It is in evidence, that before the defendant Prince proceeded to get the bill discounted, he was told by the husband of the plaintiff that it had been indorsed by her. In my opinion he was entitled to rely upon that representation, and was not bound to make further inquiry."

See *Love v. Lamar*, 78 Ga. 323, 3 S. E. 90, subd. XVIII.; *Third Nat. Bank v. Poe*, 5 Ga. App. 113, 62 S. E. 826, subd. XVIII.; *Walden v. Downing Co.* 4 Ga. App. 534, 61 S. E. 1127, subd. XVIII.; *Garbutt Lumber Co. v. Prescott*, 131 Ga. 326, 62 S. E. 228, subd. XVIII. 29 L.R.A. (N.S.)

VI. Purchase from stranger.

Some cases give much emphasis to the failure to make inquiries where a stranger offers a note for sale, and there appears to be quite a conflict in the cases, due in some measure to the cases following *Gill v. Curbitt*, 3 Barn. & C. 466 (overruled in *Crook v. Jadis*, 5 Barn. & Ad. 909), and in *MEY v. CARLSON*, due to a statute which expresses the same rule. In other cases, the fact that the payee is suspected of having obtained the note by swindling farmers through means similar to those practised in other cases which are generally known in that community is held sufficient to put a purchaser on inquiry.

Notes for large amounts were obtained by fraud from a farmer some 200 miles from the maker's residence, and within a few days were offered for sale at a bank near the maker's residence by a stranger, introduced to the cashier by a resident of the town in which the bank was situated. The party introducing refused to indorse the notes. The maker had never been engaged in business requiring discounts to any extent. The bank discounted the same in ten minutes, making from 10 to 15 per cent. It was held that the purchaser was bound to make inquiries. *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402. The court said: "Without being called upon to make the explanation usually required by banking institutions in respect to the most ordinary transactions of everyday customers, this stranger, it is claimed, walked into a national bank and converted his feloniously acquired property into money, without difficulty or delay. Common prudence, and a decent regard for the rights of those who might be injured by his conduct, required more than this from the least scrupulous of men, and much more, it would seem, from the managers of a chartered financial institution. Such institutions have no right to advertise the purchase by them of unlawfully acquired notes, bonds, or negotiable paper, without inquiry or question."

In *Rosenblum v. Blaser*, 115 N. Y. Supp. 219, the case of *Canajoharie Nat. Bank v.*

is bound to take his statements as true, although they might believe, from his manner of testifying and his appearance as a witness upon the stand, that he has testified untruly,—a point we do not decide.

The further contention of the plaintiff that, if denied his right to recover in this action, it would be introducing a dangerous rule into the law in regard to the transfer of negotiable paper, is not tenable. A person purchasing a note in good faith, who has exercised in its purchase such care as an ordinarily prudent man would exercise, will not be liable to suffer loss by the enforcement of the rule adopted by the court of appeals of New York and approved by this court; but, however, if

he fails to show that he purchased the note in good faith, by failing to observe the ordinary rules applicable to the purchase of commercial paper, where the circumstances attending the purchase are calculated to excite suspicion in the mind of an ordinarily prudent man, the law will not protect him, and his loss will be the result of his omission to exercise good faith in the purchase of the paper.

Finding no error in the record, the judgment of the court below and order denying a new trial are affirmed.

Fuller, J., taking no part in this decision.

Diefendorf, *supra*, was criticized by saying: "Written by a zealous judge, once a notable advocate, whose homily of piping phrases in eleven solid pages, upon a promissory note case, if taken literally, rather than regarded as bad law, made by a hard case, would long since in this state have dwarfed dealings in negotiable instruments, and put an end to the commercially useful and reputable business of note brokers. Be the worthiness what it may of that opinion (concurrent in by the full bench of the time), the facts presently in question contrasted in epitome with the circumstances of Farmer Diefendorf's trade and the dealing of the bank with his beguiler ('coming redhanded from the perpetration of his fraud') take this case out of the sentimental observations referred to, fortified with extracts—foreign, Federal, and domestic—and quotations out of hornbooks from home and abroad, and show without citation of cases that in a commercial community, respecting the law merchant, the judgment herein should have been against the maker as well as against the indorser."

In *Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 53 App. Div. 635, 65 N. Y. Supp. 757, the case of *Canajoharie Nat. Bank v. Diefendorf*, *supra*, was criticized, the court saying: "It is generally recognized that the last case carried the question as to what facts and circumstances were sufficient to put the purchaser upon inquiry to the extreme, and the courts have been reluctant to carry the doctrine further. While the later decisions have reaffirmed the protection to which persons dealing in negotiable instruments are entitled, and which are essential to uphold commercial transactions, to hold that the circumstances appearing in this case are sufficient upon which notice could be charged of the infirmity of the title in those bonds would extend the doctrine beyond that of any reported case, and shake the foundation upon which the law of negotiable paper rests."

In *Gill v. Cubitt*, *supra*, where a bill of exchange was stolen during the night, and taken to the office of a discount broker early in the following morning by a person whose

features were known, but whose name was unknown to the broker, and the latter, being satisfied with the name of the acceptor, discounted the bill, according to his usual practice, without making any inquiry of the person who brought it, held, that in an action on the bill by the broker, against the acceptor, the jury were very properly directed to find a verdict for the defendant if they thought that the plaintiff had taken the bill under circumstances which ought to have excited the suspicion of a prudent and careful man.

This case was overruled in *Crook v. Jadis*, *supra*, and *Backhouse v. Harrison*, 5 Barn. & Ad. 1098.

A Bank of England note for £500 was stolen from a porter of plaintiff's bank, and was changed by a country bank some seven months later, by the holder, a stranger, taking smaller notes of the country bank. (The case of *Gill v. Cubitt* was followed.) It was held to be a question for the jury whether the party changing the bill used due caution. *Snow v. Peacock*, 2 Car. & P. 215. The court said: "It is important to remember that the man asked for change in Bank of England notes, but afterwards agreed to take those of the defendant's bank. Perhaps the circumstance of getting their own notes into circulation, and the little profit they would thereby acquire, might abate the degree of caution which they would have used under other circumstances. Questions should have been asked, and those questions continued, till suspicion was satisfied. One of the witnesses proved that it is the practice of London bankers never to change a note for a stranger without first making inquiry. I think the plan adopted by the bank itself is a very proper caution."

And, where a broker discounted a bill with the acceptors' signature forged, and gave in exchange his check, payable to the acceptors, and this was cashed by forging the acceptors' names, it was held that the broker did not use due caution in discounting for a stranger, and that this was not in the usual course of business, and that he should lose the amount of his forged

check in a controversy with the bank. (Following *Gill v. Cubitt*, supra.) *Smith v. Mechanics' & T. Bank*, 6 La. Ann. 610.

A party who was robbed of a bank note of £500 brought an action of trover two years thereafter, against a holder of the note, who claimed that he received it on a Derby bet, but could not name the person. It was held (following *Gill v. Cubitt*, supra) that the holder could not say that he had used ordinary precaution. *Easley v. Crockford*, 10 Bing. 243.

And, where acceptances of two drafts for \$500 each were obtained about 7 p. m. by fraud or forgery, from a party residing some 3 miles in the country, and the drafts were transferred that evening to the railroad station agent, by a stranger, and by the indorsee to a bank on the next morning for \$800, and the drawer was unknown to the bank officers, it was held that the latter, making no inquiry, were not holders in good faith. *State Bank v. Wilkie*, 35 Neb. 579, 53 N. W. 603.

And where the payee of a fraud note was a stranger, and known to plaintiff to be doing some kind of business with the people of that country, and talked to plaintiff about the solvency of the maker before the note was made, and the plaintiff purchased the note four hours after it had been executed, at a place 5 miles distant, refused the same day to disclose what he had paid for it, or to surrender it to the maker at an advance, and only paid \$30 for a note of \$100, it was held that he was put on inquiry. *Loftin v. Hill*, 131 N. C. 105, 42 S. E. 548.

And, where a forged check, payable to brokers, was indorsed by the brokers and paid by a bank, without knowledge that the drawer's name was forged, it was held in an action by the bank against the brokers, that the presentation by a stranger, to the brokers, of a check payable to their own order, was a transaction that should have put them on inquiry. *Patten v. Gleason*, 106 Mass. 439.

A check payable to bearer in New Orleans was lost on a St. Louis steamer. It was afterwards sold by a passenger in St. Louis, a stranger, to another passenger, taking goods in part payment, and 5 per cent discount; the reason given for not cashing it at New Orleans was that the holder had been disappointed in love, and took to drink, and was so intoxicated he forgot to present it. It was held that the circumstances connected with the sale were so suspicious that the purchaser, not making further inquiries, was not a bona fide holder. *Vairin v. Hobson*, 8 La. 50, 28 Am. Dec. 125.

In *Solomons v. Bank of England*, 13 East, 135, note, 3 Eng. Rul. Cas. 634, a bank note of £500 had been obtained by a forged draft from a company, and when presented by the plaintiff, payment had been stopped. The plaintiff had received the note from his correspondents from Middleburgh, and wrote, inquiring how they came by the note; their answer was that they had received it from a man dressed in such a way, in pay-
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ment of goods, and that they knew nothing of it, and that he should return the note or pay for it. It was held that the plaintiff was properly nonsuited. *Ashurst, J.*, said: "On the evidence of suspicion which was given with respect to this note, the plaintiff ought to have given every possible account how his correspondents came by it, in order to clear them from imputation of fraud; and this was not done; the suspicion, therefore, remains as it did before."

A bank bill of £100 was lost in a stage coach, and was cashed by a bank at Brighton for a stranger, who wrote "his name and address in a vulgar hand, and in a very bungling stile," and he was not asked at what hotel he put up, or whether he knew or was known to any individual at Brighton. It was held to be a question for the jury whether due caution was exercised by the banker. The jury found for the plaintiff in an action by the loser in trover against the banker. *Strange v. Wigney*, 6 Bing. 677.

And, where merchants sold goods to a stranger, and took in payment part cash and part an accepted bill, which the true owner had lost, it was held to be a question for the jury whether inquiry should have been made, where the goods were sent to a tavern, which was not a booking office. *Slater v. West*, 3 Car. & P. 325.

And, the purchase of a note of \$300 for \$50, from a stranger, indorsed without recourse, was held to require a submission to the jury whether or not the purchaser was put on inquiry. *Gould v. Stevens*, 43 Vt. 125, 5 Am. Rep. 265. The note was for a patent right which was worthless.

A purchaser of notes knew that they were procured from farmers for wheat under circumstances which justified him in regarding them as "green" for giving them, that the note payable to bearer was offered to him by a stranger on the morning after it was executed, and that if the note was obtained from the maker by fraud, and he made inquiries, he could not enforce payment. It was held that it was a question for the jury whether or not he had acted in good faith. *Whaley v. Neill*, 44 Mo. App. 316.

And, the fact that a banker purchasing notes knew that the seller was a stranger, selling churns, and offered notes of farmers at an unusually large discount for good paper, was held to be a suspicious circumstance, and enough to awaken inquiry in the mind of any reasonably cautious person as to the consideration, before buying. *Auten v. Gruner*, 90 Ill. 300.

Most of the cases asserting a contrary rule were those that refused to follow the case of *Gill v. Cubitt*, 3 Barn. & C. 466.

A pocketbook containing an indorsed bill was lost in the canal; some weeks afterward it was presented to a bank by two men dressed like sailors, who claimed that the bill was given to them in payment of a cargo of coal. The holder could not write, and indorsed his name by his mark, and explained that the bill had been discolored

by falling into the canal; it was held that there was not evidence to warrant a finding that the agent of the bank had been guilty of gross negligence. (*Gill v. Cubitt*, supra, overruled.) *Backhouse v. Harrison*, supra. It was proved that it was the custom at the Bank of England and its branches not to discount a note for strangers who could not write, especially where the bill was dirty.

Where the sellers of a note were both strangers to the purchaser, who did not like their appearance, the facts that he became suspicious, and thought the note was not genuine, or that the maker was not solvent, and made inquiries as to the genuineness of the note and the solvency of the maker, and being satisfied upon these two points, purchased the note, were held not sufficient to put him upon inquiry as to title. *Matthews v. Poythress*, 4 Ga. 287.

Bonds were stolen in Philadelphia; before the theft was discovered, they were negotiated in New York, by a man purporting to be a New Jersey physician and a stranger to the broker. An instruction that it was a question for the jury as to whether the holder had established that he was a purchaser in good faith, or whether there were such circumstances of the character which have been described as would warrant the inference that there was ground for suspicion, was held erroneous. Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker at the time of the transfer, was held not to affect his title. That result could be produced only by bad faith on his part. *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857.

A note payable to bearer, procured by fraud, amounting to \$250, on a solvent party, was purchased for \$100 from a stranger. The stamps were not properly canceled. The stranger said that he obtained the note in New York, on trade. An instruction that the holder was put upon inquiry was held to be erroneous. *Phelan v. Moss*, 67 Pa. 50, 5 Am. Rep. 402.

In *McSparran v. Neeley*, 91 Pa. 17, it was said: "In *Beltzhoover v. Blackstock*, 3 Watts, 20, 27 Am. Dec. 330, Judge Sergeant concurred in the position taken in *Gill v. Cubitt*, supra, that if an indorsee takes a note heedlessly, and under circumstances which ought to have excited the suspicions of a prudent and careful man, the maker or indorser may be let into a defense. In *Phelan v. Moss*, however, it was expressly declared that *Gill v. Cubitt* was not law in Pennsylvania, and it was decided that the existence of suspicious circumstances alone will not defeat an indorsee's right to recover, but that, in order to defeat his title, mala fides on his part must be proved."

An instruction that if strangers offer to sell notes having any marks of suspicion about them, the purchaser will be bound to take notice of such suspicious facts, and should protect himself by inquiring of the apparent maker, was held erroneous. *Smith* 29 L.R.A. (N.S.)

v. Culton, 5 Ill. App. 422. It was said that the earlier cases which seem to sustain the doctrine that mere negligence will defeat a recovery are explained in *Comstock v. Hannah*, 76 Ill. 530, which holds that the rule in *Gill v. Cubitt*, supra, is no longer an authority.

These cases above accord with the Tennessee statute.

A merchant receiving from a stranger in payment of goods a check indorsed in blank by the payee was held not put upon inquiry, where the check had been lost, and was presumably found by the party using it. *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655. This was under Tennessee negotiable instruments law, § 56, providing that "to constitute notice of an infirmity in an instrument, or defect of the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

A similar case occurred in Louisiana, where bills on western banks were first offered by a stranger who purchased rosin, and they were refused, and then a check payable to bearer was accepted, and the balance due the holder paid in cash and a check. It was held that there was no suspicious circumstances indicating that the holder of the first check had no title. *Marsh v. Small*, 3 La. Ann. 402, 48 Am. Dec. 452. In this case the check had been lost by the owner, and as no negligence was shown in taking it on the day of its date, the last holder was protected.

Contributory negligence of plaintiff was held to bar a recovery.

In an action of trover by the owner of an indorsed bill of exchange for £332, which was stolen from him, against a banker who purchased the bill from a stranger, where the loser had advertised a lost pocketbook containing papers of no value except to the owner, it was held that the plaintiff was negligent in failing to give notice, and this would prevent a recovery, even if the defendant was not cautious. *Beckwith v. Corral*, 11 J. B. Moore, 335.

Where the sale is made through the office of reputable brokers, it seems that the purchaser is not put on inquiry.

A stolen Adams Express bond was offered by a stranger to a broker in Maryland, who declined to purchase. The stranger then asked the broker to sell it for him, which was done on the floor of the New York stock exchange, by New York brokers, who had been instructed by wire. It was held that the purchaser was not put on inquiry. *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108. The main question discussed was whether the bonds were negotiable, as they were issued by an association, and a clause purported to exempt the members from liability.

Bonds of a Maine railroad were sent to New York, to a broker, to be sold, and were stolen while in New York. Three years

after, they were sold through a bank in Portland, acting for a New York broker, to an innocent holder. In an action of trover, it was held that the latter was a bona fide holder, although the seller was a stranger, and the price paid an insignificant percentage of the face of the bonds, and the cashier who effected the sale was unable to remember the name of the banker with whom he corresponded, or to produce his letters, or fix the date, or give any details. *Smith v. Harlow*, 64 Me. 510. This was accounted for, as it was not the custom of the bank to handle such bonds.

A purchase of two notes of \$2,000 each at 50 cents on the dollar, from a stranger, without inquiry, was held sufficient to entitle a recovery, where plaintiff's evidence was not contradicted. *Richmond v. Diefendorf*, 51 Hun, 538, 4 N. Y. Supp. 375. The court said: "The plaintiff asked nothing about the consideration of the notes. There is not any ground to suppose that he knew any fact which he did not disclose. No suggestion is made of any such knowledge. It is true that the fact that so many of the defendant's notes were outstanding and offered for sale by a stranger was unusual. Did that circumstance imply that the defendant had been the victim of a fraud? Why should it? The law does not presume fraud. The circumstances possibly implied an unusual expansion of his credit; but when a person gives a series of notes, the presumption naturally is that he does so in order to benefit himself, not that he has been victimized by swindlers."

In *Farthing v. Dark*, 109 N. C. 291, 13 S. E. 918, it was held that where the purchaser from a stranger of a note for \$125, due in six months, paid only \$100 for the same, and knew that it was payable at an office not existing in that town, he was put on inquiry. On rehearing in 111 N. C. 243, 16 S. E. 337, it was held that this misstated the facts, as the note was payable at this office or at the office of *Wortham & Company*, which was well known, and there was no suspicious circumstance connected with the place of payment. If he had made inquiry, he would have learned that the machinery for which the note was given was there in town, although not accepted by the buyer.

In *Loflin v. Hill*, 131 N. C. 105, 42 S. E. 548, it was said: "There are facts in this case not found in *Farthing v. Dark*, 111 N. C. 243, 16 S. E. 337, and the decision there in upholding in its integrity the law in reference to the rights of the holders of negotiable notes is the extreme limit of that doctrine. We can go no further with it." See *Wright v. Bartholomew*, 86 App. Div. 357, 72 N. Y. Supp. 706, subd. XII.

VII. Insolvency of prior parties.

The cases do not seem to agree as to whether the insolvency of a party negotiating paper should put a purchaser on inquiry; some cases hold that he is put upon 29 L.R.A.(N.S.)

inquiry; other cases hold that this is a question for the jury.

In *Bradwell v. Pryor*, 124 Ill. App. 84, it was held that a party who had previously obtained the release of a firm's vessels from libel, and knew that the company was in financial straits, and who received a draft obtained by a sale of lumber without recognizing the lien for salvage, was put on inquiry. But, on appeal, in 221 Ill. 602, 77 N. E. 1115, this rule was denied, and it was held that he had actual notice, or was a party to the fraud in obtaining the draft.

And a party taking a note as collateral was held put on inquiry where the maker of the note had shortly before made an assignment for creditors, and this was known to the indorsee. *Randall v. Rhode Island Lumber Co.* 20 R. I. 625, 40 Atl. 763.

And in *Sturges v. Metropolitan Nat. Bank*, 49 Ill. 220, a bank sold a draft on a New York bank, but, the consideration having failed, payment was stopped by telegraph. The holder, who had sent the draft through the mail, telegraphed also to the New York bank to turn over to another bank the proceeds for his creditor. It was held that the latter was not a bona fide holder, as he knew that the holder of the draft had suspended payment, that it was rumored on the street that it had not been paid for, and the holder had refused to answer an inquiry on that point. It was held that the purchaser should have made further inquiry. The court follows *Russell v. Haddock*, 8 Ill. 233, 44 Am. Dec. 693, saying the rule in *Gill v. Cubitt*, 3 Barn. & C. 466, is the rule in this state, which does not follow the rule laid down by the Supreme Court of the United States. *Cooley v. Jones*, 25 Ill. 567. But *Russell v. Haddock* was overruled in *Comstock v. Hannah*, 76 Ill. 530.

Where a drinking, impecunious real estate broker received a certified check of \$601, to pay taxes, and used it to pay a bill to the firm where he had desk room, and received some money on the same, and the indorser was not likely to be trusted with so much money, the court held that the indorsee was not a bona fide holder. *Buckner v. Jones*, 1 Mo. App. 538. The court said: "If defendant had received a \$1,000 bank bill under circumstances such as to put him on his guard, and lead him, as a reasonable man, to suspect that it could not be honestly pledged or paid away for his own benefit by the person presenting it to him, he would not have been safe in advancing money upon it, nor could he be allowed to apply a portion of it to the payment of a debt due to him by the suspected holder."

The fact that the holder of a note knew the maker was insolvent when he bought it was held to be some evidence for the jury. where his purchase was denied, and he had sued a prior indorser, who contended that his indorsement was for the purpose of enabling the maker to take up a col-

lateral, to be applied to the indorser's benefit. *Bunzel v. Maas*, 110 Ala. 68, 22 So. 568.

And where the alleged purchaser of a note and mortgage knew that the indorser was frequently borrowing money, and at times closely pressed, that the maker of the note was quite old, and subject to the infirmities usual to old age, that the transaction covered substantially all his property, and was out of his usual course of business, it was held sufficient to have suggested inquiry as to how and for what the note and mortgage were given. *Galbraith v. McLaughlin*, 91 Iowa, 399, 59 N. W. 338.

A notary's clerk purloined a note in the possession of the notary, belonging to a tutor of minors, amounting to \$2,400, and on this obtained \$1,200 from a broker, using the note as collateral. It was held that the broker, failing to make inquiries, was not a bona fide holder, where the drawer and indorser were men with whom the clerk was not known to be in the habit of dealing, and the clerk was without any apparent means (following *Gill v. Cubitt*, supra). *Nicholson v. Patton*, 13 La. 213.

A bill of exchange for £1,727 was made by a party and accepted by another party, and both were insolvent, and it was made in contemplation of bankruptcy. It was bought for £200 after the purchaser knew it had been hawked about, and the purchaser knew that it was risky as to the acceptor, and that the drawer was insolvent. It was held, in proving the claim in bankruptcy, that the purchaser was put upon inquiry. *Jones v. Gordon*, 37 L. T. Rep. N. S. 477, 4 Eng. Rul. Cas. 416, affirming L. R. 1 Ch. Div. 137. This was on the ground that the discount was so great as to suggest something dishonest.

In *First State Bank v. Hammond*, 104 Mo. App. 403, 79 S. W. 493, where a judgment for defendant was reversed because of an instruction that knowledge of facts sufficient to put a prudent man on inquiry would affect the title of the purchaser, the court said, however, that peremptory instructions for the plaintiff should not have been given, as the jury might not have believed the cashier, who testified that he did not know the condition of the insolvent payee, which was a company in his town, and had dealings with the bank.

A bank of England note for £1,000 was lost in London. Two years later it was cashed, part in money and part in bills of exchange, in Liverpool, by a banker and brewer, for a tavern keeper, who said that it was for one of his guests. At this time this tavern keeper was indebted to the brewer, and was insolvent. No questions were asked as to the title to the bill. It was held to be a question for the jury whether it had been received out of the ordinary course of business, and whether or not full value had been given for it. The original owners recovered in trover. *Egan v. Threlfall*, 5 Dowl. & R. 326, note.

But in other cases it was held that the purchaser was not put on inquiry. 29 L.R.A. (N.S.)

The fact that a man giving a new draft had allowed a prior draft to go to protest was held insufficient to destroy the good faith of the indorsee. *Merchants' Bank v. McClelland*, 9 Colo. 608, 13 Pac. 723. In this case the court said: "The circumstance that Skinner had procured the discounting by plaintiff of a draft which had afterwards been dishonored might have been sufficient to arouse a suspicion that the draft of defendant had not been procured in good faith; but the protestations and conduct of Skinner at the depot would naturally tend to allay such suspicion. Besides, we have seen that the existence of suspicions of this character is not alone sufficient."

On the 29th of October, A accepted drafts drawn on him by B, for goods sold to B by C, and C sold these drafts to a party who had notice that C had made an assignment of his accounts to another party on the 10th of that month. It was held that the purchaser was not put on inquiry, as there should come a time when the world could trade with the assignor without being put on inquiry as to whether a previous assignment covered later bills. *Cooley v. Jones*, supra.

And that an indorsee surrendered a note indorsed by a man of good financial standing, overdue three months, and took a new note, with an additional indorser, and that the note was for a large amount, was held not to render the indorsee a purchaser in bad faith. *Bromley v. Hawley*, 60 Vt. 46, 12 Atl. 220.

And where bonds were stolen and were used as collateral with a bank, it was held that the lender was not put upon inquiry from the fact that the borrower had been owing money to the bank for several years, where the borrower had the reputation of being an honest man, and the party who owned the bonds had been security for him as tax collector. *Whiteside v. First Nat. Bank (Tenn.)* 47 S. W. 1108.

Ignorance on the part of an indorsee as to the indorser or his solvency was held not to put the purchaser on inquiry. *Rosenblum v. Blaser*, 115 N. Y. Supp. 219. In this case the purchaser bought notes of \$700 for \$620.

The fact that a bank knew that another bank was insolvent when the latter turned over to the former a draft was held not to put the receiver of the draft on inquiry as to whether or not the insolvent bank had committed a fraud in obtaining the draft. *Forbes v. First Nat. Bank*, 21 Okla. 206, 95 Pac. 785.

See *Roth v. Colvin*, 32 Vt. 125, subd. II.; *New York Iron Mine Co. v. Citizens' Bank*, 44 Mich. 344, 6 N. W. 823, subd. VIII.; *Chaffee v. First Nat. Bank*, 40 Ohio St. 1, subd. IX.

VIII. Character, reputation, and business of indorser.

Whether or not the character of the indorser will put a purchaser on inquiry de-

pends largely on the character and business he has, and the amount of knowledge of the purchaser. If the indorser has been known to forge or deal in forged paper, the purchaser will be put on inquiry. So if he is known to be in a business that is in bad repute by reason of procuring paper from farmers fraudulently. But it seems the fact that he is a gambler or a saloon keeper will not put the purchaser on inquiry.

Newspaper articles touching the moral character of a drawer of drafts, not brought home to the knowledge of the officers of a bank discounting a draft to which a forged bill of lading was attached, were held not to prevent the bank from recovering from the acceptor. *Goetz v. Bank of Kansas City*, 119 U. S. 551, 30 L. ed. 515, 7 Sup. Ct. Rep. 318. The court said: "The bad faith in the taker of negotiable paper which will defeat a recovery by him must be something more than a failure to inquire into the consideration upon which it is made or accepted, because of rumors or general reputation as to the bad character of the maker or drawer.

And the knowledge that a note for \$5,000 was given for an alleged secret remedy for the cure of alcoholic and morphine diseases did not put a bank purchasing the note on inquiry as to whether the transaction was a fraudulent scheme. *First Nat. Bank v. Moore*, 78 C. C. A. 581, 148 Fed. 953. An instruction that any knowledge that would put a prudent business man on inquiry would be notice of all facts that could be obtained by inquiry was held erroneous, and not the rule in the Federal courts.

That the purchaser of a note had found out that a note he had previously purchased from the same man had been fraudulently obtained was held only a suspicious circumstance, but would not defeat the rights of a holder for value, before maturity. *Rice v. Barrington*, 75 N. J. L. 806, 70 Atl. 169. This was under the decisions of this state, and New Jersey Negligent Instruments Law of 1902, § 56, provides: "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith."

And knowledge that the business of the payee was dishonorable, and of such a nature as would put a prudent man on inquiry, was held insufficient to prevent the purchaser from being a bona fide holder. *Comstock v. Hannah*, 76 Ill. 530; *Shreeves v. Allen*, 79 Ill. 553.

And knowledge that the seller of the note was engaged in gambling contracts, and suspicion that the note was given for one of these, was held not to prevent a bona fide purchase in the regular course of business at the purchaser's bank. *Mitchell v. Catchings*, 23 Fed. 710.

And where a check was given for a gam-

bling debt, and was transferred to a party who gave his check for the same, in a suit by the holder of the gambler's check, an instruction "that the plaintiff was not bound to make inquiry at the bank, or ascertain whether or not his check had been presented or paid at the time he presented the Scheuerman check for payment. Neither was it necessary for plaintiff to stop payment of his check, if, at the time he presented the check to the bank for payment, he was a bona fide holder thereof," was approved. *Matlock v. Scheuerman*, 51 Or. 49, 17 L.R.A. (N.S.) 747, 93 Pac. 823.

Under Mont. Civ. Code, § 4034, providing that an indorsee in due course is one who, in good faith, in the ordinary course of business, and for value, before its apparent maturity, acquires a negotiable instrument, duly indorsed to him or payable to bearer, it was held that knowledge of suspicious circumstances sufficient to put a prudent man on inquiry was not enough to destroy the right to recover,—such evidence might be admissible on the question of good faith. *Harrington v. Butte & R. Min. Co.* 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467. It this case a check was given for a gambling debt, and the first indorser was so intoxicated that his signature was somewhat unnatural. The plaintiff was second indorsee.

The fact that the indorsee knew that one selling a note was in the liquor business was held insufficient to put the purchaser on inquiry as to the consideration. *Estabrook v. Boyle*, 1 Allen, 412.

A note was given for liquor sold in violation of law, and the purchaser knew that the payee was in the liquor business. An instruction "that the plaintiff was put on inquiry regarding the consideration of the note, and failing to make inquiry, he must be held as having knowledge of such facts as by inquiry he might have learned," was held properly refused. *Bottomley v. Goldsmith*, 36 Mich. 27.

And the fact that the purchaser of a note knew that the assignor had been in cross business transactions, and that the company of which the assignor was a member was next door to the place of business of the purchaser, was held insufficient to put him on inquiry. *Setzer v. Deal*, 135 N. C. 428, 47 S. E. 466.

Mass. Stat. 1855, chap. 213, provided that if the holder of a collateral disposed of the same before the secured debt matured, he should be fined or imprisoned. The fact that indorsers were brokers, and said that they would substitute other securities at maturity, was held insufficient to put the purchaser on inquiry as to the note being held as collateral. *Gardner v. Gager*, Allen, 502.

And, where a note was indorsed to one in taking up a note at a bank, and the holder used it at another bank, to take another note, which, to the bank's knowledge, had been fraudulently altered, it was held that the bank taking the renewal note was not put on inquiry. *Lancaster Cou-*

at Bank v. Garber, 178 Pa. 91, 35 Atl. 8.

The holder of stock as collateral, suspecting that the certificate had been fraudulently raised by the pledgeor, demanded other security, and received a note indorsed by a third party. In a suit against the indorser, it was held that the refusal of instruction that knowledge of the crime raising a certificate was sufficient to put him on inquiry was correct, where the court instructed that if the indorsement was obtained through a fraudulent suppression of the truth as to the certificate, and plaintiff knew this when she accepted this note, she could not recover. *Lee v. Whitney*, 9 Mass. 449, 21 N. E. 948.

But a bank discounting paper was held to have notice of such facts that its failure to inquire amounted to bad faith, where a note was given in a bucket-shop deal by a farmer, and the indorsers were gamblers, and the bank knew that other notes were previously given in similar transactions to the same indorser. *Merchants' Nat. Bank v. Sullivan*, 63 Minn. 468, 65 N. W. 4.

Where a check was transferred, and the purchaser transferring it was known to the purchaser to be irresponsible and a forger, it was held that the plaintiff was put on inquiry. *Capital Sav. Bank & T. Co. v. Montpelier Sav. Bank & T. Co.* 77 Vt. 8, 59 Atl. 827.

In *First Nat. Bank v. Goodsell*, 107 Mass. 9 which was an action against the acceptor of a bill by a bank as indorsee holding a guaranty, it was held that the defendant was entitled to show the previous custom of the bank in discounting bills for this indorser, so as to cut off defenses of the bankers in order to show that the indorser was a dealer in tainted paper.

And where the purchaser of a note saw on its face that it was taken in the name of an employee of the party selling it, and knew that the party selling was in the bootlegging business, it was held that whether or not he had sufficient notice to put him on inquiry was a question for the jury. *Kirby v. Berguin*, 15 S. D. 444, 90 W. 856.

A purchaser of a note was held put on inquiry, where he knew that the payee of the note was engaged in fraudulent practices, and that he would be likely to take steps to consummate his purpose. *Ormsbee v. Howe*, 54 Vt. 182, 41 Am. Rep. 841.

A party discounting post-dated bills made an agent on his principal was held to be put on inquiry, where it was known that the agent was financially embarrassed, although some years prior, such bills had been made and paid when the company was in as good condition as at the time of discount. *New York Iron Mine Co. v. Citizens' Bank*, 44 Mich. 344, 6 N. W. 823. In this case the bills were drawn to aid in misappropriation.

IX. Date of paper.

That paper is post-dated or erroneously dated is generally held not to put the purchaser on inquiry. In some cases it was held that the purchaser should have made inquiry as to the authority of a bank officer to certify, or where it was known that the indorser had made an assignment for creditors.

The transfer of a post-dated check before the day of its date was held no cause of suspicion, so as to put the holder on inquiry as to any equities existing against his right to recover. *Mayer v. Mode*, 14 Hun, 155.

An indorsee receiving a post-dated check was held not put on inquiry. *Albert v. Hoffman*, 64 Misc. 87, 117 N. Y. Supp. 1043; *Walker v. Geisse*, 4 Whart. 252, 33 Am. Dec. 60.

That a note was post-dated was held insufficient to put a purchaser on inquiry. *Brewster v. McCardel*, 8 Wend. 478.

That a note for ninety days was dated a year prior to its execution, and therefore appeared overdue when indorsed, was held insufficient to put the purchaser on his guard. *McSparran v. Neeley*, 91 Pa. 17. This was because the true date of execution could be proved.

A note was dated May 3, 1866, payable April 1, 1866, the purchaser ascertained that it was payable April 1st, 1867. It was held that he did not need to make further inquiry. *Miller v. Crayton*, 3 Thomp. & C. 360.

And a check made at St. Paul, Minnesota, and cashed at Denver, Colorado, five days thereafter, was held not, for this reason, to put the holder on his guard. *Estes v. Lovering Shoe Co.* 59 Minn. 504, 50 Am. St. Rep. 424, 61 N. W. 674.

And that a check was received three days after its date was held insufficient to put the purchaser on inquiry. *Laber v. Step-pacher*, 103 Pa. 81.

But where a note dated the 24th of May was in fact made on the 22d of April, and a memorandum of the day of execution was indorsed on the note, it was held that an indorsee would be put on inquiry. *Wiggin v. Bush*, 12 Johns. 306, 7 Am. Dec. 324. The court said: "The post dating of the note, which was indorsed, was an extraordinary circumstance, and must have created suspicion."

A check of March 1st, Albion, New York, had written on the face, "accepted, A. J. Chester, A. Cash," and was executed early in February, and was purchased in New York city March 2d. The duties of the assistant cashier were solely to sign circulating notes of the bank, and he was not authorized to certify checks, and was not accustomed to certify. It was held that the check could not have come by ordinary mail by the time of purchase, after acceptance, if on March 1st, and the purchaser was put on inquiry as to the authority of the officer. *Pope v. Bank of Albion*, 57 N. Y. 126.

A cashier falsely certified a post-dated check to be good. It was held that a subsequent indorsee was bound to inquire at his peril of the extent of the agent's au-

thority. *Clarke Nat. Bank v. Bank of Albion*, 52 Barb. 592. In this case the check was taken for a precedent debt by plaintiff, and for that reason was held not a purchase for a valuable consideration.

A check was made September 29, but dated September 22. On September 26, the drawer had made an assignment for his creditors. It was held that the bank, knowing of the assignment, was put on inquiry, although it did not know that the check had been dated back. *Chaffee v. First Nat. Bank*, 40 Ohio St. 1.

Where a check was taken eight days overdue, it was held that this was a circumstance to be considered by the jury in determining whether or not it was taken by plaintiff under suspicious circumstances. *London & C. Bkg. Co. v. Groome*, L. R. 8 Q. B. Div. 288. It was held that a check was not governed by the same rules controlling the negotiability as bills of exchange where overdue.

X. Erasures, marks, and defects.

Marks or words on a note that do not affect the rights of the holder, or do not indicate that the paper is the property of a third party, or is to be used for a particular purpose, do not put the purchaser on inquiry; but bank marks showing that the paper had been rejected, or words in the note showing that someone else has an interest in the same, or that it is to be used only for a particular purpose, will be held to put a purchaser on inquiry.

So the indorsement on a note, "*ne varietur*," by a notary, was held not to put the purchaser on inquiry as to the consideration. *Schmidt v. Frey*, 8 Rob. (La.) 435; *Fusilier v. Bonin*, 12 Mart. (La.) 235. In the latter case, this phrase was said to be used in facilitating the canceling or raising a mortgage given to secure the payment of the note; "they may serve in pointing out the notary in whose office will be found the act which contains the evidence of the contract in which the note originated."

And that a note was marked "*ne varietur*" on its face, and secured by a lease, was held insufficient to require the indorsee to inquire at the notary's office, in regard to the consideration. *Bank of Kentucky v. Goodale*, 20 La. Ann. 50.

In *Canfield v. Gibson*, 1 Mart. N. S. 143, the court said: "The note was not marked '*ne varietur*,' and if it had, we have already decided, after mature deliberation, that it would not oblige the indorsee to go to the notary's office, to examine into the original consideration."

And that a note given in pursuance of a composition agreement stated on its back that, in consideration of this note, the payee assigned to a party all claims and demands against the makers, was held not to put on inquiry an indorsee. *Mindlin v. Applebaum*, 62 Misc. 300, 114 N. Y. Supp. 908.

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And the fact that a note did not have any revenue stamp, as required by law, was held not to put the purchaser on inquiry. *Ebert v. Gitt*, 95 Md. 186, 52 Atl. 900.

Gross negligence in taking a bill was held not equivalent to *mala fides*, but might be evidence of it. *Goodman v. Harvey*, 4 Ad. & El. 870. In this case the bill was noted for nonacceptance, and protested, but purchased before maturity. It was contended that the plaintiff, taking the bill with notarial marks upon it, had been guilty of gross negligence. This is one of the leading cases that repudiated the doctrine of *Gill v. Cubitt*.

The absence from bonds, of the "certificate for scrip preferred stock" was held not to put the purchaser on inquiry. *Welch v. Sage*, 47 N. Y. 143, 7 Am. Rep. 423. These bonds were stolen, and when purchased by the plaintiff did not have the additional certificate referred to in the bonds, but this did not affect their validity as bonds.

Notes were made payable to a contractor or bearer. He gave them to his subcontractor to negotiate, but he, claiming them as his own, sold them, and took in payment notes payable to his wife. In a suit by the contractors to recover possession, it was held that the purchaser was not put on inquiry, although the change in the payee's name looked suspicious. *Wilson v. Denton*, 82 Tex. 531, 27 Am. St. Rep. 908, 18 S. W. 620.

In *Central Nat. Bank v. Pipkin*, 66 Mo. App. 592, it was said: "But we fail to see even any gross negligence on the part of the plaintiff in this case. Variations between amounts expressed in numerals and words in instruments of this character are not unfrequent, and it is well settled that in such cases the written words govern the amount. *Payne v. Clark*, 19 Mo. 152, 59 Am. Dec. 333. We are aware of no case wherein such variation has been held in itself sufficient to give even rise to a suspicion, so as to put the indorsee upon the inquiry."

And where a note was overdue, and was surrendered by a holder on receiving a similar note with a new indorser, it was held that the indorsee was not put on inquiry, although the note had some numbers placed thereon by a bank. *Bromley v. Hawley*, 60 Vt. 46, 12 Atl. 220.

A certificate of deposit was issued to A, who had deposited money belonging to B. Some time afterwards, A presented the certificate, having erased an indorsement thereon to B. It was held that the bank was bound to make no inquiry, as an indorser in possession of paper may erase all indorsements made by him. *Bank of Montreal v. Dewar*, 6 Ill. App. 294.

And where the word "renewal" was erased before a note was sold, it was held that an instruction "that if there was any mark of 'renewal' the plaintiff was put on inquiry" was erroneous. *Hall v. Hale*, 8 Conn. 336.

The mere fact that former indorsements were erased on the back of the notes was held not to render the purchaser mala fide, where it was not shown when the erasure was made. *Crosby v. Grant*, 36 N. H. 273.

But where a note was made payable to "Jackson or bearer," and signed by a surety, and was to be used in buying a yoke of oxen from Jackson, it was held that another party knowing this, and taking such note from the maker for a yoke of oxen, was a bona fide holder for value. *Laub v. Rudd*, 37 Iowa, 617.

A note with the payee's name in blank recited "value received in mule," and was used by the husband of the maker to buy a horse. It was held that the holder was notified that there was no authority to deliver this note in such a transaction. *Mills v. Williams*, 16 S. C. 593.

And where the payee indorsed a note to a company, and then erased the indorsement with red ink, the purchaser, who had doubts as to the explanation, was held to be put on inquiry as to the title of the indorser. *Minneapolis Threshing Mach. Co. v. Gilruth*, 109 Minn. 23, 122 N. W. 466.

A discounted note payable to a "bank" under an agreement that he was to receive part of the money. The bank refused to discount the same until A indorsed it, which he did, and took it to the bank and got the money on it, which was partly used to pay a debt which the maker owed him. In a suit in the name of the bank, for his own use, it was held that when he took the note of the principal maker to apply on an old debt, he should be regarded as assuming the peril of the perversion of the note from the purpose of it, as shown by the note itself. *Farmers' & M. Bank v. Hathaway*, 36 Vt. 539.

A maker had a note in his possession with an accommodation indorsement thereon; the note had bank marks showing that it had been in the bank. The holder refused to discount it, but gave lottery tickets for the same. It was held that he was put on inquiry as to the authority to negotiate the same. *Brown v. Taber*, 5 Wend. 566.

A note sued on was peculiar in its form, made for the purpose of discount, and only intended for negotiation at the bank, and not for circulation out of it. A pencil mark on the face of the note indicated that it had been rejected, and the slightest inquiry would have ascertained its meaning. The note on its face was held such as to cause suspicion so palpable as to put those dealing for it before maturity on their guard. *Fowler v. Brantly*, 14 Pet. 318, 10 L. ed. 473.

A check of \$400, on a Wisconsin bank, was offered to a saloon keeper in Minnesota in payment for a drink. The check showed that it had been indorsed to a party in Duluth, who indorsed and collected the money on it, and his indorsement had been erased, and the money returned because his indorser would not let him hold the money until the check was honored. The 29 L.R.A. (N.S.)

fact of the erased indorsement was known to the saloon keeper, who advanced the money, and he had at previous times cashed checks for this indorser. It was held that failure to use the telephone service, or prosecute inquiry, was evidence of bad faith. *Drew v. Wheelihan*, 75 Minn. 68, 77 N. W. 558.

And where there was an indorsement on the note and trust deed in unmistakable terms, that another person than the seller was the legal holder of the note, it was held that the purport of this indorsement was so plain that it should have lead any intending purchaser to inquire. *Chicago Title & T. Co. v. Brugger*, 196 Ill. 96, 63 N. E. 637.

And where warehouse receipts for whisky were "to deliver the same upon payment of the whisky, the U. S. government and state tax, interest, and charges," it was held that if there was anything doubtful about the language used in the receipt, a purchaser would be put on his guard. *Stein v. Rheinstrom*, 47 Minn. 476, 50 N. W. 827.

And where a bill was torn in two pieces and thrown away, and then picked up by another party, and fixed together, and the bill put in circulation, it was held to be a question for the jury whether the bill exhibited appearances which would have led a man of ordinary intelligence to the conclusion that it had been torn off for the purpose of annulling it. *Ingham v. Primrose*, 7 C. B. N. S. 82.

The use of the word "consolidated" in railroad consolidated first-mortgage gold bonds was held to put a purchaser on inquiry, and the reference to the mortgage put him on inquiry as to whether or not the holders of the old bonds would exchange. *Caylus v. New York, K. & S. R. Co.* 10 Hun, 295.

And where a check was payable to bearer, and crossed "& Co.," and the proper holder filled in "& Co." with his bank, and sent it by his clerk to the bank, but the clerk took it to a public house, and said that he had no banker of his own, and could not get it paid, the defendant paid it to his own bank, and cashed it. It was held that the circumstance that the check was crossed was an element for consideration in determining whether or not there was good faith. *Campbell, Ch. J.*, said: "Such was the old law; for a time, in some cases, the question was left whether there had been care and caution. That was an innovation, and it has now been decided repeatedly that it was wrong, and that the old law is in force." *Carlson v. Ireland*, 5 El. & Bl. 765.

A clerk of Rothschild Banking House, instead of destroying coupons on the Prussian loan as they were paid, made a check for the same in duplicate, with "& Co." across the face of the check, thus requiring it to be paid through a bank. A wine broker presented this check, six days overdue, to a wine merchant, and obtained the cash, and the merchant drew the money

through his bank. In a suit against the merchant by Rothschild, it was held to be a question for the jury whether the circumstances of taking the check ought to have excited the suspicion of prudent men. *Rothschild v. Corney*, 9 Barn. & C. 388.

The face of the paper showed that it was "to be held as collateral." Under Ga. Code, § 2790, providing that any circumstances which would place a prudent man on his guard in purchasing negotiable paper shall be sufficient to constitute notice, it was held the purchaser's duty to inquire. *Gibson v. Hawkins*, 69 Ga. 354, 47 Am. Rep. 757.

See, as to marks, *Hamilton v. Wilson*, 67 Ga. 494, subd. XVIII.; *Royal Bank v. German-American Ins. Co.* 58 Misc. 563, 109 N. Y. Supp. 822, subd. I.

XI. "Without recourse."

The words "without recourse," indorsed on a note, are held insufficient to put a purchaser on inquiry.

That a note was assigned "without recourse" was held insufficient to put the purchaser on inquiry, where the note had several months to run, and the purchaser had satisfied himself as to the ability of the makers to pay. *Stevenson v. O'Neal*, 71 Ill. 314.

And that a note was indorsed "without recourse" was held insufficient to put a purchaser of the note on inquiry. *Borden v. Clark*, 26 Mich. 410; *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697.

An indorsee of a note "without recourse" was held not put on inquiry, and it was also held that the fact that the indorser was the son-in-law of the maker did not change this rule. *Bisbing v. Graham*, 14 Pa. 14, 53 Am. Dec. 510.

And an indorsement "without recourse" was held not to put the indorsee on guard, or lead him to suspect that there was anything wrong with the note. *Epler v. Funk*, 8 Pa. 468.

An indorsement "without recourse" had been erased from a note having a bank mark on its face. An unconditional indorsement was made. It was held insufficient to put a prudent man on inquiry. *Collins v. McDowell*, 65 Minn. 110, 67 N. W. 845.

That a note was secured by a deed of trust, and was assigned "without recourse," was held insufficient to put the indorsee on inquiry as to the consideration, or as to proceedings in the probate court which would have shown that a minor had an interest in the title. *Mayes v. Robinson*, 93 Mo. 121, 5 S. W. 611.

In *Johnson v. Way*, 27 Ohio St. 374, where it was claimed that an indorsement "without recourse" would put the purchaser on his guard, it was said: "To defeat his recovery thereon, it is not sufficient to show that he took it under circumstances which ought to excite suspicions in the mind of a prudent man."

But an indorsement, "I hereby transfer

my right, title, and interest of the within note," was held sufficient to throw doubt and suspicion upon the entire transaction, and destroy the negotiable character of the paper. *Aniba v. Yeomans*, 39 Mich. 171.

Under Wash. Laws 1899, chap. 149, § 52, providing that a holder is one who, at the time it was negotiated to him, had no notice of any infirmity or defect in the title, it was held that a purchaser was not one in good faith, where he failed to make any inquiry as to the financial standing of the maker, or examine the records to see whether he was obtaining a first chattel lien, and took the note "without recourse," and demanded payment on June 10, although the note he claimed to hold was not then due, but a note was then in default which, by its terms, would have matured all the notes. *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884.

And under Wis. Laws 1899, chap. 356, Wis. Stat. Supplement, §§ 1676-1678, providing that the words "without recourse" shall not impair the negotiable character of the instrument, it was held that the words "without recourse" did not put a purchaser upon inquiry. *Thorpe v. Minde-man*, 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417.

XII. Amount of discount.

The purchase of a note at a heavy discount will not always put the purchaser on inquiry, especially where the notes are in small amounts, or where the solvency of some of the parties is doubtful, or where the makers live at a great distance. But a purchaser on solvent parties, for a nominal price, is held in some cases to put a purchaser on inquiry, and a heavy discount, coupled with suspicious dealings of the indorser, will be sufficient to put a buyer on his guard.

That a note was discounted for the interest, and that the indorser stipulated that he would be liable without demand or notice, was held insufficient to put the purchaser on inquiry as to the consideration, which was an agreement to settle a prosecution for adultery. *Pierce v. Ricker*, 16 N. H. 322, 41 Am. Dec. 728.

And that a certificate of deposit bore 8 per cent, and was negotiated instead of being presented for payment, was held insufficient to put a purchaser on inquiry, under Iowa negotiable instruments act, § 56, providing: "To constitute notice of an infirmity in the instrument, or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731, 112 N. W. 165.

And under Wash. Laws 1899, p. 350, § 56, providing that a defense may be made to a note where the holder has knowl-

edge of such facts that his action in taking the instrument amounted to bad faith, it was held that a purchaser was not put on inquiry from the fact that it was bought at a large discount, as it was payable in Alaska, which was inaccessible for the greater portion of the year. *McNamara v. Jose*, 28 Wash. 461, 63 Pac. 903.

That a note was sold at a considerable discount was held insufficient to render its purchase suspicious. *Perkins v. Challis*, 1 N. H. 254.

In *Miller v. Crayton*, 3 Thomp. & C. 360, it was said: "The plaintiff testifies that he gave for the note 90 per cent only of the amount thereof. But this fact, it seems, does not make him a holder of in bad faith. *Williams v. Tilt*, 36 N. Y. 319. This case practically overrules the previous cases, where a contrary doctrine had been asserted. (*Ramsdell v. Morgan*, 16 Wend. 574, and *Keutgen v. Parks*, 2 Sandf. 60), and holds that a man may be a purchaser bona fide, notwithstanding the transfer to him was tainted with usury."

And that one purchased a note at one half its value was held insufficient to put the purchaser on inquiry, where the note was not regarded as good. *Cannon v. Canfield*, 11 Neb. 506, 9 N. W. 693.

A discount of \$10 on a note for \$75 due in six months, was held not calculated to raise any suspicion that the note was issued contrary to a statute in regard to patent rights. It was further held that one who, in good faith, purchased a negotiable note before maturity, for value, or who took it in payment of an antecedent debt, was not a purchaser out of the usual course of business. *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316.

The purchaser of a note knew that the indorsee was selling patent rights, and obtained a note from him at 25 per cent discount. There was a failure of consideration. It was held that circumstances sufficient to excite the suspicion of a prudent man did not prevent the purchaser from being a bona fide holder. *Gray v. Goode*, 72 Ill. App. 504. The court reviewed the Illinois cases, and stated that the doctrine of *Russell v. Haddock*, 8 Ill. 233, 44 Am. Dec. 693, had been receded from, and the court was now planted upon the furthest limit of the opposite doctrine.

The fact that the purchaser of a note from a physician knew something of the latter's reputation for skill, and discounted the note at 10 per cent, was held insufficient to put the purchaser on inquiry as to the consideration having failed. *Kent v. Barnes*, 72 Ill. App. 617.

And where the plaintiff paid \$80 for a note of \$150, in the usual course of business, without any knowledge of the circumstances attending the execution, it was held that he was a bona fide holder for value. *Lay v. Wissman*, 36 Iowa, 305. It was said: "In this state, however, the rule is settled, that one who purchases a note at a discount may be a bona fide holder, and entitled to recover thereon." 29 L.R.A. (N.S.)

And that two notes for \$500 each were purchased for \$400, and that an inquiry would have shown that the maker had a full release of every claim made by the payee of the note, was held not to prevent the purchaser on speculation from being a bona fide holder. *Schoen v. Houghton*, 50 Cal. 528.

A note was purchased three days before maturity at a discount of 3 per cent by giving the purchaser's paper, due in thirty days. The reason given for selling was that the payee of the note was on his way to Philadelphia to take up the paper maturing there, and that he could not use an overdue note for such purpose. An instruction that if the purchaser had such notice as would put a reasonable man on inquiry, and if he failed to inquire, he could not recover, was held to be properly refused. *Murray v. Beckwith*, 81 Ill. 43.

That \$1,900 worth of notes not bearing interest were purchased for \$900 was held insufficient to put the purchaser on inquiry. *Norwood v. Bank of Commerce*, 77 Neb. 205, 109 N. W. 152. The defense did not show that these notes were on solvent parties, and the notes were presumably for small sums on different persons, residing at a distance from the indorsee.

The fact that a small discount was made was held no reason to suspect dishonesty in obtaining the notes in suit. *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59.

In *Second Nat. Bank v. Weston*, 172 N. Y. 250, 64 N. E. 949, reversing 46 App. Div. 634, 61 N. Y. Supp. 1147, it was said: "Where an accommodation note is purchased at a rate of discount exceeding that of lawful interest, the transaction, in judgment of law, is usurious; but the mere fact that it is so is no evidence of the bad faith of the purchaser; is no evidence that he knew or suspected that the holder of the note, from whom he derived his title, had no right or authority to transfer it." In this case it was claimed that purchases of firm notes were made after dissolution, but it was held that no notice was brought to the knowledge of the purchaser, and prior dealings justified this purchase.

That the purchase of a note was for less than it was fairly worth was held to have no importance except as bearing upon the good faith of the purchase. *Tod v. Wick Bros.* 36 Ohio St. 370.

In *Bailey v. Smith*, 14 Ohio St. 396, 84 Am. Dec. 385, it was said that where the consideration paid by the holder was grossly inadequate to its market value, the equitable rights of third persons could not be excluded. "It may not be practically very material whether the title of such a holder is defeated by using this consideration as a circumstance of suspicion sufficient to put him upon inquiry, or whether it deprives him of the benefit of having the paper 'in the usual course of trade,' or is, in and of itself, an independent element of the commercial rule. . . . But no rule which it is admissible to adopt can reach this case in its present position. As

we have already stated, the evidence upon which the issues were found in the court below is not before us; and it is impossible now to say that the facts were not found upon sufficient proof. It may have been shown that a fair value, under all the circumstances, was given for this paper; and, if necessary to sustain the finding, we should be bound to presume that it was so shown."

But where a note for \$300, made by a man of means, was purchased, for \$5, the purchase was held to be merely nominal, and the purchaser was put on inquiry. *De Witt v. Perkins*, 22 Wis. 473.

Where three notes of \$1,000 each, bearing interest, were discounted for \$160 discount each, and the bank discounting was located in a neighboring state, it was held that the distance of the place of discount from the residence of the maker was a circumstance to be considered by the jury as to whether or not inquiry into the consideration should have been made by the purchaser. *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166. In this case the court affirmed an instruction defining a bona fide holder as one who takes it before maturity, for a valuable consideration, "and without knowledge of facts or circumstances that would lead a careful and prudent man to suspect that the paper was invalid as between antecedent parties."

Mortgage notes for \$100 were purchased for \$30, and one of them was about to mature. It was held that this was sufficient to put the purchaser on inquiry. *Smith v. Jansen*, 12 Neb. 125, 41 Am. Rep. 761, 10 N. W. 537.

A purchaser of notes knowing that the payees were in failing circumstances, which notes were offered to him at 10 per cent per month, the parties being relatives, was held to the duty of making inquiry as to the circumstance of the payees' condition, and the right of creditors to these notes, and was held not a purchaser in good faith. *Cummings v. Mead*, Fed. Cas. No. 3,476.

Where parish bonds were sold to brokers at from 15 to 30 per cent, it was held sufficient to put them on inquiry, and to charge them with notice of every legal objection that might be urged against the validity of those instruments. *Johnson v. Butler*, 31 La. Ann. 770.

In *Millard v. Barton*, 13 R. I. 610, 43 Am. Rep. 51, it was said: "It will be seen that the admission here is not that the plaintiff gave full value, but that he was a holder for a valuable consideration. The latter might be enough in some cases, but in a case like this, where the defense is fraud, alteration, or forgery, the fact that the plaintiff purchased the note for a sum much below its face, even if he did not know of any equities between the original parties, might be a circumstance tending to show that he wilfully shut his eyes to the means of knowing the facts."

And the purchase of a note of \$333 for \$125, where the maker was solvent, and the note had less than one year to run, was held 29 L.R.A. (N.S.)

to impose inquiry on the purchaser. *Hunt v. Sandford*, 6 Yerg. 387. In this case the purchaser agreed to pay \$25 more if collected without a lawsuit. This was held to be a suspicious circumstance.

And where a note of \$2,000 was obtained with others, and said to be simply for the purpose of memoranda, to show that defendant had one third interest in a patent fire-kindler business, and the plaintiff bought the note for half its face value, it was held that the large discount at which the plaintiff purchased the note, the circumstances attending his knowledge of the original parties, and especially of one of the actors in the scheme which resulted in putting the note in circulation, were proper subjects for the consideration of the jury with reference to the plaintiff's good faith. *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801.

Where notes given for a stock horse that was never delivered were purchased at a big discount by a man who had handled similar notes before, it was held that he was put on inquiry. *Wright v. Bartholomew*, 66 App. Div. 357, 72 N. Y. Supp. 706. In this case the court said: "Payees living in a distant state, without any apparent reason therefor, such as need of money, with great speed after their making, offer to him notes made by strangers living in a distant part of the state, and payable there, at a very substantial discount or 'shave.' The notes themselves, upon their face, with unusual number of makers, naturally suggest the question. 'What kind of a transaction produced such notes?' No inquiry is made to secure an answer. No information is obtained or sought to answer such question."

Where the party purchasing a note purchased the same at a discount of 40 per cent, and lived in a distant state, and was not a banker, or was not in the business of discounting notes, it was held to be a question for the jury whether or not he had notice sufficient to put him on inquiry as to fraud in obtaining the note. *McGill v. Young*, 16 S. D. 360, 92 N. W. 1066.

South Dakota Civ. Code, § 2452, provides that notice of circumstances sufficient to put a prudent man on inquiry is constructive notice of the fact itself. But this section was not noticed. See *Jones v. Gordon*, 37 L. T. Rep. N. S. 477, subd VII.

XIII. Knowledge of consideration.

The knowledge of consideration is held not to put the purchaser on inquiry, unless he has knowledge that the consideration is doubtful or has failed, or is a fraud. But knowledge that the indorser has been engaged in dealing in similar paper that has been fraudulently obtained will be held sufficient to put the buyer on guard and knowledge that the consideration has failed, or that the paper is improperly put in circulation, will put the buyer on inquiry.

In *Valley Sav. Bank v. Mercer*, 97 Md. 458, 55 Atl. 435, where fraud was practised in the sale of a jackass, and a joint note was given, and the payee released two of the makers, and then sold the note, the court said: "It does appear that even if suspicion had been aroused by seeing the indorsements upon the notes, and the plaintiff or its officers had made inquiry, that any evidence of the fraud or failure of consideration or defect in title would or could have been discovered. It does appear, however, from the evidence, that Mr. E. L. Coblentz, one of the officers of the plaintiff, made inquiry from the agent of the payee as to the meaning of the indorsements on the note, and he was informed what the circumstances were. The fraud was not thus disclosed, nor could it have been discovered by inquiry from the makers themselves, who were then ignorant of the trick that had been played upon them by foisting upon them an animal totally unfit for the purpose for which he was purchased." This was under Maryland negotiable instruments, act, art. 13, § 75, providing that notice which will prevent a recovery by a holder of a note is actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith.

Notice that the consideration was a thorough-bred cow, which was warranted to be a breeder, was held insufficient to put the indorsee on inquiry. *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858, 15 A. & E. Ann. Cas. 665. This was on the ground that notice of an executory contract would not deprive an indorsee of the character of bona fide holder, unless he had notice of the breach of that agreement.

That the purchaser of a note knew that it had been given for a jack that had been warranted was held insufficient to prevent him from being a purchaser in good faith. *Rublee v. Davis*, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135. The court said: "To have that effect, he must also have known when he bought the notes that the warranty had failed, or possessed knowledge of facts sufficient to put him upon inquiry, which, if followed, would have led to its discovery."

The recital, by indorsement upon promissory notes, that they are secured by a lien upon the maker's interest in certain horses described in a specified agreement, was held not sufficient to put a subsequent holder upon inquiry as to the terms of such agreement. *Biegler v. Merchants' Loan & T. Co.* 164 Ill. 197, 45 N. E. 512.

In *Comstock v. Hannah*, 76 Ill. 530, it was held that the title of an indorsee for value before maturity could only be affected by bad faith. Negligence or knowledge of suspicious circumstances was not enough, and therefore, "means of ascertaining" cut no figure. In this case it was held that taking for a debt notes held by the indorser which had been given for cornplanters and a

patent right to sell the same, where the consideration was known to the indorsee, would not put him on inquiry as to whether the consideration had failed. It was said that the rule in *Gill v. Cubitt* had been overruled.

And the fact that a note said, "for one Hincley Knitting Machine, warranted," was held not to put the holder of the note on inquiry as to whether or not the consideration had failed. *Mabie v. Johnson*, 8 Hun, 309.

And where the maker of a note given for stock held a contract giving him power to cancel the note by returning the stock, it was held that a bank taking the note as collateral security was not bound to inquire of the payee whether or not the maker had any set-off, although the president of the bank had reason to believe that it was given for such stock. *Oates v. First Nat. Bank*, 100 U. S. 239, 25 L. ed. 580.

And where the consideration of a bill was to make all necessary repairs on a brig, and this was known to the indorsee, it was held that he was not bound to inquire whether the vendors of the vessel had performed their agreement. *Davis v. McCready*, 17 N. Y. 230, 72 Am. Dec. 461.

And, where a note was given for a church organ, the maker wrote a bank cashier, contemplating purchase, "A note is to be given for \$1,200 when completed," that the organ would be completed in eight or ten days, "Trusting that this will answer your purpose, and, if necessary, that you inquire more in particulars in a few days." It was held that suspicious circumstances, to be sufficient to require investigation, must be of a substantial character, and so strong that bad faith on the part of the indorsee in failing to make such investigation might be reasonably inferred. *Batesville Bank v. Lehner*, 43 Ind. App. 457, 87 N. E. 990.

A note for insurance was made payable directly to the agent, in his own name; a bank, knowing that it was given for insurance, discounted the same by crediting the account against a note held by the bank. The policy was canceled for nonpayment of premium. It was held that the bank was not put on inquiry. *Wallabout Bank v. Peyton*, 123 App. Div. 727, 108 N. Y. Supp. 42.

And where notes were made with the understanding that they were not to take effect unless certain satisfactory policies of life insurance were delivered, and policies were delivered and held until the notes matured, which were claimed to be unsatisfactory, it was held that an indorsee before maturity, for value, knowing that the consideration was policies, need not inquire further than as to whether the policies had been delivered, and as to the ownership of the notes. *Donovan v. Fox*, 121 Mo. 236, 25 S. W. 915.

In *Cloud v. International Book & News Co.* 23 Mo. App. 319, it was said; "The plaintiff, being a banker, purchased the note of the payee upon his representation

that it had been given for the purchase money of a stock of books, and he knew that the payee had previously owned a stock of books, and, from the defendant's corporate name, he was warranted in concluding that they were dealers in books. The circumstance that he was not a banker in St. Louis, where the maker and the payee of the note both lived, was of no moment, since notes are every day discounted by distant bankers, and especially since the explanation of the payee that this note could not be made available in St. Louis because of the length of time, eight months, which it had to run, was probable in itself, and was calculated not to create, but to disarm, suspicion."

The fact that a note showed on its face its consideration was held not to put a purchaser on inquiry. *Bank of Commerce v. Barrett*, 38 Ga. 126, 95 Am. Dec. 384.

Knowledge by the purchaser of the consideration of a note, expressed on its face, was held insufficient to put him on inquiry as to the consideration and the probability that it might fail. *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238. The court said that it would be different in notes given for patent rights, but this was an exception by virtue of a statutory provision. In this case the note was given by a subtenant, for rent, to the principal tenant, who became insolvent and left the country, and the consideration failed. The Code, § 3699, providing that notice of circumstances that would excite suspicion on the part of a prudent man would be constructive notice of the fact, was not noticed. It was held that the facts proved in the case constituted no defense to the action.

And, that a note recited that it was given for rent was held not to put the purchaser on inquiry. *Adoue v. Tankersley* (Tex. Civ. App.) 28 S. W. 346; *Buchanan v. Wren*, 10 Tex. Civ. App. 560, 30 S. W. 1077.

In *Adoue v. Tankersley*, supra, where a note recited that it was given for accruing rent, it was said: "There are some authorities which would sustain the proposition that such a recital would be sufficient to put a purchaser of such a note upon inquiry, and charge him with notice of any failure of such consideration of which knowledge might have been obtained by reasonable investigation. *Howard v. Kimball*, 65 N. C. 175, 6 Am. Rep. 739; *Thrall v. Horton*, 44 Vt. 386. But this rule is contrary to the weight of authority, and, in our opinion, to sound principle."

And, that a note said it was secured by a mortgage was held insufficient to put the purchaser on inquiry as to the contents of the mortgage. *Kelley v. Whitney*, 45 Wis. 110, 30 Am. Rep. 697.

Where an indorser took up a note by giving his check for the same, it was held that his title as bona fide holder was not affected by the fact that, at the time he indorsed the note for accommodation, he knew that it had been given for the purchase of land, and that there was a contract in regard to the same. It was held that 29 L.R.A. (N.S.)

he was not put on inquiry as to the limitations of that contract. *Aldrich v. Peckham*, 74 N. J. L. 711, 68 Atl. 345.

And, that notes expressed on their face that they were given in part payment of a tract of land was held not to prevent their negotiability. *Maurine v. Chambers*, 16 La. 207.

The statement in negotiable notes that they were executed for the purchase money of lots on which a lien was retained to secure them was held insufficient to put a purchaser on inquiry as to any fact the existence of which could have been ascertained by investigation. *McCarty v. Louisville Bkg. Co.* 100 Ky. 4, 37 S. W. 144.

And, the fact that a note recited that it was given for the purchase price of land was held not to put the purchaser on inquiry as to title or quantity. *Bank of Sherman v. Apperson*, 4 Fed. 25.

An assignee of a note reciting that it was given for the purchase price of land was held not put on inquiry as to the title to the land. *Ferriss v. Tavel*, 87 Tenn. 386, 3 L.R.A. 414, 11 S. W. 93; *Ryland v. Brown*, 2 Head, 273.

In *Ferriss v. Tavel*, supra, the court refused to follow the case of *Howard v. Kimball*, 65 N. C. 178, 6 Am. Rep. 739, which held: "We think the fact of the notes not being in the usual form of promise to pay money 'for value received,' but expressing on the face that they were given for the purchase money of the Rocky Swamp tract of land, was sufficient to put Bullock on inquiry, and fix him with notice that the notes could not be collected unless a good title be made to Kimball, citing *Cox v. Jerman*, 41 N. C. (3 Ired. Eq.) 526."

But, in *Cunningham v. Scott*, 90 Hun. 479, 35 N. Y. Supp. 881, where it was claimed that a vendor's lien note had been turned over to plaintiff, and the note was fraudulently obtained, as the payee had no title to the land, the court said: "It is certainly quite remarkable that she should have no information in reference to it, and that she should not have felt called upon to inquire how it was that she should be given a vendor's lien note for more than twice the amount of the indebtedness due to her from Stayton, if it was intended merely as payment of such indebtedness."

An indorsee taking a draft attached to an insurance policy settling a loss was held put on inquiry where he also had held a mortgage and a policy on the same property, and the insurance policy provided that it would be void in case of concurrent insurance. *Teutonia Ins. Co. v. Bussell* (Tenn.) 48 S. W. 703.

And, where a purchaser of notes knew that they were taken by an agent of an insurance company in Boston for premiums on policies, it was held that it was a question for the jury whether the purchaser had reasonable cause to know that the policies were issued in violation of the Massachusetts laws. *Williams v. Cheney*, 8 Gra. 206.

And, where a note was given for pass-

in a ship from New York to California, and the maker refused to go upon the ship, on account of the bad character of the ship, it was held that an indorsee who was cognizant of the condition of the ship, and that the maker of the note had grounds of complaint therefor, was put upon inquiry. *Holbrook v. Mix*, 1 E. D. Smith, 154.

Notes were executed to an organ company in exchange for stock, under a contract providing for renewals, and that the notes were to be surrendered at a certain time, in return for the stock. A bank cashier, knowing of similar dealings, was held put on inquiry, where he purchased these notes. *Bowman v. Metzger*, 27 Or. 23, 39 Pac. 3, 44 Pac. 1090.

And, where an indorsee knew that the title to land was questioned, without knowing any defects in the title, and that the note was given for such land, and that the grantee would resist the collection of the note, if he should be evicted, it was held that he was put on inquiry. *Knapp v. Lee*, 3 Pick. 452.

In *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019, a purchaser surrendered as consideration for notes a deed, after knowledge that they were like Bohemian oats notes, and therefore was not a bona fide holder. The court said: "It would seem strange that a man of average intelligence, after all that has been said through the public press of Bohemian oat and Red Lion wheat deals, and the frauds practised upon the unwary by sharpers engaged in such questionable transactions, should not, when making a purchase of \$900 worth of notes, and being told that they were given in a wheat deal, make some inquiry, at least of the seller, what the wheat deal was. These matters are of such common knowledge that a jury would naturally take with some degree of suspicion the statement of a purchaser who is informed that a note is given in an oat deal or a wheat deal, and yet claims to have made no further inquiry, and insists that he is an innocent purchaser. It may be true; but it would, under proper circumstances, be a question of fact, for the determination of the jury."

Knowledge that the payee was dealing in Bohemian oats was held insufficient to put the purchaser of the note on inquiry, where it was not generally known that such transactions were fraudulent, and the purchaser of the note had no knowledge of the fraud. *Helms v. Douglass*, 81 Mich. 442, 45 N. W. 1009.

Bohemian oats notes were purchased. It was held that evidence of information received by the buyer of two notes as to the consideration of one of the notes was competent, where both notes were bought at the same time, and evidence of newspaper articles and common rumor on the street, likely to reach the purchaser, was held sufficient to put him on inquiry as to the character of the fraud. *Merrill v. Hole*, 85 Iowa, 66, 52 N. W. 4.

Where newspaper notices of Bohemian oats were published, detailing the transac-

tion, it was held that if a purchaser of this kind of a note knew of the article in the newspaper before his purchase, and made no inquiry, he would be a purchaser in bad faith. *Ibid*.

If the purchaser of a Bohemian oats note was informed that, at the time the note was made, a bond was given to the maker, and was connected with the note, it was his duty to make inquiry, and ascertain what the contract was that he was buying. *Mace v. Kennedy*, 68 Mich. 389, 36 N. W. 187.

Parties who required a new note and mortgage to be made before purchase, on the ground that they feared that the original note was given to suppress a prosecution for a crime, were held put on inquiry. *Pierce v. Kibbee*, 51 Vt. 559. The court said: "But if Dower and Kenney did not have actual knowledge of the illegality of the original notes and mortgage to Noyes and Jenkins, it was because they did not want to know it; for the facts and circumstances disclosed by the evidence, to say the least, were sufficient to have put them on inquiry. This is equivalent to notice of such facts as they might be presumed to have learned upon reasonable inquiry, and therefore sufficient to charge them with the consequences of actual knowledge of the illegality of said original notes and mortgage."

Under Georgia Code, § 2790, it was held that the charge that if the circumstances were such as to put a prudent man on inquiry, the plaintiff would be chargeable with notice of all that the pursuit of such inquiry would have disclosed, was proper. But a charge that if the purchaser superintended the preparation of the material that was used in constructing a defective pavement, which was the consideration of the note, he would not be a bona fide purchaser without notice, was held error. *Phillips v. Loyd*, 83 Ga. 536, 10 S. E. 232. See *Mills v. Williams*, 16 S. C. 593, subd. X.

XIV. Publication and notices.

Advertising lost or stolen paper is held insufficient to put a purchaser on inquiry. So printed notices, not shown to have been read by the purchaser of negotiable paper, will be held insufficient to put him on guard.

And, the fact that advertisement was made that negotiable bonds had been stolen was held insufficient to put a purchaser on inquiry, where the bonds were negotiated eighteen years after they were stolen. *Manhattan Sav. Inst. v. New York Nat. Exch. Bank*, 42 App. Div. 147, 59 N. Y. Supp. 51, second appeal 53 App. Div. 635, 65 N. Y. Supp. 757.

And, where American railroad bonds were stolen from London bankers and sold to a Paris banker, it was held that the latter was not put on inquiry by reason of newspaper publication of the list of securities stolen. It was further held that the question in issue was whether, before money was advanced on these bonds, the banker knew that they were stolen. *Venables v. Baring Bros.* [1892] 3 Ch. 527.

United States bonds, payable to bearer, were stolen, and the next morning, before 9 o'clock, printed notices describing the bonds were left at the office of defendant, who dealt largely in government bonds, and who bought the bonds that day. The cashier testified that they never paid any attention to such notices, as the number received would interfere with business. It was held that the purchaser was not bound to inquire or look up these notices before buying the bonds. *Seybel v. National Currency Bank*, 54 N. Y. 288, 13 Am. Rep. 583.

And, where bank notes were stolen in Liverpool, and notices were sent to banks of Paris, and a money changer there cashed the notes twelve months later, without looking up notices of stolen notes, but simply required the person who presented the notes to show his passport, and to write his name and address on the note, it was held he was a bona fide holder. *Raphael v. Bank of England*, 17 C. B. 161. The court said that the doctrine of *Gill v. Cubitt*, 3 Barn. & C. 466, was not now approved of.

And, where a note was given the payee in consideration of not prosecuting a charge of adultery, it was held that the indorsee was not put on inquiry by reason of a publication in a newspaper, warning the public not to buy the note, nor by reason of common gossip. *Clark v. Ricker*, 14 N. H. 44.

The publication in a paper at a place where the purchaser did not reside was held insufficient to put him on inquiry. Knowledge of circumstances that would excite suspicion in the mind of a prudent man, or gross negligence, would not alone defeat the purchaser's right of action. *Wildsmith v. Tracy*, 80 Ala. 259.

Publication notice in a newspaper, warning against buying a certain note, was held insufficient to put the purchaser on inquiry, where it was not proved that he read that notice. *Beltzhoover v. Blackstock*, 3 Watts, 20, 27 Am. Dec. 330. In this case the court quoted the rule of *Gill v. Cubitt*, supra, and approved the same. This case was said to have been overruled as to its approval of *Gill v. Cubitt*, supra, in *McSparran v. Neeley*, 91 Pa. 17, subd. VI.

A general notice to an intending purchaser that there was some defense, and that the note would not be paid, was held not to put the purchaser on inquiry. *Heist v. Hart*, 73 Pa. 286. The court said: "Hart may have been bound to ask the maker what was his defense. When he does so, however, and is only told what is clearly no defense, there is nothing which ought to impeach his bona fides."

Notice that the maker claimed he did not receive what he expected for the note, and by inquiry the purchaser could have ascertained the consideration for which the note was given, and that it had failed, was held insufficient to prevent him from being a bona fide holder. *Fidler v. Paxton*, 101 Ill. App. 107.

Where a purchaser of a \$750 note gave \$400 in money and his own note for \$350, 29 L.R.A.(N.S.)

and was then informed by the maker of the note, that it had been obtained by fraud, it was held that he was a bona fide purchaser, and not affected by the fact of paying his note (a part of the purchase money) after being informed of the alleged fraud, where the issue was only as to his being a bona fide holder. It was further held that inquiry would have been fruitless, as a lawsuit was necessary to determine whether or not there had been any fraud. "We think it a sound proposition, 'that in whatever mode information may be acquired, it must not only be such as to alarm the purchaser, and put him on inquiry, but it must also be sufficient to enable him to conduct that inquiry to a successful termination, for otherwise the general rule that a title shall not be impeached by uncertainties will intervene for the protection both of the vendor and purchaser.'" *Adams v. Soule*, 33 Vt. 538.

But, where the evidence tended to show that the holder, before acquiring a note, was informed by the payee that he ought not to use it, it was held that this was sufficient to put him on inquiry. *Nutter v. Stover*, 48 Me. 163.

A purchaser by assignment of a note deposited in a bank as collateral, with notice that the note was so held by the bank, was held put on inquiry as to the agreement of pledge. *Ladd v. Meyers*, 4 Cal. App. 352, 87 Pac. 1110.

In *Hinckley v. Union P. R. Co.* 129 Mass. 52, 37 Am. Rep. 297, where overdue coupons were involved, it was said: "The question before us is whether notice previously given of the loss of a negotiable instrument, distinguishable by number or other earmarks, is sufficient to fix upon the party liable to pay a duty of inquiry, and of refusal to pay to a holder who cannot substantiate his title. We think that such previous notice is sufficient. Whether it is sufficient to fix such duty of inquiry upon a mere transferee, it is not necessary for us to inquire, because the party liable to pay a negotiable instrument bears a relation and owes duties to the holder and loser different from those of the transferee; though it has certainly never been decided in this commonwealth that such previous notice is insufficient to fix a duty of inquiry even upon a mere transferee." See *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019 (*Bohemian oats*) subd. XIII.

And where a stolen bank note on the Bank of England was sent from France to creditors in England to pay on account, and payment of the note had been stopped, it was held that the plaintiff in England was only agent for the house in France, and he should show that the house in France gave such value for the note as to exempt them from any reasonable ground of suspicion of any knowledge that it had been improperly obtained. It was questioned whether such notes were negotiable abroad. *De la Chaumette v. Bank of England*, 9 Barn. & C. 208.

See *Snow v. Peacock*, 2 Car. & P. 215,

subd. VI.; *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857, subd. VI.; *Beckwith v. Corral*, 11 Moore P. C. C. 335, subd. VI.; *Hibbs v. Brown*, 190 N. Y. 167, 82 N. E. 1108, subd. VI.; *Smith v. Harlow*, 64 Me. 510, subd. VI.; *Nicholson v. Patton*, 13 La. 213, subd. VII.; *Whiteside v. First Nat. Bank* (Tenn.) 47 S. W. 1108, subd. VII.; *Welch v. Sage*, 47 N. Y. 143, 7 Am. Rep. 423, subd. X.

XV. Stolen notes.

The purchaser for value of stolen paper, taken in regular course of trade, is held not to be put on inquiry, unless there were more than suspicious circumstances connected with the purchase. There must be bad faith.

Suspicion of defect of title, or the knowledge of circumstances which would excite such suspicion in the mind of a prudent man, or gross negligence on the part of the taker, at the time of the transfer, was held not to defeat his title. The result can be produced only by bad faith on his part. *Murray v. Lardner*, 2 Wall. 110, 17 L. ed. 857. In this case bonds that were stolen were negotiated by a broker before it was discovered that a burglary had been committed. The stranger who offered them in New York claimed to be a physician from New Jersey, and named some physicians that he knew, who were well known in New York. No inquiries were made. The rule in *Gill v. Cubitt* was denied.

In *Hibbs v. Brown*, 112 App. Div. 214, 98 N. Y. Supp. 353, where the brokers who had sold a stolen bond replaced the same with one the title to which was not disputed, it was held that they were bona fide holders, and mere suspicion was not sufficient to put the purchaser on inquiry.

And where a country bill of exchange for \$500 was accepted and indorsed, and was lost, it was held that a banker discounting it was not bound to make inquiry concerning every bill brought to him to discount. It was also held that the amount of the bill was not a suspicious circumstance. *Lawson v. Weston*, 4 Esp. 56, overruled in *Gill v. Cubitt*, 3 Barn. & C. 466. This was overruled in *Crook v. Jadis*, 5 Barn. & C. 909.

In *Miller v. Race*, 1 Burr. 452, 3 Eng. Rul. Cas. 626, where a bank note for £21 was stolen from the mails and payment stopped, in a suit by the holder in trover against the bank that refused to pay or surrender it, Lord Mansfield said: "If it had been a note for £1,000, it might have been suspicious. This note came into plaintiff's hands in due course of trade."

But where the purchaser of a stolen bill of lading had reason to believe that the vendor had no title, it was held that the rule in regard to other negotiable instruments did not apply, and he was held to be not a bona fide holder. *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*), 101 U. S. 557, 25 L. ed. 892, 29 L.R.A. (N.S.)

XVI. Accommodation paper.

An indorsement for accommodation will not put the purchaser on inquiry as to the purpose or as to the misuse of the paper. But the place and manner of indorsement were held to be notice that the effect of such indorsement was one of suretyship.

The order of indorsements on paper was held not necessarily to import that a second indorser was an accommodation indorser, and did not put the purchaser on inquiry as to the power of the president of a bank so to indorse, where the paper was received and discounted in the usual course of business. *Auten v. United States Nat. Bank*, 174 U. S. 125, 43 L. ed. 920, 19 Sup. Ct. Rep. 628.

In *Maitland v. Citizens' Nat. Bank*, 40 Md. 540, 17 Am. Rep. 620, where an accommodation indorsement was made to be used as collateral for future discounts, and was taken as collateral for past discounts, it was held that the indorsee was not bound to make inquiry, and mere negligence, however gross, not amounting to wilful and fraudulent blindness, might be evidence of mala fides, but was not the same thing.

Notice that a note was accommodation paper was held not to impose on the purchaser the duty of inquiring as to the particular purpose for which it was executed. *Tourtlet v. Reed*, 62 Minn. 384, 64 N. W. 928.

The holder of a bill of exchange was held not to be put on inquiry, although the bill was negotiated by the acceptors. *Witte v. Williams*, 8 S. C. 290, 28 Am. Rep. 294.

But, where an accommodation maker of a note wrote his name only on the back of the note, it was held that this tended to show that he was only surety, and should have put on inquiry a creditor taking such note. *Moynahan v. Hanaford*, 42 Mich. 329, 3 N. W. 944.

As to accommodation paper, see *Hamilton v. Marks*, 52 Mo. 78, 14 Am. Rep. 391, subd. I.; *Tanner v. Hall*, 1 Pa. St. 417, subd. II.; *First Nat. Bank v. Weston*, 25 App. Div. 414, 49 N. Y. Supp. 542, subd. II.; *Citizens' Bank v. Rung Furniture Co.*, 76 App. Div. 471, 78 N. Y. Supp. 604, subd. III.; *Ex parte Estabrook*, 2 Low. Dec. 547, Fed. Cas. No. 4,534, subd. III.; *Marshall Nat. Bank v. O'Neal*, 11 Tex. Civ. App. 640, 33 S. W. 344, subd. III.

XVII. Patents.

In regard to notes given for patents, the cases are not in accord. It seems that knowledge that a note is given for a patent right will not put a purchaser on inquiry, unless he has other knowledge that similar deals are fraudulent, or unless he knows that a statutory requirement has not been followed.

So, where a note said that it was given for a patent right of a threshing machine, and was indorsed, "at his risk and cost," it was held that an indorsee was not put on inquiry. *Hereth v. Meyer*, 33 Ind. 511.

The court said: "But this would not authorize a jury to infer that the plaintiff or any prior indorsee had any knowledge that the patent right for which the note was given was of no value, or that they had any reason to suspect that such was the fact; nor is there any circumstance in the case which can justify any such inference."

And, where a note had on the margin, "This note is given for patent rights," it was held that this was insufficient to put the party upon inquiry. *Hereth v. Merchants' Nat. Bank*, 34 Ind. 380.

And a purchaser of a note was held not put upon inquiry, where it was given for an interest in a patent, and failed to state that this was the consideration, although a statute required that this should be stated. *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316. The court said: "Circumstances calculated to awaken suspicion merely are not sufficient" to overthrow the presumption of good faith. In this case the purchaser of the note did not know that it was given for a patent.

The fact that the seller of a note payable to "Alonzo Case or bearer" said that the purchaser must take it at his own risk, and that it was given for a patent right, was held insufficient to put the purchaser on inquiry. *Cone v. Baldwin*, 12 Pick. 545.

And the same was held in a similar case, where the note was indorsed, "Pay the within to E. Warren and H. A. Green, at their own risk and cost." *Goddard v. Lyman*, 14 Pick. 268.

That a note was given for a patent right was held insufficient to put on guard a purchaser of the note. *Borden v. Clark*, 26 Mich. 410; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

A purchaser of a note was held not put on inquiry from the mere fact that he knew that the note was given for a patent right. *Gerrish v. Bragg*, 55 Vt. 329.

But, where the purchaser knew that the indorser was a traveling dealer in patents, and had a general knowledge of the swindling going on in patent rights, it was held that he was a purchaser in bad faith, because he abstained from inquiry. *Boyce v. Geyer*, 2 Mich. N. P. 71.

And, where a note was given for calendar clock safes and territorial patent rights, when only a design patent had issued, and the purchaser of the note received from the payee a receipt for sample safes, signed by the maker of the note, stating also that the note would be paid when due, and the purchaser had received a letter introducing the payee before he began business, explaining it, the purchaser of the note was held to have been put on inquiry. *Swinney v. Patterson*, 25 Nev. 411, 62 Pac. 1.

And, where the purchaser of a note "given for a patent" had knowledge of the consideration, it was held to be a question for the jury whether or not he was a bona fide purchaser in good faith, where the note omitted the statutory requirement, as the holder would be guilty of a misdemeanor in 29 L.R.A. (N.S.)

taking such a note if he knew the consideration. *Hunter v. Henninger*, 93 Pa. 373.

In *New v. Walker*, 108 Ind. 365, 58 Am. Rep. 40, 9 N. E. 386, it was held that if a purchaser of a note knew that it was given for a patent right, which fact did not appear in the note, he would be put on inquiry as to the consideration. The Indiana statute required the vendor of a patent to file a copy of his letters with the county clerk, and an affidavit, and to insert in a note, "given for a patent right."

Under Illinois Stat. chap. 73, sec. 11, providing that where a note is obtained from the maker through fraud, such fraud may be pleaded in defense to any action by an assignee of such note, it was held that it was necessary for the maker to use reasonable precaution to avoid imposition, where the suit was by an indorsee before maturity. But it was held that the purchaser, when applied to by patent-right agents, should have had his suspicions aroused by the fact that they were selling patent rights, to the same extent as the maker; that he should have called on the maker and made inquiry. *Taylor v. Atchison*, 54 Ill. 196, 5 Am. Rep. 118.

See, as to validity of notes given for patent rights, *First Nat. Bank v. Stockell*, 20 L.R.A. 605, note.

In *State v. Cook*, 107 Tenn. 499, 62 L.R.A. 174, 64 S. W. 720, sustaining the constitutionality of the Tennessee statute requiring a note given for a patent to state that fact, all the recent cases pro and con are reviewed.

In *State v. Lockwood*, 43 Wis. 405, it was said that if the question was properly raised, the court would be inclined to hold as unconstitutional Wis. act 1872, chap. 140, providing that the failure to insert "given for a patent right" would be a misdemeanor.

As to validity of statutes affecting notes given for patent rights, see *Wyatt v. Wallace*, 67 Ark. 575, 55 S. W. 1105; *Hollida v. Hunt*, 70 Ill. 109, 22 Am. Rep. 63; and see the discussion of such statutes in *Allen v. Riley*, 203 U. S. 347, 51 L. ed. 216, 27 Sup. Ct. Rep. 95, 8 A. & E. Ann. Cas. 137.

In *Woods v. Carl*, 203 U. S. 358, 51 L. ed. 219, 27 Sup. Ct. Rep. 99, under Ark. Stat. Kirby's Dig. § 513, providing that a note is void that does not show that it was given for a patent, and no person can be considered an innocent holder, a verdict given for defendant was affirmed.

See other cases in regard to patent notes: *Gould v. Stevens*, 43 Vt. 125, 5 Am. Rep. 265, subd. VI.; *Tescher v. Merea*, supra, subd. XII.; *Gray v. Goode*, 72 Ill. App. 504, subd. XII.; *Simmons v. Council*, 5 Ga. App. 386, 63 S. E. 238, subd. XIII.; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801, subd. XII.; *Comstock v. Hannah*, 76 Ill. 530, subd. XIII.

XVIII. Negotiable Instrument Statutes.

In South Dakota, North Dakota, and Georgia the statute is based on the rule of

Hill v. Cubitt, 3 Barn. & C. 466, overruled in *Crook v. Jadis*, 5 Barn. & Ad. 909. North Dakota has also another statute similar to the New York act *infra*. The statute used in *MEE v. CARLSON* is not part of the negotiable law, but is in the chapter on "Definitions."

South Dakota Civ. Code 1903, § 2452: Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." Under its statute, *MEE v. CARLSON* and *Rochford Barrett*, 22 S. D. 83, 115 N. W. 522, subd. were decided.

North Dakota Civ. Code 1905, § 6703: Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself." These sections are found in a chapter on definitions.

Georgia Code 1895, chap. 6, § 3699: "Any circumstance which would place a prudent man upon his guard in purchasing negotiable paper shall be sufficient to constitute notice to a purchaser of such paper before it is due." Under the negotiable instrument law in Georgia, the following cases were decided: *Capital City Brick Co. v. Mason*, 2 Ga. App. 771, 59 S. E. 92, subd. 1; *Gibson v. Hawkins*, 69 Ga. 354, 47 S. E. 757, subd. X.; *Phillips v. Loyd*, 62 Ga. 536, 10 S. E. 232, subd. XIII.

Roswell Mfg. Co. v. Hudson, 72 Ga. 24, 10 S. E. 77, § 2790, providing that any circumstances which would place a prudent man upon his guard in purchasing negotiable paper shall be sufficient to constitute notice to a purchaser of such paper before it is due, it was claimed that drawers of a bill were negligent where they would not credit the payee without inquiry, and there was a long lapse of time before the bill was made before it was cashed. It was held that their action was not negligent, where the delay was explained by their being shown a letter stating that the draft had miscarried in the mails. The payee sold them a duplicate bill which did not indicate that it was a duplicate.

A purchaser of a guano note was held not on inquiry, where an ironclad clause in the note preventing the maker from making any defense as to the consideration had been drawn through it. This was held in *Ga. Code, § 2790. Hamilton v. Wilcox*, 67 Ga. 494.

The word "security" was before a wife's signature, where the consideration was sold to the husband; it was held that this word "security" was a suspicious circumstance that should have put the husband on guard to ascertain whether the money was for the husband or wife. *Love v. Love*, 78 Ga. 323, 3 S. E. 90.

Oliver v. Miller, 130 Ga. 72, 60 S. E. 84 (N.S.)

254, the defense was that, that the payee was the grandmother of the holder, and that the transfer was a fraudulent transaction to defeat the payee's creditors. The court cited *Ga. Civ. Code, §§ 3694-3698*, and said: "Unless he had notice of the fraudulent design, or reasonable ground to suspect such a design, he would not become a participant therein merely by becoming the holder of the note, duly indorsed and for full value."

In *Matthews v. Poythress*, 4 Ga. 287, the owner of a note payable to bearer left it with a woman for safe-keeping, and the husband of the latter took it by force and transferred it to plaintiff. It appeared that the husband and his companion were both strangers to plaintiff, and he did not like their appearance; one had rings in his ears. He made inquiries only as to the solvency of the parties and the genuineness of the note. He suspected that a fraud had been committed. The court reviews all the leading cases, and says that the rule in *Gill v. Cubitt* has been overruled and is no longer an authority, and says: "We have seen that the want of such caution as a careful and prudent man would take in his affairs is not a defense; it is not *mala fides*. And although it was at one time held that gross negligence was *mala fides*, yet we find that decision overruled, and now it is settled that gross negligence is no more than evidence of it." This must have been prior to the adoption of the Code provision.

In *Merchants' & P. Nat. Bank v. Masonic Hall*, 62 Ga. 271, the court did not notice the Code section which was substantially given in the instructions and affirmed. But the court also approved and affirmed the doctrine in the case of *Matthews v. Poythress*, *supra*, which held that the rule as subsequently laid down in the case of 62 Ga. 271, was not the law in Georgia. It was claimed in *trover* that bonds were put up as temporary collateral by a treasurer of plaintiff, but that a mortgage was to have been given. That the bonds were used to deceive a bank examiner, as the bank could not loan on mortgages. That the treasurer would withdraw the bonds to clip a coupon or to show them to plaintiff, and then leave them with defendant, who finally kept them.

In *Bank of Covington v. Cannon*, 133 Ga. 779, 67 S. E. 83, it was held that giving two notes for a large sum of money by an outgoing firm to an incoming firm was not sufficient of itself to put the bank on inquiry that the partnership giving the note had dissolved. It was said that there was nothing that would "excite the suspicion of the most careful and prudent man." This seems to be the rule in Georgia.

The fact that a man deposited a cashier's check in his bank, payable to himself, was held insufficient to put the cashier receiving the same on inquiry as to the check being the wife's property. Mere suspicion that it was the wife's money was held insufficient to put a purchaser on inquiry, or make him a *mala fide* holder. *Third Nat.*

Bank v. Poe, 5 Ga. App. 113, 62 S. E. 826. This case follows *Shaw v. North Pennsylvania R. Co.* (*Shaw v. Merchants' Nat. Bank*), 101 U. S. 557, 25 L. ed. 892, where it was held that a bill of lading was not controlled by the rule in negotiable instruments; it was said: "It is for this reason it is held that if a bill or note indorsed in blank, or payable to bearer, be lost or stolen, and be purchased from the finder or thief, without any knowledge of want of ownership in the vendor, the bona fide purchaser may hold it against the true owner. He may hold it though he took it negligently, and when there were suspicious circumstances attending the transfer. Nothing short of actual or constructive notice that the instrument is not the property of the person who offers to sell it—that is, nothing short of mala fides—will defeat his right."

This Georgia case seems to ignore the Code, which lays down the suspicion rule differently.

In *Walden v. Downing Co.* 4 Ga. App. 534, 61 S. E. 1127, where a woman made a note to her daughter, who indorsed it in blank, and gave it to her husband for safekeeping, and a partner of her husband transferred it as collateral, it was held that the title of the holder was not defeated by the want of such caution in the purchase as a careful and prudent man would exercise in the conduct of his affairs, or by gross negligence, but that it might be defeated by mala fides in the purchaser, and that mala fides consisted in notice, actual or constructive, of the fact that the security was not the property of the person who offered it, and a privity with or participation in a fraud upon the true owner. This case does not cite the Georgia Code, and seems to lay down the rule directly contrary to the same.

In *Garbutt Lumber Co. v. Prescott*, 131 Ga. 326, 62 S. E. 228, where a husband of the payee of notes that were indorsed in blank delivered them to a third party, and the question was as to his authority, it was held error for the court to express an opinion as to the sufficiency of the evidence "to put defendants on notice that they were dealing with an agent," and that "it was incumbent on them to ascertain the extent of the agent's authority," as this was a question for the jury.

But the statute prescribing a different rule is as follows:

New York negotiable instruments law, § 95, provides: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." This provision seems to have been incorporated in the law of nearly every state, as: Ala. Code 1907, § 5011; Ariz. Rev. Stat. 1901, § 3359; 3 Mills's Stat. Colo. p. 113, § 244M; Conn. Laws 1897, chap. 74, § 56; D. C. Code, § 1360; Fla. Gen. Stat. 1906, § 2989; Idaho Rev. Code, § 29 L.R.A. (N.S.)

3512; Kan. Gen. Stat. § 5309; Iowa Code Supp. § 3060a, 56; 1 Pub. Gen. Law (Md.) p. 337, § 75; 1 Mass. Rev. Laws 1902, p. 636, § 73; 1 Mo. Stat. 1906, p. 530, § 54; Montana Rev. Codes 1907, § 5903; Neb. Comp. Stat. 1901, § 3558a; Nevada act 1908; New Hampshire act April 8, 1909, taking effect January, 1910; New Jersey Laws, 1902, chap. 184, § 56; New Mexico 1907, March 21; N. C. Laws 1899, chap. 733, § 56; N. D. Rev. Code 1905, § 6353; Ohio General Code 1910, § 8161; Or. Bellinger & C. Anno. Codes & Statutes, § 4458; Pa. Laws 1901, chap. 202, § 53; R. I. Laws 1899; Tenn. Code Supp. p. 534, § 56; Utah Comp. Laws 1907, § 1608; Ballinger's Anno. Codes & Statutes, Supp. (Wash.) 1899-1903, § 3650; West Virginia 1907; Wis. Stat. Supp. 1676-26; Wyoming 1905.

Under the negotiable instruments law, the rule in *Gill v. Cubitt* is not followed.

As in Iowa: *Johnson v. Buffalo Center State Bank*, 134 Iowa, 731, 112 N. W. 105, subd. XII.

Maryland: *Valley Sav. Bank v. Mercer*, 97 Md. 458, 55 Atl. 435, subd. XIII.

Montana: *Harrington v. Butte & B. Min. Co.* 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467, subd. VIII.

New Jersey: *Rice v. Barrington*, 75 N. J. L. 806, 70 Atl. 169, subd. VIII.

Tennessee: *Unaka Nat. Bank v. Butler*, 113 Tenn. 574, 83 S. W. 655, subd. VI.; *Ford v. Brown*, 114 Tenn. 467, 1 L.R.A. (N. S.) 188, 88 S. W. 1036, subd. IV. In this case the circumstances were held equivalent to actual notice.

XIX. Summary.

Many cases, without stating the circumstances, lay down the rule in regard to negligence on the part of the holder of paper. Taking some of these cases which state the general rule, it will be readily seen what states follow the rule in *Gill v. Cubitt*, 3 Barn. & C. 466 (overruled in *Crook v. Jadis*, 5 Barn. & Ad. 909), which was to the effect that knowledge of circumstances sufficient to excite the suspicion of a prudent man would put the purchaser on inquiry.

The states which seem to follow the suspicion rule of *Gill v. Cubitt* are as follows:

The rule that a purchaser must use reasonable diligence when paper is offered for sale under circumstances that are calculated to excite the suspicion of a reasonably cautious person was applied where a cashier of a bank bought a note made to a firm of attorneys, and he knew that, prior to its execution, the maker and his two sons had been arrested for murder, and were in jail when the note was made, and these attorneys were for the defense. *Shirk v. Neible*, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281. The claim was made that this was for a fee which was excessive.

In *National Exch. Bank v. Berry*, 21 Ind. App. 261, 52 N. E. 104, it was said: "We understand the law to be, as announced by

he supreme and appellate courts of this state with reference to the purchase of negotiable paper before maturity, that if there is anything about the paper itself, or the circumstances attending its presentment for discount, calculated to excite suspicion in the mind of a reasonably cautious person, it is the duty of the purchaser to make inquiry as to its genuineness; otherwise not."

A purchaser of negotiable paper was held to be required to make inquiry of the maker or holder, as to the circumstances under which the paper was executed, unless there could be something about the paper itself, or the circumstances under which it is presented, to excite the suspicion of a person of common prudence; in the latter case, reasonable diligence would be required. *Citizens' Bank v. Leonhart*, 126 N. E. 1099.

In *Shirk v. Neible*, supra, the rule was stated: "The purchaser of commercial paper is not entitled to protection, if it is shown that he had actual knowledge of the nature of the paper; neither is he entitled to protection if it is shown that he had such credible information as would put a reasonable person upon inquiry." Citing *Citizens' Bank v. Leonhart*, supra; *Amueckle v. Waters*, 125 Ind. 265, 25 N. E. 281, where the same rule was stated.

In *Tescher v. Merea*, 118 Ind. 586, 21 N. E. 316, subd. XVII., it was held that circumstances calculated to awaken suspicion merely are not sufficient. "This means to be contrary to the rule adopted in the later cases.

In a note, where the consideration had been transferred to an attorney in Chicago, who was acquainted with the payee, and who had no notice of the consideration. A finding that the note was given without notice of a defense was not equivalent to a finding that the purchaser acted in good faith, for he might have had suspicions that led him to avoid knowledge, and this would have made him a purchaser in bad faith. *Pierson v. Huntington*, 82 Vt. 482, 74 Atl. 88. The court said: "The question whether the plaintiff's inquiry was included in the question of good faith, and the fact that there was evidence tending to show that he made inquiry justified an affirmative finding that he made none." The rule in *Gill v. Cubitt* is to be approved. *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166, subd. I. And in *New Hampshire* the rule seems to be the same. *Bank v. Rider*, 58 N. H. 512, subd. II.; *Wagner v. Freschl*, N. H. 495, subd. II.

But the weight of authority is that circumstances which would excite the suspicions of a prudent man are not sufficient to put the purchaser of a negotiable instrument on inquiry.

Evidence merely tending to show that a party, in acquiring a negotiable bill, suspected the title of the holder at the time of delivery, was held insufficient to authorize the conclusion that he was guilty of negligence when the transfer was made. *L.R.A.(N.S.)*

made, or that the holder was guilty of a breach of trust in passing it. *Goodman v. Simonds*, 20 How. 367, 15 L. ed. 942. It was claimed that the agent who carried the bill to the city for discount had no authority to use it for his own benefit. The trial court instructed the jury that knowledge of circumstances that would cause the taker to suspect the title would prevent him from being a holder in good faith. This was held error.

Knowledge of such facts as would put a prudent person on inquiry would not affect the right of the plaintiff to recover if she was otherwise a bona fide holder for value. *Clark v. Evans*, 13 C. C. A. 433, 27 U. S. App. 640, 66 Fed. 263. The defendant claimed that the note was obtained from her by fraud, without consideration, and that the plaintiff had knowledge of this. No facts are stated.

Where the consideration of a note was for refraining from bidding at an assignee's sale, and guaranteeing the payor's debts, and an indorsee brought suit, an instruction that if the officers of the plaintiff's bank refrained from making inquiry lest they thereby become acquainted with the transaction, the plaintiff was not a holder in good faith, without notice, was held erroneous, as negligence was not bad faith. *Atlas Nat. Bank v. Holm*, 19 C. C. A. 94, 34 U. S. App. 472, 71 Fed. 489. It was said that negligence might be evidence of bad faith.

In *Sinkler v. Siljan*, 136 Cal. 356, 68 Pac. 1024, the court said: "That one who purchases a note before maturity, and pays full value therefor, as plaintiff did in this case, must be prepared to defend his purchase against all equities and defenses the maker might urge against the payee, if in the purchase 'the circumstances were such as to invite inquiry on the part of the purchaser,' is too broad a statement of the rule, and gives to the jury too uncertain and indefinite a guide."

Mere suspicion is held insufficient. *St. Joe & M. F. Consol. Min. Co. v. First Nat. Bank*, 10 Colo. App. 339, 50 Pac. 1055, subd. III.; *Harrington v. Butte & B. Min. Co.*, 33 Mont. 330, 114 Am. St. Rep. 821, 83 Pac. 467.

The doctrine of *Gill v. Cubitt* was denied in *Standard Cement Co. v. Windham Nat. Bank*, 71 Conn. 668, 42 Atl. 1006, subd. III.; and was not followed in *Wildsmith v. Tracy*, 80 Ala. 259, subd. XIV.

A memorandum of the maker was used in evidence after his death. This memorandum showed that, in an interview, the holder of the note claimed to have a letter promising to pay at maturity, and the maker claimed that the letter said to pay at maturity, "if machines were sold" for which the note was given. The court instructed the jury: If there was a wilful or fraudulent failure to inquire into circumstances where they were known to be such as to invite inquiry, the jury, if they thought that such abstinence was from the belief that such inquiry would result in

finding that the note was invalid, would regard it as a case of general notice. Mere negligence, however gross, not amounting to this wilful or fraudulent blindness, will not, of itself, amount to notice, though the jury should consider the fact of such negligence, as it may tend to prove such general notice. But if, after all, though there was negligence, the purchase was yet bona fide, honest, and in the regular course of business, the purchaser would be a bona fide holder. *Oakeley v. Ooddeen*, 2 *Fost. & F.* 656.

In *Russell v. Haddock*, 8 *Ill.* 233, 44 *Am. Dec.* 693, it was stated: "The rule undoubtedly is, that where a party is about to receive a bill or note, if there are any such suspicious circumstances accompanying the transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder or the consideration of the paper, he shall be bound to make such inquiry, or, if he neglects to do so, he shall hold the bill or note subject to any equities which may exist between the previous parties to it. In other words, he shall act in good faith, and not wilfully remain ignorant when it was his duty to inquire into the circumstances and know the facts." But it was held in this case, although a holder had a suspicion that there was some reason why the parties desired to sell the bill, but what it was he did not know, the failure to make inquiry did not prevent him from being a bona fide holder. This transaction took place in Chicago, and it appeared that the drawer and drawees lived in New York, so that any inquiry of them was absolutely impracticable, and the acceptor could not be presumed to know what consideration had moved between the drawer and the drawees, nor did it appear that he could have got any information from Russell, the drawee, on the subject.

Russell v. Haddock, supra, was criticized in *Comstock v. Hannah*, 76 *Ill.* 530, because it seemed to recognize a rule inconsistent with the law in this state.

In *Merritt v. Dewey*, 115 *Ill. App.* 503, it was said: "Beginning, however, with the case of *Comstock v. Hannah*, supra, the authority of the *Haddock* Case was questioned, and virtually overruled, and upon a review of the authorities of England and this country, the rule in the following language, taken from *Chapman v. Rose*, 56 *N. Y.* 137, 15 *Am. Rep.* 401, was approved: 'It is now, however, the settled law, that mere negligence, however gross, is not sufficient to deprive a party of the character of a bona fide holder. There must be proof of bad faith. That alone will deprive him of that character.'"

In *Iowa College v. Hill*, 12 *Iowa*, 462, and *Lake v. Reed*, 29 *Iowa*, 258, 4 *Am. Rep.* 209, the rule was stated: Plaintiffs "are not to be charged with notice because of any want of diligence on their part in making inquiry, or even if they took the note under suspicious circumstances, provided they had

no notice, actual or constructive, of the alleged equities."

In *Iowa College v. Hill*, supra, an instruction: "That it was sufficient if the circumstances brought home to the plaintiffs are of such a strong and pointed character as necessarily to cast a shade upon the transaction and put them upon inquiry. They are not to be charged with notice because of any want of diligence on their part in making inquiry, or even if they took the note under suspicious circumstances, provided they had no notice, actual or constructive, of the alleged equities subsisting between *Lambrite* and *Hill*"—was held proper.

Facts which would have put a reasonable man upon inquiry were held insufficient to charge the indorsee with notice of fraud in the inception of the note. *Lake v. Reed* supra; *Lane v. Evans*, 49 *Iowa*, 156. The facts were not given.

In *Moore v. Moore*, 39 *Iowa*, 461, it was said: "If the note was indorsed 'before due and for a valuable consideration, and without notice of fraud,' it would be regarded as having been received in due course of business. The position is not correct. If the note was taken out of the 'due course of business,' under circumstances calculated to impart notice of its infirmities, plaintiff received it at his peril, though taken before due, and without notice of fraud."

In *Richards v. Monroe*, 85 *Iowa*, 359, 4 *Am. St. Rep.* 301, 52 *N. W.* 339, it was said: "The rule that when a purchaser of a negotiable promissory note for value, before due, has such knowledge or information of infirmities in the note as would put a man of ordinary prudence upon inquiry to ascertain the truth of the matter, he will be held to have notice,"—is certainly not the rule in this state.

In *Richards v. Monroe*, supra, it was said: "The early and present doctrine that the right of a bona fide holder of value, in the usual course of business, of negotiable paper, cannot be defeated by proof that he was negligent, and omitted to make inquiries which common prudence would have dictated."

In *Lehman v. Press*, 106 *Iowa*, 359, *N. W.* 818, it was said: "The fact that was merely put on suspicion, or was at least in not making inquiry, is not sufficient. He must be shown, by direct or circumstantial evidence, to have taken the paper with knowledge or notice of its infirmities. The circumstances must be such as indicate wilful neglect to inquire, or such carelessness in failing to do so, when inquiry would have led to such knowledge as shall establish bad faith."

In *Central State Bank v. Spurlin*, 12 *Iowa*, 187, 49 *L.R.A.* 661, 82 *Am. St. R.* 511, 82 *N. W.* 493, it was said: "It is shown that the bank made some inquiry as to the paper before purchasing. No claim is made that, had it inquired further, it would have learned that the note was obtained by fraud, and was without

sideration. Without saying that the evidence does not show the bank to have been diligent in this respect, the rule is that mere negligence on the part of the purchaser is not sufficient to charge him with notice."

In *Bedell v. Burlington Nat. Bank*, 16 Kan. 130, it was said: "It may be true that a party engaged in dealing in commercial paper may be more familiar with the habits of business men in the making and discounting of such paper, and therefore more chargeable with notice of anything unusual in the form of the paper, or the conduct of the holder; but beyond that we do not understand that he is under any greater obligations than any other purchaser of such paper to inquire into and ascertain the true nature of the transaction between the maker and the payee."

In *Perrin v. Noyes*, 39 Me. 384, 63 Am. Dec. 633, it was said: "If fraud is practised in the inception of a note, or the note is fraudulently put in circulation, the establishment of such facts will throw the burden of proof upon the plaintiff, to show that he came by the possession of the note fairly, in the due course of business, and without any knowledge of the fraud, and unattended with any circumstances justly calculated to awaken suspicion."

In *Aldrich v. Warren*, 16 Me. 465, it was said that "where a note, or other negotiable paper, is shown to have been fraudulent in its inception, or to have been fraudulently put into circulation, the burthen is thrown upon the holder to prove that he came by the possession fairly, without any knowledge of the fraud. It is not enough merely to show that it was negotiated before its maturity. It must appear to have been done fairly, in the due course of business, unattended with any circumstances justly calculated to awaken suspicion."

In *Farrell v. Lovett*, 68 Me. 326, 28 Am. Rep. 59, it was said: "In *Aldrich v. Warren*, supra, the ruling of the court was, 'that if it was made out that there was fraud in the inception of the note, the burden of proof was on the plaintiff to show that he came innocently by it and paid a fair consideration for it.' To this ruling exception was taken. The only question for adjudication was the correctness of this ruling. The court affirmed it, but in the opinion, *Weston, Ch. J.*, added an element not put in issue by the exceptions, and not required for the determination of the cause; viz., that the transfer should be 'unattended with any circumstances justly calculated to awaken suspicion! This new element must be regarded as a mere *obiter dictum*. In *Perrin v. Noyes*, supra, no such statement of the rule as given by *Weston, Ch. J.*, was necessary to the decision of the case, or was called for by the exceptions."

In *Kellogg v. Curtis*, 69 Me. 212, 31 Am. Rep. 273, it was said: "The purchase by an indorsee must be 'in the usual course of business.' These words are usually defined to mean, 'according to the usages and customs of commercial transactions.' If the

plaintiff purchased the note before maturity, for value, that would be such a transaction."

In *Totten v. Bucy*, 57 Md. 446, the court said: "the question is not what facts . . . will or will not be sufficient to put the party on inquiry, but the question is whether the party had knowledge of the infirmity of the note at the time of the transfer to him; or, in other words, whether he procured the note in good faith, for valuable consideration."

In *Hamilton v. Marks*, 52 Mo. 78, 14 Am. Rep. 391, the old rule of *Gill v. Cubitt*, 3 Barn. & C. 466, was followed. In this case the facts within the knowledge of plaintiff were not stated, but the payee obtained the note through fraud. This case was overruled in *Hamilton v. Marks*, 63 Mo. 167.

A mere suspicion on the part of a purchaser of a note that a contemporaneous contract will not be carried out, which was afterwards shown never to have been intended to be carried out by the payee, was held insufficient to stamp his purchase with bad faith. *Jennings v. Todd*, 118 Mo. 296, 40 Am. St. Rep. 373, 24 S. W. 148.

In *Borgess Invest. Co. v. Vette*, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754, it was said: "Nor will mere suspicion alone that the note is without consideration, brought home to the transferee before he acquires the note, be sufficient to defeat a recovery upon the note by him. Bad faith alone upon the part of the holder in taking the note will not defeat a recovery by him against the party thereto."

In *Greer v. Yosti*, 56 Mo. 307, it was said: "The notice of the fraud must be at least sufficient to put the purchaser of the paper on inquiry. Express notice is not indispensable. It will be sufficient if the circumstances are such as to strongly indicate that there was fraud in procuring the paper. But the circumstances must be of such a strong and pointed character as necessarily to cast a shade upon the transaction, and to put the holder on inquiry." In this case no facts showing grounds of suspicion were stated. The same was held in *Bennett v. Torlina*, 56 Mo. 309.

In *First State Bank v. Borchers*, 83 Neb. 530, 120 N. W. 142, it was said: "We have condemned an instruction that requires a purchaser of negotiable paper before maturity to follow up by inquiry any suspicious fact or circumstance relative to the note that may come to his attention at or before the date of his purchase. *First Nat. Bank v. Pennington*, 57 Neb. 404, 77 N. W. 1084. To constitute bad faith, the buyer must have had knowledge of infirmities in the note, or have had a belief based on circumstances known to him that there was a defense thereto, or the evidence must tend to prove that the purchase was made under such circumstances as indicate bad faith or a want of honesty on the part of the indorsee."

In *Hamilton v. Vought*, 34 N. J. L. 187, it was said: "An examination of the American reports will disclose a similar muta-

tion of judicial opinion upon this subject. For a time, in several of the states, the rule broached in the case of *Gill v. Cubitt*, has been acted upon; but now, in most of them, and in those of the most commercial importance, that rule has been entirely discarded."

In *Magee v. Badger*, 34 N. Y. 247, 90 Am. Dec. 691, it was said: "The authority mainly relied on in support of the opposite theory is the case of *Gill v. Cubitt*, 3 Barn. & C. 466. The doctrine of that case has been repeatedly overruled, as well in the English as in the American courts; and it cannot be recognized as authority without an innovation in our system of commercial law, fraught with infinite mischief and uncertainty."

Where a note was presented for discount by the first indorser, it was held that the presumption would be that it had its inception in his hands. *First Nat. Bank v. Weston*, 88 Hun, 29, 34 N. Y. Supp. 558. The court said: "It is not the duty of parties about to purchase negotiable paper to make any inquiries not required by good faith, as to possible defenses of which they have no notice, either from the face of the paper or facts communicated at the time."

In *Kitchen v. Loudenback*, 48 Ohio St. 177, 29 Am. St. Rep. 540, 26 N. W. 979, which was a seed wheat note swindle, the court laid down the general rule that suspicious circumstances would not prevent plaintiff from being a bona fide holder.

In *Mulberger v. Morgan* (Tex. Civ. App.) 34 S. W. 148, it was said: "What would be sufficient to put a man of ordinary prudence upon inquiry would be deemed notice, unless the inquiry were prosecuted and found not to justify the suggestion of vice in the transaction."

This was an action on a joint note given for a "stock horse," and in *Mulberger v. Morgan* (Tex. Civ. App.) 47 S. W. 379, it was said: "The rule announced does not apply to negotiable instruments. If the purchaser of commercial paper has no direct knowledge or trustworthy information of the defense which the maker may have against the original payee, and acquires it before maturity, and for a valuable and sufficient consideration, he is entitled to protection as an innocent holder."

In *Turner v. Grobe* (Tex. Civ. App.) 44 S. W. 898, the court said: "As to the purchaser of a negotiable note, he is not bound to take notice of facts which he might have known by the exercise of reasonable diligence. The question is, did he act in good faith, under the circumstances, considering the information actually brought to his knowledge? 'Mere suspicion that there may be a defect of title in its holder, or knowledge or circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part.'"

In *Crook v. Jadis*, 5 Barn. & Ad. 909, where a bill was discounted, it was held 29 L.R.A. (N.S.)

that nothing short of gross negligence would defeat the plaintiff's right to recover on the bill.

See *First Nat. Bank v. Stockell*, 20 L.R.A. 605, note, "As to validity of notes given for patent rights."

See *Green v. Wilkie*, 36 L.R.A. 434, note, "Fraud in obtaining the execution of a note as a defense against a bona fide holder."

See *Citizens' Nat. Bank v. Williams*, 35 L.R.A. 464, note, "Alteration of note as affecting bona fide holders."

Cases which directly hold that the circumstances known are "notice" to the purchaser are not intended to be included in this note. And the note does not include all cases which lay down the rule for negotiable instruments where no facts or circumstances are given. Cases in regard to the negotiability of municipal bonds; cases in regard to alteration of negotiable instruments; cases in regard to negotiability of overdue paper,—are not intended to be included in this note. I. T.

UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

DANIEL A. JONES et al., Pliffs. in Err., v.

WILD GOOSE MINING & TRADING COMPANY et al.

(101 C. C. A. 349, 177 Fed. 95.)

Mine — excessive location — relocation.

No entry for purposes of location can be made upon an existing mining claim which is excessive through honest mistake, until notice of the excess has been given the locator and an opportunity afforded him to reduce his claim to legal size.

(Gilbert, Circuit Judge, dissents.)

(March 11, 1910.)

ERROR to the District Court of the United States for the Second Division of the District of Alaska to review a judgment in plaintiffs' favor in an action brought to recover possession of certain mining property and for damages for the alleged unlawful detention thereof. Affirmed.

The facts are stated in the opinion.

Argued before Gilbert and Morrow, Circuit Judges, and Hunt, District Judge.

Messrs. Grigsby & Hill, N. H. Castle, Curtis H. Lindley, and E. M. Rice for plaintiffs in error.

Messrs. Albert Fink, Thomas H. Breeze, and Gordon Hall for defendants in error.

Note.—The question as to the effect of excessive locations of mining claims is covered in 7 L.R.A. (N.S.) 763, and in the supplementary note to *Nichols v. Lewis*, 21 L.R.A. (N.S.) 1029.

Hunt, District Judge, delivered the opinion of the court:

This is an action in ejectment brought by defendants in error, plaintiffs below, to cover possession of a certain piece of placer mining property in Alaska, and for damages.

There is no substantial conflict in the evidence as to the material facts: On the 1st day of January, 1901, Harry M. Ball located the Navajoe placer claim, which, by a notice of location and the recorder's certificate, contained a tract of land 1,320 feet long and 600 feet wide, i. e., an area of 20 acres; but, as actually marked upon the ground by the boundary stakes, there was, by inadvertence and honest mistake embraced within the claim an excess amounting to slightly over $2\frac{1}{2}$ acres, so that the claim really covered 22.531 acres, instead of the 20 acres allowed by law.

The Wild Goose Mining & Trading Company and Frank J. Kolash, defendants in error, succeeded to the title of the locator prior to the commencement of this action.

In July or August, 1908, one Van Orsdale had been negotiating with defendants in error for a lease on a portion of the Navajoe claim, and had spoken to plaintiffs in error with a view to having them accept over said lease and work the ground. Thereafter Van Orsdale departed from the locality, but before going notified defendant in error Kolash that the plaintiffs in error were associated with him in the lease, and that they would consummate the same. To

Kolash consented. Thereafter, after the departure of Van Orsdale from Nome, defendant in error Charles D. Jones called on Kolash to secure the said Van Orsdale's lease. A dispute arose with regard to the amount of land to be covered by the lease, Kolash, being unwilling to let plaintiffs in error have the amount of land asserted by them to have been negotiated for by Van Orsdale, offered them a definite parcel of the claim, and the next day (August 9th or 10th) the plaintiffs in error visited the locality to view the same, and to ascertain the boundaries of the portion of which Kolash was willing to lease

to them. When measuring the boundary lines of the Navajoe claim, plaintiff in error Daniel A. Jones, who is a civil engineer and surveyor, testified that they were too long, and that consequently the claim was excessive in area, containing more than the legal 20 acres. He, therefore, directly proceeded to make an accurate survey, and having thereby determined that the Navajoe claim, located on the ground, included 22.531 acres, he did, on August 12th, withdraw the same from the public record (N.S.)

without having given the defendants in error any notice of his discovery of the fact that the Navajoe claim was excessive in area, go to the Navajoe claim and select, locate, and stake a portion thereof as the "Papoose fraction," a triangular tract embracing 2.531 acres of the northeasterly portion of the Navajoe claim, which amount he had ascertained was the excess area included within the original Navajoe boundaries, and which particular piece of ground he preferred to any other in the Navajoe claim. Immediately upon locating the Papoose fraction, plaintiffs in error assumed possession thereof and went to work sinking a shaft, and prosecuted work thereon until during the latter part of September, 1908, when they made a discovery of a few colors of placer gold, and followed this up with a discovery of gold in paying quantities about October 1st.

There is a conflict of testimony among the witnesses as to the exact date when the Navajoe owners became apprised of the fact that their claim was excessive in area, and that the plaintiffs in error had located and staked the Papoose fraction. It is admitted, however, that they had no knowledge, and that no notice thereof was given to the owners of the Navajoe by the plaintiffs in error, until after location and staking of the Papoose fraction.

On August 21 or 22, 1908, T. M. Gibson, a representative of the Wild Goose Mining & Trading Company, in a conversation with said Jones, asked the latter to pull up the stakes marking the Papoose fraction, for the reason that "the owners of the Navajoe did not want to cast off the excess, if any there was, just the way he had staked it, but if he would take up his stakes, they would cast off the excess where they thought it best to do so, and that then he could take it if he wanted to." Jones refused to comply with such request. Thereafter, on November 7, 1908, defendants in error caused the Navajoe claim to be surveyed, and thereupon cast off 2.54 acres from the southeasterly portion of the claim, and made an amended location of the claim, of the remaining 20 acres. On November 12, 1908, one W. H. Lonagan, acting in behalf of the Wild Goose Mining & Trading Company, located and staked the excess so cast off as the "Pump fraction."

At the close of the testimony, plaintiffs moved the court to direct the jury to bring in a verdict for plaintiffs. This request was granted, and the jury, pursuant to the court's instructions, found for the plaintiffs. Judgment was entered in accordance therewith, and defendants sued out this writ, assigning for errors the action of the court in sustaining plaintiffs' motion, and in

structing the jury to return a verdict in favor of the plaintiffs, and in entering judgment upon the verdict of the jury, and in overruling defendants' motion for a new trial.

The law under which mining locations may be made is to be found in chapter 6 of title 32, Rev. Stat. (U. S. Comp. Stat. 1901, pp. 1422-1442). By § 2322 it is provided that "the locators of all mining locations . . . on any mineral vein, lode, or ledge situated on the public domain, . . . shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations. . . ."

And by § 2329 it is provided that "claims usually called 'placers', including all forms of deposits, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions and upon similar proceedings as are provided for vein or lode claims."

In a late case, *Clipper Min. Co. v. Eli Min. & Land Co.* 194 U. S. 220, 48 L. ed. 944, 24 Sup. Ct. Rep. 632, the Supreme Court, commenting on these sections, says: "It will be seen that § 2322 gives to the owner of a valid lode location the exclusive right of possession and enjoyment of all the surface included within the lines of the location. That exclusive right of possession forbids any trespass. No one without his consent, or at least his acquiescence, can rightfully enter upon the premises or disturb its surface by sinking shafts or otherwise. . . . That exclusive right of possession is as much the property of the locator as the vein or lode by him discovered and located. In *Belk v. Meagher*, 104 U. S. 279, 283, 26 L. ed. 735, 737, it was said by Chief Justice Waite that 'a mining claim perfected under the law is property in the highest sense of that term,' and in a later case (*Gwillim v. Donnellan*, 115 U. S. 45, 49, 29 L. ed. 348, 349, 5 Sup. Ct. Rep. 1110, 1112), he adds: 'A valid and subsisting location of mineral lands, made and kept up in accordance with the provisions of the statutes of the United States, has the effect of a grant by the United States of the right of present and exclusive possession of the lands located. If, when one enters on land to make a location, there is another location in full force, which entitles its owner to exclusive possession of the land, the first location operates as a bar to the second. In *St. Louis Min. & Mill Co. v. Montana Min. Co.* 171 U. S. 650, 655, 43 L. ed. 320, 322, 19 Sup. Ct. Rep. 61, 63, the present chief justice declared that 'where there is a valid location of a mining claim, the area becomes segregated from the public domain and the property of the locator. . . . And this exclusive right of possession

and enjoyment continues during the entire life of the location."

Again, in *Belk v. Meagher*, 104 U. S. 279, 28 L. ed. 735, the Supreme Court has said: "Mining claims are not open to relocation until the rights of a former locator have come to an end. A relocater seeks to avail himself of mineral in the public lands which another has discovered. This he cannot do until the discoverer has in law abandoned his claim, and left the property open for another to take up. The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. A location can only be made where the law allows it to be done. Any attempt to go beyond that will be of no avail. Hence a relocation on lands actually covered at the time by another valid and subsisting location is void; and this not only against the prior locator, but all the world, because the law allows no such thing to be done."

These principles of law, long settled and unambiguous, are the ones that must be invoked for guidance in the determination of the single question presented for decision by the record in this case, and that is: The right, as between the parties to this action, to the possession of the ground embraced within the so-called "Papoose fraction" location. It is evident, from the decisions of the Supreme Court above cited, that if the location by Jones of the Papoose fraction was void and invalid, then no possessory rights were initiated and he acquired none.

In *Waskey v. Hammer*, 95 C. C. A. 305, 308, 170 Fed. 31, 34, this court said: "A location made in good faith and otherwise conformable to law is not rendered wholly void by reason of such excess; but that the excessive area only is void is well settled. . . . And that such locator is at liberty to select the portion of the claim that he will reject as such excess is also established law."

And in *Walton v. Wild Goose Min. & Trading Co.* 60 C. C. A. 164, 123 Fed. 218, this court, through Judge Hawley, regarded an excess of 20 acres in the location of a placer claim as not invalidating the location, but merely rendering it voidable as to the excess. The same doctrines are announced in *Zimmerman v. Funchion*, 89 C. C. A. 53, 161 Fed. 869, and *McIntosh v. Price*, 58 C. C. A. 136, 121 Fed. 716.

Applying the above principles of law to the facts in the case at bar, it is apparent that Jones, at the time he staked the Papoose fraction, was a wrongdoer, and an intruder and trespasser upon the possessory rights of the defendants in error in and to the Navajoe claim; and that his attempted

location of the Papoose fraction, at the time and in the manner he did, was a nullity and void for any purpose, and initiated no rights whatsoever in him, for the reason that the ground covered by such attempted location was, at the time that location was made, in the eye of the law, in the exclusive possession of the defendants in error, under a valid and subsisting location; and they were unaware of, and had not been notified of, the excess, by the plaintiffs in error, nor were they given any opportunity to exercise their right to select and cast off. Until they had received such notice, and were given an opportunity to exercise such right, the whole claim, including any excess due to honest mistake and free from fraud, was so far segregated from the public domain as to exempt it or any part thereof from relocation. In *Kendall v. San Juan Silver Min. Co.* 144 U. S. 663, 36 L. ed. 584, 12 Sup. Ct. Rep. 779, a case involving the validity of a location of a mining claim upon an Indian reservation which had been set apart for "the absolute and undisturbed use and occupation of the Indians," the Supreme Court used the following pertinent language: "The effect of the treaty was to exclude all intrusion for mining or other private pursuits upon the territory thus reserved for the Indians. It prohibited any entry of the kind upon the premises, and no interest could be claimed or enforced in disregard of this provision. Not until the withdrawal of land from this reservation of the treaty by a new convention with the Indians, and one which would throw the lands open, could a mining location thereon be initiated by the plaintiffs. The location of the Bear lode, having been made whilst the treaty was in force, was inoperative to confer any rights upon the plaintiffs. . . . Had the plaintiffs immediately after the withdrawal of the reservation relocated their Bear lode, their position would have been that of original locators. They would then have been within the rule in *Noonan v. Caledonia Gold Min. Co.* 121 U. S. 393, 30 L. ed. 1061, 7 Sup. Ct. Rep. 911."

So, in the case at bar, had the plaintiff in error Jones, after giving the owners of the Navajoe notice of the excess, waited a reasonable time for them to exercise the right to select and cast off, and then relocated the Papoose fraction, a very different question would be presented, and, by a subsequent discovery, he might then perhaps have brought himself within the rule announced in *Creede & C. Creek Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co.* 160 U. S. 337, 49 L. ed. 501, 25 Sup. Ct. Rep. 38. This, however, he did not do, but relied upon his location of August 12, 1908, 1 L.R.A. (N.S.)

and this we hold was a nullity, initiating no rights; for, again to follow the doctrine of the Supreme Court, the right to the possession of mining property comes only from a valid location; if there is no location, there can be no possession under it. "A location to be effectual must be good at the time it is made." *Belk v. Meagher*, 104 U. S. 284, 26 L. ed. 737. Consequently, a location void at the time it is made, because made on a claim valid and subsisting, continues and remains void, and is not cured or made effectual by subsequent discovery.

The conduct of plaintiffs in error in the location of the Papoose fraction, as appears from the record, was, in our opinion, unjustifiable, and is not to be sanctioned. Moreover, as Chief Justice Waite said: "To hold that, before the former location has expired, an entry may be made and the several acts done necessary to perfect a relocation, will be to encourage unseemly contests about the possession of the public mineral-bearing lands, which would almost necessarily be followed by breaches of the peace." *Belk v. Meagher*, 104 U. S. 285, 26 L. ed. 737.

The decision which we have thus reached renders it unnecessary to consider and determine the other questions presented in counsel's briefs.

The action of the District Court for Alaska in sustaining plaintiffs' motion to direct a verdict, and in entering judgment on the verdict, was right, and it is affirmed.

Gilbert, Circuit Judge, dissenting:

Conceding that the plaintiffs in error could not lawfully make their location at the time when they attempted to make it, the question still remains whether or not the defendants in error had, at the time of the commencement of the action, such title that they could maintain ejectment against the plaintiffs in error, who were in possession of the disputed premises. The plaintiff in ejectment must recover, if at all, on the strength of his own title, and not on the weakness or defect of his adversary's title. In the absence of fraud or bad faith, a mining claim which includes more ground than the law allows is not entirely void, but is void only as to the excess. Such is the language of numerous decisions and of the text writers. The question arises: What portion of the excessive claim shall be deemed to be the excess? In the case of a lode claim located under regulations or a statute limiting the side lines to a certain width on each side of the vein or the discovery shaft, if the claim as marked is of greater than the permitted width, it is easy to ascertain where and what is the excess, and it would

seem that the excess is open to immediate location by another. *Taylor v. Parenteau*, 23 Colo. 368, 48 Pac. 505; *Lakin v. Dolly*, 53 Fed. 333; *Bonner v. Meikle* (C. C.) 82 Fed. 697-705. In *Hauswirth v. Butcher*, 4 Mont. 299, 1 Pac. 714, the court said: "The boundaries must be so definite and certain as that they can be readily traced, and they must be within the limits authorized by law; otherwise their purpose and object would be defeated. The area bounded by a location must be within the limits of the grant. No one would be required to look outside of such limits for the boundaries of a location. Boundaries beyond the maximum extent of a location would not impart notice and would be equivalent to no boundaries at all."

But in the case of a placer claim, where the only limitation is that it shall not exceed 20 acres, the precise part that shall be deemed the excess is not ascertained until the locator in the exercise of his right, on discovering that his claim is excessive, has readjusted his lines so as to exclude the excess. It is the logical deduction from the decisions that, if the original location was fraudulently made excessive, it is void *in toto*. If this be true, it would seem that if, after discovering that his claim is excessive, the locator wilfully continues to maintain his lines as marked upon the ground, and fails within a reasonable time to cast off the excess, he places himself in the attitude of fraudulently asserting claim to a location greater in area than the law permits, the resulting invalidity of which would be the same that it would be if he had made the claim fraudulently excessive in the first instance. The defendants in error in this case failed, for a period of nearly three months after notice that their claim was excessive, to alter their lines so as to conform to the legal requirements. This failure to act, in my opinion, amounted to an active and intentional assertion of an excessive claim, and I submit it should be held that thereby the location became void.

But whether this conclusion is correct or not, in any proper view of the facts and the law applicable thereto, the defendants in error are still fraudulently asserting an excessive claim. The only portion of their claim which they have cast off is that portion on which was their posted notice of location, their discovery shaft, and all their extensive workings, and from which practically all the gold extracted from the claim since its location had been taken, and upon which they had, at the time of locating their lines, ceased their mining operations. To cast off this portion of the claim as excess is but another way of maintaining a claim to the whole location as it was originally 29 L.R.A. (N.S.)

made. To hold that a locator of an excessive location may exhaust the mineral from a portion thereof, cast off that portion as the excess, and hold the remainder, would be to open the door to fraudulent location, and would be tantamount to deciding that such a locator, if he can succeed in working out a portion of the claim before notice is brought to him that his claim is excessive, may successfully locate, hold, mine, and exhaust a placer claim of greater area than the law allows. To hold so would be to render nugatory the express object of the mining laws, which limit the size of placer locations, and would permit the miner to profit by his own wrong.

In view of these considerations, I submit that the defendants in error had no title or right of possession on which they could recover in ejectment, and that the trial court erred in directing a verdict for the defendants in error.

ARKANSAS SUPREME COURT.

SALLIE E. MCCOY, Appt.,
v.

BOARD OF DIRECTORS OF PLUM BA-
YOU LEVEE DISTRICT.

(— Ark. —, 129 S. W. 1097.)

Levee — Injury of property by construction — Liability of district.

A levee district is not liable even under a Constitution which provides that private property shall not be damaged for public use without compensation, for running a levee across sloughs, swales, and other low places which help to absorb the flood waters of a river, and leaving certain riparian lands between the levee and the river, the effect of which is to raise the height of the flood water over such land to its injury.

(June 13, 1910.)

Note. — The cases dealing with the general question of the right of a riparian owner, as against other riparian owners, to confine flood water within the banks of a stream, are gathered in a note to *Jefferson v. Hicks*, 24 L.R.A. (N.S.) 214. A similar note, but limited to a discussion of the question whether a municipal corporation can be held liable for confining flood waters within the banks of a stream, may be found attached to *Walters v. Marshalltown*, 26 L.R.A. (N.S.) 199. These notes, it will be seen, sufficiently include the question presented in the above case.

The cases dealing with the liability of a drainage district for flooding land are gathered in a note to *Bradbury v. Vandalia Levee & Drainage Dist.* 19 L.R.A. (N.S.) 991.

APPEAL by plaintiff from a judgment of the Circuit Court for Jefferson County in defendant's favor in an action brought to recover damages for increasing the flood waters over plaintiff's lands by the construction of a certain levee. Affirmed.

The facts are stated in the opinion.

Messrs. Austin & Danaher and Crawford & Hooker, for appellant:

The overflowing of land adjacent, where it is a necessary consequence of the levee as constructed, is virtually a condemnation of it to public use.

Ex parte Martin, 13 Ark. 198, 58 Am. Dec. 321; Merriweather v. St. Francis Levee Dist. 15 Ark. L. Rep. 319; Pumpelly v. Green Bay & M. Canal Co. 13 Wall. 166-178, 20 L. ed. 557-560; United States v. Lynah, 188 U. S. 445, 47 L. ed. 539, 23 Sup. Ct. Rep. 349.

The overflow water from the river was not surface water, and could not be impounded or fought off by any proprietor without regard for his neighbor.

Cairo, V. & C. R. Co. v. Brevoort, 25 L.R.A. 527, 62 Fed. 129; Gould, Waters, §§ 211c, 264; Crawford v. Rambox, 44 Ohio St. 279, 7 N. E. 429; R. v. Trafford, 1 Barn. & Ad. 874; Burwell v. Hobson, 12 Gratt. 322, 65 Am. Dec. 247; Macomber v. Godfrey, 108 Mass. 219, 11 Am. Rep. 349; Gillett v. Johnson, 30 Conn. 180; Briscoe v. Drought, 11 Ir. C. L. Rep. 250; West v. Taylor, 16 Or. 165, 13 Pac. 665.

The owner of the land on the bank of a river cannot without liability erect on his own land an embankment which increases the overflow, in times of flood, upon the lands of the opposite proprietor, to the injury thereof.

O'Connell v. East Tennessee, V. & G. R. Co. 57 Ga. 246, 13 L.R.A. 397, 27 Am. St. Rep. 246, 13 S. E. 489; Menzies v. Breadalbane, 3 Bligh, N. R. 414; Angell, Watercourses, § 333; R. v. Trafford, supra; Jones v. Hannovan, 55 Mo. 462; Wharton v. Stevens, 84 Iowa, 107, 15 L.R.A. 630, 35 Am. St. Rep. 296, 50 N. W. 562; Gerrish v. Clough, 13 N. H. 9, 97 Am. Dec. 561, 2 Am. Rep. 165; Hartshorn v. Chaddock, 135 N. Y. 116, 17 L.R.A. 426, 31 N. E. 997; Byrne v. Minneapolis & St. L. R. Co. 38 Minn. 212, 3 Am. St. Rep. 668, 36 N. W. 339; Wallace v. Drew, 59 Barb. 413; Ordway v. Canisteo, 56 Hun, 569, 21 N. Y. Supp. 835; Carriger v. East Tennessee, V. & G. R. Co. 7 Lea, 343; West v. Taylor, 16 Or. 165, 13 Pac. 665; O'Connell v. East Tennessee, V. & G. R. Co. 87 Ga. 246, 13 L.R.A. 400, 27 Am. St. Rep. 246, 13 S. E. 489; 2 Farnham, Waters, 1340; Springfield & M. R. Co. v. Rhea, 44 Ark. 258; Railway Co. v. Magness, 39 Ark. L. Rep. 657.
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Mr. W. F. Coleman, for appellee:

Levee or drainage districts are not liable for damages resulting from the erection along a stream of a levee which, by reason of keeping the stream within its banks at the point where erected, causes the stream to overflow other lands situated upon the river.

25 Cyc. Law & Proc. p. 194, ¶ 3; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625; R. v. Sewer Comrs. 8 Barn. & C. 355, 23 Eng. Rul. Cas. 792; Hoard v. Des Moines, 62 Iowa, 326, 17 N. W. 527; Shelbyville & B. Turnp. Co. v. Green, 99 Ind. 205; Cairo & V. R. Co. v. Stevens, 73 Ind. 283, 38 Am. Rep. 139; Dubose v. Levee Comrs. 11 La. Ann. 165; Bass v. State, 34 La. Ann. 494; Re New Orleans Draining Co. 11 La. Ann. 370; Tinicum Fishing Co. v. Carter, 90 Pa. 85, 35 Am. Rep. 632; 1 Cyc. Law & Proc. p. 646, ¶ 2, note 15.

It is only where a landowner obstructs the natural flow of surface water unnecessarily, when, by reasonable care and expense, he might have avoided such injury, that he becomes liable to other proprietors for the damage thus sustained.

Baker v. Allen, 66 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511.

The defendant is not liable as for the obstruction of a watercourse.

Kansas City, M. & B. R. Co. v. Smith, 72 Miss. 677, 27 L.R.A. 702, 48 Am. St. Rep. 579, 17 So. 78.

McCulloch, Ch. J., delivered the opinion of the court:

Plum Bayou levee district was created by an act of the general assembly in 1905 (Acts 1905, p. 83), for the purpose of constructing a levee along or near the east bank of the Arkansas river, in the counties of Pulaski, Lonoke, and Jefferson, to protect the lands embraced in the specified territory from inundation of waters of that river. The levee constructed pursuant to the creation of the district is 42 miles long, commencing in Pulaski county about the head of Plum bayou, and extending into Jefferson county, within 2½ miles of what is known as Rob Roy bridge. The levee is a solid, continuous embankment, of sufficient height and width to prevent the spread of waters overflowing from the Arkansas river. It protects from overflow about 270,000 acres of fertile land, a considerable portion of which is improved and in a high state of cultivation. The general direction of the river course in front of the levee is south, but there is a wide reverse bend which changes the local course east and west, and the levee is constructed across

the bend instead of following it. Plaintiff, Mrs. Sallie E. McCoy, owns land embracing 300 acres in cultivation, fronting on the east bank of the Arkansas river, and situated at the lower end of the reverse bend and in front of the levee; that is to say, between the river and the levee.

After the levee was constructed, and after the overflow of 1908, plaintiff instituted this action against Plum bayou levee district to recover damages for alleged injuries done to her land by reason of the construction of the levee. She alleged in the complaint that the levee was constructed across two streams known as Gar slough and Plum bayou, and stopped up said streams so that no water can pass from them into the Arkansas river, or from the river into those streams; that said streams are well-defined, natural streams, with clearly marked banks and beds, and carry well-defined and constant flow of water; that until the levee was constructed by defendant, when the river reached flood stage Gar slough and Plum bayou would drain the water from the Arkansas river, thus relieving the river from a vast volume of water at flood stage at points above plaintiff's land, thereby relieving the main channel of the river to such an extent that, even in the highest flood ever known, plaintiff's land was secure from overflow; that after the construction of the levee, the natural outlet of flood water through Gar slough and Plum bayou being obstructed as aforesaid, so that all the water coming down the Arkansas river was confined to the main channel of the river and the lands lying between the river and the levee, it thereby caused the water to rise at least 6 feet higher on those lands than it would have risen if the escape of water through Gar slough and Plum bayou had not been obstructed; that on account of said rising of the waters at flood stage, the lands of plaintiff during the overflow of 1908 were permanently damaged, and the crops thereon destroyed.

Defendant in its answer denied that Gar slough is a well-defined, natural stream with clearly marked banks and beds, or that it carries a well-defined and constant flow of water, but claimed that said slough is a depression or swag about $1\frac{1}{2}$ miles in width, about 15 or 16 miles north of plaintiff's land, and carries no water except in wet seasons, and has no natural flow or outlet except the common territory comprising the Plum bayou levee district; that since the construction of the levee, said slough is in a high state of cultivation as is common to the remaining vast territory situated behind the levee. Defendant admitted that Plum bayou is a natural stream with natural banks, and in most

seasons contains water; said stream having its source many miles north of plaintiff's land, and running generally in a southeasterly direction from the Plum bayou levee district community into the Arkansas river several miles below the end of the levee. It denied that it has constructed its levee across Plum bayou, but that the levee at the point mentioned in the complaint is constructed about 500 feet west of Plum bayou, across a cut-off extending from the Arkansas river to said bayou, which cut-off, prior to the construction of the levee, contained water only in very wet weather, and the bayou, which is a sluggish stream, was unable to hold within its banks the increasing volume of water, thereby causing water from the bayou to overflow into and through the cut-off into the Arkansas river. Said cut-off is situated about 4 miles north of plaintiff's lands. It denied that when the river reached a flood stage, the said two streams, or either of them, were sufficient for and did in fact drain the water from the Arkansas river, or that such so-called streams were the natural drainage for water from the Arkansas river, or that they or either of them relieved the Arkansas river at flood stage from the vast volume of water at points above plaintiff's land, thereby so relieving the main channel of the river as to secure the plaintiff's land from overflow, as alleged, or that the construction of the levee, as alleged, has so stopped up and cut off the flood waters of the river as to cause the water in the river to rise not less than 6 feet higher than it would have risen, had the levee not stopped up and cut off the said so-called streams.

There was another issue in the case, as to the damage to plaintiff's land actually used in the construction of the levee, but that was settled by the verdict of the jury awarding a certain amount to plaintiff, and it passed out of the case so far as concerns its consideration here. The verdict was in favor of defendant on the issue of damage for raising the flood water on the land. The testimony was conflicting, but there was sufficient to sustain defendant's contention as to the situation of Gar slough and Plum bayou, and the effect of the construction of the levee upon the flow of water. It shows, too, that in order to protect the land within the bounds of the district, it was necessary to build the levee across the depressions which permitted flood water to pass through to the surrounding lowlands of the district. Plaintiff's land was, according to the evidence, subject to overflow before the construction of the levee. But the water rose higher on it in 1908, after the construction of the levee; and the evidence establishes the fact that the land was seriously

and permanently injured by the overflow of 1908.

Plaintiff requested the court to give instructions which, in substance, stated the law broadly to be that she would be entitled to compensation for damages done to her land by reason of the levee having been built so as to prevent the escape of flood water through Gar slough and Plum bayou, and confine its flow to the channel of the river and to the space between the levee and the river. The court refused to so instruct the jury, but instructed that defendant was not liable for the construction of the levee, unless it be found that the sloughs and bayous obstructed were natural outlets of the river, and were of sufficient capacity to have relieved the river from the increased flood water which caused the injury to plaintiff's land. The question is therefore presented whether or not, for the protection of lands from inundation by the flood waters of a river, a levee may rightfully be built across depressions, swales, and low places, so as to prevent the escape of the flood water into surrounding lowlands sought to be protected; and also, whether or not, in order to prevent the spread of flood water and to protect lands which would otherwise overflow, the building of a levee, which has the effect of raising the water higher on the lands between the levee and the river, calls for compensation to the owner of such lands thereby damaged.

The solution of these questions is not free of difficulty, and there are but few decisions of the court which shed much light on them. The first inquiry would seem to be, as to the characterization of flood waters overflowing a stream, to return again as they recede, whether they should be treated as surface water or as running water of the stream. But we are not sure that such an inquiry is essential to a solution of the question now presented; for, without calling it surface water, we may treat it, like surface water or the waters of the sea, as a common enemy which any landowner or body of landowners or public agency may defend against without incurring liability for damages, unless injury is unnecessarily inflicted upon another, which, by reasonable effort and expense, could be avoided. *Little Rock & Ft. S. R. Co. v. Chapman*, 39 Ark. 463, 43 Am. Rep. 280; *Baker v. Allen*, 68 Ark. 271, 74 Am. St. Rep. 93, 50 S. W. 511.

The rule established by the English cases is that waters of the sea is a common enemy and may be warded off by artificial methods without incurring liability for damages to another. In *R. v. Sewer Comrs.* 8 Barn. & C. 355, 23 Eng. Rul. Cas. 792, commissioners had, for the purpose of protection of property intrusted to their care, erected works

which caused the sea water to flow with greater force against and injure the land of another which fronted on the sea. Lord Tenterden, delivering the opinion, said: "But the sea is a common enemy to all proprietors on that part of the coast, and I cannot see that the commissioners, acting for the common interest of several landowners, are, as to this question, in a different situation from any individual proprietor. Now, is there any authority for saying that any proprietor of land exposed to the inroads of the sea may not endeavor to protect himself by erecting a groyne, or other reasonable defense, although it may render it necessary for the owner of the adjoining land to do the like? I certainly am not aware of any authority or principle of law which can prevent him from so doing. . . . I am, therefore, of opinion that the only safe rule to lay down is this, that each landowner for himself, or the commissioners acting for several landowners, may erect such defenses for the land under their care as the necessity of the case requires, leaving it to others, in like manner, to protect themselves against the common enemy."

The supreme court of Mississippi had this to say, which we think is pertinent in the present case: "It is not of controlling importance to hold that the flood water from which the plaintiff claims to have suffered be dealt with as surface water, or as the water of a stream, or as a separate and distinct sort. It cannot be the law, however, in this state, that the flood waters of the large streams which are within or along the borders of this state are to be dealt with as the waters of a stream, not to be obstructed, impeded, or turned aside under any circumstances, except upon condition that the person so doing shall respond in damages for all injury sustained by another riparian owner, and be liable for nominal damages as for the infringement of the legal right of adjacent proprietors who in truth suffer no real injury. . . . If the waters of the Mississippi river, which at flood sometimes spread in width from 20 to 40 miles, and flow in a continuous and unbroken body down the valley, are to be dealt with as the waters of a stream, and the whole valley is to be given up as the course way of the stream, the most fertile portion of our state may at once be abandoned. From Memphis to Vicksburg, and from the foothills to the river, there is not a square yard of land that was not deposited by the overflowing waters of the river. If the course usually pursued by the ordinary flood waters is the channel of the stream, the whole valley is the channel. It is evident that to so declare would be to announce as a positive rule of law, and as an undisputable fact, that which

is not true, and which, if put into practised operation, would relegate prosperous and fertile districts to the condition of a wilderness. There are farms innumerable, and railroads, villages, towns, and cities situated in a water course, if the usual flow of the flood waters of the Mississippi river mark and define the course of that stream. It is manifest that to apply the strict rules of law controlling in cases of streams and the obstructions thereof to such a river and to such conditions is, in the very nature of things, impracticable and impossible. Calling these overwhelming floods surface or channel water, for the purpose of dealing with them under rules applicable to entirely different conditions, advances us no step in the solution of the questions involved. We must deal with things, and not names, and conditions inherently and radically different cannot be assimilated by mere terminology." *Kansas City, M. & B. R. Co. v. Smith*, 72 Miss. 677, 27 L.R.A. 762, 48 Am. St. Rep. 579, 17 So. 78.

There is a decision of the supreme court of California which is directly in point; the facts of the case and conclusion of law reached by the court in the case being stated in the syllabi as follows: "A reclamation district organized and existing under the laws of the state for the purpose of reclaiming certain swamp and overflowed lands situated upon the Sacramento river has a right to erect and maintain a levee along the bank of the river, so as to prevent the inundation of the land sought to be reclaimed, notwithstanding the possible or probable effect of the levee would be to cause the waters of the stream to overflow other lands situated upon the river. Damages so caused by the levee several years after its erection, on land situated upon the opposite bank of the river, 2 miles farther down the stream, are *damnum absque injuria*, for which the reclamation district is not liable. . . . The reclamation district has a right to construct and maintain the levee across the mouth of a slough through which, in times of flood, a part of the waters of the river was accustomed to flow and escape upon the adjoining lowlands." *Lamb v. Reclamation Dist. No. 108*, 73 Cal. 125, 2 Am. St. Rep. 775, 14 Pac. 625.

The supreme court of Iowa, in the case of *Hoard v. Des Moines*, 62 Iowa, 326, 17 N. W. 527, held that (quoting from the syllabus) "every owner of land has a right to protect himself from overflow in times of flood by water from a river, even though, by excluding the water from his own premises, he deepens it between his land and the river; and, on the same principle, a city may protect its territory from overflow by the construction of a levee, and, in the absence

of negligence, will not be liable to one who owns a lot between the levee and the river." See also *Cairo & V. R. Co. v. Stevens*, 73 Ind. 278, 38 Am. Rep. 139, and other Indiana cases therein cited. 2 *Farnham Waters*, § 1340.

We conclude that, upon the state of facts which the jury could have found under the instructions of the court to exist, the defendant could rightfully construct the levee in the manner described, without liability to plaintiff for damages. It is insisted, however, that a distinction should be made because of the provision of our Constitution that "private property shall not be taken, appropriated, or damaged for public use without just compensation therefor." Const. 1874, art. 2, § 22.

In reaching the conclusion above announced, we are not unmindful of the constitutional provision; but where no right has been violated, there is no injury for which the law affords compensation. It is a case of an injury without damages. *Lamb v. Reclamation Dist. No. 108*, supra.

The judgment of the Circuit Court is affirmed.

IDAHO SUPREME COURT.

JOHN FINDLAY, Resp.,

v.

CHRISTIAN HILDENBRAND, Appt.

(17 Idaho, 403, 105 Pac. 790.)

Contract — employment — evidence — sufficiency.

1. Held, that the evidence in this case does not support the findings and judgment of the trial court.

Principal — contract by unauthorized agent — ratification — payment on.

2. A ratification cannot take place without full knowledge of all the material facts; and where a person assumes to act as agent in making a contract, and the person with whom such contract is made proceeds to a

Headnotes by STEWART, J.

Note. — Payment by principal of what he deems property or services worth as ratification of agent's unauthorized contract for same.

In *Camp v. United States*, 113 U. S. 648, 28 L. ed. 1081, 5 Sup. Ct. Rep. 687, it was held that the payment by the government of a sum on a claim for a much larger amount, as compensation for services rendered in delivering captured and abandoned property to the government, could not be deemed a recognition of a legal liability to make further payments on such claim, where the agent who made the contract with the claimants, in the execution of which the

performance of the same under protest from the principal, and during such performance is advised and notified by the principal that such person is not in his employ, and that no one had authority to employ him, and that he does not desire or need his services, the mere fact that after the cessation of such labor the principal pays to such person an amount which he deems such service is worth will not alone amount to a ratification of the contract made by the person assuming to act as such agent, and will not support an action based upon such contract, upon the ground that the contract was ratified.

(December 11, 1909.)

APPEAL by defendant from a judgment of the District Court for Washington County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover on an alleged contract of employment and to foreclose a miner's lien. Reversed.

The facts are stated in the opinion.

Mr. Lot L. Feltham for appellant.

Mr. William B. Davidson, for respondent:

Defendant fully ratified the act of making the contract with plaintiff.

1 Am. & Eng. Enc. Law, 2d ed. p. 1181; Flower v. Jones, 7 Mart. N. S. 140; Codwise v. Hacker, 1 Caines, 526; Fraser v. San Francisco Bridge Co. 103 Cal. 79, 36 Pac. 1037.

Stewart, J., delivered the opinion of the court:

The respondent brought this action to recover the sum of \$122, balance claimed to be due for labor performed on the Mayflower mining claim, and for the foreclosure of a lien. In the complaint the plaintiff alleged that the defendant was, at all times mentioned in the complaint, the owner of such mining claim; that on January 9, 1907, he entered into a contract with the

appellant, by which he was employed to perform such labor, and that the appellant agreed to pay him for such labor the sum of \$4 per day, to be paid in cash from time to time as needed during the progress of the work, and that the balance remaining due upon completion of said work was to be paid at such time; that under said contract between January 9, 1907, and May 11, 1907, he performed eighty-four days labor, and has fully performed his part of said contract, the last of said labor being performed on May 10, 1907; that the total amount of said labor amounted to \$336; and that there remains due thereon the sum of \$122. Then follow the allegations with reference to the filing of the lien and the payment of the sum of \$5 for the preparing of such lien and \$1.45 for recording the same. The defendant in his answer denies the making of the contract alleged in the complaint, and denies that the plaintiff was employed by the defendant to perform any labor on the Mayflower mine, or any other mine, or in any capacity whatever; denies that he ever agreed to pay the plaintiff, for any work or services, the sum of \$4 per day, or any other sum, and denies that the plaintiff performed any labor for the defendant between January 9, and May 11, 1907, at his request or at all. The defendant admits that he paid plaintiff the sum of \$214, and denies that the same was due plaintiff, or that plaintiff was entitled to the same, or that the plaintiff had earned the same; denies that the plaintiff was entitled to a lien. Upon these issues the court found that the defendant was the owner of the property described in the complaint at the time stated therein; that the plaintiff performed work thereon as a miner between January 9, 1907, and May 10, 1907, to the number of eighty-one and one half days, and that the defendant agreed to pay for such labor the sum of \$4 per day, aggregating the sum of \$326; that there was a balance due the plaintiff

services were performed, had no authority to bind the government.

In Craver v. House, 138 Mo. App. 251, 120 S. W. 686, an offer by the vendor of property to pay a certain sum for the services of one who had negotiated a sale, and had been employed for that purpose by the owner's agent without authority, was held not to be a ratification of the agent's unauthorized contract.

On the other hand, in Clarke v. Lyon County, 8 Nev. 181, it was held that where attorneys performed legal services for a county under an unauthorized employment by the district attorney, and presented their bill to the commissioners, who, with knowledge of all the material facts and after full discussion upon the merits, allowed a certain sum less than the amount claimed as 29 L.R.A. (N.S.)

full compensation for the services rendered, such action amounted to a ratification of the district attorney's unauthorized employment of the claimants, and by such ratification the commissioners bound the county to pay whatever the services were reasonably worth.

And in Hill v. Coates, 34 Misc. 535, 69 N. Y. Supp. 964, where the owner of a house, on receiving a bill for plumbing repairs which were made during the owner's absence, upon the order of a care taker who had no authority to order such work done, wrote a letter to the plumber objecting to the price, but not to the work, and offered a sum in settlement, it was held to be such a ratification of the employment as entitled the plumber to some recovery. J. A. C.

for such labor in the sum of \$112, and interest amounting to \$6.80. The court then finds the preparation and filing of the lien, and the expenditure in the sum of \$1.45 for filing the same, and that \$50 is a reasonable attorney's fee. A decree was entered accordingly. A motion for a new trial was made and overruled, and this appeal is from the order overruling the motion for a new trial and from the judgment.

While there are a number of specifications of error assigned in relation to the admission of evidence, yet they are all involved in the question whether the evidence supports the findings of the trial court. The appellant contends that the evidence does not support the findings of the trial court. It will be observed from the complaint that the plaintiff sought to recover upon a contract made between the plaintiff and the defendant. The main contention made by the appellant upon this appeal is that the evidence does not show that there was ever any contract made between the plaintiff and the defendant, or that the defendant in any way or manner employed the plaintiff to perform any work or labor upon the Mayflower mine. The plaintiff when upon the witness stand was asked: "State whether you had any agreement with Mr. Hildenbrand, or any other person represented as his agent, for work on this property." In answer to that he said he made an agreement with the party who was Mr. Hildenbrand's agent, Oscar Olsen; that Olsen was assistant to Howard Dennison, who was superintendent of the Iron Springs Company, and that this occurred on the last days of 1906, or possibly in 1907, in the new year; that Olsen asked him to go into the tunnel on the Mayflower group and work wherever he thought it to the most advantage; that \$4 was agreed upon as the price to be paid for such work; that he commenced work on January 15, 1907, and quit on May 10, 1907. C. H. Dennison testified that in January, 1907, he was superintendent of the Iron Springs Mining Company; that Oscar Olsen was assistant during 1906 and 1907. "I notified Olsen to have someone do the assessment work on the Hildenbrand property. . . . It was in December, 1906. I do not mean to be understood as saying that when I gave my orders to Mr. Olsen to have some work done on the Hildenbrand property, that I was acting in the capacity of the superintendent of the Iron Springs Mining Company. I do not mean to state here and have this court construe that when I ordered this work done that I did it on behalf of the Iron Springs Company. . . . As a matter of fact, the Iron Springs Mining Company never did have any interest in the Hildenbrand prop-

erty. It never did authorize me as superintendent to have any work done on it as superintendent." This was all the evidence given at the trial with reference to the plaintiff's employment by the defendant at and prior to the time the plaintiff commenced labor on the Mayflower mine, to recover for which this action was brought. Hildenbrand, the defendant, was a resident of Iowa, and had no personal conversation with the plaintiff with reference to this labor. It will thus be seen from this evidence that the plaintiff was not employed by the defendant to do this work, or by anyone who had any authority to employ the plaintiff. Neither Olsen nor Dennison, as it appears from this evidence, had any authority to put the plaintiff to work upon the Mayflower group of mines at the time plaintiff claims to have commenced labor thereon.

On February 17, 1907, and a little more than a month after plaintiff testifies he commenced working on the Mayflower group of mines, he wrote a letter to the defendant, in which he states:

You will perhaps be a little surprised to get a letter from me, but as they have put me to work on your property, with instructions to try and find the ledge in place, and to do the work where I thought best. Now it seems to me that the best place to work would be to sink on that wall, and get the course of it, and then, when the snow gets off, try and trace it down the hill a ways, perhaps down about where the trail goes along; then there would be a chance to get a good depth on it. What would be your idea? You are better acquainted with the surface than I am; just now I am working on a crosscut to the wall, when I get to it I calculate to sink; would like to hear from you soon.

Yours truly,

John Findlay.

It will thus be seen that this letter does not disclose by whom the plaintiff was employed, but he anticipates that the defendant, no doubt, will be surprised because he is working upon the Mayflower group of mines; and there is no intimation that such labor is for the purpose of doing assessment work or holding the property, or that it is necessary to do such work; but the letter seems to be of a nature to indicate that someone had put the plaintiff to work for the sole purpose of finding the ledge, or that the work was of a prospecting character. On February 28th the defendant answers plaintiff's letter of February 17th, in which the defendant writes: "I received your letter and seen that you was going to work. I was down town and seen Mr. Steward yesterday and he says he knows nothing about

you should go to work so who put you to work there. I was general manager in the compy it would ben my place to hire but i am out of the Compy i got my mines back again, now if you don any work so you get your money from the one that put you to work I dont need to do any more work the patend was so neer as the plates went up in december some time as Harris and Smith of Weiser wrote me that they would see to it that the plades would be there in time. Now if you are working then you better quit because i dont haf to work on my mines." From this letter it clearly indicates that the defendant does not ratify or indorse any employment of the plaintiff to do such work, and that the plaintiff must look to someone else for his pay. On March 12, 1907, the plaintiff wrote to Harris & Smith of Weiser, stating that he had been working on Chris Hildenbrand's property for Dennison, and had received orders to quit, and stating that there was not enough work done to hold the property for last year, and no plat of survey posted; that the property would be open to relocation, and that he would hold it until he heard from Harris & Smith, as Hildenbrand's attorneys. Thus, up to this time it must be conceded that the plaintiff had no authorization from the defendant to perform any labor, or authority from anyone who was the agent of Hildenbrand to have such work done.

On March 18th Hildenbrand wrote the plaintiff again, in which letter he states that he would tell Harris & Smith, his lawyers, to send to Findlay the plats for him to post, and that he would pay for the same, and in which he uses this language: "You said in your letter who put you to work on my property, if the iron spring compy put you to work then i will pay you. Now let me know by return mail what you do." Upon the language quoted from this letter, it is the contention of the respondent that Hildenbrand ratified the employment of Findlay, and agreed to pay him for such work. Reading this language in connection with the testimony of Dennison and Findlay, it clearly appears that the Iron Springs Company did not put Findlay to work upon the Hildenbrand property. Dennison specifically states that "I do not mean to state here and have this court construe that when I ordered this work done that I did it on behalf of the Iron Springs Company. . . . As a matter of fact, the Iron Springs Mining Company never did have any interest in the Hildenbrand property. It never did authorize me as superintendent to have any work done on its as super-

intendent." The only conclusion that can be drawn from the evidence is that Findlay was put to work by Dennison, and not by the Iron Springs Mining Company. Findlay states in his letter to Harris & Smith: "As I have been working on Chris Hildenbrand's property for C. H. Dennison, and have got orders to quit." Evidently, in this letter Mr. Findlay states the facts that he was working for C. H. Dennison, and that he received orders to quit from Mr. Hildenbrand as soon as Hildenbrand was advised of the fact that he was working on his property.

We are unable to construe the language used in the letter of Hildenbrand on March 18th into a ratification or approval of the work Findlay may have done upon the order of Dennison, or that it in any way obligated Hildenbrand to pay for such work. On March 23, 1907, Findlay wrote the defendant again, in which he says: "Your letter of the 18th received to-day. J. E. Stewart wrote me after you talked with him, he told me to quit work. Denison is the one that put me to work, or rather Oscar Olson by Denison's orders. I did not want to leave here when I got the letter from Stewart, because I thought your claims were liable to jumped. They are liable to yet unless I stay here and keep to work on them till the plats are posted. Now do you want me to do this. If so, I need some money, as I have not had any pay since I went to work for the Iron Springs Company. I will tend to the plates if they come, and keep to work till I hear from you again." Thus, at this date, and after the plaintiff had received the letter of the defendant dated on March 18th, the plaintiff admits that Dennison is the one who put him to work, or Olsen upon Dennison's orders; and that he would continue to work until the plats were posted, and again asks if the defendant desired him to do this. On April 11th the defendant sent the plaintiff \$50, but said nothing whatever about the plaintiff continuing his employment. On April 17th the plaintiff wrote the defendant, admitting the receipt of the \$50, and says: "You dont say whether you want me to stay here till the assessment work is done or not. If you do, I wish you would say where you want the work done." Thus, on April 17th the plaintiff did not contend that the defendant was under any obligations by reason of his employment, and well recognized that his employment by the defendant was in doubt, and inquired again whether the defendant desired him to remain and continue the work. On May 1, 1907, the defendant wrote the plaintiff again, in which he stated to

him: "I think there is enough work don for last year and for this year i dont need to work for this year yet; as last year i had two men working at the Mary and the over and if you den as mutch work as you say then there is more than what is nesery to be don; as soon as the road is open then i will be out there and i will settled with you." It will thus be seen that by this letter the defendant again notifies the plaintiff that he does not desire him to perform labor on his property, but that he would pay him for what he had done.

On May 27th, and after the plaintiff claims to have ceased work, he received another letter from the defendant, in which the defendant says: "I received your letter and seen that you wont the money i wrote to you in April and told you to sent me the bill and then it was \$200 \$71 dollars and now you wont more how dose that come i did not tell you to do aney more work so how can you rase more i will be there as soon as the roads are open and when i get there i receved the work my self and if you wont to leave before i get there then i can leve the money by Barton in Weiser, when i get there then i wont to see who put you to work. I sold the minos middle of Oct to steawart and in Febery i bought my mines back again and if he put you to work then i see when i get there that he will pay you to it is his place to pay you. Howard Dennes had no wright to put you to work on my property they got to ask me first." On November 24, 1907, the defendant wrote the plaintiff again, in which he says: "I got your letters and seen that you still wont more money didnt i settled with your agents one you told you work 40 days and the other you told you worked 50 days so what more do you wont i have withness to to that that you told one 40 and the other 50 and i paid you \$4 a day and that is 50 cts more then any miners charge in that part of country why didnt you sent me the check that i left you if it was not enough then why didnt you make atech on my property then i would like to got you and dennes and steawart i would only like to get you 3 together and then i would find out who put you to work and who put you to work would pay you to; i told you i would pay you as soon as i receved the work i receved the work and i payed you more than you ought to have."

This is practically all of the evidence offered at the trial with reference to the plaintiff's employment and the defendant's knowledge and recognition of the same; and upon this evidence the court found that

the plaintiff performed work and labor for the defendant between January 9, 1907, and May 10, 1907, to the number of eighty-one and one-half days, and that the said defendant agreed to pay the plaintiff for such labor and services the sum of \$4 per day. From the undisputed evidence it appears that the defendant at all times protested against the plaintiff performing work on the property of the defendant, and repeatedly notified the plaintiff of that fact, and repeatedly inquired of the plaintiff as to who employed him, and at no time recognized or ratified the acts of either Dennison or Olsen in employing the plaintiff. While it may be admitted that, in the letter written by the defendant on March 18th, the defendant notified the plaintiff that if the Iron Springs Company, put him to work, then the defendant would pay him, yet the undisputed evidence shows that the Iron Springs Company did not put the plaintiff to work or employ him, but that he was employed by Dennison, not as superintendent of the Iron Springs Company, but solely upon his own account, and this employment was in no way ratified or approved by the defendant. In every letter written by the defendant he certainly gave the plaintiff to understand that the plaintiff was not working for him, and that he should quit and did all in his power to cause the plaintiff to cease labor upon the defendant's property, and that he must look to the party who employed him for his pay. The fact that the defendant stated that, if the Iron Springs Company put the plaintiff to work, the defendant would pay him, cannot be construed into a ratification of a contract made by Dennison upon his own account, and in which Dennison employed the plaintiff to perform such work. A ratification of an employment made by the Iron Springs Company is not a ratification of an employment made by Dennison.

A ratification cannot take place without full knowledge of all the material facts. 31 Cyc. Law & Proc. p. 1253; Bohart v. Oberne, 36 Kan. 284, 13 Pac. 388; Brown v. Rouse, 104 Cal. 672, 38 Pac. 507; 1 Clark & S. Agency, § 106. The defendant at no time was informed of the nature or character of the contract made between Olsen and the plaintiff, or in what capacity Olsen was acting at the time such contract was made. It also appears that upon receipt of a letter from the plaintiff, advising the defendant that someone might jump his claim, and he thought he had better stay there until the plats were posted in the proceedings for patent, the defendant sent him \$50. This, however, does not amount to a ratification of

the plaintiff's employment, but on the contrary shows that the defendant was intending only to compensate the plaintiff for work in and about the posting of notices and plats, and was in no way a payment upon the contract made by Dennison. It appears also that after the termination of the plaintiff's work upon the defendant's premises, and after the defendant had examined the work done by the plaintiff, the defendant paid him an additional sum of \$164. This could not amount to a ratification of the plaintiff's employment, but rather showed a disposition on the part of the defendant to compensate the plaintiff for such labor as he had done, notwithstanding the fact that it was done without the defendant's authority. None of the acts on the part of the defendant show that the defendant was advised of the nature or character of the contract made by Olsen or Dennison with the plaintiff, or that the defendant did any act recognizing or ratifying such contract. The fact that a person assumes to act as agent in making a contract, and the person with whom such contract is made proceeds to a performance of the same, under protest from the principal, and during such performance is advised and notified by the principal that such person is not in his employ, that no one had any authority to employ him, and that he does not desire or need his services, in connection with the mere fact that after the cessation of such labor, the principal pays to such person an amount which he deems such service is worth, will not amount to a ratification of the contract made by the person assuming to act as such agent, and will not support an action based upon such contract, upon the ground that the contract was ratified.

We have carefully examined the evidence in this case, and are unable to find any substantial evidence supporting the findings of the trial court. To our minds the evidence conclusively shows that the plaintiff was never employed by the defendant, and that the defendant never ratified the employment made by Olsen and Dennison; that, in employing the plaintiff, Olsen was acting for Dennison alone, and not for the defendant or the Iron Springs Company, and that the facts of this case do not show either an express or implied ratification of such employment upon behalf of the defendant.

The judgment is reversed, and the trial court directed to make findings in accordance with this opinion, and to enter judgment accordingly. Costs awarded to the appellant.

Sullivan, Ch. J., and Allshie, J., concur.

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IOWA SUPREME COURT.

H. A. SEARLES, Admr., etc., of Harry C. Nutter, Deceased,
v.

NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY OF MILWAUKEE, Appt.

(— Iowa, —, 126 N. W. 801.)

Abatement — suit in other state — insurance policy.

1. An insurance company cannot abate an action to recover the amount due on a life policy because it was assigned to a nonresident who has brought suit upon it in the state of his residence, although he cannot be made a party to the action, if the assignment is alleged to have been void for want of capacity to make it.

Insurance — assignment of policy — mental capacity.

2. An assignment of an insurance policy by one who, by a long-existing habit of using intoxicating liquor to excess, has permanently impaired his mental faculties to such an extent that he could not act rationally, is invalid, although, at the time of making the assignment, he is not intoxicated and does not manifest any aberration.

Witness — opinion as to capacity.

3. Witnesses may express their opinions as to whether or not one making an assignment of an insurance policy was capable of transacting business at and prior to the time when the assignment was made.

Appeal — erroneous instructions — non-prejudicial error.

4. A judgment will not be reversed on account of general statements in an instruction which might under some circumstances have been prejudicially erroneous, if the issue was submitted to the jury in such a manner that they could not have misunderstood the law applicable thereto.

(June 16, 1910.)

Note. — Abatement of action on insurance policy by reason of pendency of action in foreign jurisdiction on the policy.

The pendency of a suit in one state upon a policy of insurance is generally held not to constitute a ground of abatement in another suit upon the policy brought in another state.

Thus, the pendency of a trustee proceeding in one state, in which the insurer is sought to be held as trustee, is not a ground of abatement of a suit on the policy by the insured in another state where he resides. *Douglass v. Phenix Ins. Co.* 138 N. Y. 209, 20 L.R.A. 118, 34 Am. St. Rep. 448, 33 N. E. 938. The court said: "We are of opinion that the answer demurred to was insufficient in law to stay the further prosecution of this action. The right of the

APPEAL by defendant from a judgment of the District Court for Polk County in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain policy of life insurance. Affirmed.

Statement by McClain, J.:

Action to recover on a policy of life insurance. The issue raised by the defendant was as to the ownership of the policy at the time of the death of the insured. There was a verdict for the plaintiff, and from judgment thereon the defendant appeals. Affirmed.

Messrs. Guernsey, Parker, & Miller, for appellant:

Plaintiff having refused to intervene in the courts of Connecticut in the suit of C. E. Shepard & Company, Incorporated, against the defendant herein, and having refused to assume on its behalf and in its name the defense in that suit, and having failed to set aside the formal assignment of the policy in any direct proceeding against C. E. Shepard & Company, Incorporated, cannot now lawfully proceed to

judgment against defendant, not having made C. E. Shepard & Company, Incorporated, a party herein, so as to bind the Shepard Company by the present action. *Miller v. Mahaffy*, 45 Iowa 289; *Litchfield v. Polk County*, 18 Iowa, 70; *Fowler v. Doyle*, 16 Iowa, 534; *Stroup v. Bridger*, 124 Iowa, 401, 100 N. W. 113; *Kennedy v. Moore*, 91 Iowa, 39, 58 N. W. 1066; 15 Enc. Pl. & Pr. p. 615; *Jessup v. Illinois C. Co.* 36 Fed. 738; *Mahr v. Norwich Union F. Ins. Soc.* 127 N. Y. 461, 28 N. E. 391; *Gray v. Schenck*, 4 N. Y. 460; *Decatur County v. Bright*, 57 Iowa, 724, 11 N. W. 653; *Collins Mfg. Co. v. Ferguson*, 54 Fed. 721; *Conolly v. Wells*, 33 Fed. 205; *Disbrow v. Creamery Package Mfg. Co.* 104 Minn. 17, 115 N. W. 715; *Donovan v. Campion*, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 71; *Blanchard v. Bigelow*, 109 Fed. 275; 1897 Code, §§ 3424-3426, 3561, 3566.

The verdict of the jury is contrary to the evidence, and is not sustained by sufficient evidence, because deceased was enjoying an interval of freedom from the influence of liquor at the time the assignment of the policy was made.

plaintiff to prosecute his action in the courts of his own state cannot be defeated by the pendency of attachment proceedings in another jurisdiction by a creditor there, to reach the debt owing to the plaintiff by the defendant, where the only claim of jurisdiction by the foreign court rests upon statutory authority to seize the debt by and through process proceedings against the agent of a corporation of this state, which owes the debt, but which has an agent in the state where the seizure is made. The pendency of a suit *in personam* in one state is not, according to the general rule, pleadable in abatement of a suit subsequently commenced in another state, between the same parties, on the same cause of action, although the courts of the state where the prior suit is pending had complete jurisdiction. The court on application may, in its discretion, grant a continuance by reason of the pendency of the first action, and a judgment once obtained in one of the actions would, on application of the court, be allowed to be set up in bar of the further prosecution of the other. But the pendency of an action in another state, between the same parties and for the same cause, does not, according to the general rule, abate the second suit."

And in *Merrill v. New England Mut. L. Ins. Co.* 103 Mass. 245, 4 Am. Rep. 548, it was held that an action on a policy in one state, by an ancillary administrator who also represented the interest and rights of the pledgee of the policy, was not defeated by the pendency of a suit brought in another state by an administrator appointed there.

And where a suit on a policy is brought in one state by an administrator of the in-

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sured, the subsequent commencement of an action in another state on the policy, by an ancillary administrator, is no defense thereto. *Steele v. Connecticut General L. Ins. Co.* 31 App. Div. 389, 52 N. Y. Supp. 373, affirmed in 160 N. Y. 703, 57 N. E. 1125.

And the pendency of garnishment proceedings against the insurer in one state will not abate an action upon the policy in another state, where the debt has no situs there to sustain the garnishment proceedings. *Strause v. Aetna F. Ins. Co.* 126 N. C. 223, 48 L.R.A. 452, 35 S. E. 471.

And it was held in *Morgan v. Mutual L. Ins. Co.* 189 N. Y. 447, 82 N. E. 438, that an assignee of an insurance policy might maintain an action thereon in one state by serving by publication nonresident beneficiaries who had instituted a suit asserting a conflicting claim in another state.

So, in *Moore v. Maryland Casualty Co.* 74 N. H. 47, 64 Atl. 1099, it was held that the pendency of a prior suit in another state was not pleadable in abatement, but that, the pendency being suggested, it was discretionary with the court to direct that the action be continued, to await the final disposition of the suit pending in such other state.

But it was held in *Sulz v. Mutual Reserve Fund Life Asso.* 145 N. Y. 563, 28 L.R.A. 379, 40 N. E. 242, where an action on a policy was brought in one state by an ancillary administrator, that the pendency of a suit on the policy brought by the domiciliary administrator in another state, prior to the institution of the ancillary administrator's action, would, on the principle of comity, defeat the latter's action.

And the pendency of garnishment proceedings in one state by creditors of the in-

Corbit v. Smith, 7 Iowa, 65, 71 Am. Dec. 431; Kirsher v. Kirsher, 120 Iowa, 341, 94 N. W. 846; Bever v. Spangler, 93 Iowa, 601, 61 N. W. 1072; Kuhlman v. Wieben, 129 Iowa, 190, 2 L.R.A. (N.S.) 666, 105 N. W. 445; Munson v. Foss, 55 Iowa, 309, 7 N. W. 594; Willcox v. Jackson, 51 Iowa, 208, 1 N. W. 513; Merchants' Nat. Bank v. Soesbe, 138 Iowa, 354, 116 N. W. 123; Nowlen v. Nowlen, 122 Iowa, 546, 98 N. W. 383; Boyer v. Berryman, 123 Ind. 451, 24 N. E. 249; Burnham v. Kidwell, 113 Ill. 429; Scanlan v. Cobb, 85 Ill. 298; Elwood v. O'Brien, 105 Iowa, 239, 74 N. W. 740; Reese v. Shutte, 133 Iowa, 681, 108 N. W. 525; Swartwood v. Chance, 131 Iowa, 714, 109 N. W. 297; Fehr v. Edwards, 129 Iowa, 61, 105 N. W. 349.

Allowing witnesses on behalf of the plaintiff to testify that in their opinion Nutter was, at divers times, "incompetent to transact ordinary business," invaded the province of the jury.

Pelamourges v. Clark, 9 Iowa, 1; Betts v. Betts, 113 Iowa, 111, 84 N. W. 975.

Since the plaintiff wholly failed to establish his ownership of, control over, and

right to, the chose in action evidenced by the insurance policy which was issued by defendant to Harry C. Nutter, the suit must fail.

Steele v. Gatlin, 115 Ga. 929, 59 L.R.A. 129, 42 S. E. 253; Ionia County Sav. Bank v. McLean, 84 Mich. 625, 48 N. W. 159.

Messrs. Bowen & Alberson, for appellee:

A status once established will be presumed to continue until shown to have been changed.

Sigler v. Murphy, 107 Iowa, 128, 77 N. W. 577; Re Colton, 129 Iowa, 542, 105 N. W. 1008; State v. Jones, 64 Iowa, 360, 17 N. W. 911, 20 N. W. 470.

A plea in abatement for nonjoinder of parties defendants which fails to show that the persons not joined are living and subject to the process of the court, thus giving a better petition, is bad.

Boseker v. Chamberlain, 160 Ind. 114, 66 N. E. 448.

As the plaintiff claimed under the original policy, it was not necessary to make a person claiming under the alleged assignment a party to the action.

ured, against an insurer, in which the assignee of the insured appeared, is ground for abating a subsequent action on the policy brought in another state by such assignee, where the insurer, although a foreign corporation, was liable to garnishment in the first state. German Bank v. American F. Ins. Co. 83 Iowa, 491, 32 Am. St. Rep. 316, 50 N. W. 53.

The rule that the pendency of a suit in a foreign jurisdiction will not ordinarily constitute a ground of abatement of a suit in a domestic court is also applied in cases where one action is pending in a state court and another in a Federal court.

Thus, the fact that a suit is pending in equity against an insurance company, by the wife of the assignor of a policy, in which she alleges that the assignment of the policy was without her consent, and that she did not act freely, does not authorize the abatement of an action on the policy in the Federal courts brought by the assignee, nor will it authorize an injunction against the assignee's proceeding with his action. Mutual L. Ins. Co. v. Brune (Mutual L. Ins. Co. v. Harris) 96 U. S. 588, 24 L. ed. 737. The court here said: "This, we think, was not sufficient to justify the injunction from which the appellant prayed. At law, the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious. But the former action must be in a domestic court; that is, in a court of the state in which the second action has been brought."

The rule in equity is analogous to the rule at law. . . . If, then, a bill in equity pending in a foreign jurisdiction has

no effect upon an action at law for the same cause in a domestic forum, even when pleaded in abatement; if, still more, it has no effect when pleaded to another bill in equity, as the authorities show,—it is impossible to see how it can be a basis for an injunction against prosecuting a suit at law. It follows that the refusal of an injunction by the circuit court was not erroneous."

So, the pendency in the state court of a suit for the reformation of an insurance policy constitutes no ground for the abatement of an action on the policy brought in the Federal court. Wilcox & G. Guano Co. v. Phoenix Ins. Co. 61 Fed. 199.

So, in an action in the Federal court to recover for a loss on a fire insurance policy, the fact that the insurance company has been summoned in the state courts as garnishee of the insured is not available as a plea in abatement, although a continuance should be granted *ex comitate*, so that the plaintiffs in the foreign actions may have an opportunity to make their attachments available. Lynch v. Hartford F. Ins. Co. 17 Fed. 627.

But it was held in Smith v. Atlantic Mut. F. Ins. Co. 22 N. H. 21, that a plea in abatement to an action in the state court on a policy of insurance, that another action was pending for the same cause between the same parties in the circuit court of the United States, was good, since such court was not to be regarded as a foreign jurisdiction.

For a note on Pendency of actions in both state and Federal courts sitting in the same state, see Willson v. Milliken, 42 L.R.A. 449.

J. T. W.

Kelly v. Norwich F. Ins. Co. 82 Iowa, 137, 47 N. W. 986; New York L. Ins. Co. v. Smith, 14 C. C. A. 635, 29 U. S. App. 220, 67 Fed. 694; Busse v. Schaeffer, 128 Iowa, 319, 103 N. W. 947.

This was an action at law, and there is a difference as to the necessity of making persons claiming an interest in the subject-matter parties in suits at law and in suits in equity.

New York L. Ins. Co. v. Smith, *supra*; Donovan v. Campion, 29 C. C. A. 30, 56 U. S. App. 388, 85 Fed. 71; Mahr v. Norwich Union F. Ins. Soc. 127 N. Y. 452, 28 N. E. 391.

If the mental powers of a contracting person are so deteriorated that he is incapable of understanding the nature and consequences of his act, the contract is invalid for lack of capacity on the part of such person.

Nowlen v. Nowlen, 122 Iowa, 541, 98 N. W. 383; Elwood v. O'Brien, 105 Iowa, 239, 74 N. W. 740; Mann v. Keene Guaranty Sav. Bank, 29 C. C. A. 547, 57 U. S. App. 654, 86 Fed. 51; Wright v. Jackson, 59 Wis. 569, 18 N. W. 486; Burnham v. Mitchell, 34 Wis. 117.

The defendant in this cause never having paid the assignee or parted with any money under the policy in question, and never having relied upon the act of the assignor, plaintiff's decedent, to its prejudice, the necessary elements of an estoppel are lacking.

Auchampaugh v. Schmidt, 77 Iowa, 13, 41 N. W. 472; Dohms v. Mann, 76 Iowa, 723, 39 N. W. 823; Eikenberry v. Edwards, 67 Iowa, 20, 24 N. W. 570; Brewer v. Boston & W. R. Corp. 5 Met. 482, 39 Am. Dec. 604; Davis v. Davis, 26 Cal. 38, 85 Am. Dec. 157; 11 Am. & Eng. Enc. Law, 2d ed. p. 436.

The evidence created a question for the jury.

Citizens' Nat. Bank v. Gardner (Iowa) 125 N. W. 161.

McClain, J., delivered the opinion of the court:

In March, 1887, the defendant issued to Harry C. Nutter, plaintiff's intestate, a policy of life insurance in the sum of \$1,000, payable to his legal representatives. In September, 1906, said Nutter died at Kansas City, Missouri, to which place he had removed in March preceding from Des Moines, where he resided at the time of the issuance of the policy and thereafter until such removal. Soon after removing to Kansas City, Nutter negotiated a sale of this policy to C. E. Shepard & Company, incorporated, of Hartford, Connecticut, receiving in consideration therefor the sum 29 L.R.A. (N.S.)

of \$410, and executing a formal assignment. The business of Shepard & Company was to deal in policies of insurance. The defendant admitted liability under the policy, in this action brought thereon by plaintiff, as Nutter's administrator, but averred the assignment to Shepard & Company, and the institution by that company of a suit on the policy in a court of Connecticut, which suit was still pending, and that it had requested plaintiff to appear in said suit and interpose any claim that he might have as administrator to the proceeds of such policy, which request the plaintiff declined to comply with. And defendant further alleged that there was a defect of parties in this case on account of the failure to make Shepard & Company a party thereto, which defect rendered further proceedings in this case illegal. The plaintiff replied, alleging that the assignment was made in Missouri, and was void under the laws of that state, because the assignee had no insurable interest in the life of the insured, and also that, at the time of the execution of the said assignment, said Nutter was of unsound mind, and in such a state of mental derangement as to be unable to understand the nature of said transaction or the effect thereof. The court overruled defendant's motion to strike from plaintiff's reply the allegations as to the invalidity of the assignment under the laws of Missouri, but, on final submission of the case to the jury, did not leave to them any issue of fact to be determined under those allegations of the reply, and the sufficiency of such allegations need not now be considered. We have for determination of this appeal therefore substantially two questions: First, should the plaintiff have been denied relief on account of the failure to make Shepard & Company a party defendant in the case? and, second, was the issue as to Nutter's mental incapacity at the time of the assignment of the policy supported by sufficient evidence to justify its submission to the jury, and was this issue submitted without substantial error?

1. The question as to whether the action could be maintained by plaintiff, conceding that a formal assignment of the policy to Shepard & Company had actually been made before Nutter's death, without making such assignee a party to the action, was raised by allegations in the answer which amounted practically to a plea in abatement, and the contention for appellant in this respect is that, after it was alleged and in effect conceded that an assignment valid in form and effective, if Nutter had sufficient mental capacity to make it, had been made, plaintiff could not proceed in the action until Shepard & Company had been brought in, so

that the judgment would be binding upon such assignee. As Shepard & Company was nonresident of this state, it is apparent that the plaintiff could not make such assignee a party, and the practical result of appellant's contention would be that a suit in this state could not be maintained by plaintiff on the policy, even though plaintiff was able to show to the satisfaction of the jury that the assignment was invalid on account of Nutter's want of capacity to execute it; and that plaintiff's only effective method of procedure would be to intervene in the action alleged to have been brought by Shepard & Company in Connecticut. This proposition of law is, we think, unsound, for reasons which may be briefly pointed out.

This is an action at law, and as between plaintiff and defendant is properly brought in this state. No action is pending elsewhere to which plaintiff is a party that can be pleaded in abatement of the present action, for plaintiff has not subjected himself to action to adjudication in any other state. The rule as to necessary parties, requiring that all parties whose interests are involved in the matters to be adjudicated must be brought in, has application only in proceedings in equity where the plaintiff is seeking some relief to which he is not entitled, unless he can make the decree binding on those who are to be necessarily affected by it. The cases relied upon for appellant are all of that character. See *Miller Mahaffy*, 45 Iowa, 289; *Mahr v. Norwich* on F. Ins. Soc. 127 N. Y. 452, 28 N. E. ; *Disbrow v. Creamery Package Mfg.* 104 Minn. 17, 115 N. W. 751; *Donovan* 29 C. C. A. 30, 56 U. S. App. , 85 Fed. 71; *Jessup v. Illinois C. R.* (C. C.) 36 Fed. 735; *Blanchard v. Dow* (C. C.) 109 Fed. 275; *Collins Mfg. v. Ferguson* (C. C.) 54 Fed. 721. While it is true that in this state distinctions between forms of action are abolished, the distinction between "actions at law" and "actions in equity" remains, and we think the question as to when an action at law is to be abated for want of proper parties must be determined by the rules applicable to ordinary proceedings. It is provided in Code, § 3466, as follows: "The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, by saving their rights; but when a determination of the controversy between the parties before the court cannot be made without the presence of other parties, it is proper to order them to be brought in." It is apparent from this section that the remedy for failure to bring in necessary parties is by pleading by way of abatement, but L.R.A.(N.S.)

by motion asking the court to order such parties to be brought in. *Stroup v. Bridger*, 124 Iowa, 401, 100 N. W. 113. It is sufficient answer to appellant's contention that it did not ask to have Shepard & Company made a party in order that it might be bound by the adjudication, but interposed instead an anomalous answer by way of plea in abatement contesting plaintiff's right to have judgment against the defendant, because the determination of the issues involved a question in which Shepard & Company might be interested. Even if a plea of abatement for defect of parties were proper, it seems that it would be necessary to show that the parties not joined are subject to process. *Boseker v. Chamberlain*, 160 Ind. 114, 66 N. E. 448. Shepard & Company is not here objecting to a rendition of a judgment against the defendant, nor questioning the right of plaintiff to sue on the policy. Plaintiff makes allegations, and supports them by proof entitling him to recover a judgment against the defendant, and we are unable to see how, in an action at law, the right to have these issues determined can be affected by an allegation by defendant in the alleged interest of Shepard & Company, that a recovery from defendant would be prejudicial to such interest. The judgment will in no way bind Shepard & Company, nor deprive it of any right of action which it may have. It is not necessary that there be any saving of the rights of Shepard & Company, for its rights can be in no way affected by the judgment.

But apart from any mere question of procedure, it is plain that plaintiff should not be put in a position of having to seek his relief in a foreign jurisdiction, when he alleges a complete cause of action as against the defendant. No doubt there are cases even at law where a judgment cannot be rendered on account of the absence of necessary parties, without whom no judgment would be proper. *Decatur County v. Bright*, 57 Iowa, 724, 11 N. W. 653; *Fowler v. Doyle*, 16 Iowa, 534. But this case is not of that character, for plaintiff under his allegations is entitled to a judgment against the defendant alone. He asks no relief as against Shepard & Company, and the defendant interposes no defense which cannot be fully determined without entering a judgment that will bind that company.

The fact is that the inability to get plaintiff and Shepard & Company into the same jurisdiction, so that a judgment may be rendered as to the validity of the assignment which will be binding on both of them, is not a misfortune of plaintiff, but of the defendant. Were it possible for defendant, by proceedings of interpleader or otherwise,

to have a final adjudication in one action as to the validity of the assignment, it no doubt would do so, standing back ready to pay the amount due on the policy to which ever party was found to be entitled thereto. It would be protected fully by such judgment. But we are unable to see how defendant can saddle its misfortune upon the plaintiff. We find no authority for holding that, because a defendant may possibly be subject to suit on an inconsistent claim in another jurisdiction, he can successfully resist payment in a jurisdiction in which he is properly asked to defend. The practical result of appellant's contention would be that it could not be successfully sued in any jurisdiction, unless plaintiff and Shepard & Company should, without any obligation to do so, amicably agree that their claims should be submitted to the same court,—a court which would be foreign to the one or the other, or perhaps both of them.

Even in equity cases the impossibility of bringing in necessary parties is a reason for not doing so. In *Hawes, Parties to Actions*, § 19, we find the principle thus stated: "The rule that all persons having an interest in the suit should be made parties is not inflexible. It is a rule of convenience, adopted by courts of chancery to shorten litigation, to prevent doing business by halves, and may be dispensed with when impracticable or very inconvenient; as when such persons are very numerous or are unknown or are dead, and their representatives are unknown or are insolvent or beyond the jurisdiction of the court. . . . The rule being a rule of convenience, courts will not allow it to be so applied as to defeat the very purpose of justice, if they can dispose of the merits of the case before them without prejudice to the rights of other persons who are not parties, or if the circumstances of the case render the application of the rule impracticable." This principle is well illustrated by what is said in *Jessup v. Illinois C. R. Co. supra*, a case relied upon for appellant.

The learning on the subject of parties to suits in chancery is copious, and within a limited extent the principles which govern their introduction are flexible. There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that, while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such that, if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties, if within its jurisdiction, before deciding the case; but if this cannot be done, it will pro-

ceed to administer such relief as may be in its power, between the parties before it. But there is a third class, whose interest in the subject-matter of the suit and the relief sought are so bound up with that of the other parties that their legal presence as parties to the proceeding is an absolute necessity, without which the court cannot proceed. In such cases the court refuses to entertain the suit when these parties cannot be subjected to its jurisdiction.

It is evident that in the case before us Shepard & Company would fall within the second of the classes of parties enumerated, for, while it is interested in the determination of the validity of the assignment, full relief as against the defendant may be granted without its presence. The convenience to defendant of having Shepard & Company brought in for the purpose of having it bound by the adjudication might be a sufficient reason for requiring it to be brought in, if practicable. But the importance of doing so would clearly not be a reason for denying to plaintiff the relief against defendant, to which plaintiff may show himself to be entitled. In the case of *Kelly v. Norwich F. Ins. Co.* 82 Iowa, 137, 47 N. W. 986, it was contended, the action being upon a policy of fire insurance, that the plaintiff was not entitled to recover because a recovery against the defendant had already been had in a New York court by one claiming in the same interest, practically by assignment; and with reference to a direction by the trial court that the burden rested on the defendant to show that the policy was in fact assigned, this court said: "Counsel insist that the burden rested on the other party to show that it was not so assigned. The defendant as a defense pleaded the assignment. . . . Surely there is no presumption in law of the fact pleaded as a defense, which changes the rule and casts the burden on the other party." And the court further said: "A motion to make Mahr & Sons [the persons claiming to have the right of action by assignment] parties was rightly overruled. They were not interested in the event of the suit, for the reason that a judgment in it would not affect them. The plaintiff was not required to make them, or others who may claim an interest adverse to the plaintiff, parties to the suit. It will be remembered that this is an action at law to recover on a contract. The plaintiff shows an assignment of the contract to himself. He is not required to inquire if there are others who claim to hold an interest in the contract. Mahr & Sons could have under the statute intervened, but the plaintiff's action cannot be defeated on

the ground that they were not made parties to the suit."

The New York case, in which the assignment involved in the case last cited was referred to, appears to have been *Mahr v. Norwich Union F. Ins. Soc.* 127 N. Y. 452, 28 N. E. 391, in which the plaintiffs sued in equity, claiming to be the owners of the policy of insurance, and asking that the defendant be restrained from paying the amount to the insured or his alleged assignee in Iowa. In that case the court held that plaintiff was not entitled to relief, because the insured or his alleged assignee in Iowa had not been made a party, and it sustained this ruling on the ground that the action was to establish the equitable title of the plaintiffs to the policy, and prevent the company from paying the proceeds to anyone except themselves. It is admitted that there is an essential difference between the practice at law and in equity in determining who are proper and necessary parties, even under New York practice, after which ours is in general modeled, and we have no doubt that, if the action in New York had been at law, the court would have adjudicated whatever controversy was presented as between the plaintiff and the insurance company, although it was advised that some inconsistent claim to the proceeds of the policy was made by the insured.

In *New York L. Ins. Co. v. Smith*, 14 C. C. A. 635, 29 U. S. App. 220, 67 Fed. 694, the court, discussing the question whether, in view of the allegation of the insurance company that the insured had assigned the policy, he was bound to make such assignee a party, very pertinently says that if the company's position in this respect is sound, the same objection could be made to any action brought by the assignee, and that, while it might be necessary in equity that this be done, there is no such requirement in an action at law.

We reach the conclusion, therefore, that in this action it is wholly immaterial to an adjudication between the plaintiff and defendant that *Shepard & Company* be made parties, in order that, as against said company, the validity of the assignment which defendant says was made to it should be adjudicated. So far as defendant is concerned, that question was adjudicated, and we see no reason for interfering with the judgment in this respect.

2. The allegation of plaintiff as to Nutter's mental incapacity rendering the assignment of the policy by him invalid was that, at the time of making such assignment, he was of unsound mind, and in such a state of mental derangement as not to be able to understand the nature of said instrument or the effect thereof. The evidence

for plaintiff tended to prove, not that Nutter was intoxicated at the time the assignment was made, but that his mental faculties had become so far impaired by the long-existing habit of using intoxicating liquors to excess, that he was irresponsible and unable to rationally transact business. Without setting out the evidence as it appears in the record, it is sufficient to say that there was an ample showing to sustain the finding of the jury that Nutter was not possessed of a mind capable of forming an intelligent judgment with reference to his actions. Cases cited for appellant in regard to intoxication as a ground for setting aside a contract, or as to the effect of temporary aberrations due to intoxication or otherwise, are not in point. If before this assignment was made Nutter's mind was permanently impaired to such an extent that he could not act rationally, then his contract of assignment was not binding upon him, and it is immaterial that, at the precise time the act was done, he was not intoxicated or did not manifest any aberration.

It is contended, however, that there was error in allowing witnesses to testify for plaintiff that in their judgment Nutter was not capable of transacting business at and prior to the time when the assignment was made. It is said that such answers were incompetent as invading the province of the jury. But this question has been recently discussed in the cases of *Glass v. Glass*, 127 Iowa, 646, 103 N. W. 1013, and *State v. McGruder*, 125 Iowa, 741, 101 N. W. 646. In view of what is said in these cases, it is unnecessary to further discuss *Betts v. Betts*, 113 Iowa, 111, 84 N. W. 975, and *Pelamourges v. Clark*, 9 Iowa, 1, relied upon for appellant. The answers were not open to the objection which is urged against them.

Counsel discuss at some length instructions given by the court with reference to the rules to be followed by the jury in determining whether Nutter was incapable of executing a valid assignment. We do not find it necessary to enter into a detailed analysis of these instructions. They seem to fully present to the jury all the considerations which should properly be taken into account under the evidence in determining the question, and properly leave it to the jury to say whether Nutter's mind had become affected by intemperate habits to such an extent that he was incapable of executing such assignment. In one of these instructions the jurors were told that "drunkenness itself is a species of insanity, and may invalidate a transaction or contract made while in a drunken condition." We think this statement to have been unfortunate for

two reasons: Drunkenness is not in itself necessarily a species of insanity, and there is no evidence that the assignment was made while Nutter was in a drunken condition. But in neither of these respects did the instruction apply to any question submitted to the jury for determination, and there is no intimation in the instructions that the statements which we have quoted had such application. We are satisfied that the question of Nutter's mental capacity at the time the assignment was made was so submitted to the jury that they could not have misunderstood the law applicable thereto, and we are not willing to reverse the judgment on account of general statements in the instruction which might under other circumstances have been prejudicially erroneous. It was sufficient, as the court told the jury, to invalidate the assignment, if they found that when it was made he did not know what he was doing and understand the consequences of his act. *Nowlen v. Nowlen*, 122 Iowa, 541, 98 N. W. 383. And see *Merchants' Nat. Bank v. Soesbe*, 138 Iowa, 354, 116 N. W. 123; *Elwood v. O'Brien*, 105 Iowa, 239, 74 N. W. 748.

The preceding discussion renders it unnecessary to consider some questions presented in argument.

On the whole record we are satisfied that no prejudicial error was committed, and the judgment of the trial court is affirmed.

MISSOURI SUPREME COURT. (Division No. 2.)

STATE OF MISSOURI, Resp.,

v.

J. P. LOONEY, Appt.

(214 Mo. 216, 97 S. W. 934.)

Interstate commerce — pictures in frames — sales.

1. The sale of the frames does not constitute interstate commerce where, after the taking of orders upon a foreign concern for pictures which the contract stipulates may be delivered in frames which the one giving the order may purchase or not at his pleasure, the pictures in the frames are shipped to the vendor's agent, who delivers the pictures, collects the price, and sells the frames whenever he can.

Note. — The question involved in the above case, whether, where one who has, as a transaction of interstate commerce, ordered a picture, is given the option of purchasing a frame delivered with it, the sale of the frame under such circumstances is within the protection of the commerce clause, has been authoritatively settled in the affirmative, and contrarily to the conclusion reached by the Missouri court, by 29 L.R.A. (N.S.)

Peddler — sale of picture frames.

2. One who, in delivering pictures from house to house, which had been ordered through another agent from a manufacturer in another state, receives them in frames which he attempts to sell to the persons who had ordered the pictures, is a peddler within the meaning of a statute defining a peddler as whoever shall deal in the selling of goods, wares, or merchandise by going from place to place to sell the same.

(November 20, 1906.)

A PPEAL by defendant from a judgment of the Circuit Court for Oregon County convicting him of peddling without a license. Affirmed.

The facts are stated in the opinion.

Mr. George M. Miley for appellant.

Messrs. Herbert S. Hadley, Attorney General, and N. T. Gentry, for the State.

The defendant was a peddler, within the meaning of the law.

State v. Emert, 103 Mo. 241, 11 L.R.A. 210, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81, 156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367; *State v. Smithson*, 106 Mo. 140, 17 S. W. 221; *State v. Snoddy*, 128 Mo. 523, 31 S. W. 36; *Hynes v. Briggs*, 41 Fed. 468.

Gantt, J., delivered the opinion of the court:

On February 21, 1905, the prosecuting attorney of Oregon county filed an information duly verified by affidavit, charging the defendant with going from place to place in said county and selling goods, wares, and merchandise without having a peddlers' license, or any other legal authority to sell. At the February term, 1905, at the circuit court of said county, the defendant was tried and convicted and his punishment assessed at a fine of \$10. Within due time and in proper form, he appealed to the St. Louis court of appeals, and that court has certified the cause to this court because a constitutional question is involved. The state's evidence tended to prove that in the latter part of the year 1904, a man by the name of B. E. Irby, an agent of the Chicago Portrait Company, of Chicago, Illinois, called upon the state's witnesses with samples, and took from them

the decision of the United States Supreme Court in *Dozier v. State*, 28 L.R.A. (N.S.) 264.

The question when a license or occupation tax on hawkers, peddlers, and persons engaged in soliciting orders by sample or otherwise, violates the commerce clause, is covered by annotation in 19 L.R.A. (N.S.) 297, and a supplemental note appended to the case above referred to.

orders to said Chicago Portrait Company, for unframed crayon portraits, to be delivered about January 10, 1905, and left with each purchaser a memorandum showing the agreement, which is as follows:

Chicago Portrait Company.

Capital Stock, \$500,000.

118-182 W. Jackson Boulevard, Chicago.

Portraits made in oil, crayon, pastel, sepia, pearl, and bromide. We manufacture frames for harmonious effects.

On or about Jan. 10th, 1905, we agree to deliver to Mr. Will Minix a finely finished unframed crayon portrait, 16 x 20, like sample. The purchaser agrees to pay \$3.96 for the portrait when delivered. We do not compel you to take frames from us, but, owing to the delicate nature of the work, all portraits are delivered in appropriate frames, which this ticket entitles you to select at wholesale prices. Elegant patterns, that retail from \$4 to \$8, we furnish from \$1.50 to \$4.90, which is one half to one third the retail price. Please remember the date of the delivery and have the money ready, as our delivery man can make but one call to collect charges for same. Please be at home, or leave money with nearest neighbor.

[Signed] B. E. Irby,

Advertising Solicitor Chicago Portrait Company.

This order cannot be countermanded.

Afterwards, in February, 1905, the defendant, another agent of the Chicago Portrait Company, appeared in Oregon county, with the said portraits in frames, and delivered them to the parties who had ordered the same, and collected the price of the portraits, and in most cases the purchasers also took the frames and paid for them. The portraits and frames were made in Chicago, Illinois, and were shipped from that city to the defendant, in Missouri, and he made the delivery and collected therefor. In some cases the purchasers declined to take the frames, and received only the portraits and paid for them. No pictures and no frames were delivered or collected for by the defendant except to or for persons by whom these orders for portraits had previously been taken. At the close of the state's case the defendant demurred to the evidence: First, because the facts disclosed were insufficient to convict; and, second, because the facts disclose that under the interstate commerce clause of the Federal Constitution (§ 8, art. 1) the defendant is not required to have a license, and a Federal question is involved. The demurrer to the evidence was overruled, and the defendant duly excepted.

29 L.R.A.(N.S.)

Thereupon the defendant testified in his own behalf that he was engaged in the business of delivering pictures and frames for the Chicago Portrait Company; that orders for the goods in question had been previously taken by a solicitor in Oregon county, Missouri, and sent in to the portrait company at Chicago, Illinois, to be filled; that the said portraits and frames were shipped from the house in Chicago to the defendant in this state, to be delivered by him, and it was his duty to collect for them, all of which he did; that he had not delivered or collected for, nor tried to deliver or collect for, any of these goods to or from any person or persons except to such as had previously given an order therefor to a solicitor for the company. This in substance was all the evidence. The court gave the jury the following instructions: "(1) The court instructs the jury: If you believe from the evidence beyond a reasonable doubt that this defendant at any time within one year before February 21, 1905, in Oregon county, Missouri, did deal as a peddler and did engage in the selling of goods, wares, and merchandise, to wit, picture frames, by going from place to place to sell the same, without having a license as a peddler, you should find defendant guilty, and assess his punishment at a fine not less than \$10 or more than \$100. (2) If you believe from the evidence that the picture frames in question were sold by an agent of a Chicago firm, who took the order for such frames, and sent such order to the firm in Chicago for its approval, and that such firm accepted such order and shipped such goods to this defendant as its agent, and that he as such agent delivered such goods and collected therefor, then he would not be a peddler within the meaning of the law, and you should acquit the defendant." As already said the jury under the instructions found the defendant guilty.

1. It is plain from the instructions given by the court that the circuit court was of the opinion that the transactions in regard to the portraits themselves constituted interstate commerce, and that our peddler's act in Missouri did not and could not require the defendant to take out a license for delivering the portraits and receiving the purchase price therefor. Nowhere has the law been better stated than by Judge MacFarlane in *State v. Emert*, 103 Mo., loc. cit. 245, 11 L.R.A. 219, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81, wherein he says: "By force of these decisions of the court having the highest judicial authority over the subject, it is settled that the sale of goods which are in another state at the time of the sale, for

the purpose of introducing them into the state in which the regulation is made, is interstate commerce; that a tax on a sale of such goods, before they are brought into the state, is a tax on interstate commerce itself; that the imposition of a license tax upon the person making such sale is, in its effect, a tax upon the goods themselves; that a state cannot tax goods beyond its jurisdiction. *Hynes v. Briggs* (C. C.) 41 Fed. 469, citing *Robbins v. Taxing Dist.* 120 U. S. 489, 30 L. ed. 694, 1 Inters. Com. Rep. 45, 7 Sup. Ct. Rep. 592; *Brown v. Houston*, 114 U. S. 622, 29 L. ed. 257, 5 Sup. Ct. Rep. 1091; *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382; *Cook v. Pennsylvania*, 97 U. S. 566, 24 L. ed. 1015; *Wellton v. Missouri*, 91 U. S. 275, 23 L. ed. 347." But the circuit court was of the opinion that the transaction in regard to the sale by the defendant of the frames for the said pictures did not fall within the interstate commerce clause of the Constitution of the United States, and submitted to the jury whether the defendant dealt as a peddler in selling the said picture frames by going from place to place in said county to sell the same without having a license as a peddler. Whereas the defendant insists that inasmuch as it was agreed between the portrait company and the purchasers of the portraits at the time they ordered the same, that the portraits should be delivered in appropriate frames, which frames the purchaser could take at the regular wholesale prices, if he desired to do so at the time of the delivery, and did do so; that the delivery of the frames and the receipt of the prices therefor were parts of one and the same contract, which was made by the agent who took the order while the goods were yet in the state of Illinois, and that the delivery of the frames was as much a part of the full performance of that contract as was the delivery of the portraits. An examination of the memorandum given to each purchaser by the soliciting agent Irby will demonstrate, we think, that there was no contract of purchase and sale of the portrait frames when the contracts for the portraits were made. The only agreement on the part of the purchaser was to pay a specified price for the portrait when delivered. The most that can be said was that the portrait company agreed to deliver the portraits in appropriate frames, which the memorandum entitled the purchaser to select at wholesale prices, but no frame was ordered and no price of the frame agreed upon, and the purchaser of the portrait was under no obligation to purchase the frame of the portrait company of the defendant. The uncontradicted evidence on both sides estab-

lishes that, at the time named in the information, the defendant appeared in Oregon county with the portraits already framed, and urged the state's witnesses who had ordered the portraits to also buy and pay for the frames, which, in several instances, they did. The sale, exhibition, and purchase of these frames all occurred in Oregon county, Missouri, and long after the contract for the portraits had been made and entered into.

In view of these facts, we are compelled to hold that the sale of these frames was a distinct transaction from that of the order and purchase of the portraits, and that such sales of the frames did not constitute interstate commerce. We are cited by the learned counsel for the defendant on this point to *Caldwell v. North Carolina*, 187 U. S. 622, 47 L. ed. 336, 23 Sup. Ct. Rep. 229, but an examination of the facts found in the special verdict upon which the decision of the Supreme Court of the United States is predicated in that case shows that in that case that not only the pictures were ordered by citizens of Greensborough, North Carolina, of the portrait company in Chicago, but the frames also. That being the case, the transaction was one of interstate commerce. In that case the frames were ordered along with the portraits. In this case the portraits alone were ordered, and thus the facts themselves distinguish the two cases. We think it is too clear for discussion that the portrait company shipped the picture frames into this state to the defendant, its agent, without having any valid contract with the several purchasers of the pictures, and that the contract and sale by the defendant, of the frames to the several purchasers, was a Missouri contract, and not one falling under the interstate commerce clause of the Constitution. *State v. Emert*, 103 Mo. 241, 11 L.R.A. 219, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81; *State v. Smithson*, 106 Mo. 149, 17 S. W. 221; *Hynes v. Briggs* (C. C.) 41 Fed., loc. cit. 470. Accordingly, it must be ruled that the defendant was not exempt from taking out a license as a peddler, on the ground that he was engaged in interstate commerce.

2. But it still remains to be determined whether, conceding all that was shown by the state, the defendant was a peddler under the laws of this state and as such required to take out a license. Section 8861, Rev. Stat. 1899, defines who are peddlers in this state: "Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares, or merchandise except pianos, organs, sewing machines, books, charts, maps, and stationery, agricultural and horticultural product

including milk, butter, eggs, and cheese, by going about from place to place to sell the same, is declared to be a peddler." By § 8862 it is provided: "No person shall deal as a peddler without a license," and by § 8867 the rates of tax on peddlers' licenses are fixed. By § 8808: "Every person who shall be found dealing as a peddler contrary to the provisions of" chapter 140 "shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined not less than \$10 nor more than \$100."

Statutes regulating the occupation of itinerant peddlers, and requiring them to obtain licenses, are very ancient. Our Missouri statute is very similar to Stat. 50 Geo. III. chap. 41. The purpose of that act was explained by Baron Graham in *Atty. Gen. v. Tongue*, 12 Price, 51, as follows: "The object of the legislature, in passing the act upon which this information is founded, was to protect, on the one hand, fair traders, particularly established shopkeepers, resident permanently in towns or other places and paying rent and taxes there for local privileges, from the mischiefs of being undersold by itinerant persons, to their injury, and, on the other hand, to guard the public from the impositions practised by such persons in the course of their dealings, who, having no known residence, carry on a trade by means of vending goods conveyed from place to place by horse or cart." In *Com. v. Ober*, 12 Cush. 493, Chief Justice Shaw said: "The leading primary idea of a hawker and peddler is that of an itinerant or traveling trader who carries goods, in order to sell them, and who actually sells them to purchasers, in contradistinction to a trader who has goods for sale and sells them in a fixed place of business. . . . Our statute goes further, and not only prescribes actual hawkers and peddlers whose employment is that of traveling traders, and thus seem to refer to a business or habitual occupation, but it extends to all persons doing the acts prescribed." And by reference to § 8861, Rev. Stat. 1899, it will be observed that our statute denominates "whoever shall deal in the selling of patents, etc., goods, wares, and merchandise except pianos, organs, sewing machines, books, charts, maps, and stationery, agricultural and horticultural products including milk, butter, eggs, and cheese, by going about from place to place to sell the same, is declared to be a peddler." *State v. Hoffman*, 50 Mo. App. 585; *Moberly v. Hoover*, 93 Mo. App. 663, 67 S. W. 721. In *State v. Emert*, 103 Mo. 247, 11 L.R.A. 219, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81, it was said by this court: "Defendant was engaged in going from place to place selling

and trying to sell sewing machines in Montgomery county, in this state, and had been so engaged for some years. He carried the machines with him in a wagon, and, on making a sale, delivered those sold to the purchaser; he was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a peddler."

In support of his contention that the evidence in this case does not constitute the defendant a peddler within the meaning of our statute, counsel for the defendant cites us to two recent decisions of the supreme court of South Carolina, *State v. Coop*, 52 S. C. 508, 41 L.R.A. 501, 30 S. E. 609, and *Laurens v. Elmore*, 55 S. C. 477, 45 L.R.A. 249, 33 S. E. 560. In *State v. Coop*, it was held that one who delivers a portrait already sold in a frame, with option to the purchaser to buy the frame, as set out in the contract of sale of the portrait, is not a hawker and peddler under the Code of Criminal Procedure of that state, § 294, in selling the frame to the purchaser of the portrait. That decision is based upon a prior decision of the same court, in *State v. Moorehead*, 42 S. C. 211, 26 L.R.A. 585, 46 Am. St. Rep. 719, 20 S. E. 544. In the last-mentioned case, it was said by the court, after quoting the 1st section of the act of 1893, entitled "An Act to Amend the Law as to Hawkers and Peddlers:" "There is nothing in the act to indicate any intention on the part of the legislature to give any new definition to the words 'hawkers and peddlers'; but the sole purpose was to regulate the granting of licenses to persons falling within the well-recognized definition of those words." It appears in the statement of the facts of that case that "the defendant has since the 20th of December, 1893, to wit, on the 29th day of March, 1894, sold a sewing machine from his wagon while traveling from place to place, said sale having been made to one John Smith in Richland county. . . . The defendant on and prior to said 29th day of March, 1894, was employed by said [Singer Manufacturing] company and by it furnished with a wagon in order to travel about from place to place in Richland county and elsewhere, for the purpose of selling sewing machines, parts, and attachments, and for the purpose of soliciting patronage for the business and store of said company at Columbia, South Carolina." Entertaining the highest respect for that court and the distinguished jurist who wrote the majority opinion in the *Moorehead* Case, we are nevertheless of the opinion that it is in conflict with the views expressed by this court in *State v. Emert*, supra, and the decision of the Supreme

Court of the United States in the same case (156 U. S. 296, 39 L. ed. 430, 5 Inters. Com. Rep. 68, 15 Sup. Ct. Rep. 367), as to what constitutes a peddler under our laws. *State v. Coop*, *supra*, involves the identical memorandum that we have before us in this case. 'An agent of the same Chicago Portrait Company was tried and convicted before a magistrate for selling picture frames as a peddler without a license, and the circuit court dismissed the defendant's appeal, and the supreme court of that state reversed the decision of the circuit court, and held that the defendant, in circumstances in all respects similar to those appearing in this record, was not a peddler.

In that case *Jones, J.*, dissented, and said: "The defendant, under the facts in this case, so far as concerns the picture frames, was a hawker or peddler within § 294 of the Criminal Statutes of 1893. The sale of the picture frames was not exceptional or occasional merely, but was within the general scope and purpose of defendant's business. It was a part of defendant's avocation to sell a picture frame to any and every customer who had given an order for a portrait, therefore the rule in *State v. Moorehead*, *supra*, and *Alexander Bros. v. Greenville County*, 49 S. C. 527, 27 S. E. 469, has no application here. These picture frames were not sold by sample or pursuant to an order solicited, but were carried about from place to place within this state, and sold or offered for sale for a price separate and distinct from the price of the portrait ordered. The fact that the frame was convenient for the use, protection, and enjoyment of the portrait can make no sort of difference in determining the question whether 'picture frames' come within the definition of goods, wares, and merchandise, and whether the sale of such goods by an itinerant carrying them from place to place for such purpose constitutes hawking and peddling." Citing, among other cases, *State v. Emert*, 103 Mo. 241, 11 L.R.A. 219, 3 Inters. Com. Rep. 527, 23 Am. St. Rep. 874, 15 S. W. 81. *Laurens v. Elmore*, *supra*, an agent of the same portrait company was prosecuted for violation of the ordinance of said city, and the same contract or memorandum of the Chicago Portrait Company was in issue, and the majority of the court held that the city could not impose a special license on the agent, and that the ordinance was in conflict with the interstate commerce clause of the Constitution. Judge *Jones* again dissented, and again pointed out the fact that the record disclosed that the defendant delivered the enlarged pictures or photographs pursuant to orders theretofore given, and that he sold picture

frames only to persons who had given such orders for enlarged pictures. Said the learned judge: "Here, then, is the distinct fact that the picture frames were not sold and delivered pursuant to any interstate order or contract therefor. I admit that if the picture frames had been sold and delivered pursuant to the contract for delivery of the enlarged pictures, such sales and delivery would constitute interstate commerce, and would come under the principle announced in reference to delivery of the enlarged pictures." Accordingly, he dissented from the opinion of the majority. In the case at bar, the evidence shows beyond all controversy that the defendant was a collecting agent for the Chicago Portrait Company, to deliver enlarged pictures which had been ordered by residents of Oregon county from the Chicago Portrait Company. It also affirmatively appears that these residents of Oregon county, in giving their orders for these pictures, did not give any order or orders for frames for the same, and that about February, 1905, the defendant, as agent for the said portrait company, appeared in Oregon county with the portraits and also frames for each of the said pictures, and that he went from house to house, and delivered the pictures, and at each of some five or six different farms offered for sale to the persons who had ordered these pictures a picture frame for each of said portraits, for a price separate and distinct from the price of the portrait ordered; that in all, except one or two cases, the parties for whom the portraits had been made purchased picture frames of the defendant, and received them and paid him therefor. The question arises whether the court erred in submitting to the jury, as it did, whether the defendant dealt as a peddler and engaged in selling the pictures aforesaid by going from place to place to sell the same without having a license as a peddler, and, in our opinion, there was sufficient evidence to justify the court in so instructing the jury, and the jury in finding that the defendant was guilty of dealing as a peddler in the selling of the said picture frames without having a license so to do. It cannot be said that these sales by the defendant were sporadic or accidental; on the contrary, they appear to have been a large part of the business of the defendant.

The judgment of the Circuit Court must therefore be, and it is, affirmed.

Burgess, P. J., and Fox, J., concur.

Abandoned after being taken to Supreme Court of United States.

NEBRASKA SUPREME COURT.

FRANK DINUZZO, Plff. in Err.,
v.

STATE OF NEBRASKA.

(85 Neb. 351, 123 N. W. 309.)

Statute — title — scope.

1. Chapter 82, p. 345, Sess. Laws 1909, an act declaring by its title a purpose to amend § 14, chap. 50, Comp. Stat. 1907, and making it unlawful to sell or give away intoxicating liquors after 8 o'clock P. M. and before 7 o'clock A. M., is germane to the amended statute, which prohibited the sale of intoxicating liquors on days of election and on Sundays; and the amendment did not violate the constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title."

Same — amendment — delegation of power — intoxicating liquor — traffic — regulation.

2. In enacting chapter 82, p. 345, Sess. Laws 1909, an act amending § 14, chap. 50, Comp. Stat. 1907, by inserting therein a provision making it unlawful to sell or give away intoxicating liquors after 8 o'clock P. M. and before 7 o'clock A. M., the legislature did not amend other laws delegating to municipalities the power to regulate the traffic in intoxicating liquors, within the meaning of the constitutional provision that "no law shall be amended unless the new act contains the section or sections so amended, and the section or sections so amended shall be repealed."

Intoxicating liquor — license — forfeiture on conviction.

3. Section 14, chap. 50, Comp. Stat. 1907, making it unlawful for a licensed saloon keeper to sell or give away intoxicating liquors after 8 o'clock P. M. and before 7 o'clock A. M., is not invalidated by reason of a provision therein which authorizes a fine of \$100 and a forfeiture of the license upon conviction of the licensee for violating the law.

(November 9, 1909.)

Headnotes by ROSE, J.

Note. — Validity of statute or ordinance providing for forfeiture of liquor license upon conviction of licensee for violation of law irrespective of appeal.

Although there are many cases in which, because of various constitutional provisions, the courts have been asked to hold void ordinances providing for the revoking or forfeiture of liquor licenses, only one case aside from *DINUZZO v. STATE* has been found upon the specific point suggested in the title. In *McInerney v. Denver*, 17 Colo. 302, 29 Pac. 516, it was held that an ordinance providing that, upon a second conviction, the license and the money paid therefor shall be forfeited and "remain forfeited notwithstanding defendant may, upon a trial *de novo* on appeal in the county

ERROR to the District Court for Douglas County to review a judgment convicting defendant of a violation of the daylight saloon act. Affirmed.

The facts are stated in the opinion.

Messrs. Weaver & Giller, for plaintiff in error:

The act is unconstitutional, as it attempts to amend acts not contained therein.

State v. Wright, 14 Or. 365, 12 Pac. 708; *Portland v. Stock*, 2 Or. 69; *King v. Banks*, 61 Ga. 20; *Ex parte Conner*, 51 Ga. 571; *Bossier v. Steele*, 13 La. Ann. 433; *Smails v. White*, 4 Neb. 357; *Cutlip v. Calhoun County*, 3 W. Va. 588; *Re Blodgett*, 89 N. Y. 392; *People ex rel. Stewart v. Young Men's Father Matthew Total Abstinence Benev. Soc. No. 1*, 41 Mich. 67, 1 N. W. 931; *State v. Everage*, 33 La. Ann. 120; *Ex parte Thomason*, 16 Neb. 238, 20 N. W. 312; *People ex rel. Drake v. Mahaney*, 13 Mich. 481; *Davis v. State*, 7 Md. 152, 61 Am. Dec. 331; *State ex rel. Graham v. Tibbets*, 52 Neb. 228, 66 Am. St. Rep. 492, 71 N. W. 990; *Trumble v. Trumble*, 37 Neb. 340, 55 N. W. 871; *Douglas County v. Hayes*, 52 Neb. 191, 71 N. W. 1023; *State ex rel. Farmers' Mut. Ins. Co. v. Moore*, 48 Neb. 870, 67 N. W. 876; *Boales v. Ferguson*, 55 Neb. 565, 76 N. W. 18; *Sovereign v. State*, 7 Neb. 412; *State ex rel. Miller v. Lancaster County*, 17 Neb. 85, 22 N. W. 228; *Touzalin v. Omaha*, 25 Neb. 817, 41 N. W. 796; *Holmberg v. Hauck*, 16 Neb. 337, 20 N. W. 279; *Foxworthy v. Hastings*, 23 Neb. 772, 37 N. W. 657; *Stricklett v. State*, 31 Neb. 674, 48 N. W. 820.

The act is unconstitutional and void because it contravenes that portion of the Constitution which provides that "no bill shall contain more than one subject and the same shall be clearly expressed in its title."

State ex rel. Graham v. Tibbets, supra; *Armstrong v. Mayer*, 60 Neb. 423, 83 N. W. 401; *Miller v. Hurford*, 11 Neb. 381, 9 N.

court, be acquitted of the offense," was so oppressive and unreasonable as to be void.

A case interesting on this question, although not strictly in point, is *Harrison v. People*, 124 Ill. App. 519, where, in affirming the revocation of a liquor license, the court said: "The record shows that the petitioner, O'Hare, was convicted of a violation of the wine room ordinance, which expressly provides that, in addition to the penalty provided therein, the license should be revoked and that such a person shall not be permitted to again obtain a license for two years after the date of the conviction. When the license of petitioner was revoked the judgment of conviction was in full force and effect, except that by the appeal the execution of the judgment was suspended." G. V.

W. 477; *State ex rel. Scott v. Bowen*, 54 Neb. 211, 74 N. W. 615; *Hyman v. State*, 87 Tenn. 109, 1 L.R.A. 497, 9 S. W. 372; *Dolese v. Pierce*, 124 Ill. 140, 16 N. E. 218; *Dorsey's Appeal*, 72 Pa. 195; *State v. Bristow*, 131 Iowa, 604, 109 N. W. 199; *State v. American Sugar Ref. Co.* 106 La. 553, 31 So. 181; *State v. Ninestein*, 132 N. C. 1039, 43 S. E. 936; *Com. v. Farnum*, 114 Mass. 207; *Hewson v. Englewood Twp.* 55 N. J. L. 522, 21 L.R.A. 736, 27 Atl. 904; *Davenport v. Rice*, 75 Iowa, 74, 9 Am. S. Rep. 454, 39 N. W. 191; *State v. Smithart*, 128 Iowa, 631, 105 N. W. 128; *Jewell v. Sumner Twp.* 113 Iowa, 47, 84 N. W. 973; *Spencer v. Whiting*, 68 Iowa, 678, 28 N. W. 13; *Wausau v. Heideman*, 119 Wis. 244, 96 N. W. 549; *Stanford v. Fisher*, 140 N. Y. 187, 35 N. E. 500; *Com. v. Ober*, 12 Cush. 493; *Pegues v. Ray*, 50 La. Ann. 574, 23 So. 904; *Stuart v. Cunningham*, 88 Iowa, 191, 20 L.R.A. 430, 55 N. W. 311; *Emmons v. Lewistown*, 132 Ill. 380, 8 L.R.A. 328, 22 Am. St. Rep. 540, 24 N. E. 58; *Potts v. State*, 45 Tex. Crim. Rep. 45, 74 S. W. 31, 2 A. & E. Ann. Cas. 827; *State v. Gibbs*, 115 N. C. 700, 20 S. E. 172; *Gerding v. Idaho County*, 13 Idaho, 444, 90 Pac. 357; *Mewherter v. Price*, 11 Ind. 199; *State v. Bowers*, 14 Ind. 195; *Watkins v. Bigelow*, 93 Minn. 210, 100 N. W. 1108; *Megins v. Duluth*, 97 Minn. 23, 106 N. W. 89; *Ex parte Thomason*, *supra*; *Omaha & N. P. R. Co. v. Sarpy County*, 82 Neb. 140, 117 N. W. 118; *Fairview v. Detroit*, 150 Mich. 1, 113 N. W. 370; *Prowett v. Nance County*, 82 Neb. 400, 117 N. W. 996; *Fish v. Stockdale*, 111 Mich. 46, 69 N. W. 92; *McDuffie v. State*, 87 Ga. 687, 13 S. E. 596.

The act inflicts cruel and unusual punishments, and is therefore contrary to the Constitution of both the state of Nebraska and the United States.

Robison v. Miner, 68 Mich. 549, 37 N. W. 21.

Messrs. William T. Thompson, Attorney General, and George W. Ayres for the State.

Rose, J., delivered the opinion of the court:

The question for determination in this case is the validity of the daylight saloon act. Laws 1909, chap. 82, p. 345. In a prosecution by the state in the district court of Douglas county, defendant, Frank Dinuzo, a licensed saloon keeper in the city of Omaha, was convicted of selling and giving away malt and spirituous liquors after 8 o'clock P. M. July 10, 1909, in violation of the act mentioned. For that offense he was sentenced to pay a fine of \$100, and he now presents the record of his conviction for review by a petition in error. 29 L.R.A. (N.S.)

Defendant assails the sentence of the trial court on the sole ground that the daylight saloon law, under which he was convicted, is unconstitutional and void. Before that act was passed, the General Statutes regulating the sale of intoxicating liquors, namely, chapter 50, Comp. Stat. 1907, contained the following: "Sec 14: Every person who shall sell or give away any malt, spirituous, and vinous liquors on the day of any general or special election, or at any time during the first day of the week, commonly called Sunday, shall forfeit and pay for every such offense, the sum of \$100." This section was amended at the last session of the legislature. The amendment contains the daylight saloon act, and reads as follows: "Every person who shall sell or give away any malt, spirituous, or vinous liquors, or any intoxicating drinks, on the day of any general, special, or primary election, or at any time during the first day of the week, commonly called Sunday, or at any time upon any week day, after the hour of 8 o'clock P. M. and before the hour of 7 o'clock A. M. of the following day, shall forfeit and pay for every such offense, the sum of \$100, and his license shall be forfeited and canceled by the board granting the same, forthwith, whether such person convicted shall appeal therefrom or not." Sess. Laws, 1909, chap. 82, p. 345, Comp. Stat. 1907, chap. 50, § 14.

Defendant admitted by demurrer the truth of the charge that he sold and gave away malt and spirituous liquors in violation of the amendment quoted, but insists the amendatory act is void, and for that reason prays for a reversal of the judgment imposing the fine. The validity of the act is challenged on the ground it contravenes the constitutional provision that "no bill shall contain more than one subject and the same shall be clearly expressed in its title." Const. art. 3, § 11. The title of the amendatory act is as follows: "An Act to Amend § 14, Chap. 50, Compiled Statutes of the State of Nebraska for the Year 1907, and to Repeal Said Original Section." Sess. Laws 1909, chap. 82, p. 345. Defendant insists this title confines the new legislation to the subject of the original section, which, according to his conception thereof, is limited to sales of intoxicating liquors on days of election and on Sundays, and that the amendment prohibiting sales after 8 o'clock P. M. on other days is a different subject, within the meaning of the Constitution. The fallacy of this argument is in the assumption that the subject of the original section is limited to sales on days of election and on Sundays. Section 14, in its original form, was part of the general statute regulating "the license and sale of malt,

pirituous, and vinous liquors." That law as passed in 1881, and, with few changes, as since been in force. The subject of § 14 must be determined by its relation to the entire statute, as well as by the import of its own provisions. Chapter 50, Comp. Stat. 1907, contains no limitation on the time of giving away intoxicating liquors or making sales thereof, except that found in § 14, which, as originally enacted, prohibited gifts and sales on days of election and on Sundays. The only purpose of § 14 was to impose that limitation and make it effective. To that extent it qualified and limited other provisions. It contained no regulation on any other subject, and no other restriction of a similar nature can be found anywhere in the statute in which it was inserted. Other sections authorized licenses and sales, but restrictions as to time of sales are found alone in § 14. By imposing the limitation therein to days of election and Sundays, the lawmakers did not restrict their power to legislate on the time of closing saloons. The daylight saloon act restricts still further the time of trafficking in intoxicating liquors, and that subject is certainly germane to the original section. Being the only provision limiting the time of making sales, it was natural for the lawmakers to amend it when extending the restrictions. It was evidently selected for amendment, because it was the section which imposed limitations on the time of operating saloons. Considered in this light, the amendment is not surreptitious legislation. Its passage in its present form and its effect under other laws are not evils which the constitutional provision was intended to avert. Defendant's interpretation of the subject of the original section cannot be adopted. It is a doctrine which would interfere with legislative amendments to an extent never contemplated by the framers of the Constitution or by the people who adopted it. The daylight saloon law is also attacked on the ground that it violates the constitutional provision that "no law shall be enacted unless the new act contains the same sections so amended, and the sections or sections so amended shall be re-enacted." Const. art. 3, § 11. In pointing to statutes thus amended, defendant refers to the following enactment: "The corporate authorities of all cities and villages shall have power to license, regulate, and prohibit selling or giving away of any intoxicating malt, spirituous, and vinous, mixed, or rectified liquors within the limits of such city or village." Comp. Stat. 1907, chap. 23.

Reference is also made to a number of city charters which confer upon cities power to regulate the traffic in intoxicating liquors, L.R.A.(N.S.)

without restriction as to the time of making sales. Other provisions are also included in defendant's list of statutes amended by, but not contained in, the daylight saloon law, or repealed by it. He argues that the act, though purporting on its face to amend no legislative enactment except § 14, chap. 50, Comp. Stat. 1907, in fact, amends also § 25 of the same chapter, and other statutory provisions, and consequently passes the bounds of the constitutional limitation quoted. In discussing the effect of the amendment on the power delegated to cities and county boards, he said in his argument: "By this act the power conferred has been partially taken away from the various corporate authorities. It is necessary now to read into § 25 of chapter 50 the amendment known as the daylight saloon bill. It is now necessary to say, so far as § 25 is concerned, that the corporate authorities of all cities and villages shall have power to regulate and prohibit only between the hours of 7 in the morning and 8 in the evening, because by the act in question there is an absolute prohibition of all sales between 8 P. M. and 7 A. M. of every week day. It is also necessary to read into the charter of every city and village in the state, that the power to regulate and prohibit is limited to the hours between 7 A. M. and 8 P. M. of every week day. It is also necessary to read this amendment into the power granted county commissioners with reference to the regulation and prohibition of the sale of liquors within their respective jurisdictions."

It is the duty of the court to consider as a whole and harmonize, if possible, all valid legislation on the subject of intoxicating liquors. A construction making all provisions valid should be adopted, if it can be done without violating a limitation fixed by the Constitution. For the same reason, a construction which would make an act unconstitutional should be avoided, unless there is a plain violation of the supreme law. When these canons are followed, it is not necessary to hold the daylight saloon act invalid on the ground that it amends other laws without referring to them. The police power to restrict by law the time when intoxicating liquors may be sold is within legislative control. By § 14 of the original act, the legislature exercised such power to the extent of prohibiting sales of intoxicating liquors on the days of election and on Sundays, and still retains it unless it has since been delegated to the municipalities by exclusive grants, which can only be found in explicit declarations construed in connection with other legislation on the same subject. Police power is usually retained by the legislature to be

exercised for the general welfare, and a contrary purpose should not be inferred from doubtful language. *Territory v. Webster*, 5 Dak 351, 40 N. W. 535. A text-writer says: "In some of the states the legislative policy has been to confide the regulation or prohibition of the sale of liquor exclusively to the authorities of the municipal corporations. The grant of such power, while undoubtedly valid, is not to be presumed. Nothing short of an explicit declaration of the legislative will in that behalf will suffice to endow the municipalities with entire control over the subject, to the exclusion of all other authorities." *Black, Intoxicating Liquors*, § 226. The provisions by which the legislature delegated to cities power to regulate or prohibit the liquor traffic do not warrant the conclusion that the grants were exclusive to the extent of preventing the enactment or amendment of a general law limiting the business hours of licensees. The nearest approach is found in the Lincoln charter, which declares: "The excise board shall have the exclusive control of the licensing and regulating the sale of malt, spirituous, vinous, or intoxicating liquors in such city." *Comp. Stat. chap. 13, art. 1, § 64*. In Lincoln control in such matters had been transferred from the mayor and council to the excise board, and the words "exclusive control" were intended to emphasize the complete jurisdiction of the excise board to the exclusion of the mayor and council. The nature of the delegation of power conferred upon the city of Lincoln by its charter has already been considered by this court. In an able opinion by Judge Norval it was said: "While the excise board has the exclusive authority to license the sale of liquors in the city, it is required to exercise its power subject to the limitations and restrictions imposed by general law. . . . We agree with the trial court that the word 'exclusive' was used by the legislature to bar all claim of authority over the subject of granting license by the body from which control had been taken, and that the exclusive control given the excise board over the matter is subject to the restrictions contained in the general law." *Sanders v. State*, 34 Neb. 872, 52 N. W. 721. The power to license, regulate, or prohibit the traffic in intoxicating liquors, as delegated to cities by § 25, chap. 50, *Comp. Stat. 1907*, and by other enactments, is subject to the limitations and restrictions imposed by general law. That this was the intention of the legislature appears on the face of the general statute. The municipal power conferred by § 25 is limited by the following proviso in the same section: "In granting license or permits such corporate authorities

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in cities and villages, and the board of fire and police commissioners in such other cities, shall comply with and be governed by all the provisions of this act in regard to granting of license, and all the provisions and penalties contained in this act shall be applicable to such licenses and permits and the persons to whom they are granted." *Comp. Stat. 1907, chap. 50, § 25*. Section 64 of the Lincoln charter contains the following limitations on the power of the city authorities: "All the restrictions, regulations, forfeitures, and penalties provided by law respecting the sale of liquors by persons licensed therefor by the county board shall apply to and govern all persons licensed by virtue of this section." *Comp. Stat. 1907, chap. 13, art. 1, § 64*. The charter of cities of the second class and villages contains the following provision on the same subject: "Such corporate authorities shall comply with whatever general law of the state may be in force relative to the granting of licenses." *Comp. Stat. 1907, chap. 14, art. 1, § 69, subdiv. 9*. All other city charters, with the possible exception of that of the city of Omaha, contain provision of like import. City authorities and licensees therefor are not only restricted by general law, but are bound by valid amendments thereof. The opinion is unanimous that the daylight saloon act does not amend any other statute, within the meaning of the constitutional limitation invoked by defendant.

It is finally contended that the provision authorizing a fine of \$100 and a forfeiture of the license upon conviction of a licensee for violating the law, "whether such person convicted shall appeal therefrom or not," invalidates the amendment. The objection to the legislation is that it inflicts cruel and unusual punishment, deprives defendant of his license without a jury trial, and denies the right of appeal. This position is clearly untenable. The penalties are both usual and lawful, and the right of appeal is not denied. In an opinion by Chief Justice Reese, these conclusions were announced: "There is no vested right in a licensee to sell intoxicating liquors which the state may not take away at pleasure. . . . Such licenses are not contracts between the state or municipality issuing them and the licensee, but are mere temporary permits to do what otherwise would be unlawful. . . . They are subject to the direction of the government, which may revoke them as it deems fit, and may be abrogated by the adoption of a municipal ordinance prohibiting the sale of liquors." *Martin v. State*, 23 Neb. 371, 36 N. W. 554.

No sufficient reason for holding the day-

ight saloon act invalid has been suggested, and the judgment of the District Court upholding it is affirmed.

Petition for rehearing denied,

TEXAS COURT OF CRIMINAL APPEALS.

E. B. THORP, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 129 S. W. 607.)

Seduction — offer of marriage — effect of other existing marriage.

1. That the offer of marriage cannot be accepted because the woman has married another between the commission of the offense and the trial will deprive one accused of seduction of the benefit of a statute providing for the dismissal of the prosecution upon an offer, in good faith, to marry the person seduced.

Criminal law — testimony of accomplice — sufficiency.

2. The court cannot permit a jury to content on the testimony of an accomplice which merely tends to show the guilt of accused.

Id. — Offer of marriage as defense to prosecution for seduction.

In the absence of a statute making marriage a defense, an offer of marriage is no defense to a prosecution for seduction. *State v. Bierce*, 27 Conn. 319; *Williams v. State*, Miss. 70, 15 A. & E. Ann. Cas. 1026, 45 146.

and the great weight of authority supports the view that an unaccepted offer to marry is no defense, under a statute making subsequent marriage of the parties a defense to a prosecution for seduction. *Carroll v. State*, 77 Ark. 16, 91 S. W. 30; *People v. Hough*, 120 Cal. 538, 65 Am. St. Rep. 52, 52 Pac. 846; *State v. Thompson*, 79 Iowa, 393, 48 N. W. 918; *State v. Bauerkemper*, 95 Iowa, 562, 64 N. W. 609; *State v. Whalen*, 98 Iowa, 662, 68 N. W. 554; *People v. People*, 2 Thomp. & C. 404; *State v. Wise*, 32 Or. 280, 50 Pac. 800; and see *State v. State*, 77 Ark. 468, 94 S. W. 146.

and it is no defense to an indictment for seduction, that the defendant was afterwards prevented from performing his promise of marriage, by improper conduct on the part of the prosecutrix. *State v. Bierce*, supra.

1. *People v. Hough*, supra, it was said that it is of no moment whether or not the facts which actuate the prosecutrix in refusing to marry the accused are good or bad, that it does not lie in the power of the accused to prevent the marriage. (N.S.)

Appeal — erroneous instruction — immateriality.

3. A conviction will not be reversed because the jury were instructed that the testimony of an accomplice must tend to show guilt, where the testimony absolutely shows the guilt if the jury believes it.

Evidence — flight of accused — effect.

4. Forfeiting the bond and fleeing from the county after arrest for seduction may be considered, in corroboration of the testimony of the victim, to support a conviction.

On Rehearing.

Trial — instruction — limitation period.

5. Where, on a prosecution for seduction, there is evidence tending to show that the offense might be barred by the statute of limitations, the court should instruct the jury that, before they can convict, they must find that it was committed within the limitation period.

(May 4, 1910.)

APPEAL by defendant from a judgment of the District Court for Knox County convicting him of seduction. Reversed.

The facts are stated in the opinion.

Mr. James A. Stephens, for appellant:

A conviction cannot be had upon the testimony of an accomplice, unless corroborated by other evidence.

accused to escape the penalties of the law by reason of his subsequent willingness to carry out his marriage promise.

The reason for the rule that a subsequent offer of marriage is no defense to a prosecution for seduction is that the act of seducing and debauching is the gravamen of the offense, and when this is done by promises of marriage the crime is complete, no matter what the defendant's intentions may have been or what offers he may have made after the act was consummated. *State v. Wise*; *State v. Thompson*; and *State v. Bierce*,—supra. And see *State v. Brandenburg*, 118 Mo. 181, 40 Am. St. Rep. 362, 23 S. W. 1080.

The subsequent offer and refusal of marriage is competent, however, as bearing upon the question whether or not the alleged seduction was accomplished by means of a promise of marriage, and may also be presented to the court at a proper time in mitigation of punishment. *State v. Thompson*; *State v. Whalen*; *State v. Bauerkemper*; and *Williams v. State*,—supra. But see *State v. Brandenburg* and *State v. O'Keefe*, infra, where the contrary was held because of the statute, which expressly provided that the mere offer of marriage was no defense.

But under the Kentucky statute, which provides that a prosecution for seduction shall be discontinued if the accused marry the girl before final judgment, an offer of marriage by the defendant in open court, and the prosecutrix's refusal thereof, re-

rated by other evidence connecting the defendant with the offense committed.

Newman v. State, 55 Tex. Crim. Rep. 273, 116 S. W. 579; Wadkins v. State (Tex. Crim. Rep.) 124 S. W. 959; Campbell v. State, 57 Tex. Crim. Rep. 301, 123 S. W. 583; King v. State, 57 Tex. Crim. Rep. 363, 123 S. W. 135; Brown v. State, 57 Tex. Crim. Rep. 570, 124 S. W. 101; Lemmons v. State (Tex. Crim. Rep.) 125 S. W. 400; Moore v. State (Tex. Crim. Rep.) 125 S. W. 34; Maples v. State, 56 Tex. Crim. Rep. 99, 119 S. W. 105; Early v. State, 56 Tex. Crim. Rep. 61, 118 S. W. 1036; Fruger v. State, 56 Tex. Crim. Rep. 393, 120 S. W. 197; Barrett v. State, 55 Tex. Crim. Rep. 182, 115 S. W. 1187; Tate v. State, 55 Tex. Crim. Rep. 397, 116 S. W. 604; Fruger v. State, 50 Tex. Crim. Rep. 621, 99 S. W. 1014; Jones v. State, 44 Tex. Crim. Rep. 557, 72 S. W. 845; Carlos v. State, 48 Tex. Crim. Rep. 449, 88 S. W. 345; Hart v. State, 47 Tex. Crim. Rep. 156, 82 S. W. 652; Grenshaw v. State, 48 Tex. Crim. Rep. 77, 85 S. W. 1147; Washington v. State, 47 Tex. Crim. Rep. 131, 82 S. W. 653; Barton v. State, 49 Tex. Crim. Rep. 121, 90 S. W. 877; Oates v. State, 50 Tex. Crim. Rep. 39, 95 S. W. 105; Dixon v. State (Tex. Crim. Rep.) 90 S. W. 878; Morawitz v. State, 49 Tex. Crim. Rep. 366, 91 S. W. 227; Reagan v. State, 49 Tex. Crim. Rep. 443, 93 S. W. 733.

The defendant was entitled to an in-

quires a dismissal of the prosecution. Com. v. Wright, 16 Ky. L. Rep. 251, 27 S. W. 815.

In recording its approval of the action of the trial judge in dismissing the prosecution in the above case, the court said: "The marriage of the parties is the purpose, intent, hope, and spirit of the statute. Within its keeping, the past misery and shame may be forgotten, the future happiness of both secured. So that, the statute being so construed, although the seducer be forced almost to the very doors of the penitentiary before offering to fulfil his promise of marriage, yet, having done so in good faith, and his offer having been declined by his victim, he can do no more. The woman, and not the man, defeats the object and purposes of the law."

And so also in the following cases it was held that a bona fide offer to marry the prosecutrix before institution of the prosecution is a complete defense under a statute making marriage of the parties a bar to the prosecution: Ingram v. Com. 114 Ky. 726, 71 S. W. 908, and Com. v. Hodgkins, 111 Ky. 584, 64 S. W. 414.

Statutes specifically relating to offer of marriage as defense.

In State v. Brandenburg, 118 Mo. 181, 40 Am. St. Rep. 362, 23 S. W. 1080, it was held that it was no error to refuse to per-

struction as to whether the offense was committed within the statutory limitation period.

Wimberly v. State, 22 Tex. App. 506, 3 S. W. 717; Reynolds v. State, 8 Tex. App. 412; Greta v. State, 9 Tex. App. 429; Jackson v. State, 15 Tex. App. 84; White v. State, 18 Tex. App. 57; Burkhard v. State, 18 Tex. App. 599; Irvine v. State, 20 Tex. App. 12; Bond v. State, 23 Tex. App. 180, 4 S. W. 580; Smith v. State, 24 Tex. App. 290, 6 S. W. 40; Williams v. State, 24 Tex. App. 342, 6 S. W. 531; Thompson v. State, 24 Tex. App. 383, 6 S. W. 296; Dones v. State, 8 Tex. App. 112; Erwin v. State, 10 Tex. App. 700; Ainsworth v. State, 11 Tex. App. 339; Neyland v. State, 13 Tex. App. 536; Bonner v. State, 29 Tex. App. 223, 15 S. W. 821; Nalley v. State, 30 Tex. App. 456, 17 S. W. 1084; Hays v. State, 30 Tex. App. 472, 17 S. W. 1063; Carter v. State, 30 Tex. App. 551, 28 Am. St. Rep. 944, 17 S. W. 1102; Hargrove v. State, 33 Tex. Crim. Rep. 431, 26 S. W. 993; Wheeler v. State, 34 Tex. Crim. Rep. 350, 30 S. W. 913; Wright v. State, 35 Tex. Crim. Rep. 470, 34 S. W. 273; Carver v. State, 36 Tex. Crim. Rep. 552, 38 S. W. 183; Winters v. State, 37 Tex. Crim. Rep. 582, 40 S. W. 303; Berry v. State (Tex. Crim. Rep.) 125 S. W. 580; Massengale v. State, 24 Tex. App. 181, 6 S. W. 650, 6 S. W. 35; Holt v. State, 57 Tex. Crim. Rep. 432, 125 S. W. 43; Black

mit defendant to testify that it was his honest intention to marry the prosecutrix and that he was then ready to do so, where the statute expressly provided that an offer to marry was no bar to the prosecution. And in State v. O'Keefe, 141 Mo. 271, 42 S. W. 725, it was held no error to refuse to instruct the jury that, while the offer of marriage was no defense under the statute, still the jury may take such fact into consideration in assessing the penalty, especially where the only evidence to that effect was defendant's own testimony.

And the mere fact that differences arose between the defendant and prosecutrix after he had seduced her under promise of marriage will not constitute a bar to the prosecution, unless the defendant then offered, in good faith, to marry her, under a statute which makes a bona fide offer of marriage a defense. Hinman v. State (Tex. Crim. Rep.) 127 S. W. 221.

—time of offer.

There is some conflict of authority as to the time when the offer must be made, to prevail as a bar to the prosecution in those jurisdictions where it is a defense.

In Wright v. State, 31 Tex. Crim. Rep. 354, 37 Am. St. Rep. 822, 20 S. W. 756, it was held that the offer to marry the prosecutrix may be made at any time up to the moment of conviction.

v. State, 38 Tex. Crim. Rep. 58, 41 S. W. 606.

Mr. John A. Mobley for the State.

McCord, J., delivered the opinion of the court:

From a conviction for seduction, with a penalty of two years' confinement in the penitentiary, appellant has appealed to this court, asking a revision of the trial of the case in the court below. An indictment was returned in the district court of Knox county at the March term, 1908, charging appellant with seducing one Flora Dykes, an unmarried woman under the age of twenty-five years. He was brought to trial at the October term, 1909, resulting in his conviction.

The record discloses that at the time of the trial the prosecutrix, Flora Dykes, was married to a Mr. Davis. The record does not disclose when she married said Davis. At the time of the trial, after the state had announced ready for trial, the defendant filed in court a paper sworn to and subscribed by him, in which he made an offer, stating same was made in good faith, to marry the prosecutrix, Flora Dykes, and for that reason he asks that this prosecution be dismissed. To the refusal of the court to dismiss under the defendant's plea, he reserved a bill of exceptions. We do not find in the record where the issue was

submitted to the jury, either in the general charge of the court or in any of the special instructions requested by defendant, that they should acquit the defendant because, since the seduction, the said Flora Dykes had married a man named Davis, and had placed herself in such position as that she could not, in law, enter into a marriage contract with the defendant. It is insisted in the motion for new trial that the court erred in not dismissing the cause for the reason stated, and the contention is here made that the prosecutrix, having married after the act of seduction, placed herself in a position where she could not legally marry the defendant, and for that reason the prosecution was barred. Article 967, White's Anno. Penal Code, provides: "If any person, by promise to marry, shall seduce an unmarried female under the age of twenty-five years, and shall have carnal knowledge of such female, he shall be punished by imprisonment in the penitentiary not less than two nor more than five years, or by fine not exceeding \$5,000." Article 969 provides: "If the parties marry each other at any time before the conviction of the defendant, or if the defendant, in good faith, offers to marry the female so seduced, . . . no prosecution shall take place, or, if begun, it shall be dismissed; but the benefits of this article shall not apply to the case of a defendant who was

In Kentucky it is held that an offer to marry the prosecutrix, made at any time before final judgment, even after verdict, is sufficient to entitle the accused to a discharge. *Com. v. Akers*, 28 Ky. L. Rep. 78, 88 S. W. 1108; and *Com. v. Hodgkins*, supra.

But in *Jinks v. State*, 114 Ga. 430, 40 S. E. 320, it was held that an offer to marry made during the progress of the trial comes too late to constitute a bar to the prosecution, under a statute providing that a prosecution for seduction may be stopped by a bona fide offer of marriage before arraignment and pleading.

Prior to the act of 1899 (Acts 1899, p. 42) the rule in Georgia was that the offer could be made at any time before final judgment. *Mann v. State*, 34 Ga. 1; *O'Neill v. State*, 85 Ga. 383, 11 S. E. 856; *Wilson v. State*, 58 Ga. 328.

—requisites of offer.

It is not sufficient if the offer to marry is made to the father, though the prosecuting witness is a minor. *Nolan v. State*, 48 Tex. Crim. Rep. 436, 88 S. W. 242.

—good faith of offer.

Under a statute providing that if defendant, in good faith, offer to marry the female seduced, no prosecution shall take place, or, if begun, it shall be dismissed, it 29 L.R.A. (N.S.)

was held in *Wright v. State*, 31 Tex. Crim. Rep. 354, 37 Am. St. Rep. 822, 20 S. W. 756, that the offer in good faith requires only a submission to the marriage rites, and that where, during a prosecution, defendant makes an offer of marriage in open court, produces a marriage license, and asks the presiding judge to perform the ceremony, it is error to permit the prosecuting attorney to question the good faith of the offer, and, on the refusal of the prosecutrix to marry defendant, it is error for the court to refuse to dismiss the cause on the ground that he does not think defendant intended, in good faith, to marry the prosecutrix and live with her.

But the offer in good faith to marry the prosecutrix means the ability to consummate the marriage, in order to constitute a defense.

Thus the fact that the accused, who was a minor, had offered to marry the prosecutrix and was prevented by his father's refusal to consent, was held in *Harvey v. State* (Tex. Crim. Rep.) 53 S. W. 102, to be insufficient to relieve him from prosecution. To the same effect is *Merrell v. State*, 42 Tex. Crim. Rep. 19, 57 S. W. 289.

And the subsequent death of the prosecutrix before the trial of the defendant is no bar to a prosecution, under the statute. *Merrell v. State*, supra. This case is fully set out in the opinion of *THORP v. STATE*.

in fact married at the time of committing the offense." We have not been cited to any authority sustaining appellant's contention that, because of the marriage of the prosecutrix, defendant was denied the right or privilege of marrying her; but we understand from the language of article 969 that marriage, or offer in good faith to marry, obliterates the offense. The offense was complete and perfect before the offer of marriage; and the law, in its tender mercy to preserve the good name of the injured female, and to save her from shame and her issue from the degradation of bastardy, has made this provision, not as a protection to the defendant, but as a shield to the good name of the woman. In other words, the law says this to the defendant: "You have committed a crime for which you should be punished, but we are willing to obliterate that crime in order that the name and character of the female whom you have injured and outraged may be preserved. In the case of *Harvey v. State* (Tex. Crim. Rep.) 53 S. W. 102, this court held that the fact that defendant was under twenty-one years of age, and the fact that his mother had refused to allow him to marry the prosecutrix, was no defense; and in the case of *Merrell v. State*, 42 Tex. Crim. Rep. 19, 57 S. W. 289, it was held that the prosecutrix having died before the trial of defendant would be no defense to a prosecution charging him with the seduction of the female, who had subsequently died; and this court, speaking through Judge Henderson, said: "It will be seen that the statute with reference to seduction makes the offense complete when carnal knowledge of the female is procured by virtue of a promise to marry, and the subsequent article simply authorizes a dismissal of the case under certain contingencies. These contingencies are the marriage of the parties, or an offer made on the part of the seducer, in good faith, to marry the prosecutrix. We take it that 'good faith' here means ability to consummate the marriage. The law requires a promise to marry to be made in good faith, and takes no note of appellant's inability to consummate the marriage. As far as the crime is concerned, it is already committed, and appellant can only escape punishment for his crime by complying with the statute that authorizes a dismissal of the prosecution. Any other construction would lend the sanction of the law to a seducer who was under minority to ply his seductive arts, and thus encompass the ruin of his victim, and afterwards depend on the interference of his parents to prevent the enforcement thereof." *Polk v. State*, 40 Ark. 482, 48 Am. Rep. 17. Therefore, if the minority of the 29 L.R.A. (N.S.)

defendant or the death of the prosecutrix will not relieve a party from prosecution for the crime of seduction, it would follow that the marriage of the prosecutrix to another party after seduction, and before the trial of defendant, would not relieve the party of the crime that he had committed, and because the marriage of prosecutrix has interposed between the time of the commission of the crime and the trial would not in any way obliterate the crime. The prosecutrix having married, and being in a position not to marry the defendant, or accept an offer to marry him, it cannot be said that the offer was made in good faith, because of the inability of the parties to consummate the marriage. We therefore hold that the court below did not err in refusing to dismiss the case, because the offer of the defendant to marry the prosecutrix was not in good faith on account of the inability of the parties to consummate the marriage. Following the reasoning in the *Merrell* and *Harvey* Cases, *supra*, we must hold that defendant is not relieved from prosecution for the crime of seduction because the prosecutrix married another party, and prevented him from offering to marry her after the institution of the prosecution.

On the trial of the case in the court below, the court, in its charge to the jury, directed them that the witness *Flora Dykes* was an accomplice, and instructed them, further, that they could not convict the defendant upon the testimony of said *Flora Dykes*, unless the jury should first believe that her testimony was true, and that it shows, or tends to show, that the defendant is guilty as charged in the indictment, and that there is other testimony tending to connect the defendant with the commission of the offense. This charge has been frequently condemned by this court, and in a proper case will be ground for reversal. The court should never charge a jury that the testimony of an accomplice must tend to show the guilt. This is requiring a less degree of proof than the law contemplates, and, in a case where the testimony of the accomplice is weak in its character, it would not only be ground for reversal to give such a charge, but this court would feel called upon to reverse a case where such a charge was given. However, under the provisions of article 723 of the Code of Criminal Procedure, which provides that a case shall not be reversed, unless the error committed in the trial court was prejudicial to the defendant, we hold that the charge in this case was not prejudicial to the defendant. The witness *Flora Dykes* had testified unequivocally and unconditionally to the promise of marriage,

to the act of intercourse, and that she, in permitting said act, was prompted to do so by the promise of marriage and her devotion to the defendant. Therefore her testimony does not tend to connect the defendant with the commission of the offense, but absolutely connects him with it; and if the jury believed her testimony was true, and that it showed, beyond cavil, the guilt of the appellant, there was but one issue to be ascertained by them in connection with her testimony, and that was as to whether there was other testimony tending to connect the defendant with the commission of the offense. The corroboration in this case consisted not only of the defendant keeping the company of the prosecutrix, calling upon her at her home, accompanying her day and night to different gatherings, social and religious, in the community, but also consisted of a couple of letters which were produced and offered in evidence and identified as having been written by the defendant to the prosecutrix, in which he spoke of his love and devotion to her, and that the same would last through life, and spoke of their coming marriage. The letters not only breathed words of love for the prosecutrix, but protested that the prosecutrix did not have the same love, and was not willing to make the same sacrifices as himself. The first letter was written on July 4, 1905. This letter was addressed to the prosecutrix and commenced: "Dearest one." This letter was written about the time of the first act of intercourse. One significant expression in this letter is as follows: "I am very proud we were falsely alarmed the last time I seen you. Yes, have nearly gotten over the vexation." Further along in the letter he says: "That night I thought your decision would have to go if it did break my heart and wreck my life and take the sweetness out of my life. You ask me to come back and love you as before. I simply ask you to return to me, as you asked me to. Though my love for you is as great and greater than yours for me." In this letter is also this expression: "Say, how will it do to arrange our business for this summer? It sure would suit me mighty well. Yes, you can depend on what I say about the future as sure as life goes on. (This is a fact). I have always loved you. I still and always, and forever will. You asked me to come back, queen of May; I asked you please will you come back and love me as you have in the past. You can depend on me being anything you wish me to be to you, for this matter rests entirely with you; you can do as you wish, but oh! hope it will be to me as you once was,—sure I do." From the tone of this letter, we gather that the defendant not

only was speaking words of love to the prosecutrix, but that she could depend upon him; that he would be true to her through life, and evidently the language in regard to arranging the business "for this summer" had reference to a consummation of marriage. We think the proof shows corroboration of a strong character. We think the prosecutrix is further corroborated in the fact that appellant, after his arrest, forfeited his bond and fled the country.

Appellant, in his motion for new trial, also complains that the court erred in not giving defendant's special charges Nos. 1 and 2. These charges were to the effect that if the jury found that the prosecutrix was not a chaste woman at the time she submitted to the embraces of the defendant, or that she had had intercourse with other men, they would acquit. Both these issues were submitted by the court in its main charge to the jury; for the court had directed the jury that they must find that she was a chaste and pure woman at the time she submitted to the embraces of the defendant, and, unless they found that she was, they would acquit the defendant. We think that these issues were sufficiently submitted in the main charge.

Finding no error in the record, the judgment is affirmed.

A motion for rehearing having been made, the following additional opinion was handed down on June 8, 1910:

At a former day of this term this case was affirmed. Appellant has filed a motion for rehearing, in which he complains that this court was in error in holding that the charge as given by the trial court on accomplice's testimony, though incorrect, was harmless in view of the testimony offered on the trial of the case; and, second, that this court was in error in holding that the court below properly refused appellant's special charge No. 3. This charge reads as follows: "Gentlemen of the jury, you are instructed that, although you may believe that the defendant was engaged to be married to the prosecuting witness, Flora Dykes, during the year 1905, but if you further find from the evidence that the defendant or anyone else had intercourse with the prosecuting witness, Flora Dykes, during the year 1904, you must acquit the defendant and say, by your verdict, not guilty." The court in its main charge instructed the jury as follows: "You are charged that, before you can convict the defendant, you must believe from the evidence, beyond a reasonable doubt, that the defendant seduced the prosecuting witness in Knox county, as alleged, and that at that

time she, the said Flora Dykes, was a chaste woman, who had never had sexual intercourse with anyone prior to the 9th day of July, 1905, and unless you believe beyond a reasonable doubt that said Flora Dykes had never had such sexual intercourse with anyone prior to the time she had such intercourse, if any, with defendant in Knox county, Texas, you must find the defendant not guilty." When the case was originally submitted, our attention was not directed to the question of limitation. The bill of indictment was returned into the district court of Knox county on March 25, 1908. The offense of seduction is barred within three years. Hence, if the prosecutrix in this case was seduced in 1904, the offense would have been barred. The prosecutrix testified that the first act of intercourse between her and defendant was in July, 1905, and while they lived upon what was known as the McGee farm west of Knox City. She testified, further, that it might be possible that she was mistaken as to whether the offense occurred in 1904 or 1905. The prosecutrix's mother, Mrs. Dykes, testified that they moved to Knox county in 1901, and the first year they lived on the Steeve Reed place, and then moved to the McGee place, and lived there two years, and then moved on the place where they are now living. Simon Goss testified that he saw the appellant and the prosecutrix in a compromising position in the spring of 1904; that he passed them in a buggy at night, and that he went on to church, and that the defendant and prosecutrix came on in the church, and he stated to Lon Hopkins and Shaffer Smith when they came in what he had seen when he passed them; that the witness Goss left Knox county and moved to Jones county in the early part of 1905, and had not been back to Knox county. Lon Hopkins and Shaffer Smith took the stand, and testified about the witness Goss telling them of this occurrence and the circumstances occurring that night, and they fixed the date of it in 1904. It is sufficient to say that the testimony raises the issue as to when this offense was committed. Therefore it was the duty of the court to have submitted it and the special charge of the defendant in this case, to the effect that, if the jury believed the intercourse was had in 1904, they should acquit. In our original opinion we held that, in view of the testimony in the case, the charge of the court on accomplice's testimony was not prejudicial to the defendant, though incorrect. As the case will have to be reversed, we would suggest to the trial court to follow the charge laid down by this court in the case of Campbell v. State, 57 Tex. Crim. Rep. 301, 123 S. W. 583.

bell v. State, 57 Tex. Crim. Rep. 301, 123 S. W. 583.

The motion for rehearing will therefore be granted, the judgment of affirmance set aside, and the case reversed and remanded.

WASHINGTON SUPREME COURT.

R. H. WELLS, Appt.,

v.

FERRY-BAKER LUMBER COMPANY,
Respt.

(57 Wash. 658, 107 Pac. 869.)

Master — employing surgeon — liability for negligence.

1. An employer who retains from the wages of his employees a certain amount with which to pay for the services of a surgeon if they are injured discharges his full legal obligation when he selects a competent surgeon to attend a particular injury, and cannot be held responsible for the surgeon's negligence.

Surgeon — negligence — failure to photograph fracture.

2. A surgeon is not negligent in failing to take an X-ray photograph of an injured arm to ascertain whether or not there is a fracture where he diagnoses and treats the injury as a sprain, which proves to be erroneous, and results in permanent impairment of the usefulness of the arm.

(March 25, 1910.)

APPPEAL by plaintiff from a judgment of the Superior Court for Snohomish County dismissing an action brought to recover damages for personal injuries which were alleged to have been caused by the negligence of defendant's servant. Affirmed.

The facts are stated in the opinion.

Messrs. Shepard & Flett for appellant.

Messrs. Brownell & Cloeman and Cooley & Horan for respondent.

Gose, J., delivered the opinion of the court:

On October 21, 1907, the appellant, the plaintiff below, while engaged in the discharge of his duties as a day watchman at the defendant's mill, fell from the conveyer onto a platform, a distance of about 10 feet, and sustained serious injuries. The complaint, after alleging formal matters, the employment, fall, and the injuries sustained, avers, in substance, that the defend-

Note. — As to the liability of a physician for failure to diagnose properly a sprain or dislocation, see the note to Bonnet v. Foote, 28 L.R.A. (N.S.) 136.

ant exacted and withheld from the wages of each of its employees, including the plaintiff, the sum of \$1 per month, which it paid to a physician and surgeon of its selection for such professional services as he should render them; that as a result of the fall the bones of each forearm were broken; that the doctor selected by the respondent negligently treated the left arm for a sprain, and, as a result of the negligent diagnosis and treatment, it is deformed and its usefulness greatly impaired. The complaint also alleges that the doctor was incompetent as a surgeon, and that this fact was known to the defendant. At the close of the plaintiff's testimony, a judgment of dismissal was entered. The plaintiff has appealed.

The first and principal question to be determined is whether, under the averments in the complaint and the testimony, there was any legal obligation resting upon the respondent other than to select a competent surgeon. While the incompetency of the surgeon selected by the respondent is alleged in the complaint, no testimony was offered to support it, and it will not receive further notice. The averment, when reduced to its simplest form, is that the sum of \$1 per month was withheld from the wages of the appellant and other employees, and paid to a physician or surgeon selected by the respondent, and that the negligence of the surgeon caused the injury complained of.

We think, under the decisions of this court, that the implied duty of the respondent was to select a competent physician and surgeon, and that when it did so it had discharged its full legal obligation. It is not claimed that there was any express contract between the company and the appellant, and the complaint expressly excludes the interference that any profit resulted to the respondent. It was, therefore, a noncompensated or gratuitous trustee, and is liable only for a failure to use reasonable care in the selection of a competent surgeon. In treating a similar case in *Richardson v. Carbon Hill Coal Co.* 10 Wash. 648, 39 Pac. 95, this court said: "This hospital was maintained and the physician provided for the sole purpose of relieving sick and injured employees without expense to them, and without any intention on the part of the company of making any profit out of the undertaking. It was therefore a charitable institution, and it was supported by the contributions of employees, and carried on in their interests. And if the company did employ the physician, as claimed by respondent, to look after and treat the sick and injured, it is not liable 29 L.R.A. (N.S.)

for his negligence, but is responsible only for want of ordinary care in selecting him."

The appellant, however, insisted that this rule was not adhered to in *Sawdey v. Spokane Falls & N. R. Co.* 30 Wash. 349, 94 Am. St. Rep. 880, 70 Pac. 972. In the *Sawdey* Case the court adverts to the fact that the surplus in excess of the cost of treating the employees was retained by the company, and said: "There is therefore in this case both the element of contract and profit." In commenting on the *Richardson* Case, the court said that it was not authority for the broad proposition that an employer who maintains a hospital for a profit, or contracts for a consideration to treat its injured employees, as not liable for the negligence of the physician he employs, notwithstanding he exercises reasonable care in the selection of a physician. Torn from its setting, the word "consideration," as used by the court, might give color to the view that the rule in the *Richardson* Case was modified; but the opinion as an entirety clearly shows that the word was used as synonymous with profit or anticipated profit. In the case at bar the language of the complaint expressly negatives even an anticipated profit. The appellant cites *Phillips v. St. Louis & S. F. R. Co.* 211 Mo. 419, 17 L.R.A. (N.S.) 1167, 124 Am. St. Rep. 786, 111 S. W. 109, 14 A. & E. Ann. Cas. 742. This case holds, upon somewhat similar facts, that the deduction of a portion of the wages of the employee and the employment of the physician makes the physician the agent of the company, and renders it liable for his acts of negligence. We think the rule announced by this court is the better and juster one, and it will be followed in this case. This conclusion requires an affirmation of the judgment. We will, however, consider the testimony which it is claimed makes a prima facie case of negligence on the part of the surgeon.

The learned trial court dismissed the case because, in his opinion, there was no negligence shown. We concur in this view. Briefly stated, the evidence discloses that the surgeon, at first, expressed the opinion that both arms were broken, but said he would examine them with the X-ray; that he did so, and then said that there was a fracture of the right wrist, but that the left was sprained, that he so treated them; that the right wrist was restored to its normal condition; that, upon complaint of the appellant from time to time that the left wrist was painful, and not improving, he re-examined it with the X-ray at least three times; that each examination confirmed his later opinion that it was sprained, and not

broken; that he said to the appellant whenever he complained of the pain, that a sprain was "worse" than a break. The X-ray examinations were what the physicians term "fluoroscopic," which is made as the physician expressed it: "You use an X-ray; but instead of taking a picture you have an apparatus that you hold in the hand and look through the arm." The only negligence claimed is that the attending surgeon failed to take an X-ray photograph, so as to make certain his diagnosis.

A physician and surgeon by taking charge of a case impliedly represents that he possesses, and the law imposes upon him the duty of possessing, reasonable skill and learning. He is not liable for mistakes if he uses the method recognized and approved by those reasonably skilled in the profession. *Sawdey v. Spokane Falls & N. R. Co.* supra. "He does not undertake to effect a cure or restore a broken limb to its normal condition. If he treats the injury with a reasonable degree of skill and care, he is not responsible for the results." *Peterson v. Wells*, 41 Wash. 603, 84 Pac. 608. See also *Pike v. Honsinger*, 155 N. Y. 201, 63 Am. St. Rep. 655, 49 N. E. 760; *Jackson v. Burnham*, 20 Colo. 532, 39 Pac. 577; *Patten v. Wiggin*, 51 Me. 594, 81 Am. Dec. 593.

The conclusion is irresistible that the surgeon used reasonable diligence and skill, and that to permit a recovery would establish the rule that a surgeon is liable for a failure to use extraordinary care and diligence in both diagnosis and treatment. The surgeon who testified that an X-ray photograph should have been taken stated that he had practised his profession for a period of twenty years, and that he had never had an X-ray machine. He examined the appellant for the first time about seventeen months after the injury, and took X-ray photographs of the left wrist, which he said showed a fracture which, in his opinion, a like investigation in the beginning would have revealed. Another surgeon said that the X-ray was used only as a matter of extreme care. Viewing the testimony in the light most favorable to the appellant, it clearly shows that the attending surgeon used reasonable care, skill, and diligence in diagnosis and treatment. A verdict for the appellant could not be permitted to stand, and a judgment resting upon it would be set aside.

The judgment will be affirmed.

Rudkin, Ch. J., and Chadwick and Fullerton, JJ., concur.
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CALIFORNIA SUPREME COURT.

RE ESTATE OF JOHN F. KENNEDY, Deceased.

(— Cal. —, 108 Pac. 280.)

Succession tax — homestead — statutory allowances.

The statutory homestead and allowances set apart by the court to the family of a decedent pending administration of his estate are not within the provisions of a statute providing for a succession tax on property which shall pass by will or by the intestate laws of the state, and it is immaterial that had the property not been so set apart it would have passed to the widow under the will.

(April 1, 1910.)

Note. — Succession tax on dower, curtesy, statutory homestead, or allowances.

Dower, being property which exists inchoately during the husband's lifetime and consummates on his death, regardless of the laws governing the disposition of property by will, and in case of intestacy, is a right not subject to a succession tax. *Re Riemann*, 42 Misc. 648, 87 N. Y. Supp. 731; *Re Weiler*, 122 N. Y. Supp. 608; *Commonwealth's Appeal*, 34 Pa. 204; *Small's Estate*, 11 Pa. Co. Ct. 1.

So, it was held in *Re Page*, 39 Misc. 220, 79 N. Y. Supp. 382, that under a statute providing that if a man dies, leaving a widow and no minor children, certain articles enumerated therein "shall not be deemed assets," but shall belong to her, such articles form no part of the decedent's estate, and are not subject to the transfer tax.

Upon the same principle, an estate by curtesy is not subject to succession taxes. *Re Starbuck*, 137 App. Div. 866, 122 N. Y. Supp. 584, affirming 63 Misc. 156, 116 N. Y. Supp. 1030. The court declared that the words "intestate laws" in the statute imposing a tax upon property transferred by the intestate laws of the state referred to the statutes governing the descent and distribution of a decedent's property, and did not include an estate by the curtesy, saying that the essential inquiry was, From what source did the estate by the curtesy come? To quote from the opinion: "Certainly not from the transfer to the heirs of the fee subject to his life estate. He did not inherit as the heir of his wife an estate by the curtesy of any other estate. He was not her heir. No recognized law of intestacy can be invoked that in the slightest degree indicates such a transfer or such relation. . . . Its [tenancy by the curtesy] origin and continuance are due to the law, but not the law that appoints the inheritable property of an intestate to prescribed heirs. It is unimportant, in the present inquiry, upon what theory, adopted at remote time and now obscure in motive,

SEPARATE APPEALS from an order of the Superior Court for the city and County of San Francisco fixing the amount of a tax upon the succession to the estate of John F. Kennedy, deceased; the county treasurer appealing from so much of the order as excluded a family allowance in fixing the amount upon which the tax was assessed, and Alice Kennedy, the widow, appealing from so much as included the homestead. Modified.

The facts are stated in the opinion.

Messrs. Campbell, Metson, Drew, Oatman, & Mackenzie for appellant Kennedy.

Mr. Hartley F. Peart for appellant treasurer.

Angellotti, J., delivered the opinion of the court:

These are separate appeals by the treasurer of the city and county of San Francisco and Alice Kennedy, surviving wife of deceased, from an order fixing the amount of inheritance tax to be paid by Mrs. Kennedy under the provisions of the act of March 20, 1905 (Stat. 1905, p. 341), and directing payment thereof.

Deceased died testate, giving by his will all his property to his wife. The value of all his property was \$82,752.50. The debts of deceased and the expenses and charges of administration, exclusive of family allowance, aggregated in amount \$9,975.93. Under an order for family allowance duly made in accord with the provisions of § 1466, Code Civ. Proc., there was paid to the widow during administration the sum of \$4,600. Under the provisions of § 1465, Code Civ. Proc., there was also regularly selected, designated, and set apart to her absolutely by the court in probate as a homestead certain real property of the deceased

of the value of \$14,000. In fixing the amount upon which the tax should be calculated, the superior court deducted from the whole value of the estate the debts, expenses, and charges of administration (\$9,975.93), and the family allowance paid (\$4,600), but refused to deduct the value of the property set apart as a probate homestead, thus leaving \$68,176.57 as the amount upon which the tax was to be calculated. The property going to the widow in this case, and the act in terms exempting from the tax, in favor of the widow, "property of the clear value of ten thousand (10,000) dollars transferred to the widow" of a decedent, the court deducted the further sum of \$10,000, fixing the amount of \$58,176.57 as the amount upon which the tax against the widow must be calculated, resulting in a tax of \$888.53. The treasurer's claim is that the \$4,600 family allowance should have been included in fixing the amount upon which the tax was to be paid, and the widow claims that the value of the property set apart as a homestead should have been excluded.

We are of the opinion that there is no question of "exemption" presented by these appeals, but that the real question is whether the act purports to impose any tax as to property of a decedent disposed of in the course of administration, as was this property. The only exemptions provided for by the act are those specified in § 4 thereof, being of property "transferred" for charitable, etc., purposes, "property of the clear value" of certain designated amounts to various classes of relatives of the deceased, and "property of the clear value of \$500 to more distant relatives and strangers in blood. There is absolutely nothing in the act purporting to "exempt" even the amount

the law proceeded in making this transfer to the husband. It is only necessary to establish that it was not, and is not, an intestate law."

And the foregoing language from *Re Starbuck*, supra, was quoted with approval and its principles followed by a surrogate's decision in *Re Green*, 124 N. Y. Supp. 863, in which it was held that a succession tax could not be imposed upon the personal property which a husband took by statute on the death of his wife without a will and leaving no descendants. And the court said: "The husband takes his right in personal property by virtue of his marriage. He enters upon its enjoyment by virtue of the death of his wife. His right, as well as the absolute ownership into which it matures, springs from the common law, and neither can be said to come to him by the intestate laws."

Nor should allowances made by a probate court for the support of the children and legatees of a testator, who were to receive only 29 L.R.A. (N.S.)

the income from their respective shares of the estate until they reached stated ages, be computed in ascertaining the amount subject to a succession tax. *Union Trust Co. v. Lynch*, 148 Fed. 49, affirmed in 90 C. C. A. 147, 164 Fed. 161.

On the other hand, it was held in *Billings v. People*, 189 Ill. 472, 59 L.R.A. 807, 59 N. E. 798, that the words "intestate laws" in a statute imposing a transfer tax upon property passing by the intestate laws of the state referred to the laws governing the devolution of estates of persons dying intestate, including applicable rules of the common law in force, so that the tax would be applicable to a widow's dower interest and her award under the administration laws.

This note does not purport to cover the question whether the rights under consideration fall within express exemption provisions.

As to liability of community property to succession tax, see note to *Re Moffitt*, 20 L.R.A. (N.S.) 208. J. A. C.

of charges of administration or debts of the deceased from any tax imposed by the act; § 12 relied on as implying such an intent as to debts, to our minds, implying an entirely different intent.

The all-important section of the act in this controversy is the section imposing the tax,—the section declaring the property that shall be subject to the tax. That is § 1. So far as material here, it provides: "All property which shall pass, by will or by the intestate laws of this state, from any person who may die seised or possessed of the same while a resident of this state, . . . to any person or persons, or to any body politic or corporate, in trust or otherwise, . . . shall be and is subject to a tax hereinafter provided for . . . ; and such tax shall be and remain a lien upon the property passed or transferred until paid, and the person to whom the property passes or is transferred . . . shall be liable for any and all such taxes until the same shall have been paid as hereinafter directed." Section 2 prescribes the rates to be paid by different classes of persons "entitled to any beneficial interest in such property" when the property or interest "so passed or transferred" exceeds in value the exception specified in § 4, and does not exceed in value \$25,000, while § 3 prescribes the rates for amounts in excess of \$25,000. Section 4 provides for exemptions, as already stated. Section 7 makes all taxes "due and payable" at the death of decedent, and provides that they may be paid "within eighteen months" thereafter without any charge for interest. Section 9 provides that any administrator, etc., having in charge any legacy or property for distribution, "shall deduct the tax therefrom," or, if it be not money, shall collect the tax from the legatee or person entitled to the property, and that he shall not deliver any specific legacy or property until he shall have collected the tax thereon. Section 12 provides: "Whenever any debts shall be proven against the estate of a decedent after the payment of legacies, or distribution of property, from which the said tax has been deducted or upon which it has been paid, and a refund is made by the legatee, devisee, heir, or next of kin, a proportion of the tax so deducted or paid shall be repaid to him by the executor, administrator, or trustee, if the said tax has not been paid to the county treasurer or to the state comptroller, or by them, if it has been so paid." Section 28 provides that the words "estate" and "property," as used in the act, "shall be taken to mean the real and personal property or interest therein of the testator, intestate . . . passing or transferred to individual legatees, dev-

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isees, heirs, next of kin, grantees, donees, vendees, or successors." The act is entitled, "An Act to Establish a Tax on Gifts, Legacies, Inheritances, Bequests, Devisees, Successions, and Transfers, to Provide for Its Collection, and to Direct the Disposition of Its Proceeds," etc.

Section 1465, Code Civ. Proc., provides that, at any time during the administration of the estate subsequent to the return of the inventory, the court, if no homestead has already been selected, must select, designate, and set apart and cause to be recorded a homestead for the use of the surviving husband or wife and the minor children; and the effect of an order under this section, setting apart absolutely certain real property as a homestead, is to vest such property in the surviving husband or wife, if there be no minor child, and to relieve it from administration as a part of the estate. Code Civ. Proc. § 1468; *Re Moore*, 96 Cal. 531, 31 Pac. 584. Section 1466, Code Civ. Proc., provides that if the property set apart is insufficient for the support of the widow and children, or either, the court or judge in probate must make such reasonable allowance out of the estate as shall be necessary for the maintenance of the family according to their circumstances during the progress of the settlement of the estate, and by § 1467, Code Civ. Proc., it is provided that any such allowance must be paid in preference to all other charges, except funeral charges and expenses of administration. By its terms the taxing act is limited to such property as "shall pass by will or by the intestate laws of this state," from the deceased to some other person. It must be borne in mind that we are speaking, regardless of other provisions applicable to grants, etc., made by a deceased in contemplation of death, or intended to take effect in possession or enjoyment, after death; for these provisions can have no application here.

In one sense of the word all of the property of deceased of which he died seised did "pass by will" to his sole devisee at the moment of his death,—that is, she, by reason of the will, at once became vested with the title to the full property (*Brenham v. Story*, 39 Cal. 188),—but she took under the will "subject to certain burdens, as the payment of the debts of the deceased, and the right of the court to appropriate some portion of the estate for the support of the family of the decedent" (*Id.* p. 185). It is thoroughly settled that, as was said in *Sulzberger v. Sulzberger*, 50 Cal. 385, "the power of testamentary disposition of property, as conferred and defined by the statute, is not paramount, but is subordinate to the authority conferred upon the probat

court to appropriate the property for the support of the family of the testator, and for a homestead for the widow and minor child or children, as well as for the payment of the debts." And to the extent that his power is exercised by the probate court in any estate, the devisees and legatees take no beneficial interest at all. Although real property be specifically devised by a will, the probate court may set apart such property as a homestead to the family, and thus defeat the devise. *Ibid.*; *Re Davis*, 9 Cal. 458, 10 Pac. 671; *Re Huelsman*, 17 Cal. 275, 59 Pac. 776; *Re Firth*, 145 Cal. 230, 78 Pac. 643. Where it is so set apart absolutely as a homestead, the title goes to the person to whom it is so set apart in no way derived by will, even though he was the devisee, but comes solely from the homestead order. Of a similar situation it was said in *Re Huelsman*, *supra*, notwithstanding, then, the specific devise of one half of the farm to the widow, her share to all of it is deraigned from the homestead order." Money paid from the proceeds of the estate by order of the court for the maintenance of the widow and children, if any, is on the same basis. It is paid regardless of and even in opposition to the terms of the will, and those receiving it take it, not "by will," but solely by reason of the order of the court diverting from the purposes to which it was appropriated by the will. It is clear, therefore, that the widow did not receive any beneficial interest in the real property set apart as a homestead or in the \$4,600 paid as family allowance by reason of the will. That she would have received it as devisee and legatee had there been no order for homestead or family allowance is absolutely immaterial. The rule applicable is necessarily the same here as it would be if the legatee or devisee were another person. What the widow takes under such orders of the probate court she does not take by will. It is equally clear that she does not take property so set apart from the probate court "by the intestate laws of this state." The language "pass by will" by the intestate laws of this state," means to pass by virtue and force of the laws of this state governing testate or intestate succession. *Re Joyslin*, 76 Vt. 88, 56 Vt. 231. "The term 'intestate laws' is intended to cover the statute of descents, which relates to the descent of real estate, and the statute of distributions, which provides for the distribution of the personal property of decedent after the payment of debts, . . . and after the setting apart to the widow and minor children of the exemptions specified. . . . These ex-

empt articles are in no way governed by the statute of distributions." *Re Page*, 39 Misc. 223, 79 N. Y. Supp. 384. "A homestead right, or a right to have a homestead, is not a right which vests under the law by succession. It is a right bestowed by the beneficence of the law of this state for the benefit of the family. Upon the death of an intestate, his property goes by succession to his heirs, subject to administration. . . . Setting apart a homestead is a part of the probate proceeding, as much as is a family allowance." *Re Moore*, 57 Cal. 442.

If, then, the widow is liable at all for a tax as to the property set apart as a homestead and the money paid as family allowance, it must be upon the theory that within the meaning of the inheritance-tax statute such property passed to her as sole devisee and legatee at the moment of the testator's death, and must be regarded as having so passed, although subsequently diverted and removed from administration by the probate court in due course of administration, and thus not constituting any part of the distributable assets of the estate. This theory, however, not only appears to us to be inconsistent with the provisions of the tax act, but is absolutely opposed to the decisions rendered by the courts of other states in cases involving similar questions. It is recognized by this court and by the courts generally that a tax of this character is not a tax on property as such, but one upon the right of succession, a tax upon one for the privilege of succeeding to property. See *Re Wilmerding*, 117 Cal. 284, 49 Pac. 181, and cases cited. It was said in the case just cited: "The same authority which confers this privilege may attach to it the condition that a portion of the estate so received shall be contributed to the state." The act construed by the supreme court of Connecticut in *Gallup's Appeal*, 76 Conn. 617, 57 Atl. 609, was materially the same as our tax act; the description of property being "any property . . . which shall pass by will or by the inheritance laws of this state," etc. The court said that the design of this act was a tax based on the distribution of the net proceeds of the decedent's property, after payment of his debts and costs and charges of administration, and after deduction of amounts and articles exempted, to the persons upon whom it devolves. The New York court of appeals said of a similar statute in *Re Gihon*, 169 N. Y. 443, 62 N. E. 561: The collateral inheritance tax does not attach to the very articles of property of which the deceased died possessed. It is imposed only on what remains for distribution after expenses of

administration, debts, and rightful claims of third parties are paid or provided for. It is on the net successions to the beneficiaries. In that case a deduction of certain fees and disbursements in a will contest was upheld. The court said that this was an expense of administration, and therefore chargeable to the estate, and not to the legatees or devisees. In *Pepper's Estate*, 159 Pa. 508, 28 Atl. 353, the supreme court of Pennsylvania, construing a similar act, in holding that there should be deducted from the amount upon which the tax was calculated a sum paid in compromise of a claim, said that the legatees were not liable thereon, for the reason that the amount paid was never received by them, and that "under the act it is only so much of the estate which actually passes to them by virtue of the will that is liable to the tax." Of a similar act the supreme court of Iowa said in *Re Stone*, 132 Iowa, 140, 109 N. W. 457, 10 A. & E. Ann. Cas. 1033: "The collateral inheritance tax is on the right to succession to property, and not on the property itself, and it is collectable out of each specific share or interest, not out of the general property of the estate." And in *Morrow v. Durant*, 140 Iowa, 437, 23 L.R.A. (N.S.) 474, 118 N. W. 781, 784, the same court held that money properly devoted by the executor to the erection of a monument to the deceased, and thus taken from legatees, was not to be included, because the tax is only on the property that passes to the legatees, and that in such cases the money so used does not pass to the beneficiary. In *Re Wolfe*, 89 App. Div. 349, 353, 85 N. Y. Supp. 949, 953, it is said: "If no transfer is effected, because it turns out that there is no property to transfer, no tax can be collected." In *Re Thomas*, 39 Misc. 223, 79 N. Y. Supp. 571, in fixing the amount of inheritance tax, the court said: "Where the legal representative makes a proper payment in the course of administration, the transfer from the estate is subordinate and subject thereto,"—citing *Re Gihon*, supra. In *Re Page*, 39 Misc. 223, 79 N. Y. Supp. 382, it was held that, in view of a statute providing in effect that certain enumerated articles should go to the widow and minor child or children, and not be considered as assets for the purposes of administration, such articles did not "pass" by will or by the intestate laws of the state, but that the beneficiaries took absolutely by the express terms of the statute, and whether the decedent died testate or intestate, and that such property was not subject to the tax. In *Re Maresi*, 74 App. Div. 76, 77 N. Y. Supp. 76, it was held, following *Re Gihon*, supra, that the costs and expenses of an action instituted

by the executor of the will to obtain a judicial construction of the will and instructions as to distribution must be deducted as a necessary expense of administration in estimating the amount of tax. No case cited or discovered by us hints at any different doctrine than that declared by these decisions, except, perhaps, the case of *Millward's Estate*, 6 Misc. 425, 27 N. Y. Supp. 287, where there is some language of the surrogate that may be construed as supporting a contrary view. But, if so construed, it is but the expression of a single judge plainly in conflict with the views later expressed by both the supreme court of New York and the court of appeals of that state. All these cases are based not on the theory that there is any express or implied exemption provided by the tax act under consideration, but upon the theory that the act does not purport to impose the tax as to such property, being confined by its terms to such property as actually passed to the beneficiary, that is, to his distributable interest. No substantial distinction can be found in any matter material to the question involved here, between any of the acts so considered and our own act. The decision of this court in *Re Moffitt*, 153 Cal. 359, 20 L.R.A. (N.S.) 207, 95 Pac. 653, 1025, that the surviving wife's share of the community property is subject to this inheritance tax was based solely on the proposition, established in this state by several prior decisions, that the wife takes such property solely by succession as an heir of the husband, and therefore "by the intestate laws of this state."

The provisions of our tax act clearly show that the tax imposed thereby is one solely upon the devisee, legatee, or heir, and one upon him only as to such property as he actually takes on distribution as devisee, legatee, or heir. It would appear to be a most absurd and inequitable provision that imposed a tax on one for the privilege of succeeding as heir, devisee, or legatee to certain property of the decedent, where the very property to which he is so held to succeed is lawfully diverted by the probate court to other purposes, and never can be distributed to him. Suppose in this very case the real property set apart as a homestead had been devised by the will to another person than the wife. Suppose, also, that the money paid as family allowance exhausted the property available to pay a legacy given to still another person. Under the treasurer's theory that the property had passed to the devisee and the legatee, within the meaning of the act, at the moment of the death of deceased, the devisee and legatee would be liable for the whole tax thereon although both devise and legacy had been wholly

defeated, so far as any practical effect is concerned, by the orders of the probate court. As we have seen, the fact that the wife was here the devisee and legatee is of no consequence in determining the proper construction of this act. Happily no such conclusion appears to be warranted by the act. Section 12, relied on as implying an "exemption" as to debts due from a deceased, is rather a clear recognition that no tax was intended to be imposed as to property that was lawfully diverted by the probate court from the purposes declared by the will or by the laws of succession; the object thereof being simply to provide a method for the repayment to the legatee, devisee, heir, or next of kin of a proper proportion of the money theretofore paid by him as a tax where the property already devolved is diminished by the subsequent proving of debts against the decedent.

In view of what we have said, it is apparent that such cases as *Trippet v. State*, 19 Cal. 526, 8 L.R.A. (N.S.) 1210, 86 Pac. 184, *Re Martin*, 153 Cal. 225, 94 Pac. 1053, and *Re Stanford*, 126 Cal. 112, 45 L.R.A. 18, 54 Pac. 259, 58 Pac. 462, are in no way pertinent to the question here involved. The doctrine of those cases is simply that the right of the state to the tax imposed by the act vests upon the death of the testator or intestate, and cannot be surrendered or limited by any subsequent act of the legislature. For instance, in *Re Stanford*, supra, in the act in force at the death of the testator, there was no exemption as to legacies or devises to nephews, nieces, or educational institutions. By an act enacted subsequent to his death, the original act was amended by providing for such exemptions, and it was specially provided that the amendment should apply to the estates of persons who had died prior to the amending act. It was very properly held that this could not be done, and that the right of the state was determined by the act in force at the time of the death of the testator. This doctrine was affirmed in *Trippet v. State*, supra, where it was held that the act in force at the death of the testator gave to the state a right which vested immediately upon such death, and which could not be surrendered by subsequent legislative act or by a repeal of the law under which the right became vested, as such a surrender would be a gift or donation from the state, in violation of § 31 of article 4 of the Constitution. *Re Martin* is practically to the same effect. While undoubtedly correct, these decisions do not touch the point here under discussion. Whatever tax is imposed by the act in force at the death of the deceased, the right thereto vested in the state at the moment of his death, and L.R.A. (N.S.)

could not be legally devested by any department of the state, executive, legislative, or judicial. But it was only as to the tax imposed by such act that the right so vested, and, when it is determined that the act imposed no tax as to property lawfully diverted by the court in probate with the consequence that it could never be distributed to the devisee, legatee, or heir, it is apparent that no vested right of the state is impaired.

To summarize: Under the tax act of March 20, 1905, property of a decedent set apart absolutely as a homestead by the court in probate under the provisions of § 1465, Code Civ. Proc., and moneys paid under order of the probate court under § 1466, Code Civ. Proc., do not pass by will or by the intestate laws of the state, and the persons taking under such orders are not liable for any tax under such act; and the devisees, legatees, and heirs to whom said property would have been distributed under the will or the succession laws of this state if such property had not been so diverted by the court in probate are not liable for any tax on account thereof, for such property never passed to them within the meaning of the act.

It follows that the learned judge of the trial court was correct in his conclusion as to the family allowance, but erred as to the real property set apart as a homestead. The tax fixed by the order was excessive therefore by \$280.

It is ordered that the order of the Superior Court be, and the same is hereby, modified by reducing the amount of tax fixed thereby from \$888.53 to \$608.53, and as so modified the order is affirmed.

We concur: Shaw, Sloss, Lorigan, Melvin, and Henshaw, JJ.

IDAHO SUPREME COURT.

VICTOR R. RASICOT, Resp't.,

v.

ROYAL NEIGHBORS OF AMERICA, Appt.

(— Idaho, —, 108 Pac. 1048.)

Benefit Insurance — warranties.

1. Where an applicant for fraternal benefit insurance specifically warrants the literal truth of the answers given to the questions submitted, the statements made in the application are treated in law as warranties, and not as mere representations.

Headnotes by AILSHIE, J.

Note. — See note to *Reppond v. National L. Ins. Co.* 11 L.R.A. (N.S.) 981, as to when statements may be regarded as representa-

Same — answers founded on opinion.

2. The warranty as to the truth of an answer which by its nature expresses only the opinion or judgment of the applicant should not extend further than to insure the honesty and good faith of the party answering the question, and that it was in truth and in fact his honest opinion or judgment.

Same — pregnancy — false answer — waiver.

3. Where a fraternal benefit society received an application from a woman for insurance which warranted the literal truth of the answers given by her, and she represented, and at the time honestly believed, that she was not pregnant, when in fact and in truth she was, and the contract provided that the society would not become liable in such a case, and that it would not consider such an application until at least two months after confinement; and the society collected and received dues, assessments, and premiums from the insured for a period of nearly five years thereafter, during which time the applicant was in good health,—the insurance society will be held to have waived the right to insist on a breach of the contract for the falsity of the answer.

Same — agency of subordinate camp.

4. Where a local camp of a fraternal benefit society receives and collects the dues and assessments and insurance premiums from its members, and transmits them to the officers of the superior or head organization, which issues the benefit certificates, and has supervision and right of expulsion of members, the local camp should be regarded and treated as the agent of the superior or head department of the society.

Same — repudiation of policy — public policy.

5. It is contrary to sound public policy, and detrimental to the best interests of society at large, to allow a fraternal benefit society to issue to an applicant a benefit certificate, and thereafter continuously collect and receive from the applicant his dues and assessments for a number of years, and induce him to continue his payments and keep up his membership and dues, under the belief that his savings are being devoted to the purchase of protection for his family and dependent ones, and then, after his death, to allow the society to repudiate the contract, on the ground that the policy never went into effect, because of some temporary cause or disability which existed at the time of the delivery of the policy and of which the applicant had no knowledge and which was wholly obviated, and did not in

any manner contribute to the cause of death, increase the risk, or lessen the life expectancy of the applicant, and which cause or condition would not have avoided the policy or been a breach of the contract had it occurred after the contract went into force and operation.

Same — "sound health" — pregnancy.

6. An agreement or stipulation in a contract of insurance made with a married woman, that the policy shall not go into effect unless it is delivered to her "while in sound health," is not violated by reason of the applicant being pregnant at the time of the delivery of the policy.

Same — "personal ailment" — confinement in childbirth.

7. A statement made by a married woman who applies for insurance in a fraternal benefit society, that she has not consulted with a physician "in regard to a personal ailment" within the last seven years, does not cover a single attendance by a physician upon the applicant some three years prior thereto, when she was confined and gave birth to a child. Confinement in childbirth is not a "personal ailment" within the meaning of such a provision in the contract.

Evidence — action on insurance certificate — proofs of death — exclusion — error.

8. In an action for recovery on a life insurance certificate, it is error for the trial court to exclude the proofs of death which have been furnished by the beneficiary, where the same are offered in evidence on the trial by the insurance society.

Trial — opening statement — reference to abandoned defenses.

9. Where an amended answer has been filed in a case, which omits and abandons certain affirmative defenses pleaded in the original answer, the trial court should not permit the counsel for the plaintiff in his opening statement to read and comment upon the defenses contained in the original answer, and which have been omitted and abandoned in the answer on which the case is to be tried.

(April 16, 1910.)

APPEAL by defendant from a judgment of the District Court for Bonner County in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain benefit certificate. Affirmed.

Statement by Allshie, J.:

The plaintiff commenced this action in

tions, although expressly denominated in the policy as warranties.

As to effect of stipulation in application or policy that latter shall not become binding unless delivered to assured while in good health, see note to *Roe v. National L. Ins. Asso.* 17 L.R.A. (N.S.) 1144.

As to what constitutes a consultation with or attendance by a physician within 29 L.R.A. (N.S.)

the meaning of an application, see note to *Metropolitan L. Ins. Co. v. Brubaker*, 18 L.R.A. (N.S.) 362.

As to waiver by subordinate lodge of right of benefit association to insist upon forfeiture of benefit because of violation of laws of association, see note to *Modern Woodmen v. Breckenridge*, 10 L.R.A. (N.S.) 136.

the district court to recover upon a benefit certificate for \$1,000 issued by the defendant, the Royal Neighbors of America, to plaintiff's wife, Emeline Rasicot. About May 14, 1902, Emeline Rasicot was elected as a beneficiary member of Dewey Camp No. 1037 of the Royal Neighbors of America, located at Little Falls, Minnesota. Under date of April 25th she answered the prescribed list of questions, and made application for a benefit certificate in the society. This application appears to have been witnessed and filed by the camp recorder on June 4th, and on the same date she was given the medical examination, and answered the list of questions submitted by the camp physician. On June 28th the society issued its benefit certificate for the sum of \$1,000, payable to Victor R. Rasicot, husband of the insured. The insured afterwards removed to Idaho, and transferred her membership to Lakeside Camp No. 2373, located at Sand Point, Idaho, and thereafter kept up the regular payment of all dues and assessments until the date of her death, February 7, 1907. The beneficiary, Victor R. Rasicot, made the necessary proofs of death and demanded payment on the certificate. The society refused payment, and this action was accordingly instituted. The defendant filed an answer, denying generally the allegations of the complaint and setting up four separate affirmative defenses. The first defense pleaded the by-laws of the society, and the application made by Emeline Rasicot for insurance, and alleged that certain of her answers were false and untrue, and that, by the provisions of the application and benefit certificate, she had warranted the literal truth of every answer given, and that the policy was therefore void, and never became effective, by reason and on account of the falsity and untruth of her answers. The second affirmative defense alleged that, under the stipulations and agreements of the application and certificate, it is essential to the validity of the policy or certificate that it should be delivered to the applicant while she was in sound health, and that in truth and in fact she was not in sound health at the time of the delivery of the certificate, and that therefore the policy never took effect. The third and fourth defenses are each to substantially the same effect, and allege that the insured died from a criminal and self-inflicted abortion and miscarriage, and that, under the terms of her certificate, no recovery could be had in such a case. The defendant subsequently filed an amended answer, containing more specific denials of the allegations of the complaint, and later it filed a

second amended answer, on which the case was finally tried.

The defendant omitted from this last answer the third and fourth defenses relating to the charge that the insured had died from a self-inflicted operation. This answer contained a further allegation as to the falsity of a further question propounded by the company and answered by the applicant.

The answer as it finally stood alleged that the applicant had given false and untrue answers to questions 17, 18, 25 (in two particulars), 28, 33j, 33v, and 33l; the questions and answers being as follows:

"(17) Are you now of sound body and mind, in good health, free from disease or injury, of good moral character, exemplary habits, and a believer in a Supreme Being? Yes.

"(18) Have you within the last seven years consulted any physician or physicians in regard to personal ailment? If so, give dates, ailment, and physician's or physicians' name and address. No."

"(25) Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms: Fistula? No.

"(26) Have you ever had any disease of the following named organs, or any of the following named diseases or symptoms: Rheumatism? No."

"(28) Have you ever had any disease of the urinary or genital organs? No."

"(33j) Is your menstruation regular and healthy? Yes."

"(33v) Have you now or ever had any disease of the breast, ovaries, or uterus? No."

"(33l) Are you now pregnant? No."

The application contains the following provision in several different forms and in different paragraphs and subdivisions thereof: "I have verified each of the foregoing answers and statements, from 1 to 33, both inclusive, adopt them as my own, whether written by me or not, and declare and warrant that they are full, complete, and literally true, and I agree that the exact literal truth of each shall be a condition precedent to any binding contract issued upon the face of the foregoing answers, and I hereby constitute and make the officers of the local camp and of the Royal Neighbors of America, who have aided in making this application, my agents for such purpose. I further agree that the foregoing answers and statements, together with the preceding declaration, shall form the basis of the contract between me and the Royal Neighbors of America, and are offered by me as a consideration for the contract applied for, and

hereby made a part of any benefit certificate that may be issued on this application, or a substitute therefor issued at my request, and shall be deemed and taken as a part of any such certificate; that this application may be referred to in any said benefit certificate as the basis thereof, and that they shall be construed together as one entire contract; and I further agree that if any answer or statement in this application is not literally true, or if I should fail to comply with and conform to any and all of the laws of said Royal Neighbors, whether now in force or hereafter adopted, that my benefit certificate shall be void."

When it came to the trial, the chief controversy revolved about the answer to question 331. On this question special findings were submitted to the jury, and the questions submitted and the answers thereto are as follows: "(1) State whether or not the deceased, Emeline Rasicot, was pregnant at the time she made application for a policy of insurance with the defendant, to wit, on June 4, 1902. Answer: We, the jury, answer, 'Yes.' State whether or not the said decedent, Emeline Rasicot, if you answer that she was pregnant on June 4, 1902, or June 28, 1902, knew of her condition as to pregnancy on either of said dates, and, if so, on what date. Answer: We, the jury, answer that she did not know her condition on the 4th day of June, 1902, and did not know such condition June 28, 1902." The jury at the same time returned a general verdict in favor of the plaintiff for the sum demanded by his complaint.

Messrs. Benjamin D. Smith and Edwin McBee, for appellant:

Breach of warranty with respect to pregnancy will forfeit an insurance policy.

Supreme Lodge, K. & L. H. v. Payne, 101 Tex. 440, 15 L.R.A.(N.S.) 1277, 108 S. W. 1160 (Tex. Civ. App.) 110 S. W. 523.

A warranty is a stipulation inserted in writing on the face of the policy, on the literal truth or fulfillment of which the validity of the entire contract depends.

Angell, Ins. § 140; Bacon, Ben. Soc. § 194; 3 Cooley, Briefs on Insurance, p. 1932; Joyce, Ins. § 1944; Bliss, Life Ins. § 45; May, Ins. § 156.

As a warranty is in the nature of a condition precedent to the validity of a policy, and must be literally true, if the fact warranted is not true, there is a breach of warranty.

3 Cooley, Briefs on Insurance, 1950; Fitch v. American Popular L. Ins. Co. 59 N. Y. 557, 17 Am. Rep. 372; Co-operative Life Asso. v. Leflore, 53 Miss. 1; Miles v. Connecticut Mut. L. Ins. Co. 3 Gray, 580; 29 L.R.A.(N.S.)

Schwarzbach v. Ohio Valley Protective Union, 25 W. Va. 622, 52 Am. Rep. 227; Glutting v. Metropolitan L. Ins. Co. 59 N. J. L. 287, 13 Atl. 4; Connecticut Mut. L. Ins. Co. v. Pyle, 44 Ohio St. 19, 53 Am. Rep. 781, 4 N. E. 465; Cummings v. Kanebec Mut. L. Ins. Co. 89 Ma. 37, 35 Atl. 1032; Aloe v. Mutual Reserve Fund Life Asso. 147 Mo. 561, 49 S. W. 553; Metropolitan L. Ins. Co. v. Rutherford, 98 Va. 195, 35 S. E. 361, 2 Va. Dec. 707, 35 S. E. 719; Webb v. Bankers' L. Ins. Co. 19 Colo. App. 456, 76 Pac. 738; Bacon, Ben. Soc. § 197.

Where there is a breach of warranty the policy is avoided, though the statement on which the breach is predicated is in no way material to the risk.

3 Cooley, Briefs on Insurance, 1951; 3 Joyce, Ins. § 1962; Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A.(N.S.) 798, 99 Pac. 83; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; Price v. Phoenix Mut. L. Ins. Co. 17 Minn. 497, Gil. 473, 10 Am. Rep. 166; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595; Peterson v. Des Moines Life Asso. 115 Iowa, 668, 87 N. W. 397; National Union v. Arthorst, 74 Ill. App. 482; Modern Woodmen v. Von Wald, 6 Kan. App. 231, 49 Pac. 782; Connecticut Mut. L. Ins. Co. v. Young, 77 Ill. App. 440; McClain v. Providence Sav. & Life Assur. Soc. 105 Fed. 834; Cerys v. State Ins. Co. 71 Minn. 338, 73 N. W. 849; Clements v. Connecticut Indemnity Co. 29 App. Div. 131, 51 N. Y. Supp. 442; Kansas Mut. L. Ins. Co. v. Coalson, 22 Tex. Civ. App. 64, 54 S. W. 388; Schane v. Metropolitan L. Ins. Co. 76 App. Div. 271, 73 N. Y. Supp. 582; Aloe v. Mutual Reserve Fund Life Asso. and Metropolitan L. Ins. Co. v. Rutherford, supra; Bayley v. Employers' Liability Assur. Corp. (Cal.) 5 Pac. 638; Dwyer v. Mutual L. Ins. Co. 7 N. H. 572, 58 Atl. 502; Supreme Lodge O. C. K. v. McLaughlin, 108 Ill. App. 85.

A breach of warranty is fatal to the policy, though the insured had no knowledge of the falsity constituting the breach and did not intend to deceive the insurer.

3 Cooley, Briefs on Insurance, 1954; May, Ins. § 156; 3 Joyce, Ins. § 1964; 1 Bacon, Ben. Soc. § 197; Provident Sav. Life Assur. Soc. v. Llewellyn, 7 C. C. A. 579, 16 U. App. 405, 58 Fed. 940; Standard Life Acci. Ins. Co. v. Sale, 61 L.R.A. 337, 57 C. A. 418, 121 Fed. 664; Alabama Gold Ins. Co. v. Johnston, 80 Ala. 467, 60 Ala. Rep. 112, 2 So. 125; Mutual L. Ins. Co. v. Arhelger, 4 Ariz. 271, 36 Pac. 895; Morgan v. Bloomington Mut. Life Ben. Asso. 32 Ill. App. 79; National Union v. Arthorst, supra; Continental L. Ins. Co. v. Rogers, 119 Ill. 474, 59 Am. Rep. 810, 10 N.

242; *Mutual Ben. L. Ins. Co. v. Cannon*, 48 Ind. 264; *O'Connell v. Supreme Conclave*, K. D. 102 Ga. 143, 66 Am. St. Rep. 159, 28 S. E. 282; *Johnson v. Mains & N. B. Ins. Co.* 83 Me. 182, 22 Atl. 107; *Cummings v. Kennebeck Mut. L. Ins. Co.* 89 Me. 37, 35 Atl. 1032; *Vose v. Eagle Life & Health Ins. Co.* 6 Cush. 42; *Cushman v. United States L. Ins. Co.* 63 N. Y. 404; *Connecticut Mut. L. Ins. Co. v. Pyle*, supra; *Home Mut. Life Assn. v. Gillespie*, 110 Pa. 84, 1 Atl. 340; *Dinan v. Supreme Council*, C. M. B. A. 201 Pa. 363, 50 Atl. 999; *Powers v. Northeastern Mut. Life Assn.* 50 Vt. 630; *Baumgart v. Modern Woodmen*, 85 Wis. 546, 55 N. W. 713; *Boyle v. Northwestern Mut. Relief Assn.* 95 Wis. 312, 70 N. W. 351; *McGowan v. Supreme Court*, I. O. F. 104 Wis. 173, 80 N. W. 603, 107 Wis. 462, 83 N. W. 775; *National Fraternity v. Karnes*, 24 Tex. Civ. App. 607, 60 S. W. 576; *Leonard v. State Mut. Life Assur. Co.* 24 R. I. 7, 96 Am. St. Rep. 698, 51 Atl. 1049; *Peterson v. Des Moines Life Assn. and Modern Woodmen v. Von Wald*, supra; *Supreme Conclave K. D. v. Wood*, 120 Ga. 328, 47 S. E. 940.

The applicant herein made unequivocal answers to the questions in the application complained about, and these answers were an assumption of knowledge on her part as to the matters inquired of, and the society had the right to rely upon that assumption of knowledge. The plaintiff is therefore estopped from questioning applicant's having had that knowledge.

Hartford Life & Annuity Ins. Co. v. Gray, 91 Ill. 159; *Bloomington Mut. Life Ben. Assn. v. Cummins*, 53 Ill. App. 530.

The warranties made by the applicant in her application were continuing warranties, and must have been true at the time of the completion of the contract; that is, the delivery of the benefit certificate.

May, Ins. § 190; *Bacon, Ben. Soc.* 3d ed. § 274; *Piedmont & A. L. Ins. Co. v. Ewing*, 92 U. S. 377, 23 L. ed. 610; *Globe Mut. L. Ins. Co. v. Wolff*, 95 U. S. 326, 24 L. ed. 387; *Cable v. United States L. Ins. Co.* 49 C. C. A. 216, 111 Fed. 19; *Bingler v. Mutual Ben. L. Ins. Co.* 10 Kan. App. 6, 61 Pac. 673; *Whitley v. Piedmont & A. L. Ins. Co.* 71 N. C. 480; *Thompson v. Travelers' Ins. Co.* 11 N. D. 274, 91 N. W. 75.

The statement by an applicant that she had not consulted a physician regarding any personal ailment within seven years preceding her application, and which was warranted to be true, and which said answer was untrue, constituted a breach of warranty relieving the defendant from liability, without regard to the character of the ailment for which the physician was consulted. 29 L.R.A. (N.S.)

Beard v. Royal Neighbors and Hoover v. Royal Neighbors, supra; *Metropolitan L. Ins. Co. v. McTague*, 49 N. J. L. 587, 60 Am. Rep. 661, 9 Atl. 766; *Cobb v. Covenant Mut. Ben. Assn.* 153 Mass. 176, 40 L.R.A. 666, 25 Am. St. Rep. 619, 26 N. E. 230; *Arhelger v. Mutual L. Ins. Co.* 6 Ariz. 245, 56 Pac. 720; *Modern Woodmen v. Von Wald*, 6 Kan. App. 238, 49 Pac. 782; *Providence Life Assur. Soc. v. Reutlinger*, 58 Ark. 528, 25 S. W. 835; *McDermott v. Modern Woodmen*, supra; *Hubbard v. Mutual Reserve Fund Life Assn.* 40 C. C. A. 665, 100 Fed. 719; *Caruthers v. Kansas Mut. L. Ins. Co.* 108 Fed. 487.

If a matter is specifically inquired about in the application, the answer by the applicant is regarded as an agreement that the matter inquired about is material.

May, Ins. § 185; *Cuthbertson v. North Carolina Home Ins. Co.* 96 N. C. 480, 2 S. E. 258; *Brignac v. Pacific Mut. L. Ins. Co.* 112 La. 574, 66 L.R.A. 322, 36 So. 595.

In determining whether questions contained in an application are material, the test is whether knowledge or ignorance of the facts sought to be elicited thereby would influence the company in determining whether to accept the risk.

Mattson v. Modern Samaritans, 91 Minn. 434, 98 N. W. 330.

Reading and commenting, over defendant's objection, on defendant's original answer, which had been withdrawn, was improper and prejudicial.

Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545; *Burke v. McDonald*, 3 Idaho, 296, 29 Pac. 98; *State v. Harness*, 10 Idaho, 18, 76 Pac. 788; *Smith v. Smith*, 106 N. C. 498, 11 S. E. 188; *Riley v. Iowa Falls*, 83 Iowa, 761, 50 N. W. 33; *Taft v. Fiske*, 140 Mass. 250, 54 Am. Rep. 459, 5 N. E. 621; *Owens, L. & D. Mach. Co. v. Pierce*, 5 Mo. App. 576; *Rickabus v. Gott*, 51 Mich. 227, 16 N. W. 384; *Stratton v. Nye*, 45 Neb. 619, 63 N. W. 928.

Proofs of death are admissible in evidence, and are prima facie proof on the facts stated therein and against the beneficiaries and on behalf of the society, the same being admissions by the beneficiary.

Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. 32, 22 L. ed. 793; *Home Ben. Assn. v. Sargent*, 142 U. S. 691, 35 L. ed. 1160, 12 Sup. Ct. Rep. 332; *Grand Lodge I. O. M. A. v. Wieting*, 168 Ill. 408, 61 Am. St. Rep. 123, 48 N. E. 59; *Walther v. Mutual L. Ins. Co.* 65 Cal. 417, 4 Pac. 413; *Modern Woodmen v. Von Wald*, 6 Kan. App. 231, 49 Pac. 782; *Elliot, Ev.* § 2387; *Bliss, Life Ins.* 2d ed. § 265.

Knowledge of the breach of a condition in a benefit certificate by a local camp or its

officers does not constitute a waiver or work an estoppel against the society.

Northern Assur. Co. v. Grand View Bldg. Asso. 183 U. S. 308, 46 L. ed. 213, 22 Sup. Ct. Rep. 133; Modern Woodmen v. Tevis, 54 C. C. A. 293, 117 Fed. 369; Graves v. Modern Woodmen, 85 Minn. 396, 89 N. W. 6.

Mr. B. S. Bennett, for respondent:

A pleading, or an admission or allegation in a pleading, notwithstanding it had been withdrawn or stricken from the record by amendment, is competent in evidence against the party from whom it proceeded, like any other admission or declaration, subject, however, to explanation by himself.

Abbott, Trial Brief, Civil Jury Trials, 2d ed. pp. 296, 301.

The answer complained of was a representation, and not a warranty.

Merriman v. Grand Lodge Degree of Honor, A. O. U. W. 77 Neb. 544, 8 L.R.A. (N.S.) 983, 124 Am. St. Rep. 867, 110 N. W. 302, 15 A. & E. Ann. Cas. 124; Royal Neighbors v. Wallace, 73 Neb. 409, 102 N. W. 1020; Ranta v. Supreme Tent, K. M. 97 Minn. 454, 107 N. W. 156; Rupert v. Supreme Court U. O. F. 94 Minn. 293, 102 N. W. 715; Royal Neighbors v. Wallace, 5 Neb. (Unof.) 519, 99 N. W. 256.

The fact that insured was pregnant at the time of making the application did not prevent her from receiving the certificate or policy, under the health certificate or clause.

American Order of Protection v. Stanley, 5 Neb. (Unof.) 132, 97 N. W. 467.

The relations between a subordinate lodge of a benefit society and the principal lodge is that of agency.

Modern Woodmen v. Breckenridge, 75 Kan. 373, 10 L.R.A. (N.S.) 136, 89 Pac. 661, 12 A. & E. Ann. Cas. 638; High Court I. O. F. v. Schweitzer, 171 Ill. 325, 49 N. E. 506.

Allshie, J., delivered the opinion of the court:

At the outset it must be conceded that, under the terms of this contract, the answers given by the applicant for insurance are viewed by the law in the nature of warranties, rather than as mere representations. 3 Joyce, Ins. § 1944; Bacon, Ben. Soc. § 194; Hoover v. Royal Neighbors, 65 Kan. 616, 70 Pac. 595; Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A. (N.S.) 798, 99 Pac. 83; Supreme Lodge K. & L. H. v. Payne (Tex. Civ. App.) 110 S. W. 523. It has been found as a fact that the insured was pregnant at the time she made application for insurance, and at the time the benefit certificate was issued to her. It 29 L.R.A. (N.S.)

is also established that she did not know of her pregnancy at the time, and that her answer was in good faith and honestly made. Viewing these facts alone, if we should follow the inflexible technical rule of warranties which has been adopted by many courts, the inquiry would end here, and we would hold that the breach itself avoided the contract, and that the subsequent conduct of the society could not be considered. Joyce, Ins. § 1970; McDermott v. Modern Woodmen, 97 Mo. App. 636, 71 S. W. 833; Hoover v. Royal Neighbors, and Beard v. Royal Neighbors, supra; and authorities above cited.

We are of the opinion, however, that there are rules of law and principles of equity that must be applied to the insurer as well as to the insured, and that its treatment of the contract for a number of years after the effects and consequences of the breach had disappeared is a subject requiring our consideration. The benefit certificate was issued to the insured on the 28th day of June, and thereafter, and on the 25th day of November of the same year, she gave birth to twins, both of whom were healthy and normal. No unusual or unfavorable condition of health resulted from her confinement. She continued to be a member of Lakeside Camp No. 2373 located at Sand Point, and continued the regular payment of dues and assessments from time to time, and was in fairly good health until shortly before the date of her death in February, 1907. In the meanwhile she bore at least one child after the birth of the twins. It should at this point be observed that there is no provision of the contract or policy of insurance which attempts to suspend or avoid the contract, after it is once entered into, on account of subsequent pregnancy. The provision of the contract confronting us is a stipulation against pregnancy existing at the time of the application for the insurance. It is conceded in this case that the death of the insured did not result from any condition of the insured which existed at the time of making the application or of the issuance of the policy; nor, indeed, is it contended that the pregnancy of the insured at the time of the issuance of the policy in any way contributed to the ultimate cause of death, or in any way augmented the subsequent risk or diminished her life expectancy. In the application question 331 is followed by a star, and at the foot of the application blank is the following note: "If applicant is pregnant application will not be accepted by supreme physician. Examination should be postponed until at least two months after confinement." It appears that under the by laws, rules, and regulations of the society

in a case of this kind, the application is withheld until a period of two months after the confinement of the applicant, and thereupon the physician makes the examination and takes the applicant's answers to the questions, and, if they prove satisfactory in other respects, the application is accepted and the certificate is issued. In this case no fraud was practised whatever. Although the society contends that the policy never went into effect and that the contract never became binding, still it received and accepted dues and assessments from the insured for a period of more than four years continuously succeeding her confinement, and also covering a subsequent period of gestation and confinement; and the society is presumed to have had notice, through the local camp, of the existence of the facts and the happening of the contingency which would have avoided the contract. The local camp of which the insured was a member collected and received the dues and assessments from its members, and was charged with the duty of looking after the health and conduct of its members, and of expelling or suspending its members for any violation of the laws of the order or breach of their duties as members of the society. The local lodge was therefore the agent of the society which issued the benefit certificate, and the appellant, after the lapse of more than four years, is chargeable with notice of the existence of the condition on the part of the insured which would have avoided the risk and prevented the contract becoming effective and operative. *Modern Woodmen v. Breckenridge*, 75 Kan. 363, 10 L.R.A.(N.S.) 136, 89 Pac. 661, 12 A. & E. Ann. Cas. 638; *High Court I. O. F. v. Schweitzer*, 171 Ill. 325, 49 N. E. 506; *Supreme Lodge, K. H. v. Davis*, 26 Colo. 252, 58 Pac. 695; *Modern Woodmen v. Lane*, 62 Neb. 89, 86 N. W. 943; *Modern Woodmen v. Colman*, 68 Neb. 660, 94 N. W. 814, 96 N. W. 154; *Supreme Lodge K. P. v. Wellen-voss*, 56 C. C. A. 287, 119 Fed. 671; *Pringle v. Modern Woodmen*, 76 Neb. 384, 107 N. W. 756, 113 N. W. 231. Under these facts and circumstances the doctrine of waiver should be applied to the society.

In *Supreme Lodge K. H. v. Davis*, supra, the court said: "In a mutual benevolent order composed of a supreme lodge and subordinate lodges, an officer of a subordinate lodge charged with the duty of notifying the members of assessments made by the supreme lodge for the purpose of paying insurance certificates of deceased members, and of collecting and forwarding to the supreme lodge such assessments, is an agent of the supreme lodge, notwithstanding a rule or by-law of the order recites that such officer, in collecting and forwarding assess-

ments, shall be the agent of the members of the subordinate lodge, and the supreme lodge is charged with all knowledge possessed by the agent in making the collection." In *Trotter v. Grand Lodge, I. L. H.* 132 Iowa, 513, 7 L.R.A.(N.S.) 569, 109 N. W. 1099, 11 A. & E. Ann. Cas. 533, the court said: "The rule that courts will give effect to any act or circumstance from which it may fairly be argued that the insurer has waived the right to strict and literal performance by the insured, or upon which an estoppel against forfeiture may be founded, applies to fraternal or lodge insurance. . . . [And] whether a waiver of forfeiture of a certificate of insurance will be found in any particular case depends not on the intention of the insurer, against whom it is asserted, but on the effect which its conduct or course of business has had upon the insured, and this rule is applicable where the insurer acts under a mistake." In *Pringle v. Modern Woodmen*, supra, *Pringle* held a benefit certificate which contained a clause to the effect that it should become null and void if the insured should at any time be convicted of a felony. While holding the certificate, the insured was convicted of felony and sentenced to the state penitentiary, where he was confined for about six months, and died. The beneficiary sued on the contract to recover the amount of the policy. It appeared that the insured had continuously kept up the payment of his dues and assessments. The supreme court of Nebraska, in speaking through Mr. Justice Barnes, said: "The local camp and its clerk being the agents of the association, the conclusive presumption, in the absence of fraud, is that they seasonably communicated the fact of *Pringle's* conviction to the head camp. Indeed, the clerk testified that the governing body knew of the fact, and his statement stands unchallenged, except by the evidence of one C. W. Hawes, the head clerk of the association. A like state of facts has often been held to amount to a waiver of a similar forfeiture clause."

The state is vitally interested in the thrift and frugality of its citizens, and in encouraging the citizen in providing for his family, and looking to their protection and comfort in the event of his demise. To allow him, when acting honestly and from the most laudable motive, to be led on under the belief that he is devoting his savings to the purchase of a legacy for his dependent ones, and then, when the beneficiary comes to make demand for that paltry recompense, to tell him that the courts, the final arbiters of his rights, will not listen to the equity of the case, would be doing violence to the principles of fair deal-

ing, and would be likewise contrary to the best interests of the public at large, which we term "public policy." Had the insured been in any manner advised that her policy was not in force, she would perhaps have procured one that would have been valid, and this would have been to the benefit of her family and in the interest of society as well; and the state itself must feel an interest in having her take such precautions, and in that sense the construction of such contracts becomes a matter of public policy. The insurer cannot suffer half so much from such a policy and such a construction as the individuals interested, and society at large must, in the end of necessity, suffer from the cold-blooded, technical rule that seems to prevail in so many jurisdictions. This ought to be the rule in order to prevent organizations soliciting membership, receiving insurance applications, and accepting dues and assessments for years, and then, after the applicant is, perhaps, too old to procure insurance elsewhere, tell the insured that he made a false answer in some one of the numerous questions propounded by the society, and that consequently his policy has never been in force. Such a contract is clearly violative of the interests of society at large and of the welfare of its citizens, and ought to be discouraged. The more than 200 questions contained in one application blank run the gamut of the applicant's ancestry from his grand ancestors down to date, and ask him about every disease and pathological condition for which the medical world has been able to invent a name, and then, if forsooth he misses a guess on any one of them, he is chargeable with expert knowledge and warranting the correctness of his answers, and must lose his protection on the venture of a guess. In such a game the insured has only a chance in hundreds, and the result must follow that he only thinks he is insured. It amounts to mental insurance, and nothing more. The insurance society in such case could exist for the sole and only purpose of collecting dues and assessments, with no insurance liability.

Some courts have held, and we think the rule sound, that, notwithstanding the stipulation of warranty in such contracts, answers which merely express the opinion or judgment of the applicant cannot be classed among the facts, the truth of which is insured by the applicant,—that he only warrants his honesty and good faith as to such answers. *Rupert v. Supreme Court U. O. F.* 94 Minn. 293, 102 N. W. 715; *Ranta v. Supreme Tent, K. M.* 97 Minn. 454, 107 N. W. 156; *Royal Neighbors v. Wallace*, 73 Neb. 409, 102 N. W. 1020; *Royal Neighbors v. Wallace*, 5 Neb. (Unof.) 519, 99 N. 29 L.R.A. (N.S.)

W. 256. "It would be solemn nonsense," says the supreme court of Minnesota in *Ranta v. Supreme Tent, K. M.*, "to hold that an ordinary applicant insures the exact reality of physical conditions and causes at a time when the greatest pathologists might differ, or even when they might be impossible of definite determination." This rule seems to us more in consonance with reason and justice, than the rule of strict literal warranty contended for by appellant. The application contained the stipulation that any certificate which might be issued to the applicant "shall be delivered to me while in sound health, and in pursuance of the by-laws of the order." It is also contended that the insured was not in "sound health" at the time of delivery, because of pregnancy. Pregnancy is not *per se* a condition of "unsound" health, nor is it a "disease" or "ailment" within the meaning of those terms used in this application and policy. The term "sound health" has been frequently defined by the courts, and, so far as we are advised, it has never been held that this term used in an insurance policy or certificate covered every slight ailment or indisposition of health of a temporary character which does not tend directly to shorten the life or undermine the constitution of the insured. *Packard v. Metropolitan L. Ins. Co.* 72 N. H. 1, 54 Atl. 287; *Morrison v. Wisconsin Odd Fellows' Mut. L. Ins. Co.* 59 Wis. 162, 18 N. W. 13; *Brown v. Metropolitan L. Ins. Co.* 65 Mich. 306, 8 Am. St. Rep. 894, 32 N. W. 610; *Manhattan L. Ins. Co. v. Carder*, 27 C. C. A. 344, 42 U. S. App. 649, 82 Fed. 986; 7 Words & Phrases, 6554. So far as we are informed, this term, of itself and standing alone, has never been held to cover or include a case of pregnancy. Appellant must therefore rest its case on the falsity of the representation that the insured was not pregnant.

Appellant attempted to show that the answer to question 18 was false, for the reason that the insured had consulted a physician within the period of seven years immediately preceding her application. On this point there was a sharp conflict in the evidence, except with reference to one visit by a physician, who, it is admitted, attended her on April 5, 1899, the date of her last previous confinement. The appellant had notice that the applicant was a married woman, and that she had already borne five children, and that she had been confined on April 5, 1899, which was only about three years prior to this application. It might have assumed that either a physician or a midwife attended her on this confinement. The attendance, however, of a physician at the time of a normal case of

confinement is clearly not a "consultation" or treatment of a "personal ailment" of the female confined. Childbirth is a physiological fact which occurs in the regular course of nature, and neither signifies nor entails disease or ailment in the usual and ordinary use of those terms.

On the trial of the case, the plaintiff introduced the physician who attended the insured during her last sickness, and examined him as to the nature of her illness and the cause of death. He testified that she died following an operation performed by him, and testified to the general nature and character of her condition and the cause for which the operation was performed. He said: "The object of it was to remove the right tube and the right ovary and drain for an abscess in the pelvis." He also testified to signing the death proofs, and identified the paper containing the proofs made by him. The defendant thereafter offered to introduce in evidence the death proofs made by this physician. The plaintiff objected, and the objection was sustained by the court. This ruling is assigned as error. The court should have admitted this exhibit in evidence. It is a uniform rule almost without exception that such proofs are admissible when offered by the insurer. 3 Elliott, Ev. §§ 2386-2389; Mutual Ben. L. Ins. Co. v. Newton, 22 Wall. 32, 22 L. ed. 793; Beard v. Royal Neighbors, 53 Or. 102, 19 L.R.A.(N.S.) 798, 99 Pac. 83. The defendant was not prejudiced by the exclusion of this exhibit. The exhibit has been preserved in the record, and is before us. Answer No. 11 is the particular portion of the exhibit that defendant offered in evidence, and to the rejection of which counsel took their exception. It is an answer to the question: "State the remote cause of death." The answer given by the physician is as follows: "Exposure and cold. Patient had a recto vaginal fistula which may predisposed to the pelvic inflammation 1st symptoms, severe abdominal pains, tenderness of whole abdomen, vomiting and constipation, Tympanitis then located pelvic cellulitis uterus became filled was forming in right side filling up Douglas pouch." This answer was substantially the same as that given by the doctor when on the witness stand. His explanation at length as given on the witness stand was clearer and more complete than the answer given in the death proofs. This is evidently due, however, to the fact that he was asked more questions. The purpose of this proof should not be lost sight of. The defendant was not seeking to prove that the answers given in the death proof showed that the insured had died from a disease or malady or cause not covered

by the policy of insurance. The purpose must have been either to impeach or discredit the physician who was then testifying, or, what is more probable, to show by inference that the insured had fistula at the time she made application for insurance. Death took place, however, nearly five years after the application was made, and, while she was afflicted with fistula at the time of her death, the inference that she had this trouble at the time she made application for insurance would be very remote and at most only prima facie. These facts were substantially all before the jury, and we are satisfied that the appellant was not prejudiced by the erroneous ruling of the court.

Appellant assigns as error the action of the court in permitting the plaintiff to introduce evidence showing that defendant had never paid back or tendered the dues and assessments that had been paid on this benefit certificate. We do not think the admission of this evidence was prejudicial or reversible error. Of course, it was immaterial in view of the fact that the defendant had not tendered it into court or pleaded a return or tender of the premiums paid.

When the case was called for trial and prior to the introduction of any evidence, the attorney for the plaintiff read the pleadings to the jury, and thereupon proceeded to make a statement to the jury, and in doing so commented upon the allegations contained in the first answer of defendant, whereupon counsel for defendant made objection to any comment being made on the original answer. This objection was overruled. Further along in counsel's statement he again made reference to that part of the defendant's original answer, in which it had alleged that the insured came to her death by a self-inflicted criminal operation. Counsel for defendant again objected, and the objection was overruled by the court. This action of counsel for the plaintiff and the ruling of the court is assigned as error. Without going into any discussion of the evils and dangers of such a practice, it is sufficient to say that we do not approve of the same, and that the court should have sustained the objection and admonished counsel to refrain from commenting on any allegations contained in the pleadings that were not then at issue and on which the case was to be tried. Owens, L. & D. Mach. Co. v. Pierce, 5 Mo. App. 576; Stratton v. Nye, 45 Neb. 619, 63 N. W. 928; Giffen v. Lewiston, 6 Idaho, 231, 55 Pac. 545. We cannot reverse the judgment in this case, however, on account of this error for the following reason: Counsel for appellant have not preserved in their statement and

bill of exceptions any statement that was made by the counsel for the plaintiff which it claims was prejudicial, and nowhere in the record does it appear what language counsel used. The comment made by counsel may have, in no respect, been prejudicial, and, in the absence of any positive showing in the record as to what it was, we must assume that nothing prejudicial to the appellant's rights was said in this connection.

Many other errors are assigned on the admission and rejection of evidence and the giving and refusing to give instructions to the jury. It is unnecessary to give all these assignments of error specific and detailed consideration here, for the reason that what we have already said covers and disposes of the entire case. We find no error that will either require or justify a reversal of the judgment in this case. The judgment is eminently just, and the defense was highly technical and wholly unconscionable.

The judgment is affirmed with costs in favor of the respondent.

Sullivan, Ch. J., and Stewart, J., concur.

ILLINOIS SUPREME COURT.

PEOPLE OF THE STATE OF ILLINOIS
EX REL. JEREMIAH RING et al., Plffs.
in Err.,

v.

BOARD OF EDUCATION OF DISTRICT
NO. 24.

(245 Ill. 334, 92 N. E. 251.)

School — religious exercise — constitutional right.

1. Requiring school children to listen to the reading of passages of the King James' version of the Bible, and join in repeating the Lord's Prayer, and in singing hymns, violates their constitutional right to the free exercise and enjoyment of religious profession and worship.

Same—public fund — sectarian purposes.

2. The reading of the King James' version of the Bible, repeating the Lord's Prayer, and singing hymns as part of the exercises of a public school, violates a con-

Note. — Apparently PEOPLE EX REL. RING v. BOARD OF EDUCATION is the only case passing upon the right to give religious exercises or instruction in public schools decided since *Church v. Bullock*, 16 L.R.A.(N.S.) 860, to which is appended a note upon the subject.

See *O'Connor v. Hendrick*, 7 L.R.A.(N.S.) 403, which passes upon the validity of a rule forbidding the wearing of religious garb in public schools.
29 L.R.A.(N.S.)

stitutional provision forbidding the appropriation of any public fund or the donation of money by the state in aid of sectarian purposes.

(Hand and Cartwright, JJ., dissent.)

(June 29, 1910.)

ERROR to the Circuit Court for Scott County to review a judgment dismissing a petition for a writ of mandamus to compel defendant to discontinue certain alleged sectarian exercises in the public schools. Reversed.

The facts are stated in the opinion.

Mr. Thomas F. Ferns for plaintiffs in error.

Messrs. J. M. Riggs and J. A. Warren for defendant in error:

It is not a violation of the Illinois Constitution to let a schoolhouse be used for religious meetings, even for regular, stated meetings, by a religious denomination.

Nichols v. School Directors, 93 Ill. 61, 34 Am. Rep. 160.

Reading the Bible and especially the New Testament, without note or comment, is not sectarian.

Stevenson v. Hanyon, 16 Pa. Co. Ct. 186, 7 Pa. Dist. R. 585; *Vidal v. Philadelphia*, 2 How. 127, 200, 11 L. ed. 205, 235.

The reading of the Protestant version of the Bible as a book used in teaching reading in public schools is not an interference with religious belief.

Donahoe v. Richards, 38 Me. 379, 61 Am. Dec. 257; *Spiller v. Woburn*, 12 Allen, 127; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 539, 77 N. W. 250.

The custom in a public school of repeating the Lord's Prayer as found in King James' version of the Bible, and reading selection from said Bible, is not a violation of any of the rights of a Catholic patron of the school.

Billard v. Board of Education, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 145, 76 Pac. 422, 2 A. & E. Ann. Cas. 521; *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 A. & E. Ann. Cas. 36; *Church v. Bullock* (Tex. Civ. App.) 100 S. W. 1025 (Tex.) 16 L.R.A.(N.S.) 860, 109 S. W. 115; *North v. University of Illinois*, 137 Ill. 296, 27 N. E. 54.

A school does not become a place of worship, nor a teacher a minister of religion, within the constitutional provisions, by the offering of prayer at the opening thereof by the teacher.

Hackett v. Brooksville Graded School Dist. supra; *Hart v. School Dist. 2 Lane* L. Rev. 346.

A rule of school authorities requiring

pupils, among other things, to learn the Ten Commandments and repeat them once a week, is not a violation of a constitutional provision which secures to the citizen liberty of conscience and worship.

Com. ex rel. Wall v. Cooke (Mass.) 7 Am. Law Reg. 417.

A rule of a school board requiring a portion of the Bible to be read as an opening exercise of the school does not violate the constitutional provision "that no person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his consent.

Nessle v. Hum, 1 Ohio N. P. 140; 25 Am. & Eng. Enc. Law, 2d ed. pp. 30, 31; 8 Cyc. Law & Proc. p. 884.

Dunn, J., delivered the opinion of the court:

The relators filed a petition for a writ of mandamus to require the defendant in error to cause to be discontinued, as exercises in the public schools, the reading of the Bible, the singing of hymns, and the repeating of the Lord's Prayer. This writ of error is brought to reverse a judgment dismissing the petition upon sustaining a demurrer thereto.

The petition avers that the relators are residents of, and two of them taxpayers in, school district No. 24, township No. 14, range 12, Scott county, Illinois; that certain free public schools are maintained in said school district in accordance with the statutes of Illinois, and that relators are parents of children between the ages of seven and fourteen years, who are entitled to the benefits of said schools, and are attending said schools for the purpose of receiving instruction therein; that certain teachers employed in said schools read to the pupils, including the children of relators, every day school is in session, during school hours, portions selected by the teachers from the King James' version of the Bible; that relators and their children are members of the Roman Catholic Church and believe in its doctrines, faith, and forms of worship; that said church believes the King James' version of the Bible to be an incorrect and incomplete translation, and that it disapproves of its being read as a devotional exercise; that in addition to reading the Bible, the Lord's Prayer as found in the King James' version is recited audibly in concert under direction of the teachers, and that said prayer is in different words from that taught by the Roman Catholic Church; that during school hours what are called "sacred hymns" are sung in concert by the pupils, who are required to stand while singing; one of said hymns, called "Grace Enough for Me," being set out in full in 29 L.R.A. (N.S.)

the petition; that during the reading from the Bible and the reciting of the Lord's Prayer the pupils are required to rise in their seats, fold their hands, and bow their heads, and from time to time certain pupils have been asked to explain the meaning of certain passages of Scripture read; that the said exercises are in violation of the Constitution of this state and of the United States, because they are devotional, sectarian exercises, and violate the right of the free exercise and enjoyment of religious profession and worship; that there is no parochial or private school in the county of Scott to which the relators could send their children for instruction; that the laws of Illinois make it compulsory upon them to send their children to school, and that to require said children to be sent to the public school aforesaid requires them to attend a place of worship against the consent of the children and their parents.

The 1st Amendment to the Federal Constitution prohibits Congress from making any law respecting an establishment of religion or prohibiting the free exercise thereof. That instrument contains no restriction in this respect upon the legislatures of the states, which are thus left free to enact such laws in respect to religion as they may deem proper, restrained only by the limitations of the respective state Constitutions. 2 Story, Const. § 1878; *Permoli v. New Orleans*, 3 How. 589, 11 L. ed. 739; *Reynolds v. United States*, 98 U. S. 145, 25 L. ed. 244. Our state Constitution guarantees "the free exercise and enjoyment of religious profession and worship, without discrimination." Const. art. 2, § 3. Section 3 of article 8 prohibits the appropriation of any public fund in aid of any church or sectarian purpose, or for the support of any school, academy, seminary, college, university, or other literary or scientific institution controlled by any church or sectarian denomination, or the donation of money by the state to any church or for any sectarian purpose.

The exercises mentioned in the petition constitute worship. They are the ordinary forms of worship usually practised by Protestant Christian denominations. Their compulsory performance would be a violation of the constitutional guaranty of the free exercise and enjoyment of religious profession and worship. One does not enjoy the free exercise of religious worship who is compelled to join in any form of religious worship. "Worship" is defined by Webster as follows: "4. The act of paying divine honors to the Supreme Being; religious reverence and homage; adoration or acts of reverence paid to God or a being viewed as God. . . . The worship of God is an

eminent part of religion, and prayer is a chief part of religious worship." Worcester's definition is: "3. Adoration; a religious act of reverence; honor paid to the Supreme Being, or by heathen nations to their deities. Worship consists in the performance of all those external acts and the observance of all those rites and ceremonies in which men engage with the professed and sole view of honoring God." We know of no technical definition of the word by any court. It includes prayer, praise, thanksgiving. In the ordinary church meeting the congregation is regarded as engaged in religious worship while listening to the sermon, reading the Holy Scriptures or hearing them read, or engaged in the singing. Devotional, religious exercises constitute worship. Prayer is a chief part of the worship. The petition avers that the Lord's Prayer is recited in concert under the direction of the teachers, during which the pupils are required to rise in their seats, bow their heads, and fold their hands. Prayer is always worship. Reading the Bible and singing may be worship. The song "Grace Enough for Me," set out in the petition, is a devotional hymn of religious joy and of praise and thanksgiving for the flood of grace flowing from the cross on Calvary. Praise is defined by Webster as "especially the joyful tribute of gratitude or homage rendered to the Divine Being; the act of glorifying or extolling the Creator; worship, often in song, in distinction from petition or confession." If these exercises of reading the Bible, joining in prayer, and in the singing of hymns, were performed in a church, there would be no doubt of their religious character; and that character is not changed by the place of their performance. If the petitioners' children are required to join in the acts of worship, as alleged in the petition, against their consent and against the wishes of their parents, they are deprived of the freedom of religious worship guaranteed to them by the Constitution. The wrong arises not out of the particular version of the Bible or form of prayer used—whether that found in the Douay or the King James' version—or the particular songs sung, but out of the compulsion to join in any form of worship. The free enjoyment of religious worship includes freedom not to worship.

A decision that the exercises complained of constitute a violation of the guaranty of freedom of worship does not, however, dispose of the questions arising in this case. It is further contended that the reading of the Bible in the schools constitutes sectarian instruction, and that thereby that provision of the Constitution is also violated which prohibits the payment from any pub-

lic fund of anything in aid of any sectarian purpose. The public schools are supported by taxation, and if sectarian instruction should be permitted in them, the money used in their support would be used in aid of a sectarian purpose. The prohibition of such use of public funds is therefore a prohibition of the giving of sectarian instruction in the public schools.

Is the reading of the Bible in the public schools sectarian instruction? Religion has reference to man's relation to divinity; to the moral obligation of reverence and worship, obedience, and submission. It is defined by Webster as the recognition of God as an object of worship, love, and obedience; right feeling toward God, as rightly apprehended. It deals with the soul. Its phenomena are spiritual. It controls external things. Things external cannot control it. Religion cannot be burned out of a man; it cannot be scourged into him,—“for as he thinketh in his heart so is he.” His own reason and feeling are, of necessity, his only guide. He cannot, if he would, worship a God in whom he does not believe, though he may be compelled to go through the form of doing so. In the very nature of things, therefore, “religion, or the duty we owe to the Creator,” is not within the cognizance of civil government, as was declared by James Madison in 1784 in his remonstrance against a bill pending in the Virginia legislature “establishing provision for teachers of the Christian religion.” Not only was that bill defeated, but another “for establishing religious freedom,” drafted by Thomas Jefferson, was passed (12 Henning's Stat. 84), which, after reciting that “to suffer the civil magistrate to intrude his powers into the field of opinion and to restrain the profession or propagation of principles on supposition of their ill tendency is a dangerous fallacy which at once destroys all religious liberty,” declared that “it is time enough, for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order.” “In these two sentences,” says the Supreme Court of the United States, “is found the true distinction between what properly belongs to the Church and what to the state.” *Reynolds v. United States*, supra.

The practical recognition of entire, individual freedom of thought and action in reference to matters of religion has not, however, always been conceded. In fact, most of the governments of the world have claimed and have exercised the right to interfere with and direct the religious profession and worship of their citizens. A government without a state religion was hardly known before the adoption of our Federal

Constitution, and long after that event, in some of the states, ministers of the Gospel were lawfully paid out of public funds raised by general taxation for that purpose. Even now there exist constitutional provisions authorizing not only such payment, but also religious tests with reference to qualification for office or competency as a witness or juror, as in New Hampshire, under whose Constitution the legislature may authorize subordinate municipalities to provide at their own expense for the support of Protestant ministers (N. H. Const. Bill of Rights, art. 6; 4 Thorpe's American Charters, Constitutions, and Organic Laws, 2494); Pennsylvania and Tennessee where a belief in God and a future state of rewards and punishments is a constitutional qualification for office (Pa. Const. art. 1, § 4; 5 Thorpe, 3121; Tenn. Const. art. 9, § 2; 6 Thorpe, 3465); Arkansas, whose Constitution declares ineligible to office and incompetent as a witness any person who denies the being of a God (Ark. Const. art. 19, § 1; 1 Thorpe, 365); and Maryland, whose Constitution prescribes a belief in God and in a dispensation of rewards and punishments, as essential to competency as a witness or juror (Md. Const. Declaration of Rights, § 36; 3 Thorpe, 1782).

The Puritan, in New England, and the Cavalier, in Virginia, each established his own church and taxed the people for its support. Nonconformists were discriminated against and in some cases were oppressed and persecuted or driven out. The Pilgrims, who fled from the oppression of the majority at home, made their religion a part of their civil government,—not religion, but their religion. In the new country, being themselves in the majority, they became oppressors of the minority, which refused to conform to the religion preferred by the laws which they enacted. Quakers were banished from Massachusetts, and Roger Williams was driven out of the colony to found the new colony of Providence, whose government should have authority "only in civil things." By this express limitation of the authority of the magistrate to civil things was the fundamental principle of the separation of Church and state then and there for the first time definitely declared.

The ordinance of 1787, for the government of the Northwest territory, declared that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and means of education shall forever be encouraged." This provision is no longer in force, having been superseded by the adoption of our Constitution and the admission of the state into the Union. *Escanaba & L. M. Transp. Co. v. Chicago*, 107 U. S. 678, 27 L. ed. 442, 2 Sup. 29 L.R.A. (N.S.)

Ct. Rep. 185; *Huse v. Glover*, 119 U. S. 543, 30 L. ed. 487, 7 Sup. Ct. Rep. 313. The ordinance did not, however, by any means as originally adopted, impose upon the states the duty of religious instruction in the schools which were to be encouraged. It recognized education as a means promotive of religion and morality by the increase of knowledge. The recital or preamble recognized religion, morality, and knowledge as three things essential to good government and the happiness of the people, and to secure those three things it enacted not that religious instruction (which is not within the province of civil government) should be given by the states, but that the means of education should be encouraged, and thus the essentials of good government should be promoted.

The question for decision is one of constitutional power. The Bible is not mentioned in our state Constitution. It was mentioned in the convention which framed the Constitution, when it was sought to add to § 3 of article 8 a provision prohibiting the exclusion of the Bible from the public schools, but the amendment proposed was not adopted. What is the Bible? Different sects of Christians disagree in their answers to this question. They agree that the Bible is the inspired word of God, that the Creator of the Universe is its Author, and that it is a book of Divine instruction as to the creation of man, his relation to, dependence on, and accountability to, God. The historical and literary features of the Bible are of the greatest value, but its distinctive feature is its claim to teach a system of religion revealed by direct inspiration from God. It bases its demand for the reverence and allegiance of mankind upon the direct authority of God himself. The various Protestant sects of Christians use the King James' version, published in London in 1611, while Catholics use the Douay version, of which the Old Testament was published by the English college at Douay, in France, in 1609, and the New Testament by the English college at Rheims in 1582, and these two versions are often called, respectively, the Protestant Bible and the Catholic Bible. The original manuscripts containing the inspired word of God, written in Hebrew, in Aramaic, and in Greek, have all been lost for many hundreds of years, and each of the Bibles mentioned is a translation, not of those manuscripts, but of translations thereof into the Greek and Latin. (Roman Catholic and Protestant Bibles compared, Gould Prize Essays; Gigot's General Introduction to Study of Scriptures.) The earliest copy of the Old Testament in Hebrew now in existence was made as late as the eleventh century, though there are partial copies

made in the ninth and tenth centuries. The oldest known Greek manuscripts of the Bible, except a few fragments, belong to the fourth and fifth centuries. Each party claims for its own version the most accurate presentation of the inspired word as delivered to mankind and contained in the original Scriptures. The versions differ in many particulars. There are differences of translation many of which seem unimportant, though Catholics claim that there are cases of wilful perversion of the Scriptures in King James' translation, from which erroneous doctrines and inferences have been drawn. The Lord's Prayer is differently translated in the two versions. Of the different translations of the Lord's Prayer in later versions of the Bible, the following language of a Protestant has been quoted with approval by a Catholic author: "Even the Lord's Prayer has been tampered with and a discord thrown into the daily devotions. The inspired text is changed and unsettled, the faith of the people in God's Holy Word is undermined, and aid and comfort given the enemy of all religion." The Douay version also contains six whole books and portions of other books which are not included in King James' version. The Catholic Church regards these as a part of the inspired Scriptures, entitled to the same faith and reverence as the other portions of the Bible, while the Protestant Churches do not recognize them as a part of the Scriptures.

Christianity is a religion. The Catholic Church and the various Protestant Churches are sects of that religion. These two versions of the Scriptures are the bases of the religion of the respective sects. Protestants will not accept the Douay Bible as representing the inspired word of God. As to them, it is a sectarian book, containing errors and matter which is not entitled to their respect as a part of the Scriptures. It is consistent with the Catholic faith but not the Protestant. Conversely, Catholics will not accept King James' version. As to them, it is a sectarian book, inconsistent in many particulars with their faith, teaching what they do not believe. The differences may seem to many so slight as to be immaterial, yet Protestants are not found to be more willing to have the Douay Bible read as a regular exercise in the schools to which they are required to send their children, than are Catholics to have the King James' version read in schools which their children must attend. Differences of religious doctrine may seem immaterial to some, while to others they seem vitally important. Sectarian aversions, bitter animosities, and religious persecutions, have had their origin in apparently slender distinctions. The 29 L.R.A. (N.S.)

schism between the Presbyterian Church of the United States of America and the Cumberland Presbyterian Church in 1810 grew out of a difference of opinion as to the teachings of the Westminster confession of faith concerning the doctrines of universal foreordination, election, and reprobation. The differences in doctrine existing in their revised confessions of faith in 1906 seemed so slight to the respective general assemblies of those churches as to form no obstacle to the reunion of the two as a single church, yet to thousands of the members of the Cumberland Presbyterian Church the differences seem now so vital that their consciences will not permit of their consenting to the union, and they have adhered to their own organization even where they have been obliged to surrender the church property. That religious controversy we declined to determine because it was a religious controversy, and not within our cognizance as a part of the civil government. *First Presby. Church v. First Cumberland Presby. Church*, 245 Ill. 74, 91 N. E. 761. The importance of men's religious opinions and differences is for their own, and not for a court's, determination. With such differences, whether important or unimportant, courts or governments have no right to interfere. It is not a question to be determined by a court in a country of religious freedom what religion or what sect is right. That is not a judicial question. All stand equal before the law,—the Protestant, the Catholic, the Mohammedan, the Jew, the Mormon, the freethinker, the atheist. Whatever may be the view of the majority of the people, the court has no right, and the majority has no right, to force that view upon the minority, however small. It is precisely for the protection of the minority that constitutional limitations exist. Majorities need no such protection,—they can take care of themselves.

The reading of the Bible in school is instruction. Religious instruction is the object of such reading, but whether it is so or not, religious instruction is accomplished by it. The Bible has its place in the school, if it is read there at all, as the living word of God, entitled to honor and reverence. Its words are entitled to be received as authoritative and final. The reading or hearing of such words cannot fail to impress deeply the pupils' minds. It is intended and ought to so impress them. They cannot hear the Scriptures read without being instructed as to the divinity of Jesus Christ, the Trinity, the resurrection, baptism, predestination, a future state of punishments and rewards, the authority of the priesthood, the obligation and effect of the sacraments, and many other doctrines about which the various sects

do not agree. Granting that instruction on these subjects is desirable, yet the sects do not agree on what instruction shall be given. Any instruction on any one of the subjects is necessarily sectarian, because, while it may be consistent with the doctrines of one or many of the sects, it will be inconsistent with the doctrine of one or more of them. The petitioners are Catholics. They are compelled by law to contribute to the maintenance of this school, and are compelled to send their children to it, or, besides contributing to its maintenance, to pay the additional expense of sending their children to another school. What right have the teachers of the school to teach those children religious doctrine different from that which they are taught by their parents? Why should the state compel them to unlearn the Lord's Prayer as taught in their homes and by their church, and use the Lord's Prayer as taught by another sect? If Catholic children may be compelled to read the King James' version of the Bible in schools taught by Protestant teachers, the same law will authorize Catholic teachers to compel Protestant children to read the Catholic version. The same law which subjects Catholic children to Protestant domination in school districts which are controlled by Protestant influence will subject the children of Protestants to Catholic control where the Catholics predominate. In one part of the state the King James' version of the Bible may be read in the public schools, in another the many Bible, while in school districts where the sects are somewhat evenly divided, a religious contest may be expected at each action of a school director, to determine which sect shall prevail in the school. Our institution has wisely provided against such contest, by excluding sectarian instruction altogether from the school.

We have been considering the case of the Protestant and the Catholic. Let us consider that of the Christian and the Jew. The Christian believes that Judaism was a temporary dispensation, and that Christ is the Messiah,—the Saviour of the world. The Jew denies that Christ was the Messiah and regards him as an imposter. It is not the teaching of sectarian doctrine to his children to read to them daily from the New Testament, every chapter of which holds up Christ crucified as the Saviour of men?

The Bible, in its entirety, is a sectarian work as to the Jew and every believer in any religious other than the Christian religion, and as those who are heretical or who hold beliefs that are not regarded as orthodox. Whether it may be called sectarian or not, its use in the schools necessarily results in sectarian instruction. There are

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many sects of Christians, and their differences grow out of their differing constructions of various parts of the Scriptures,—the different conclusions drawn as to the effect of the same words. The portions of Scripture which form the basis of these sectarian differences cannot be thoughtfully and intelligently read without impressing the reader, favorably or otherwise, with reference to the doctrines supposed to be derived from them. The petition avers that selected portions of the Bible have been read by the teachers, without averring what portions, so that it does not appear whether or not the portions so read involved any doctrinal or sectarian question. No test suggests itself to us, and perhaps it would be impossible to lay down one, whereby to determine whether any particular part of the Bible forms the basis of or supports a sectarian doctrine. Such a test seems impracticable. The only means of preventing sectarian instruction in the school is to exclude altogether religious instruction, by means of the reading of the Bible or otherwise. The Bible is not read in the public schools as mere literature or mere history. It cannot be separated from its character as an inspired book of religion. It is not adapted for use as a text-book for the teaching alone of reading, of history, or of literature, without regard to its religious character. Such use would be inconsistent with its true character and the reverence in which the Scriptures are held and should be held. If any parts are to be selected for use as being free from sectarian differences of opinion, who will select them? Is it to be left to the teacher? The teacher may be religious or irreligious, Protestant, Catholic, or Jew. To leave the selection to the teacher, with no test whereby to determine the selection, is to allow any part selected to be read, and is substantially equivalent to permitting all to be read.

It is true that this is a Christian state. The great majority of its people adhere to the Christian religion. No doubt this is a Protestant state. The majority of its people adhere to one or another of the Protestant denominations. But the law knows no distinction between the Christian and the Pagan, the Protestant and the Catholic. All are citizens. Their civil rights are precisely equal. The law cannot see religious differences, because the Constitution has definitely and completely excluded religion from the law's contemplation in considering men's rights. There can be no distinction based on religion. The state is not, and under our Constitution cannot be, a teacher of religion. All sects, religious or even anti-religious, stand on an equal footing. They have the same rights of citizenship, without

discrimination. The public school is supported by the taxes which each citizen, regardless of his religion or his lack of it, is compelled to pay. The school, like the government, is simply a civil institution. It is secular, and not religious, in its purposes. The truths of the Bible are the truths of religion, which do not come within the province of the public school. No one denies their importance. No one denies that they should be taught to the youth of the state. The Constitution and the law do not interfere with such teaching, but they do banish theological polemics from the schools and the school districts. This is done, not from any hostility to religion, but because it is no part of the duty of the state to teach religion,—to take the money of all, and apply it to teaching the children of all the religion of a part only. Instruction in religion must be voluntary. Abundant means are at hand for all who seek such instruction for themselves or their children. Organizations whose purpose is the spreading of religious knowledge and instruction exist, and many individuals, in connection with such organizations and independently, are devoted to that work. Religion is taught, and should be taught, in the churches, Sunday schools, parochial and other church schools, and religious meetings. Parents should teach it to their children at home, where its truths can be most effectively enforced. Religion does not need an alliance with the state to encourage its growth. The law does not attempt to enforce Christianity. Christianity had its beginning and grew under oppression. Where it has depended upon the sword of civil authority for its enforcement it has been weakest. Its weapons are moral and spiritual, and its power is not dependent upon the force of a majority. It asks from the civil government only impartial protection, and concedes to every other sect and religion the same impartial civil right. "United with government, religion never rises above the merest superstition; united with religion, government never rises above the merest despotism; and all history shows us that the more widely and completely they are separated the better it is for both." *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233.

In several of the states the provisions of their respective Constitutions have been considered with respect to their effect upon the right of school officers to cause the Bible to be read in the public schools. In Maine, Massachusetts, Michigan, Iowa, Kansas, Kentucky, and Texas it has been held that such reading of the Bible, or exercises such as those described in the petition in this case, are not in violation of any of the 29 L.R.A. (N.S.)

provisions of the Constitutions of those states. *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Spiller v. Woburn*, 12 Allen, 127; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 A. & E. Ann. Cas. 521; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Church v. Bullock* (Tex.) 16 L.R.A. (N.S.) 860, 109 S. W. 115; *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 722, 9 A. & E. Ann. Cas. 36. In Wisconsin and Nebraska the decisions were adverse to the use of the Bible in the schools. *State ex rel. Weiss v. District Board*, 76 Wis. 177, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967; *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169. In *O'Connor v. Headrick*, 184 N. Y. 421, 7 L.R.A. (N.S.) 402, 77 N. E. 612, 6 A. & E. Ann. Cas. 432, it was held that a regulation which prohibited teachers in the public schools from wearing a distinctively sectarian garb while engaged in teaching was legal and reasonable. The costume in question in that case was the distinctive dress worn by the Roman Catholic religious order known as the Sisterhood of St. Joseph. The respect inspired in the pupils for the religious denomination of their teachers, thus manifested, was regarded as a sectarian influence. On the other hand, the supreme court of Pennsylvania has held that sisters of a religious order of the Roman Catholic Church might be employed as teachers in the public schools, and permitted, while teaching, to wear the garb of their order. *Hysong v. Gallitzin School Dist.* 164 Pa. 629, 26 L.R.A. 203, 44 Am. St. Rep. 632, 30 Atl. 482. The Constitutions of Maine, Massachusetts, and Michigan do not contain the prohibitions of our Constitution, and differ so widely from the latter that the decisions in those states have little bearing on the question here presented. The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises, as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exercises in which the rest of the school joins separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma, and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it

because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the Constitution. While some of these decisions tend to sustain the proposition that the reading of the Bible, prayer, and singing of hymns, in accordance with the usual method of conducting devotional exercises in Protestant denominations, may be required of the pupils of a public school against the protest and religious convictions of the pupils and their parents, we cannot assent to the reasoning on which such decisions are founded and apply it to the provisions of our Constitution.

This question has never been passed upon by this court. In *Millard v. Board of Education*, 121 Ill. 297, 10 N. E. 669, it appeared that the Angelus Prayer, used in Roman Catholic Churches, was said by teachers and pupils when school closed at noon. It did not appear to be required of or by anybody, but, so far as appeared, it was by a voluntary understanding between the teachers and scholars, to which no scholar or parent objected, and it did not appear that the complainant had any children attending the school. It was held that no rights of the complainant were shown to be violated. In *North v. University of Illinois*, 137 Ill. 296, 27 N. E. 54, it was held that a rule of the university requiring students to attend chapel exercises, unless excused for good cause, was not in violation of the Constitution. It has been held that the temporary use of a schoolhouse for religious meetings is not forbidden by the Constitution. *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160. In *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, it was held that school directors, acting in good faith, and not maliciously, are not answerable in damages for the expulsion of a pupil for refusing to observe a rule requiring all pupils to lay aside their books and remain quiet during the opening exercises, which consisted in reading a chapter from the King James' translation of the Bible. School directors are vested with discretion in determining what rules will best promote the good order and well-being of the school, and though they may err as to their powers and duties under the law or as to the facts submitted to them, they are not liable to a suit for damages for their mistakes honestly made, but only for malicious acts. These decisions have little or no bearing on the question here.

In our judgment the exercises mentioned in the petition constitute religious worship, and the reading of the Bible in the school constitutes sectarian instruction. The demurrer to the amended petition should

therefore, in our opinion, have been overruled.

The judgment is reversed, and the cause remanded to the Circuit Court, with directions to overrule the demurrer.

Hand and Cartwright, JJ., dissenting:

This was a petition filed in the name of the people, upon the relation of Jeremiah Ring, John J. Doyle, Johanna Watts, Mary Murphy, and Bridget Markillie, against the Board of Education of School District No. 24, township 14, range 12, in Scott county, for a peremptory writ of mandamus to require the said board of education to cause the teachers in the public schools of said school district, during school hours, to discontinue the practice of reading passages from the King James' version of the Bible; from causing the pupils of said schools to recite in concert the Lord's Prayer as it is found in the King James' version of the Bible, and from singing sacred hymns. The board of education filed a demurrer to said petition, which was sustained, and the petition was dismissed, and a writ of error has been sued out from this court to review the judgment of the circuit court; and this court is asked to hold that the Constitutions of the United States and this state prohibit the reading of the King James' version of the Bible, the repeating of the Lord's Prayer in concert as it is found in that version of the Bible, and the singing of sacred hymns by the teachers and pupils of our public schools during school hours; and the majority opinion holds that such acts are prohibited by constitutional enactment.

The sections of the state and Federal Constitutions which it is claimed are violated read as follows: "The free exercise and enjoyment of religious profession and worship, without discrimination, shall forever be guaranteed; and no person shall be denied any civil or political right, privilege, or capacity on account of his religious opinions; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the state. No person shall be required to attend or support any ministry or place of worship against his consent, nor shall any preference be given by law to any religious denomination or mode of worship." Const. of 1870, art. 2, § 3. "Neither the general assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, univer-

sity, or other literary or scientific institution, controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the state or any such public corporation to any church, or for any sectarian purpose." Const. of 1870, Art. 8, § 3. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." 1st Amendment to Const. of U. S. "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." 14th Amendment to Const. of U. S. § 1.

The Federal Constitution does not control in the matter of public schools or in what instructions shall be given therein; but the regulation of public schools, as well as their support, rests with and devolves upon the several states. Nor does the Constitution of the United States provide for protecting the citizens of the respective states in their religious liberties. This is left to the state Constitutions and laws. Nor is there any inhibition imposed by the Constitution of the United States in this respect on the states. (*Permoli v. New Orleans*, 3 How. 589, 11 L. ed. 739.) The question, therefore, to be decided in this case is, Is the reading of the Bible in the public schools of this state prohibited by our state Constitution? The Bible is not mentioned in the Constitution, nor is there found therein any express inhibition against the giving of religious or moral instruction in the public schools, and while the Constitution is silent upon those subjects, it has been, from the formation of our state government to the present time, universally recognized by the people that there are certain fundamental principles of religion and morality which the safety of society requires should be imparted to the youth of the state, and that those principles may be properly taught in the public schools as a part of the secular knowledge which it is their province to instill into the youthful mind. That this may be done without the infraction of any of the safeguards of the Constitution is recognized in all the cases where the right to read the Bible in the public schools has been conceded, so far as 29 L.R.A. (N.S.)

we have been able to discover. Even as early as the ordinance of 1787, the men who framed that great charter of liberty sought to secure to the inhabitants of the Northwest territory, and their posterity, the inestimable blessings of religious and moral instruction. It is therein provided that "religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." And Mr. Justice Lyon, in *State ex rel. Weiss v. District Board*, 76 Wia. 177, 195, 7 L.R.A. 330, 20 Am. St. Rep. 41, 44 N. W. 967, 974, which is the main authority relied upon by the relators, while considering this phase of the question and while referring to the Bible, said: "Furthermore, there is much in the Bible which cannot justly be characterized as sectarian. There can be no valid objection to the use of such matter in the secular instruction of the pupils. Much of it has great historical and literary value, which may be thus utilized without violating the constitutional prohibition. It may also be used to inculcate good morals,—that is, our duties to each other,—which may and ought to be inculcated by the district schools. No more complete code of morals exists than is contained in the New Testament, which reaffirms and emphasizes the moral obligations laid down in the Ten Commandments. Concerning the fundamental principles of moral ethics, the religious sects do not disagree."

It has always been understood that those general provisions found in the several state Constitutions which usually appear in what are designated as a "bill of rights," and which provide that the enjoyment of the free exercise of religious profession and worship, without discrimination, shall be forever guaranteed to the people, and that they shall not be required to attend upon or support any ministry or place of worship against their consent, were primarily designed to prevent the establishment of a state religion or the compulsion of the citizen to support, by taxation or otherwise, an established ministry or places of established worship, it being the object of such constitutional provisions to work a complete divorcement of the state and the Church, and to sever the relation between the state and Church which had existed in the mother country prior to the Revolution, and secure to the citizen freedom of conscience in the matter of religious belief and worship, and that the instruction which was to be imparted in the public schools did not fall within those provisions of the state Constitution unless the instruction sought to be imparted degenerated into what may be properly designated as denominational or

sectarian instruction, and falls within the inhibition of those provisions of the Constitution which were enacted with a view to placing all religious denominations or religious sects upon an equality before the law. *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 160; *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256. We think it obvious, therefore, that all must agree that there can be no rational constitutional basis upon which this court can hold that the Bible can be excluded from the public schools of the state, other than upon the ground that it is sectarian in character and falls within those inhibitions of the state Constitution which prohibit teaching in our public schools the beliefs and doctrines of the different denominations or sects into which the believers of the Bible have, in the course of time, divided.

In all the cases upon this subject which the diligence of counsel have been able to discover,—and, so far as we can learn, they have found them all,—when the Bible has been excluded from, or when it has been admitted to, the public schools, the question turned upon (1) whether or not the Bible was viewed by the court then considering the question, to be sectarian in its character or nonsectarian in its character; and (2) whether the engaging in the reading of the Bible, repeating the Lord's Prayer, singing songs, etc., rendered the public school in which the exercises were held a place of public worship. None of the courts of last resort have held that the Bible, as an entirety, could be excluded from the public schools on constitutional grounds, as none of them have held that all parts of it were sectarian. The supreme courts of two states, Wisconsin and Nebraska (*State ex rel. Weiss v. District Board*, *supra*; *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169, have held that certain portions of the Bible are sectarian in their character while others are not sectarian in character, and that the sectarian portions should be excluded from the public schools while the nonsectarian portions might be read. Neither of these courts, however, lays down any test or tests, or points out any course of reasoning, whereby the school boards, teachers, patrons, or pupils of the public schools can certainly determine what portions of the Bible are sectarian and what portions are nonsectarian,—that is, what portions may and what portions may not be read in the public schools; and it would seem essential in a matter of so great importance to the success of the public schools (there should be no doubt if only a part of the Bible is to be admitted and only a part of the Bible is to be excluded from the public schools) that there

should be some test or tests, or some course of reasoning pointed out by the courts, which could be applied by the school boards, teachers, patrons, and pupils, so that all might know with reasonable certainty what portions of the Bible might and what portions might not be read in the public schools. To leave the determination of those questions in doubt would be to invite strife and stir up litigation in almost every case where a portion of the Bible had been admitted or excluded from the public school. As to whether the portions admitted or rejected were, within the view of the law, sectarian or nonsectarian, we assume no rule upon this subject was announced by those courts, as, doubtless, by reason of the character of the question involved, no rational rule on the subject could be formulated. If this is true, as it would seem to be, it perhaps would lead to the conclusion that the Bible should be held by the courts to be either sectarian or nonsectarian in character in its entirety, and cause the legal mind to doubt the soundness of the judgments of those courts which hold that the Bible in part may be read in the public schools and in part must be excluded from the public schools. The supreme courts of Maine, Massachusetts, Michigan, Iowa, Kentucky, Kansas, and Texas (*Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256; *Spiller v. Woburn*, 12 Allen, 127; *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250; *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475; *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 A. & E. Ann. Cas. 36; *Billard v. Board of Education*, 69 Kan. 53, 66 L.R.A. 166, 105 Am. St. Rep. 148, 76 Pac. 422, 2 A. & E. Ann. Cas. 521; *Church v. Bullock* [Tex.] 16 L.R.A. (N.S.) 860, 109 S. W. 115) have each held the Bible to be nonsectarian in character in its entirety and that no part of it could be excluded from the public schools on constitutional grounds. The judgment of those courts would seem at least to be capable of enforcement, and to announce a definite rule and one that would be readily understood by the school boards, teachers, patrons, and pupils, and the reasons given in support of those judgments appear to be satisfactory, convincing, and logical. The supreme court of every state of the Union which has spoken on the subject, with the exception of Wisconsin and Nebraska, has held that the reading of the Bible in the public schools is not prohibited by constitutional enactment, and the supreme courts of Wisconsin and Nebraska each hold that only portions of the Bible may be excluded. The majority opinion does not cite a single case, and one can-

not be found, which sustains the position assumed therein; but that opinion is in conflict with the adjudications of the Supreme Court of the United States and the Supreme courts of Maine, Massachusetts, Ohio, Michigan, Iowa, Kentucky, Kansas, Texas, Wisconsin, and Nebraska upon the questions here involved; and this conflict cannot be explained upon a difference of constitutional enactment, as no essential difference has been, and cannot be, pointed out upon this subject, between the Constitution of this state and the Constitutions of the states referred to. The majority opinion is also out of harmony with all our previous decisions on the subject, and either ignores these decisions or misinterprets them.

We think it apparent that it must be held, from a constitutional standpoint, that all parts of the Bible can be read in the public schools, or that it must be excluded as an entirety from the public schools; and the supreme court of Ohio (Board of Education v. Minor, 23 Ohio St. 211, 13 Am. Rep. 233) has held that the Bible could not be admitted to the public schools of the state against the wish of the school board in control of the schools in the city where the question arose, but that its admission or exclusion from the public schools of that state rested entirely with the several school boards in charge of the schools of the state.

It is stated in a note to *Cook County v. Chicago Industrial School*, 125 Ill. 540, 1 L.R.A. 437, 18 N. E. 183 (where the same is reported in 8 Am. St. Rep. 386), that the Constitutions of twenty-three states, in addition to that of Illinois, contain provisions prohibiting the payment of moneys or any appropriation or grant for the support, benefit, or in aid of sectarian schools. In the twenty-three states designated, the wording of their Constitutions differs somewhat on this question, and none of them, we think, correspond in exact terms with the constitutional provisions on the subject as they are found in the Constitution of this state. We believe them, however, in principle, to all substantially agree. We think, therefore, the question here to be determined does not differ from the question determined by the several supreme courts of our sister states that have spoken upon this question, and that the subject, for the purposes of this case, may be condensed into the following propositions: First, was the reading of the Bible by the teachers, the repeating of the Lord's Prayer in concert, and the singing of sacred hymns by the pupils in said schools, sectarian religious instruction? Second, did the conducting of the foregoing exercises in said public schools in the manner in which the bill avers them to have been conducted make said schools places of

worship, which the relators' children were required to attend and the relators, who were taxpayers, required to support? These propositions will be considered in their order.

There is no book that is so widely read or so highly respected as the Bible, or that has had so great an influence upon the habits and lives of mankind, and all men whose judgments are of value—even those who deny its divine origin—admit it to be a great historical and literary storehouse, and that its teachings are of the greatest value to the world. While numerous translations have been made of the Bible and many editions of it published since the art of printing and manufacture of paper were discovered, the version of King James I. (1607-1611), which is the version generally used by the Protestants, and the one compiled at Douay some time previous and which was later adopted by the Roman Catholic Church as the only authentic version, are the versions generally in use in this country. We do not think the Bible can be said to be a sectarian book or that its teachings are sectarian. Its plan of salvation is broad enough to include all the world; and the fact that those who believe in the Bible do not agree as to the interpretation of its teachings and have divided into sects, and are therefore sectarian in their beliefs, does not change the Bible or make it a sectarian book. To make the Bible sectarian, it must be made to appear that it teaches the dogmas of some particular sect, and it is not sufficient, to show that it is sectarian, to establish that its teachings are so comprehensive that different phases of belief may be founded on arguments based upon some of its parts which, when perhaps only imperfectly examined and partially understood, may seem to tend to support the doctrines of a particular sect and to overthrow the doctrines of some other sect. Much has been written upon the subject as to whether the Bible is sectarian and whether or not there is a difference between sectarianism and Christianity as taught by the Bible. We will call attention to some of the cases where the question now under consideration has been considered. by other courts, and will quote from them quite extensively, even at the risk of some repetition.

In *Vidal v. Philadelphia*, 2 How. 127, 197, 11 L. ed. 205, 223, the question was whether a charitable bequest made by Stephen Girard to establish a college in the city of Philadelphia was void because it prohibited the teaching of the Christian religion within the college. The will provided that no ecclesiastic, missionary, or minister of any sect whatever, should ever hold or exercise any

station or duty within the college, and that no such person should ever be admitted, as a visitor or otherwise, within the premises appropriated for the purposes of the college. The court, in sustaining the trust, said: "This objection is that the foundation of the college upon the principles and exclusions prescribed by the testator is derogatory and hostile to the Christian religion, and so is void as being against the common law and public policy of Pennsylvania.

. . . The objection itself assumes the proposition that Christianity is not to be taught because ecclesiastics are not to be instructors or officers. But this is by no means a necessary or legitimate inference from the premises. Why may not laymen instruct in the general principles of Christianity, as well as ecclesiastics? There is no restriction as to the religious opinions of the instructors and officers. They may be, and doubtless under the auspices of the city government they will always be, men not only distinguished for learning and talents, but for piety and elevated virtue and holy lives and characters; and we cannot overlook the blessings which such men, by their conduct as well as their instructions, may—nay, must—impart to their youthful pupils. Why may not the Bible, and especially the New Testament, without note or comment, be read and taught as a Divine revelation in the college, its general precepts expounded, its evidences explained, and its glorious principles of morality inculcated? What is there to prevent a work, not sectarian, upon the general evidences of Christianity, from being read and taught in the college by lay teachers? Certainly there is nothing in the will that proscribes such studies. Above all, the testator positively enjoins 'that all the instructors and teachers in the college shall take pains to instill into the minds of the scholars the purest principles of morality, so that on their entrance into active life they may, from inclination and habit, evince benevolence towards their fellow creatures and a love of truth, sobriety, and industry, adopting at the same time such religious tenets as their matured reason may enable them to prefer.' Now, it may well be asked, What is there in all this which is positively enjoined inconsistent with the spirit or truths of Christianity? Are not these truths all taught by Christianity, although it teaches much more? Where can the purest principles of morality be learned so clearly or so perfectly as from the New Testament? Where are benevolence, the love of truth, sobriety, and industry so powerfully and irresistibly inculcated as in the Sacred volume? The testator has not said how these great principles are to be taught or by whom, except it be

by laymen, nor what books are to be used to explain or enforce them. All that we can gather from his language is that he desired to exclude sectarians and sectarianism from the college, leaving the instructors and officers free to teach the purest morality, the love of truth, sobriety, and industry, by all appropriate means, and, of course, including the best, the surest, and the most impressive." In reviewing this case in *Hackett v. Brooksville Graded School Dist.* 120 Ky. 608, 69 L.R.A. 592, 117 Am. St. Rep. 599, 87 S. W. 792, 9 A. & E. Ann. Cas. 36. Mr. Justice O'Rear concludes: "Two points are emphasized by the reasoning of the learned judge: (1) That it was sectarianism that was prohibited; and (2) that the Bible is not a sectarian book,—which are the two points most prominent in this case."

The case of *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256, is an early case, and was an action against a school board for expelling a pupil who refused to read the King James' version of the Bible in the public school, that book having been adopted by the school board as one to be used by the pupils in their school work. The court said: "That common schools are not for the purpose of instruction in the theological doctrines of any religion or of any sect. The state regards no one sect as superior to any other, . . . and if the peculiar tenet of any particular sect were so taught, it would furnish a well-grounded cause of complaint on the part of those who entertained different or opposing religious sentiments." The court further said: "The Bible was used merely as a book in which instruction in reading was given. But reading the Bible is no more an interference with religious belief than would reading the mythology of Greece or Rome be regarded as interfering with religious belief or an affirmation of the pagan creeds."

In *Spiller v. Woburn*, 12 Allen, 127, it was held that the public-school committee did not exceed their authority in passing an order that the Bible should be read at the opening of the schools on the morning of each day. "No more appropriate method could be adopted," said the court, "of keeping in the minds of both teachers and scholars that one of the chief objects of education, as declared by the statutes of this commonwealth, and which teachers are especially enjoined to carry into effect, is 'to impress on the minds of children and youth committed to their care and instruction the principles of piety and justice, and a sacred regard for truth.'"

In *Pfeiffer v. Board of Education*, 118 Mich. 560, 42 L.R.A. 536, 77 N. W. 250, it was held the use in the public schools, for fifteen minutes at the close of each day's

session, as a supplemental text-book on reading, of a book entitled "Readings from the Bible," which is largely made up of extracts from the Bible, emphasizing the moral precepts of the Ten Commandments, where the teacher is forbidden to make any comment upon the matter therein contained, and is required to excuse from that part of the session any pupil upon application of his parent or guardian, is not a violation of the state Constitution (art. 4, § 41) prohibiting the legislature from diminishing or enlarging "the civil or political rights, privileges, and capacities of any person on account of his opinion or belief concerning matters of religion."

In *Hackett v. Brooksville Graded School Dist.* supra, a taxpayer sought an injunction to restrain the teachers and trustees from reading from the King James' version of the Bible in the schools, and from opening the school with prayers and songs alleged to be of a denominational character. The case went to the court of appeals, where, in a most learned and exhaustive opinion, it was held the injunction was properly denied. The court, on page 616 of 120 Ky., said: "The main question we conceive to be, Is the King James' translation of the Bible—or, for that matter, any edition of the Bible—a sectarian book? There is, perhaps, no book that is so widely used and so highly respected as the Bible; no other that has been translated into as many tongues; no other that has had such marked influence upon the habits and life of the world. It is not the least of its marvellous attributes that it is so catholic that every seeming phase of belief finds comfort in its comprehensive precepts. Many translations of it, and of parts of it, have been made from time to time. . . . There is controversy over the authenticity of some parts of some of the editions, and there are some people who do not believe that any of it is the inspired or revealed word of God; yet it remains that civilized mankind generally accord to it a reverential regard, while all who study its sublime sentiments and consider its great moral influence must admit that it is, from any point of view, one of the most important of books. . . . That the Bible, or any particular edition, has been adopted by one or more denominations as authentic, or by them asserted to be inspired, cannot make it a sectarian book. The book itself, to be sectarian, must show that it teaches the peculiar dogmas of a sect as such, and not alone that it is so comprehensive as to include them by the partial interpretation of its adherents. Nor is a book sectarian merely because it was edited or compiled by those of a particular sect. It is not the 29 L.R.A. (N.S.)

authorship nor mechanical composition of the book, nor the use of it, but its contents, that give it its character. . . . If the legislature or the constitutional convention had intended that the Bible should be proscribed they would simply have said so. The word 'Bible' is shorter and better understood than the word 'sectarian.' It is not conceivable that if it had been intended to exclude the Bible from public schools, that purpose would have been obscured within the controversial word. Nor can we conceive that, under the American system of providing thorough education of all the youth, to fit them for good citizenship in every sense, the legislature or the constitutional convention could have intended to exclude from their course of instruction any consideration of such work, whose historical and literary value, aside from its theological aspects, would seem to entitle it to a high place in any well-ordered course of general instruction. The history of a religion, including its teachings and claim of authority,—as, for example, the writings of Confucius or Mahomet,—might be profitably studied; Why may not also the wisdom of Solomon and the life of Christ? If the same things were in any other book than the Bible, it would not be doubted that it was within the discretion of the school boards and teachers whether it was expedient to include them in the common-school course of study without violating the impartiality of the law concerning religious beliefs."

In the case of *State ex rel. Freeman v. Scheve*, 65 Neb. 853, 59 L.R.A. 927, 91 N. W. 846, 93 N. W. 169, each of the several judges of the supreme court of Nebraska filed an opinion, and upon a petition for a rehearing an additional opinion was filed. Mr. Justice Holcomb, in the opinion filed by him, said: "The Bible itself is not a sectarian book, and it is an erroneous conception to so regard it. Altogether, aside from its theological aspects, the Bible has a historical and literary value surpassed by no secular writings. Its moral teachings and precepts are of the purest and highest, and appeal to the noblest impulses of mankind, as no other literary production ever has. Can anyone successfully contend, in the light of the contemporaneous history of the times, that the constitutional framers, and the people who adopted that instrument, intended to altogether exclude the Bible from the schools? If such had been the intention, would not the members of the convention have expressed themselves in such language as could not be misunderstood? . . . The provisions of the Constitution on the subject of sectarian instruction in the public schools should be con-

strued so as to give it the scope and effect intended by its framers and the people who adopted it. This is accomplished by firmly excluding therefrom all forms of instruction calculated to establish and confirm in the minds of the students those theological doctrines and beliefs which are peculiar to some only of the different religious sects. Further than this we are not warranted in going."

The precise questions here involved do not appear to have been directly passed upon by this court. There are a number of cases, however, which have been decided by this court which bear upon the questions, and which lead to the conclusion that the Bible may be read in the public schools of this state, and that the reciting of the Lord's Prayer and the singing of sacred hymns by the pupils do not constitute acts of worship or make the school a place of public worship in a constitutional sense. *Nichols v. School Directors*, 93 Ill. 61, 34 Am. Rep. 60; *McCormick v. Burt*, 95 Ill. 63, 35 Am. Rep. 163; *Millard v. Board of Education*, 21 Ill. 297, 10 N. E. 669; *Cook County v. Chicago Industrial School*, 125 Ill. 540, 1 R.A. 437, 18 N. E. 138; *North v. University of Illinois*, 137 Ill. 296, 27 N. E. 54. In the year 1879, in *Nichols v. School Directors*, supra, the question was raised as to the constitutionality of a statute which provided that the board of school directors might permit religious meetings and Sunday schools to be held in schoolhouses; and the court, speaking by Mr. Justice Sherman, held there was nothing in the state constitution which prohibited a schoolhouse, with the consent of the school directors, from being used for the purpose designated by the statute. He said, in considering the questions involved in that case, that religion and religious worship had not been so far placed under the ban of the constitution that they might not be allowed to become the recipients of any incidental benefit, because it flowed from public bodies or the authorities of the state. The soundness of the doctrine announced in that case has never been questioned until now. In the year 1880, in *McCormick v. Burt*, supra, the court, speaking through Mr. Justice Craig, held that a school-teacher and a board of education were not liable for damages for excluding a pupil from the public schools of this state who refused to comply with the rule which provided that the teacher should read a chapter from the King James' version of the Bible as an opening exercise each morning, and that the pupils, during such reading, should lay aside their books and remain quiet. The court, in the course of its opinion, said, "the rule is certainly a reasonable one." L.R.A.(N.S.)

In 1887, in *Millard v. Board of Education* supra, the court held, speaking through Mr. Justice Craig, that there was nothing in the Constitution of this state to prevent a board of education from permitting, as an opening exercise of the school, the recital by the pupils of the Angelus Prayer. And in *North v. University of Illinois*, supra, which was decided in 1891, this court, speaking through Mr. Justice Wilkin, held that a rule of the state university requiring all students who had not been excused to attend chapel exercises, where the New Testament was read, the Lord's Prayer recited, religious hymns sung, and religious addresses delivered, was not unreasonable, and that the rule, or its enforcement, was not prohibited by the Constitution of this state; and it may be remarked of this case that the soundness of the doctrine announced has never been questioned until now. At the time all these cases were before the court and under consideration, and when decided, Mr. Justice Scholfield and Mr. Justice Craig were members of this court, both of whom were members of the constitutional convention which framed the Constitution of 1870; and it must be conceded they were both able and painstaking judges; and it is very strange, indeed, if the state Constitution which they assisted in framing contained provisions which excluded the Bible from the public schools of this state on the ground it was a sectarian book, and prohibited the reciting of the Lord's Prayer and singing the religious hymns in the public schools, because they were religious exercises and made the schoolhouse a place of public worship, that they did not discover that fact, but that the discovery that the reading of the Bible, the reciting of the Lord's Prayer, and the singing of religious hymns in the public schools, were unconstitutional, was left to a later generation of judges. In *Chicago v. Reeves*, 220 Ill. 274, 77 N. E. 237, in considering the validity of the amendment of the Constitution adopted in 1904, on page 296, it was said: "Judges Craig and Scholfield were both members of the constitutional convention of 1870 and were members of this court at the time the amendment of 1878 was proposed and adopted, and Judge Craig wrote the opinion in *Moore v. People*, 106 Ill. 376, and Judge Scholfield that in *Wilson v. Sanitary Dist.* 133 Ill. 433, 27 N. E. 203, construing and interpreting that amendment, and it can hardly be presumed that either of these painstaking and able men was not familiar with § 2 of article 14 of the Constitution, and its legal effect, at the time of the proposal and adoption of said amendment, and at the time they prepared opinions in those cases."

We think the great weight of authority sustains the position that the Bible, or any version thereof, may be read in the public schools of this state, without comment, without violating those inhibitions of the Constitution which prohibit the giving of sectarian religious instruction in the public schools. The opinion of the supreme court of Wisconsin which holds only portions of the Bible may be read in the public schools was repudiated by this court in *North v. University of Illinois*, supra.

We will next consider the question whether said school, by reason of the exercises hereinbefore referred to being conducted therein, converted the school into a place of worship which the relators' children were required to attend, and the relators who were taxpayers were required to support. This question has been passed upon adversely to the contention of the relators in the cases above cited from the supreme courts of the states of Kentucky and Tennessee, and in *Moore v. Monroe*, 64 Iowa, 367, 52 Am. Rep. 444, 20 N. W. 475, and in *Nichols v. School Directors*, supra. In the Kentucky and Texas cases, by way of illustration, the practice of opening the sessions of legislative assemblies by prayer was referred to, and it was said similar exercises in schools no more made it a place of worship, within the meaning of the Constitution, than it made legislative halls places of worship. In the *Nichols* Case it was sought to enjoin the directors from allowing the schoolhouse to be used by any society or organization for the purpose of holding therein religious meetings. The bill alleged that the directors had given permission to different church organizations to hold religious services in the schoolhouse, and that under this permission some of the church organizations intended holding stated meetings therein. The bill alleged that the complainant was a taxpayer in the school district; that he objected to the action of the directors, and that, by such action of the school directors, he was compelled to aid in furnishing a house of worship, contrary to the law of the land. The circuit court sustained a demurrer to the bill, and this court affirmed its decision, holding that such use of the schoolhouse as was proposed was not in violation of § 3 of article 2 of the Constitution, or of any other provision of the Constitution.

It is urged, however, that the children of relators were required to bow their heads and assume a devotional attitude during the reading of the Bible and the recitation of the Lord's Prayer and the singing of sacred hymns. This is true in part; but the petition does not allege the relators' children were required to participate in the reci-

tation of the Lord's Prayer or in the singing of said sacred hymns. At most, according to the averments of the petition, the children of relators were required to remain quiet during the exercises; and the fact that they were required to bow their heads and fold their hands during the exercises did not convert the school into a place of worship. In *Spiller v. Woburn*, 12 Allen, 127, during the exercises the pupils were required to bow their heads. The court said the regulation "did not prescribe an act which was necessarily one of devotion or religious ceremony. It went no further than to require the observance of quiet and decorum during the religious service with which the school was opened. It did not compel a pupil to join in the prayer, but only to assume an attitude which was calculated to prevent interruption by avoiding all communication with others during the service."

It is also said that some of the children in the school were asked to explain certain passages of the Bible which were read. It does not appear from the petition what the passages were which were required to be explained, what the explanation was, or that the children of relators were ever called upon by the teacher to make such explanation. We think, therefore, that the fact that some of the children in the school were required to explain the meaning of certain passages of Scripture which were read in their presence did not convert the school into a place of worship.

Our conclusion is that the exercises which were conducted in said school did not convert the school into a place of worship which the relators' children were required to attend or the relators, who were taxpayers, were required to support.

The questions involved in the last proposition are not as vital to a decision of this case as the main question involved in the first proposition, viz., Is the reading of the Bible, or any translation thereof, in the public schools of this state, without comment, sectarian religious instruction?—which question is the principal one discussed in the briefs, and was undoubtedly considered by the parties as the pivotal question in the case, and the other questions were only thrown in as makeweights. In holding that the Bible, or any of its translations, may be read in the public schools of the state without comment, and that when so read the reading thereof is not sectarian religious instruction, and does not convert the school where it is read into a place of worship, it must not be thought that we would have this court assume the power to determine whether the Bible, or any translation thereof, shall or shall not be read in

the public schools of the state. That power is vested in other hands. Nor must it be thought that we would have this court assume to determine which one of the several translations referred to is the correct translation of the Bible, or that all of said translations are not correct, or to determine which translation, if any, shall be read in the public schools, or which one of the many sects or denominations into which the believers of the Bible have divided, teaches, as a part of its creed or church doctrine, the correct interpretation of the Bible. With those questions, or any of them, this court is not, in the decision of this case, concerned. All we would have the court decide is that the Constitution of this state does not prohibit the reading of the Bible, or any of its translations, in the public schools, and that the exercises as carried on in the schools in question did not make them a place of worship.

Section 1 of article 8 of the Constitution of 1870 provides: "The general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common-school education." In pursuance of this constitutional provision, legislation has been passed by the general assembly whereby an elaborate free school system has been established in this state, and the management and control of the public schools of the state have been placed by such legislation in the hands of boards of school directors and boards of education, the members of which boards are elected by the people. The powers of such boards are very broad, and the determination of the questions whether or not the Bible, or any of the translations thereof, and, if any, which one, shall be read in the public schools, rests primarily with those boards, and their determination of those questions cannot be reviewed or controlled by the courts.

In *McCormick v. Burt*, 95 Ill. 263, 35 Am. Rep. 163, Edward McCormick brought an action on the case against Cora Burt and the directors of the school she was teaching, to recover damages on account of his suspension, by the board of directors, from the benefits of the school, for the nonobservance of a rule adopted by them for the government of the school. The substance of the rule adopted was, the teacher might read, as an opening exercise, every morning, not occupying more than fifteen minutes, a chapter from the King James' translation of the Bible. No one was required to be present at or participate in such exercise unless he chose to do so, and while such exercise was being conducted every pupil was required to lay aside his books and remain quiet. The plaintiff was a

Catholic, and for the nonobservance of the rule, which it was alleged was void as an interference with the religious convictions of plaintiff and his father, the plaintiff was expelled. A demurrer was sustained to the declaration, and this court, in affirming the judgment of the lower court, after referring to the powers conferred upon the board of school directors, on page 265, said: "In the performance of the duties imposed by law upon school directors, they must exercise judgment and discretion. What rules and regulations will best promote the interests of the school under their immediate control, and what branches shall be taught and what text-books shall be used, are matters left to the determination of the directors, and must be settled by them from the best lights they can obtain from any source, keeping always in view the highest good of the whole school."

In *Board of Education v. Minor*, 23 Ohio St. 211, 13 Am. Rep. 233, the board of education of the city of Cincinnati adopted a rule prohibiting the reading of the Bible in the public schools of that city, and the plaintiffs, who were taxpayers, filed a bill to enjoin the board of education from enforcing said rule. The nisi prius court gave judgment for the plaintiffs, and perpetually enjoined the enforcement of the rule. The judgment of the lower court was reversed by the supreme court on the ground that the legislature of the state had placed the management of the public schools under the exclusive control of directors, trustees, and boards of education, and the courts had no rightful authority to interfere with the management and control of the public schools of said state.

In *Donahoe v. Richards*, 38 Me. 379, 61 Am. Dec. 256, the plaintiff brought an action to recover damages for expelling him from the district school in the town of Ellsworth for having refused to read from the Protestant revision of the English Bible, which the school committee had regularly prescribed to be used as a reading book in the public schools of said town. The court said: "The right to prescribe the general course of instruction and to direct what books shall be used must exist somewhere. The legislature have seen fit to repose the authority to determine this in the several superintending school committees. They may, therefore, rightly exercise it. . . . The power of selection is general and unlimited. It is vested in the committee of each town. It was neither expected nor intended that there should be entire uniformity in the course of instruction or in the books to be used in the several towns in the state. The very distribution of power manifestly shows that no such intention could have existed.

The manner of its exercise must depend upon the judgment, discretion, and intelligence of the different committees. The actual selection at any given time and place depends upon the views and opinions of those upon whom the law devolves this duty. The power of ultimate decision must rest somewhere. No right of appeal is granted. No power of revision is conferred upon any other tribunal. Because the right of selection may be injudiciously or unwisely exercised, it by no means follows that it does not exist. This court cannot make an affirmative rule as to what books shall be selected, nor a negative rule prescribing what shall not be used, if the right of selection be exercised in conformity with existing statutes and the Constitution."

We are unable to discover any natural or logical connection between the questions before the court, of the construction of our Constitution and the sorrows of the Quakers and Roger Williams, or the illiberal views and practices of the Puritans, in England, or the Cavaliers, in Virginia. Those things lend no aid to the determination of the question whether the reading of the Bible in the public schools, without comment, is sectarian instruction. Those matters have no more relation to the controversy in this case, than the inability of the court to decide the sectarian controversy between the different branches of the Presbyterian Church. That controversy between two organized religious bodies related to sectarian doctrine, and if the decision has any application to this case, the logical conclusion would be that we could not determine whether the reading of the Bible is sectarian instruction or not. In that case, as in all other sectarian controversies, each party disputed the proposition that the Bible contained the teachings of the other sect, and insisted that the sectarian beliefs arose not from what was contained in the Bible, but from what the other sect read into it. In fact, sectarian differences are rapidly disappearing from the religious world, and the growing general understanding is that the Bible does not teach sectarian doctrine. To hold that the Bible cannot be read in the public schools requires a judicial determination that it teaches the doctrine of some sect, and if that is so we ought to be able to say what sect.

It is said in the majority opinion that a child cannot hear the Scriptures read in the public schools without being instructed as to the Divinity of Jesus Christ, which would be an affront to a large and intelligent religious denomination whose members do not admit that it teaches such a doctrine, and the same may be said of the other sectarian beliefs mentioned in the opinion. Free-29 L.R.A. (N.S.)

thinkers and atheists do not constitute a sect which is an organized religious body, and the prohibition against sectarian instruction, which relates only to the teaching of the doctrine of a particular sect, has no application to them. The Constitution is not directed against the Bible, but applies equally to all forms and phases of religious beliefs. If the Bible is to be excluded because it pertains to a religion and a future state, heathen mythology must go with it. Moral philosophy must be discarded because it reasons of God and immortality, and all literature which mentions a Supreme Being, or intimates any obligations to Him, must be excluded. We cannot conceive that the framers of the Constitution, or the people, intended that the best and most inspiring literature, history, and science should be excluded from the public schools, so that nothing should be left except that which has been sterilized, so as not to interfere with the beliefs or offend the sensibilities of atheists.

The majority opinion seems to proceed upon the theory that the people cannot be trusted to determine, through their constitutionally elected school officers, the question whether the Bible shall be read in the public schools of the state, for fear that where Protestants are in the majority the King James' version will be read, and where the Catholics are in the majority the Douay version will be read, and that by leaving the question to the determination of the school boards (where it has heretofore rested) "a religious contest may be expected at each election of a school director." The principle which lies at the basis of our government is that majorities must control in the determination of all questions which affect the public, and that principle applies here as it does in the decision of all public questions. The state of Illinois is a Christian state. Its people, as a people, are a Bible-reading people, and its citizens who are students of and believers of the Bible are not all found in the churches. We are of the opinion the decisions of the question whether the Bible shall be read in the public schools should be left where it has rested from the foundation of the state and through its entire history,—i. e., with the local school boards,—and this court, with a view to foreclose the people by its decision upon the question whether they desire to have the Bible read in the public schools, should not read into our state Constitution, as the majority opinion does, a provision excluding the Bible and all its translations from the public schools, and that especially should this be true in view of the well-known historical fact that the framers of the Constitution of 1870 expressly refused

to incorporate into the Constitution a provision excluding the Bible from the public schools when that provision was offered in that convention, and declared by its action in declining to incorporate into the Constitution such provision, in the view of the members of that convention, the question whether the Bible should be read in the public schools should rest with the several school boards of the state, where it had rested under the Constitutions of 1818 and 1848. While it is true this court may construe the Constitution, it has not the power, and it should not, under a pretext to construe the Constitution, amend it, certainly not in a case like this, where the effect of the amendment will be to deprive many thousands of children living in this state of any knowledge of the principles taught in the Bible, as the Bible is not taught in all the homes of the state, and the only knowledge which a large number of children in this state will ever gain of the Bible must be through the public schools, and if they do not get such knowledge there it will be lost to them entirely. We therefore most respectfully dissent from the majority opinion, and earnestly protest against a result which excludes the Bible from the public schools of the state.

IOWA SUPREME COURT.

STATE OF IOWA
v.

FRANK DYER, App't.

(— Iowa, —, 124 N. W. 629.)

Indictment — murder — first degree.

1. Murder in the first degree is charged by an indictment alleging that accused did, with intent to kill and murder, wrongfully, deliberately, and premeditatedly, and with malice aforethought, shoot a bullet from a revolver into the body of accused, and that death resulted therefrom.

Evidence — dying declarations.

2. Declarations by one *in articulo mortis* who believes that he is mortally wounded are admissible in evidence.

Appeal — rejected evidence — subsequent testimony.

3. A judgment cannot be reversed be-

Note. — See note to State v. Gardner, 2 L.R.A. (N.S.) 49, on "retreat to the wall" in homicide; and particularly cases cited at pages 75, 76, of that note, on the question what constitutes the dwelling or castle for the purposes of the rule with respect to the duty to retreat. See also note to State v. Beckner, 3 L.R.A. (N.S.) 535, on standpoint of determination as to danger and necessity to kill in self-defense. 29 L.R.A. (N.S.)

cause of refusal to permit a witness to answer a question, if he afterwards testifies fully with respect to the matter.

Homicide — self-defense — justification.

4. One cannot excuse the taking of life, on the ground of self-defense, unless it was, or reasonably appeared to be, the only means of saving his own life, or preventing great bodily injury.

Same — retreat — roomer in building.

5. A roomer in a house cannot when attacked by its owner, in the building, out of his own room, take life, without retreating, on the theory that he is in his own habitation.

Trial — instructions — homicide — lesser degrees of crime.

6. The court is not bound, in a prosecution for homicide, to submit to the jury the question of guilt of some degree of the offense lower than that of which the evidence shows him to be guilty, if he is culpable at all.

Homicide — self-defense — drunken adversary — question for jury.

7. The court cannot say as matter of law that one who shoots another person who, while very drunk, is attempting to attack him with a knife, acts in self-defense, if it might be found that he could easily have avoided the assault.

(February 8, 1910.)

APPPEAL by defendant from a judgment of the District Court for Monona County convicting him of manslaughter. Affirmed.

The facts are stated in the opinion.

Messrs. Sullivan & Griffin, B. F. Ross, and E. L. Conlin for appellant.

Messrs. H. W. Byers, Attorney General and Charles W. Lyon, for the State:

The indictment is in proper form to charge murder in the first degree.

1 McClain, Crim. Law, p. 367.

The condition of mind on the part of the deceased necessary to render a declaration admissible as a dying declaration may be shown by proof of the evident danger or conduct of the person making the declaration, or other circumstances, such as the nature of the wound or sickness.

State v. Gillick, 7 Iowa, 287; State v. Nash, 7 Iowa, 347; State v. Leeper, 70 Iowa, 748, 30 N. W. 501; State v. Kuhn, 117 Iowa, 216, 90 N. W. 733; State v. Murdy, 81 Iowa, 603, 47 N. W. 867.

It is not necessary to show that, at the time the declarations were made, deceased was under the apprehension of immediate dissolution or that he was *in articulo mortis*.

State v. Nash, supra.

It is sufficient if it appear that the declarations of deceased were made at a time

when he was in fact *in extremis* and under the belief of impending dissolution.

State v. Dennis, 119 Iowa, 688, 94 N. W. 235.

The killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life or preventing great bodily injury.

State v. Jones, 89 Iowa, 182, 56 N. W. 427; State v. Warner, 100 Iowa, 260, 69 N. W. 546; State v. Bone, 114 Iowa, 537, 87 N. W. 507; State v. Bennett, 128 Iowa, 713, 105 N. W. 324, 5 A. & E. Ann. Cas. 997; State v. Rutledge, 135 Iowa, 581, 113 N. W. 461; Wharton, Homicide, 3d ed. p. 358.

Where, in a prosecution for murder, it is admitted that the defendant, by violence, caused the death of the deceased and claimed that his act was done in self-defense, and was not unlawful, it is not error to instruct the jury that they should convict the defendant of murder or manslaughter, or acquit him. In such cases it is not necessary to instruct the jury as to offenses lower than manslaughter which may be included in the crime of murder charged in the indictment.

State v. Perigo, 80 Iowa, 37, 45 N. W. 399; State v. Munchrath, 78 Iowa, 268, 43 N. W. 211; State v. Mahan, 68 Iowa, 304, 20 N. W. 449, 27 N. W. 249; State v. Walker, 133 Iowa, 489, 110 N. W. 925.

Deemer, Ch. J., delivered the opinion of the court:

That defendant shot one E. C. Kirk, and inflicted a wound from which he almost immediately died, is practically admitted. Defendant relied largely upon the defense of self-defense. This defense was submitted to the jury, but without avail. For a reversal many propositions are relied upon, which we shall consider in the order presented by the briefs.

It is first insisted that the trial court was in error in submitting the crime of murder in the first degree, for the reason that the indictment does not charge that degree of homicide. To meet this proposition it will not be necessary to do more than set forth the charging part of the presentment. It reads as follows: "For that the said Frank Dyer then and there, and in and upon the body of one E. C. Kirk, wilfully, feloniously, deliberately, premeditatedly, and with malice aforethought, did commit an assault with a deadly weapon, to wit, a revolver, then and there loaded with powder and ball, the particular description of said revolver being to this grand jury unknown, and said revolver being then and there held in the hands of the said Frank Dyer, and then and

there the said Frank Dyer did, with a specific intent to kill and murder the said E. C. Kirk, wilfully, feloniously, deliberately, premeditatedly, and with malice aforethought, shoot off and discharge the contents of said deadly weapon at, against, and into the body of the said E. C. Kirk, thereby wrongfully, wilfully, feloniously, deliberately, premeditatedly, and with malice aforethought, and with the specific intent aforesaid, inflicting upon the body of the said E. C. Kirk a mortal wound, of which mortal wound the said E. C. Kirk did, on or about the 3d day of March, A. D. 1909, die." That this charges murder in the first degree, see cases cited in 1 McClain, Crim. Law, p. 367. It not only charges that the shooting was with the specific intent to kill, but also that it was done wrongfully, deliberately, premeditatedly, and with the specific intent to kill and murder. This is sufficient. State v. Townsend, 66 Iowa, 741, 24 N. W. 535; State v. Stanley, 33 Iowa, 526. The cases relied upon for appellant are not in point. In State v. Andrews, 84 Iowa, 88, 50 N. W. 549, there was no allegation that the killing was done deliberately, premeditatedly, and with malice aforethought, and the same defect appears in the indictment in State v. Linhoff, 121 Iowa, 632, 97 N. W. 77. Here both the assault and the killing are alleged to have been done with the intent to kill and murder.

2. The state was permitted, over defendant's objections, to introduce what were said to be the dying declarations of Kirk. It is said that no proper foundation was laid for this testimony. It sufficiently appears that, when these declarations were made, deceased was *in articulo mortis*. He then believed that he had been mortally wounded, had been told by his physician that he could not recover, and was in fact *in extremis*, under the rule announced in State v. Murdy, 81 Iowa, 603, 47 N. W. 867; State v. Kuhn, 117 Iowa, 216, 90 N. W. 733; State v. Dennis, 119 Iowa, 688, 94 N. W. 235, and other like cases.

3. Complaint is made of the court's refusal to permit defendant to testify as to why he thought the bullet which he shot ranged upward. As he afterward testified to this matter without objection, no prejudice resulted from the ruling on a previous question, even if it were erroneous.

4. The ninth instruction given by the trial court is complained of. It reads as follows: "In determining whether or not the shot was fired without legal excuse or justification, you are instructed that the defendant admits the killing of E. C. Kirk. And his claim is that in what he did he was acting in self-defense. You are instructed

ed, in relation to this claim of the defendant, that where one is assaulted by another person in such a manner as to induce the person assaulted to reasonably believe that he is at the time in actual danger of losing his life, or of suffering great bodily harm, he is justified in defending himself, although the danger be not real, but only apparent, and he may use such force and means to defend himself as may, in good faith, appear necessary to him as an ordinarily prudent and courageous man, under all the circumstances at the time surrounding him. And he is not bound to draw nice calculations from appearances. All that is required of him is that he shall act from reasonable and honest convictions as to his danger, although mistaken as to the extent of said danger. But before one is justified in taking life in self-defense, it must be, or it must reasonably appear to be, the only means of saving one's own life, or of preventing great bodily injury. If it is evident to the assaulted that the danger which appears to be imminent can be avoided in any other way, as by retreating from the conflict, the taking of the life of the assailant is not excusable. And if you shall find from the evidence in this case that, just before the defendant killed E. C. Kirk, he had been unlawfully assaulted by the said E. C. Kirk, and that from the character of said assault and the weapon used he had reason, as an ordinarily prudent and courageous man, to believe, and did in good faith and honestly believe, that he was in danger of being killed or suffering great bodily injury, and that the parties were so situated that he could not have retreated, or that he could not reasonably have expected to have preserved his life or protect himself from injury by retreating,—then and in that case he was justified in using such force and such means to protect his life and person as may, in good faith, then have appeared necessary to him as an ordinarily prudent and courageous man, under all the circumstances then surrounding him, even to the taking of life. And if you shall find that he did not use greater force or more hazardous means to protect his life and person than really appeared to him necessary, as an ordinarily prudent and courageous man, under the circumstances in which he was then placed, including the nature and manner of the assault, then and in that case the killing was not unlawful, and you should return a verdict of not guilty. But if you find that he did use greater force or more hazardous means than appeared necessary to protect himself from great bodily harm, as an ordinarily prudent and courageous man, under the circumstances in which he was then placed, including the nature

and manner of the assault, you cannot acquit him on the ground of self-defense. And, in determining whether or not the defendant in doing what he did acted in self-defense, you will remember that the burden of proof is upon the state to prove, beyond a reasonable doubt, that in doing what he did he was not acting in self-defense. If, after considering all the evidence introduced in this case, a reasonable doubt arises in your minds as to whether or not the defendant, in doing what he did, was acting in self-defense, then the state has not proved the defendant guilty beyond a reasonable doubt. 'A great bodily injury,' as used in these instructions, means a more serious bodily injury than results from an ordinary battery."

The chief complaint made of this is that it imposed upon defendant the duty of retreat. This is said to be error for two reasons: First, because one assaulted is not bound to retreat, but may repel force with force; and, second, because one in his own habitation is not bound to retreat under any circumstances. *State v. Goering*, 106 Iowa, 636, 77 N. W. 327, 11 Am. Crim. Rep. 140; *State v. Evenson*, 122 Iowa, 88, 64 L.R.A. 77, 97 N. W. 979; *Young v. State*, 74 Neb. 346, 2 L.R.A. (N.S.) 66, 104 N. W. 867, are relied upon. None of these cases are in point. In the *Evenson* Case defendant was accused of an assault with intent to inflict a great bodily injury, and in the *Goering* Case the defendant was charged with a simple assault; and in each of these cases it was held that, where one is assaulted, and the character thereof does not involve life or great bodily injury, the person assaulted is not bound to retreat. That these cases are not applicable to the one at bar sufficiently appears from the following quotation, taken from *State v. Evenson*, supra: "We do not overlook the many cases wherein it is held that one may not, under the plea of self-defense, justify the taking of human life, if it reasonably appears that the same could have been avoided by making use of an avenue of escape open to him. But the principle thus declared upon has no application to a case where, as in the case at bar, one is wrongfully assaulted, and repels force by the use of like force. In the one case the law regards the liberty of the citizen to come and go as he pleases without molestation, save at the hands of the law, as the thing paramount. In the other case the law regards the temporary deprivation of the exercise of personal liberty on the part of one citizen as of less importance than is the life of another citizen, and this even though the latter is for the moment engaged in making an unlawful assault upon the former. Hence the injunction that a

person assaulted must retreat, if he can do so in reasonable safety, before resorting to the extreme measure of taking the life of his assailant."

The rule applicable to this case is announced in *State v. Bennett*, 128 Iowa, 713, 105 N. W. 324; 5 A. & E. Ann. Cas. 997; *State v. Rutledge*, 135 Iowa, 581, 113 N. W. 401; *State v. Jones*, 89 Iowa, 182, 56 N. W. 427; *State v. Warner*, 100 Iowa, 260, 69 N. W. 546, and other like cases. From the *Jones Case*, *supra*, we quote the following: "The specific objection to this instruction goes to that part of it which, under the facts recited, required the defendant to retreat or retire from the conflict, unless it appeared to him, as a reasonably prudent man, that he could not retreat without danger to his life, or danger of great bodily injury. It may be conceded that, in the earlier adjudications of this court, there is language employed which may be said to lay down the doctrine that one who is assailed with a deadly weapon is not required to flee from his adversary, but may strike and kill in his own defense. See *Tweedy v. State*, 5 Iowa, 433. But in the latter utterances of this court, and it may now be said to be the general rule elsewhere, that the killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable." In the *Warner Case* we said: "We have stated the rule applicable to the law of self-defense. In the late case of *State v. Jones*, 89 Iowa, 183, 56 N. W. 428, it is said 'that the killing of an assailant is excusable on the ground of self-defense only when it is, or reasonably appears to be, the only means of saving one's own life, or preventing some great bodily injury. If the danger which appears to be imminent can be avoided in any other way, as by retiring from the conflict, the taking of the life of the assailant is not excusable.' The instructions of the court upon this branch of the case are assailed as erroneous. We will not set them out. They are in accord with the rule above announced, and with many other cases determined by this court." In *State v. Bennett*, *supra*, we said: "In the earlier cases in this court it was held that there was no duty to retreat where one was assailed with a deadly weapon. See *Tweedy v. State*, *supra*. While in the later adjudications it has been held that such duty exists under ordinary circumstances. See *State v. Jones*, 89 Iowa, 182, 56 N. W. 427, and cases cited 29 L.R.A. (N.S.)

therein. But none of the latter cases decide the exact point involved here, which is, briefly, whether a person, while on his own premises, must retreat from a felonious assault. It is the universal rule that the dwelling house is the castle, and that no retreat is necessary therein; and we see no sound reason for holding that a greater obligation exists when the accused is on his own premises, where he has a right to be, and which constitute a part of his residence and home."

It does not appear that defendant was on his own premises when he claims to have been assaulted by the deceased. The most that can be said is that he had a room in the house of the deceased which he called his own, and that he made his home there. The alleged assault was not made upon him while he was in his room, but in the dining room or parlor of the house belonging to the deceased. This was not defendant's castle. It belonged to and was occupied by the deceased, and defendant was not, under the circumstances, permitted to stand his ground in order to defend his premises. In other words, the duty of retreat applied to him just the same as if he were upon the street, or in any other place where the rights of the disputants were equal. Generally speaking, the duty of retreat applies in this jurisdiction, and the rule was correctly stated by the trial court in its instruction which is now challenged.

5. As the deceased died within a few days after he was shot, the trial court did not err in refusing to submit to the jury the question of defendant's guilt of some offense lower than a degree of homicide. *State v. Perigo*, 80 Iowa, 37, 45 N. W. 399; *State v. Mahan*, 68 Iowa, 304, 20 N. W. 449, 27 N. W. 249; *State v. Walker*, 133 Iowa, 489, 110 N. W. 925. Under the testimony defendant was guilty of manslaughter, if guilty of any offense, and there was no error in not submitting the various degrees of crime lower than that offense.

6. Lastly, it is argued that the testimony fails to show that defendant was not acting in self-defense. We are not disposed to take this view of the case. That question was primarily for a jury. From the testimony it appears that the deceased was very drunk, and that while he may have assaulted, or attempted to assault, defendant with a knife, the way for escape was open and easy. Other persons were present to aid the defendant, and they had succeeded, down to the time of the shooting, in keeping deceased away from the defendant. Defendant had armed himself with a gun before having any trouble with the deceased. He knew that deceased was much intoxicated, and a jury may very well have found that he

could easily have avoided the assault, which he claims deceased was threatening to make with a knife. We cannot say, as a matter of law, that defendant was acting in self-defense. That was a fair question for the jury under the record before us.

No prejudicial error appears, and the judgment must be, and it is, affirmed.

Petition for rehearing overruled.

KENTUCKY COURT OF APPEALS.

AMERICA MARTIN et al., Appts.,

v.

BURRELL SMITH et al.

(136 Ky. 804, 125 S. W. 249.)

Officer — surety — liability — scope of duty.

The sureties on a marshal's bond are liable for his act in shooting a bystander whom he believes intends to interfere in an arrest which he is attempting to make.

(February 18, 1910.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Whitley County in defendants' favor in an action brought to recover upon a marshal's bond for damages alleged to have been caused by the unlawful killing by defendant Smith of plaintiffs' father. Reversed.

The facts are stated in the opinion.

Messrs. T. Z. Morrow and J. K. Watkins for appellants.

Messrs. A. T. Siler and K. D. Perkins for appellees.

O'Rear, J., delivered the opinion of the court:

Appellants, the infant children of Demps. Martin, brought this suit against appellees, Burrell Smith's sureties, on the bond of

Smith as marshal of the town of Corbin, for the unlawful killing of Demps. Martin by the marshal while in the discharge of his official duty. The marshal was attempting to arrest Charley Martin for an alleged offense and was resisted by the prisoner. Demps. Martin and others were standing by. The officer evidently thought Demps. Martin and the others contemplated an interference with the arrest, but, in fact, they did not attempt it. In the difficulty the marshal shot Charley Martin, and while still holding to and fighting with him turned his pistol on Demps. Martin, and shot him, inflicting a mortal wound. On a former appeal (Martin v. Smith, 33 Ky. L. Rep. 582, 110 S. W. 413) it was held that the action could be maintained on behalf of the infants, although the widow of Demps. Martin should decline to prosecute it. On a return of the case the trial was had before the jury. The issue was whether the shooting of Demps. Martin was done by the marshal in his apparent necessary self-defense. The answer denied, too, that Martin was shot by the marshal unlawfully, wilfully, and maliciously. The evidence for the plaintiff showed the facts above recited, except, of course, it did not show absolutely the belief of the marshal as to the necessity for shooting Demps. Martin. In fact, the evidence for the plaintiff showed that the marshal did not act lawfully in attempting the arrest of Charley Martin. The latter was not committing any offense in the presence of the officer, and had not committed any offense at all. Whether he should have resisted the arrest is not the question. But whether the officer acted in excess of his legal authority in what he did, including the shooting of Demps. Martin, was the question to be tried.

At the close of the plaintiff's evidence, the trial court peremptorily directed a verdict for appellees, the sureties on the marshal's official bond. That was done because

Note. — Liability of sureties on bond of peace officer for latter's act in killing or injuring one person while attempting to execute criminal process against another.

In *Kopplekom v. Huffman*, 12 Neb. 95, 10 N. W. 577, a former appeal of which is reported in 8 Neb. 344, 1 N. W. 243, the sureties of an officer were held liable for assaulting and injuring a person under the mistaken belief that he was an escaped prisoner for whom he had a warrant; and to the same effect is the similar case of *Johnson v. Williams*, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759, which is sufficiently set out in *MARTIN v. SMITH*.

In the analogous case of *Stephenson v.* 29 L.R.A. (N.S.)

Sinclair, 14 Tex. Civ. App. 133, 36 S. W. 137, the sureties of an officer were held liable where he shot a prisoner on a misdemeanor charge to prevent his escape, and killed a horse belonging to the plaintiff, upon which the prisoner was riding.

As to liability of sureties on constable's bond for assault made in serving or executing civil writ or process, see *Greenberg v. People*, 8 L.R.A. (N.S.) 1223, and note appended thereto.

As to right of action under the death act against the sureties on the bond of a peace officer, for the death of a person due to the act or default of the officer or one of his deputies, see *Growbarger v. United States Fidelity & G. Co.* 11 L.R.A. (N.S.) 758, and note.

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the court was of the opinion that the officer's act in shooting Demps. Martin, an unoffending bystander, was not in the attempted exercise of official authority, but was the personal malicious act of that officer. The marshal was at the time acting in his official capacity. He was endeavoring to arrest a person whom he believed was violating the law. The circumstances proven tend to show that he thought Demps. Martin was about to interfere to liberate his prisoner, or that he would inflict some bodily harm on the officer. He evidently deemed that it was necessary to protect himself in the discharge of what he conceived to be his official duty to shoot Demps. Martin. In that, so far as the plaintiff's evidence showed, he was not in fact in jeopardy, nor did there appear reasonable grounds for his believing that he was.

In *Shields v. Pflanz*, 101 Ky. 407, 41 S. W. 267, it was held that the officer's malicious and excessive exercise of authority under a writ in his hands for execution was an act for which he was liable in his official capacity to the person aggrieved. In *Johnson v. Williams*, 111 Ky. 289, 54 L.R.A. 220, 98 Am. St. Rep. 416, 63 S. W. 759, the action was against the sheriff and the sureties on his official bond for the negligent killing of Charles Williams by two of the sheriff's deputies acting under warrant, but mistaking the person killed for the one whom they were directed to arrest upon a charge of felony. The officers were acting in their official capacity. Circumstances might have justified their killing the real defendant in executing their writ, even though he had been doing no more than the person supposed to be he was doing. Yet for their mistake their principal and his sureties were held liable. The case was rested upon the principle that, if the officer in executing a legal writ seizes the goods or person of a stranger to the writ, he is not protected by his writ, is a trespasser *ab initio*, and liable to the person damaged for the full consequences of his error. The court reasoned thus: "If the sheriff, in executing an order of attachment against the property of one person, seizes that of another, he and his sureties are liable. If he should seize the property of one not a defendant in the execution and sell it to satisfy it, he is liable on his bond for the tort. If he has a warrant against one, and under it arrests another, he is liable on his bond for the tort thus committed. He cannot justify the wrongful arrest by showing he believed and had reasonable grounds for believing that he was executing it upon the party named in it. If he cannot in that way justify a wrongful arrest, much less should he be permitted to justify the killing of another by

showing that he had probable cause for believing that he was shooting at the party whom he was authorized to arrest." It was also held in *Stephens v. Wilson*, 115 Ky. 27, 72 S. W. 336, that, if the deputy sheriff, acting under void process, arrests a man under it, the sureties on the sheriff's bond are liable. So, in *Growbarger v. United States Fidelity & G. Co.* 126 Ky. 119, 11 L.R.A. (N.S.) 758, 128 Am. St. Rep. 274, 102 S. W. 873, a town marshal and his surety were held liable on the former's official bond for the wanton killing, by the officer, of Growbarger, whom the marshal had under arrest for breach of the peace. All the cases rest upon the principle that the officer in executing his writ, or in acting officially where a writ is not required, as where an offense has been committed in his presence, is restrained by the terms and the limit of his writ; that if he exceeds its terms in taking the property or the person of a stranger to the writ, or if he acts in excess of authority, he becomes a trespasser, whose act, being in virtue of his office, is covered by the terms of his bond, and that he breaches his bond in committing such excess.

In the case here in hand the act of the marshal in attempting to arrest Charley Martin was in virtue of the former's office. In acting he acted in excess of authority. If he had killed Charley Martin unnecessarily, it would not be disputed, under the authorities cited, that he and the sureties on his bond would be liable for the damages so inflicted. If he had been mistaken as to the person, and perpetrated the same act upon Demps. Martin, though in good faith believing he was Charley Martin, he and his sureties would nevertheless be liable. When he, in the course of his action, carries his official act so far as that reaches over and touches a stranger, inflicting injury upon him, the liability of the marshal as for an act done in virtue of his office is identical with the liability in the foregoing adjudged cases. It was one continuous transaction, consisting of a series of connected parts. It cannot be said that he is liable for one part of his act, and yet for another part is not liable.

We are of the opinion that the peremptory instruction was erroneous. There was enough in the evidence for the case to have gone to the jury under instructions telling them that if the killing of Demps. Martin by the marshal was done by the latter, in virtue of his official capacity, in attempting to arrest Charley Martin when not necessary, or apparently necessary, to save himself from death or great bodily harm about to be then inflicted on him by Charles Martin or Demps. Martin, or by others there acting with them, the marshal and the sur-

eties on his official bond are liable to the infant plaintiffs for the damages inflicted, which is the reasonable value of the power of the deceased to earn money, which was destroyed. Ky. Stat. § 4 (Russell's Stat. § 8).

Judgment reversed and remanded for a new trial under proceedings consistent herewith.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

WESTERN UNION TELEGRAPH COMPANY, Appt.,
v.

ABRAHAM V. D. POLHEMUS et al.

(102 C. C. A. 105, 178 Fed. 904.)

Telegraph — prescriptive right in highway.

1. A telegraph company which has maintained poles on a public highway for more than sixty years is presumed to have acquired the right to do so from the abutting owner.

Same — additional poles — right to set.

2. A telegraph company which has a right, as against the abutting owner, to maintain a line of poles along the highway in front of his property, has included therein the right to set additional poles where necessary to strengthen the line because of the weight of additional wires.

(May 5, 1910.)

A PPEAL by complainant from a decree of the Circuit Court of the United States for the District of New Jersey dismissing a bill filed to restrain the alleged unlawful cutting down of telegraph poles along a certain public highway. Reversed.

The facts are stated in the opinion.

Argued before Buffington, Circuit Judge, and McPherson, District Judge.

Mr. George H. Fearons, with Messrs. John H. Backes and Henry D. Estabrook, for appellant:

The occupation of the highway by tele-

Note. — A careful search has failed to disclose other cases passing upon the right of a telegraph or telephone company to set additional poles along a line to which it has already acquired a right. A somewhat analogous question as to the right of an abutting owner to damages for running of street railway is discussed in a note to *Gosa v. Milwaukee Light, Heat & Traction Co.* 15 L.R.A. (N.S.) 531.

As to the general question whether a telegraph or telephone line is an additional servitude on the highway, see notes in 3 L.R.A. (N.S.) 323 and 7 L.R.A. (N.S.) 87.
29 L.R.A. (N.S.)

graph and telephone lines is permissible, and does not constitute an additional servitude.

Julia Bldg. Assn. v. Bell Teleph. Co. 88 Mo. 258, 57 Am. Rep. 398; *Magee v. Overshiner*, 150 Ind. 127, 40 L.R.A. 370, 65 Am. St. Rep. 358, 49 N. E. 951; *Cater v. Northwestern Teleph. Exch. Co.* 60 Minn. 539, 28 L.R.A. 310, 51 Am. St. Rep. 543, 63 N. W. 111; *People v. Eaton*, 100 Mich. 208, 24 L.R.A. 721, 59 N. W. 145; *Pierce v. Drew*, 136 Mass. 75, 49 Am. Rep. 7; *Hershfield v. Rocky Mountain Bell Teleph. Co.* 12 Mont. 103, 29 Pac. 883; *McCormick v. District of Columbia*, 4 Mackey, 396; *Hewett v. Western U. Teleg. Co.* 4 Mackey, 424, 54 Am. Rep. 284; *Coburn v. New Teleph. Co.* 156 Ind. 90, 52 L.R.A. 671, 59 N. E. 324; *Irwin v. Great Southern Teleph. Co.* 37 La. Ann. 63; *Boston v. Richardson*, 13 Allen, 160; *Bishop v. North Adams Fire Dist.* 167 Mass. 364, 45 N. E. 925; *St. Louis v. Bell Teleph. Co.* 96 Mo. 623, 2 L.R.A. 278, 9 Am. St. Rep. 370, 10 S. W. 197; *Kirby v. Citizens' Teleph. Co.* 17 S. D. 362, 97 N. W. 3, 2 A. & E. Ann. Cas. 152; *Donovan v. Allert*, 11 N. D. 289, 58 L.R.A. 775, 95 Am. St. Rep. 720, 91 N. W. 441; *Patton v. Chattanooga*, 108 Tenn. 197, 65 S. W. 414; *Rugg v. Commercial U. Teleg. Co.* 66 Vt. 208, 28 Atl. 1036; *Western U. Teleg. Co. v. Bullard*, 65 Vt. 634, 27 Atl. 332; *Maxwell v. Central Dist. & Printing Teleg. Co.* 51 W. Va. 121, 41 S. E. 125.

The erection of the poles in controversy did not place an additional servitude upon the fee.

Nichols, Em. Dom. §§ 64, 123, 134; *Brainard v. Clapp*, 10 Cush. 6, 57 Am. Dec. 74; *Tucker v. Tower*, 9 Pick. 110, 19 Am. Dec. 350; *Newton v. Perry*, 163 Mass. 321, 39 N. E. 1032; *Northeastern Teleph. & Teleg. Co. v. Hepburn*, 72 N. J. Eq. 7, 65 Atl. 747; *Jones, Easements*, §§ 812 et seq.

Mr. Willard O. Parker for appellees.

Buffington, Circuit Judge, delivered the opinion of the court:

This is an appeal by the Western Union Telegraph Company from a decree dismissing a bill in equity filed by it against Polhemus and others, praying for an injunction to prevent the cutting down of certain telegraph line poles on a public road in New Jersey. The road in question is known as the "Old York road," which antedates the Revolution, and is the main highway between Philadelphia and New York. From the stipulated facts it appears that such road has, since 1846, been used as a telegraph line way by various companies which, about 1880, were absorbed and succeeded by complainant. The latter then put all its wires upon one line, located practically

as it is to-day, and from time to time renewed its poles and added extra cross-arms and wires to meet its needs. At the date of suit, and for many years prior thereto, such line consisted of poles set 150 feet apart, each provided with five cross-arms and carrying in all thirty-eight wires. In 1903, complainant, its wires having been prostrated for 14 miles by storm, began strengthening its said line between Philadelphia and New York by planting an extra pole, with cross-arms, midway between every two poles, and has since completed the whole of such work between said cities, except for some 1,700 feet in front of the property of the respondents. At this point strengthening of the line is particularly required on account of strains caused by curves. This strengthening was reluctantly undertaken by complainant, and only because, in expert opinion, the same was necessary for the operation of its lines. The added poles will not interfere with the use of the highway. The respondents denied the right of the telegraph company to place these additional poles on the highway without compensation to them for the additional burden to the easement, and, not being paid therefor, chopped them down.

It will thus be observed that respondents do not question the general right of the complainant to maintain a telegraph line supported by poles along the York road; but their objection is to the additional poles placed between the old ones. This, they say, is an unwarranted burden on the easement, which complainant cannot enjoy without compensation therefor to the abutting landowner. The unchallenged right of complainant to maintain a telegraph line along the York road appeared to have been in enjoyment from a short time after the state of New Jersey, by its act of March 19, 1845 (P. L. 1845, p. 119), chartered the New Jersey Magnetic Company, the predecessor of the complainant. That act empowered the company to "construct and use a line of magnetic telegraph across the state of New Jersey for the purpose of transmitting intelligence between the cities of New York and Philadelphia, on the most eligible route," and provided: "It shall be lawful for said company to contract for and acquire the fee simple, or any lesser interest in the lands which may be needed for said work, and, when obtaining such lands or such interest therein as shall be requisite, may proceed to construct and use said telegraph, and said company may construct their said telegraph either over or under public roads . . . not interfering with the travel on said roads."

Now, the telegraph line being authorized, a recognized factor of commerce (Pensacola 29 L.R.A. (N.S.)

Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1, 24 L. ed. 708), and being a public use (Western U. Teleg. Co. v. Pennsylvania R. Co. [C. C.] 120 Fed. 371), and having been in use all these years, it is to be presumed that the right so to do, with reference to abutting landowners, was acquired from the predecessors of these respondents, who then owned the abutting lands here concerned, in which event due compensation for present and future use thereof was either paid to or waived by them; for, as was said in *Brainard v. Clapp*, 10 Cush. 6, 57 Am. Dec. 74, hereafter referred to: "Where land is thus taken and paid for, for public use, the public, or those corporations who act as agents and trustees for the public, have a right to make all the use of the land which the necessity and convenience of the public may require, and that the landowner receives in damages a compensation, which in theory of law is an indemnity for all such uses."

Such being the reasonable presumption, warranted by the long, uninterrupted, and unchallenged use of the easement, it seems that strengthening the line by additional poles was an incident to the enjoyment of the easement originally acquired. It was conducive to the advancement of the purpose for which the land was originally taken; for a company vested with the right of eminent domain is not to be restricted to such a limited exercise of that power that the public use, the full enjoyment of which alone justifies the grant of the high power of eminent domain, will be crippled in enjoyment. On the contrary, the scope of the power is commensurate with the full use of the end in view. And as in condemnation, so also when an easement for a public use exists by grant or presumption of grant, such grant, unless in some way restricted, is presumed to embrace every incident conducive to the entire enjoyment of the grant. In other words, as said in *Newton v. Perry*, 163 Mass. 321, 39 N. E. 1032: "The purpose of the taking must fix the extent of the right. . . . The whole right is paid for without regard to the probability of its being exercised." *Howe v. Weymouth*, 148 Mass. 605, 20 N. E. 316; *Proprietors of Mills v. Randolph*, 157 Mass. 345, 32 N. E. 153.

Indeed, at an early day, Chief Justice Shaw, in *Brainard v. Clapp*, supra, held that the easement acquired by a railroad was "an appropriation of the land to all the uses of the land for the road, necessary and incidental; . . . that the right and power of the company to use the lands within their limits may not only be exercised originally, when their road is first laid out, but continues to exist afterwards. And if, after

hey have commenced operations, it is found necessary," etc., "to make further uses of the land, for purposes incident to the safe and beneficial occupation of the road, by," etc., "they have a right to do so to the same extent as when the railroad was originally laid out and constructed. All the reasons of necessity, propriety, and fitness which apply to the one case are equally applicable to the other."

And, referring to the broader use of the easement, he says: "The case of railroads may be regarded as standing on somewhat stronger grounds in this respect for several reasons: Because railroads are extremely costly, and proprietors cannot, in the outset, make and complete all the works which they contemplate and intend to make; because these works are comparatively new, and improvements are constantly making in the structure and management of the tracks, and thus companies may profit by their own experience and that of others; and because an increase in the business of carrying passengers and freight may call for new works after the roads have gone into operation, and these are new exigencies calling for a new use of the land assigned to them."

And this future exercise of easement rights seems to have been generally followed, and was recognized in this circuit in *Lake Shore & M. S. R. Co. v. New York, & St. L. R. Co.* (C. C.) 8 Fed. 858, by Judge McKennan, who, where one railroad sought to condemn in part the easement of another, said: "At the points of the alleged right, no actual encroachment upon these rights can be sanctioned or allowed; and in ascertaining their extent there must be a liberal consideration of the future as well as the present necessities of the complainant, requiring the use of the existing tracks, the construction of additional ones, the convenient storage of its freight at all seasons, and the unembarrassed transaction of its right business."

And in *Western U. Teleg. Co. v. Pennsylvania R. Co.* (C. C.) 120 Fed. 366, affirmed 195 U. S. 594, 49 L. ed. 362, 25 Sup. Ct. 150, 1 A. & E. Ann. Cas. 533, wherein it was said: "We deem the question therein presented as to the future needs of a railroad in fulfilling its chartered purpose, and as should receive thoughtful regard and due consideration before it is deprived of any part of its right of way."

Now, in view of these general principles of the existence of an easement for this telegraph line, we are clearly of opinion that the use of such additional poles as from time to time may be required to support the line is an incident to the old easement, and not a new one. It would be intolerable for the R.R.A. (N.S.)

and at variance with salutary principles of law, *ut sit finis litium*, if an easement could be taken piecemeal, so to speak, and for a lesser purpose than for the entire use, for the full enjoyment of which the right of condemnation is alone conferred. If, when such taking occurred, the taker sought to limit the compensation to be paid by the fact that only a partial use was to be made of it, the law would not permit such proof (*Howe v. Weymouth and Proprietors of Mills v. Randolph*, supra), but in the one proceeding would measure the right taken and the compensation allowed as covering the entire use possible, and therefore all incidents to such entire use. And the same reasoning is applicable to an easement by grant, unless there was some limitation to the contrary therein. And that this conclusion that additional poles, necessary to support the line, is incident to the unchallenged right to maintain a telegraph line, is our opinion; and that such construction is just and reasonable is fortified by the fact that, in the hundreds of abutting owners of property along which this line has been strengthened, none save these respondents have asserted to the contrary.

We are therefore of opinion the decree of the court dismissing this bill must be reversed, the case reinstated, and an injunction granted restraining the respondents from cutting down the complainant's intermediate strengthening poles; but it is due to the court below to add that, while the question on which this case is now decided is covered by the stipulation of facts and was urged and argued in this court, it was not raised in the court below, and it had no opportunity to express its views thereon.

Without discussing the facts and conduct of the parties hereto in their respective acts in taking the law in their own hands, instead of resorting to courts, we award no costs to the complainant either on the appeal or the bill.

WASHINGTON SUPREME COURT.

JULIA DALY, Appt.,

v.

S. RIZZUTTO and Wife, Respnts.

(— Wash. —, 109 Pac. 276.)

Community — abandoned wife — loss of rights.

1. A deserted wife cannot claim community rights in property bought and sold by her husband in another state, under the solemn assurance that he was a single man, where there is nothing on the records or in the circumstances to charge the gran-

tees with notice of any community rights in the property.

Same — notice — result of inquiry.

2. The fact that diligent inquiry would have led to facts disclosing community rights in property sold by one representing himself to be a single man is not enough to charge the purchaser with notice of the rights of the wife, if there was no fact or circumstance which raised a duty to inquire.

Evidence — burden of proof — community rights — bona fide purchaser.

3. A wife seeking to establish her community rights against one who purchased from her husband's grantee, who was a purchaser for value of a clear record title, has the burden of showing that defendants had notice of her equity.

(June 16, 1910.)

A PPEAL by plaintiff from a judgment of the Superior Court for King County in defendants' favor in an action brought to

recover possession of certain property which had been conveyed by plaintiff's husband in alleged violation of her community rights. Affirmed.

The facts are stated in the opinion.

Mr. Milo A. Root, with Messrs. Heber McHugh and John T. Casey, for appellant:

The Optic Land Company was not an actual bona fide purchaser. It knew, or by the exercise of the most ordinary prudence would have known, that Daly was a married man.

Dane v. Daniel, 23 Wash. 379, 63 Pac. 268; Adams v. Black, 6 Wash. 528, 33 Pac. 1074; McNair v. Ingebrigtsen, 36 Wash. 186, 78 Pac. 789.

Messrs. Gill, Hoyt, & Frye and E. L. Blewett for respondents.

Chadwick, J., delivered the opinion of the court:

Plaintiff, Julia Daly, and Joseph P. Daly

Note. — Right of one spouse living apart from the other to claim community rights in property as against persons ignorant of relationship.

In Wooters v. Feeny, 12 La. Ann. 449, where a husband and wife voluntarily lived separate, and the wife purchased land with money acquired by her own industry, the deed to her being made in the form of a donation to her individually, it was held that the husband cannot recover the land, after the wife's death, from one who purchased it from the wife in good faith, in reliance on the record title in her, and in ignorance of his relationship to her. This holding was placed largely on the ground of estoppel, the court saying: "Considering the position in which the plaintiff [husband] stands, this [claim to the land] is insufferable. He brought about the present condition of things by his own conduct. He lived apart from his wife, and unknown to the world as her husband; permitted her to manage her affairs as a *feme sole*, contributed nothing to the common fund, and during her lifetime did not pretend to have any interest in her affairs. He now produces no written title."

In Texas a husband may ordinarily dispose of community property by deed in his own name, and without the joinder of his wife, but if he deserts his wife, and does not contribute to her support, she may dispose of it to supply her necessities by deed in her own name, though the record title be in him. In Zimpelman v. Robb, 53 Tex. 274, it was held that a purchaser of land from a deserted wife who gave a deed in her own name to land standing in the name of her husband, which deed was recorded, would get good title as against subsequent purchasers from the husband, who were ignorant of the desertion. This ruling was made notwithstanding the objection that

was raised, that a conveyance from one stranger to the title to another would not be constructive notice to a subsequent purchaser who claims under a different grantor. The court said that "as the wife, in the event of desertion by the husband, has the power, in certain contingencies, to sell community property, a subsequent purchaser from the husband must, at his peril, take notice of a prior recorded deed from the wife."

In Edwards v. Brown, 68 Tex. 329, 4 S. W. 380, 5 S. W. 87, where a married man obtained a patent to land in his own name, issued to him as assignee of a certificate, and thereafter his wife obtained a decree of divorce from him, which made no disposition whatever of his property, either community or separate, and he thereafter remarried, and on his death willed it to his second wife, who sold to an innocent purchaser for value, it was held that the latter is entitled to the land as against the divorced wife. The court said that the legal title to the land was in the husband at the time of his death, as the conveyance ran to him, but that, whether the title of the wife was legal or equitable, the purchaser who was ignorant of the relationship, would take good title.

The court did not discuss the question of estoppel, though the case might very well have rested on that ground; since the wife though she had obtained a divorce, allowed the husband to appear on the record as the sole owner, though she might have had her rights adjudicated by the decree and placed on record, where they could have been ascertained by intending purchasers. The court distinguished Zimpelman v. Robb, supra, on the ground that the purchasers from the husband did not deny, in their pleading, that they knew of the relationship of husband and wife, but merely alleged that they did not know the fact that he had ev-

were married at Chicago, Illinois, in December, 1888. About May 15, 1903, Joseph P. Daly deserted his wife and family and came to Seattle. He did not make his whereabouts known to his wife, but in August, 1904, his wife found him to be working for the Northern Pacific Railway Company as switchman. From that time on he corresponded with his children, and wrote a few letters to his wife evidently in answer to letters received from her with reference to the children and the home in Chicago, which was under mortgage and about to be sold. The defendant Daly at all times seems to have desired that his children be sent to Seattle. He finally obtained transportation for them, but plaintiff returned it because she did not want the children to travel alone. He never sent plaintiff any money, although the testimony shows that he was in funds, having paid \$650 for a team of horses. His wages were about \$6 a day. Mrs. Daly came to Seattle in April or May,

1905, and stayed about one month, when she returned to Chicago. In August, 1907, she came to Seattle with her children, and has since resided there. Several of the employees in the Northern Pacific yard testified that they and others employed with Daly knew him to be a married man. On February 20, 1906, defendant Daly purchased from the Hill Tract Improvement Company a lot in the city of Seattle. On November 16, 1906, he conveyed this property, describing himself as a single and unmarried man. On the 17th day of November, 1906, his grantee sold and conveyed the property to the defendants, Rizzutto, who are now in possession of the property. Mrs. Daly was in Seattle about one year when, at the suggestion of others that her husband had bought property, she caused inquiry to be made, which developed the facts as we have related them. Mrs. Daly brought this action to recover possession of the property, asserting it to be community property,

abandoned her. But the facts in that case seem to show that they were also ignorant of her existence, as he was living in a distant part of the state, holding out another woman as his wife.

In *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 10, 1030, a husband and wife were married and lived together for eight years in Pennsylvania, when the husband, a seafaring man, quit his wife and went to Washington, where he held himself out as a widower and acquired lands, which he thereafter sold to one who bought without notice or suspicion that he had a wife living. Hereafter the wife came to Washington, took up her residence for a while with her husband, and claimed the land. The court was unanimous in rejecting her claim, but a constitutional majority was unable to agree upon any one ground which should be assigned for their decision. A Washington statute provided that the community real estate shall not be conveyed excepting by a joint deed of the two spouses. It was held by Stiles, J., Anders, Ch. J., concurring, that it is the duty of undivorced husband and wife to live together, that the business community have a right to expect that they will not place themselves so widely apart that common reputation will report them unmarried, and that an innocent purchaser would be protected. He further said: "Can this husband, with the lie that he is unmarried on his lips, and the money of Niesz in his pocket, turn around and sue to recover the land which he sold? Can a woman who has such a husband maintain that every consideration is subordinate to her rights, and, in such a suit, not only protect herself, but take away from a purchaser who had been purposely thrown off his guard as to her existence the property which, under all other circumstances, would be decreed to be his?" He admitted, how-

ever, that a large measure of responsibility is thrown upon the purchaser in the way of making inquiry as to the condition of his grantor, which a mere inspection of the public records would not satisfy, but that a reasonable effort would be sufficient. Scott, J., Dunbar, J., concurring, thought that the facts showed that the wife had been guilty of inequitable conduct which would estop her to claim the property against an innocent purchaser. Scott, J., also doubted whether the statute relating to the disposal of community lands by the husband should be held to apply where the wife did not become a resident in the state prior to the conveyance. Hoyt, J., said: "In my opinion, so far as the public is concerned, such a relation [community] cannot be held to exist without the concurrence of two facts: First, the marriage relation between the members of the community; and, second, some assertion of the rights incident to such marriage relation. Until there has been some avowal of the relation between them, the community does not exist at all so far as the public is concerned; and whenever either member of the community ceases to assert his or her rights under the marriage relation for such a time, and under such circumstances, as to induce the public generally to believe that the other spouse is in fact a single person, then, as between the spouse so neglecting the assertion of his or her rights and the public, the community does not exist. The facts in the case at bar show clearly that there has been such an omission to assert any rights by virtue of the marriage, upon the part of the wife, as would lead the most prudent person dealing with the husband to believe his assertion that he was in fact a single man. It follows that as to those dealing with the husband as a single person, neither the community, nor either

ty. Her husband, refusing to join as a plaintiff, was made a defendant. Upon a trial a nonsuit was granted, and plaintiff has appealed. We shall refer to defendants, Rizzutto, as respondents.

Appellant relies upon the cases of *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268, and *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074, while respondents rely upon *Sadler v. Niesz*, 5 Wash. 182, 31 Pac. 630, 1030, and *Rem. & Bal. Code*, § 8771. In *Dane v. Daniel*, it was held that failure to assert a claim to community property held in the name of a husband did not estop the wife from claiming an interest therein, except as against such bona fide purchasers as purchased without knowledge of the existence of the marriage relation, or who could not, by the exercise of reasonable diligence, have obtained such knowledge. In *Sadler v. Niesz*, the wife was denied an interest in the property claimed to be community property. The parties had been married in 1863. They lived together for eight years, when the husband came to the Pacific coast, taking up his residence in Kitsap county. Sadler's family remained in the East, and the fact that he was married was unknown to his associates and acquaintances. He represented himself to be a widower. In 1883 he acquired the lands which became the sub-

ject of the suit. In 1889 Mrs. Sadler appeared and asserted her claim to the land. While the result of that case is certain, the ground upon which the decision should properly be made to rest has been the subject of debate and controversy by the bar, and the occasion of much doubt on the part of the courts. The question has been put to this court in subsequent cases, but, it being possible to decide the particular case on other grounds, it has not been answered. It is sufficient to say that, up to this time, no absolute rule has been laid down by this court, but each case has been met by reference to its own facts.

The facts in this case, in our judgment, are wholly insufficient to put respondents or their grantors upon notice. The record title stood in the name of Joseph P. Daly. The community had never occupied the property, nor had there been any conveyances or instruments of record which would indicate any ownership other than that of Daly, and he had by the most solemn assurance represented and acknowledged himself to be a single man. It is not shown that respondents or their grantors knew that Daly was employed as a switchman in the Northern Pacific yards, and, even though the testimony showed this fact, it would not be enough to put them upon notice, for it in

member thereof, can assert its existence to the detriment of those thus dealing with the husband."

In *Nuhn v. Miller*, 5 Wash. 405, 34 Am. St. Rep. 868, 31 Pac. 1031, 34 Pac. 152, the facts were very similar. The court held the purchaser was protected. The majority of the court held that the facts showed that the separation was voluntary and that both parties had regarded it as final; and placed their decision principally on the ground of estoppel, but also partly on the ground that the community relationship, if it ever could be held to have existed, had become abrogated or suspended by their own voluntary acts. Stiles, J., concurred for the reason given in his opinion in *Sadler v. Niesz*, *supra*.

In *Schwabacher v. Van Reyepen*, 6 Wash. 154, 32 Pac. 1061, the court, purporting to follow *Sadler v. Niesz* and *Nuhn v. Miller*, *supra*, held that a mortgage may be foreclosed, though executed by the husband alone, when it recited that the mortgagor was an unmarried man, and there was no proof that the mortgagee had such knowledge on the subject as would lead a man of ordinary prudence to further investigation in regard to the matter. It does not appear from the report where the wife was living at the time of the giving of the mortgage, or why she was not living with her husband. But this case, so far as can be gathered from the facts set out, seems to go somewhat farther than the two cases named, as they were disposed of principally 29 L.R.A. (N.S.)

on the ground of estoppel, while in this case no facts are recited which show any inequitable conduct on the part of the wife.

In *Adams v. Black*, 6 Wash. 528, 33 Pac. 1074, it was held that where husband and wife are living together, a deed executed by the husband alone will transfer no interest in the community real estate, though the husband represents himself as a single man and the deed so recites. The court said that as the wife was living with her husband, and the slightest inquiry would reveal that fact, there was no act on her part on which an estoppel could be founded.

In *Canadian & A. Mortg. & T. Co. v. Bloomer*, 14 Wash. 491, 45 Pac. 34, it was held, following *Sadler v. Niesz*, that where husband and wife have been living apart for thirty years, she in a distant state and never visiting her husband, during all of which time it had been understood that he was a single man, she will be estopped to claim real estate mortgaged by her husband, as against a mortgagee ignorant of her existence.

It will thus be seen that prior to *DALY v. RIZZUTTO*, it was not necessary for the court of Washington to pass squarely upon the question whether a purchaser from a husband of community property standing in his name, in ignorance of the existence of the wife, or of facts sufficient to put him on notice, is protected as against the wife, who has been guilty of no inequitable conduct which would estop her to claim her community rights. The question is analo-

no way suggested to a stranger anything with reference to his domestic status, or gave the slightest clue for inquiry upon the subject-matter of the transfer. In this class of cases, and particularly so since the enactment of our statute, the term "notice" must be taken in its full legal sense. It need not be actual, nor amount to full knowledge, but it should be such "information from whatever source derived, which would excite apprehension in an ordinary mind, and prompt a person of average prudence to make inquiry." *Bryant v. Booze*, 55 Ga. 438; *Phillips v. Reitz*, 16 Kan. 396. It follows, then, that it is not enough to say that diligent inquiry would have led to a discovery, but it must be shown that the purchaser had, or should have had, knowledge of some fact or circumstance which would raise a duty to inquire. Implied notice arises from knowledge, and not from ignorance, unless the law charges notice by registry or other token. *McCallum v. Corn Products Co.* 131 App. Div. 617, 116 N. Y. Supp. 118. "There must appear to be, in the nature of the case, such a connection between the facts discovered and the further facts to be discovered, that the former may be said to furnish a clue—a reasonable and natural clue—to the latter." *Birdsall v. Russell*, 29 N. Y. 220, 250; *John-*

son v. Erlandson, 14 N. D. 518, 105 N. W. 722. In *McFarland v. Louisville & N. R. Co.* 130 Ky. 172, 113 S. W. 82, it was urged, as in this case, that the defendant well knew the facts or "that the said knowledge was easily accessible to him." The court said: "The fact that a person could learn of a thing is not equivalent to knowledge, especially where the facts alleged do not show that there was anything to put him upon notice."

In Michigan it has been held—*E. B. Millar & Co. v. Olney*, 69 Mich. 560, 3 N. W. 558—that it is well settled that, if one has knowledge or information of such facts as would lead an ordinarily prudent man to make inquiry as to the rights of others in property he is about to purchase, he must be charged with notice of such facts as inquiry would have discovered. But, by way of emphasizing the fact that there must be a haven of knowledge or information, the court proceeds to say: "This court has never gone to the extent that, solely upon failure to inquire of the mortgagor as to prior encumbrances or prior conveyances, one is to be charged with notice of such encumbrances or conveyances; and we are aware of no case in any court that holds to this doctrine. The extent to which the cases have gone is that, where the fact of a prior con-

gous to the rights of a wife to dower in lands of her husband, as to which it is generally held that she may claim dower as against an innocent purchaser from her husband in ignorance of her existence, if that is the only element of estoppel in the case. See note to *Mason v. Dierks Lumber & Coal Co.* 26 L.R.A. (N.S.) 575, on estoppel of wife living apart from husband to claim homestead or dower as against purchaser ignorant of the relationship. It should also be noticed that Washington, unlike Texas and some other community law states, has a statute requiring the wife's joinder in a deed of community real estate. Where, by statute, the wife's joinder is unnecessary, it would seem to make no difference whether the purchaser knew of the wife's existence or not, as the deed would be valid in either event. In *DALY v. RIZZUTTO*, unlike earlier Washington cases, there was no element of estoppel present as far as the wife was concerned, as she had been deserted, and it did not appear that the husband, at the time he held the land, was willing to resume marital relations. The decision in *DALY v. RIZZUTTO* might very well have been based on § 8771, Rem. & Bal. Code, mentioned by the court, and § 8772. The former section, in general language, provides for the protection of bona fide purchasers from persons appearing, on the face of the records, to have good title. The latter section provides that, if one spouse has the legal title to real estate, the other, who has an interest therein by virtue of the 29 L.R.A. (N.S.)

marital relation, may protect it by filing and recording in the auditor's office of the county where the land lies a certain instrument setting forth the marital relation, etc., and that if that is not done within ninety days from the date of the recording of the legal title, an innocent purchaser from the spouse having the legal title will be protected.

Cases like *Hill v. Moore*, 62 Tex. 610; *Saunders v. Isbell*, 5 Tex. Civ. App. 513, 24 S. W. 307; *Hensel v. Kegans*, 8 Tex. Civ. App. 583, 28 S. W. 705; *Attebery v. O'Neil*, 42 Wash. 487, 85 Pac. 270, discussing rights of innocent purchaser from husband after death of wife, as against heirs of wife whose interests were unknown to the purchaser, are omitted. Cases are not included which deal merely with what will constitute notice to purchaser of existence of wife; but on effect of head-right certificate as giving notice that its holder is married, see, *inter alia*, *Ferguson v. Kentucky Land & Live-Stock Co.* (Tex. Civ. App.) 25 S. W. 1074; *Hill v. Moore*, 85 Tex. 335, 19 S. W. 162; *Hensel v. Kegans*, supra.

As to right of nonresident wife to claim community rights, see, *inter alia*, *Hershberger v. Blewett*, 46 Fed. 704; *Gratton v. Weber*, 47 Fed. 852; *Jacobson v. Bunker Hill & S. Min. & Concentrating Co.* 3 Idaho, 126, 28 Pac. 396; *Cole v. His Executors*, 7 Mart. N. S. 41, 18 Am. Dec. 241; *McKenna's Succession*, 23 La. Ann. 369; *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 478.

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vayance or encumbrance is brought to the knowledge of the subsequent purchaser or encumbrancer, he must be held to take subject to such prior conveyance or encumbrance, or, when such circumstances are shown to exist as would put an ordinarily prudent business man upon inquiry as to such prior conveyance or encumbrance, then he is charged with notice of such facts as upon inquiry he could have ascertained; but where circumstances alone are relied upon, with no proof of actual knowledge, they must be of such character that failure to make the inquiry amounts to bad faith." In that case, as in this, it was not shown that there was the least intimation or hint from any source that a third party had any interest in the property.

When these rules are considered, in connection with the fact that the husband and wife were living separate and apart,—she in a distant state,—and that the property had been acquired and sold by the husband in defiance of the community rights, if it be held that a community exists under such circumstances, it would seem that respondents exercised the diligence put upon ordinarily prudent persons, and are entitled to claim as bona fide purchasers under the statute. This case is easily distinguished from *Dane v. Daniel*, where the property has been formerly occupied by one of the parties and his wife. They had made a number of conveyances as husband and wife, all of which had been recorded, and the other party and his wife had lived for more than ten years in the county and were well known to be husband and wife. The case is more like *Attebery v. O'Neil*, 42 Wash. 487, 85 Pac. 270, where the court said: "A purchaser must, no doubt, exercise due diligence to ascertain the status of his several grantors at the time they acquired and conveyed the property, but he is not bound to go outside of and beyond the record to ascertain whether any such grantor had an equity in the premises before he acquired his title, and whether he was married or single when such equity was acquired. If such were the case, records and deeds would be of little avail, and the evils resulting from the adoption of such a rule would far outweigh any benefits to be derived from it."

In her reply brief appellant contends that, in any event, the case should be reversed and the respondents put to the proof of bona fides. It is not denied that respondents' grantor was a purchaser for value, or that the record title was clear. This raised the presumption that the purchaser was without notice, and put the burden on appellant to prove notice of her equity. "Proof of such payment, in the absence of proof of

notice, or of any fact sufficient in law to charge notice, or sufficient to put the purchaser upon inquiry, will raise the presumption that his purchase was without notice, and the onus will be upon the one asserting an equity in the property to prove notice thereof to such purchaser." *Williams v. Smith*, 128 Ga. 306, 57 S. E. 801; *Atkinson v. Greaves*, 70 Miss. 42, 11 So. 688, and cases cited; 13 Enc. Ev. p. 901.

In *E. B. Millar & Co. v. Olney*, supra, it was said: "We are of the opinion that there is nothing shown in this case that would have put an ordinarily prudent business man on inquiry, and that there was no question of fact to go to the jury for a finding upon this part of the case."

For the reasons assigned, the judgment is affirmed.

Rudkin, Ch. J., and Fullerton, Morris, and Gose, JJ., concur.

IOWA SUPREME COURT.

M. E. SHIELDS, Appt.,

v.

RICHARD COYNE.

(— Iowa, —, 127 N. W. 63.)

Principal — husband securing loan — liability of wife.

1. That a man, in negotiating for a loan, is acting for his wife as undisclosed principal, is not shown by evidence that she was carrying on a farm in her own name and that all the marketing, buying, and selling was done by him for her.

Same — contract to lend money — breach — action.

2. An undisclosed principal cannot sue for breach of a contract to lend money to the agent.

(July 9, 1910.)

Note. — Character of contract as affecting right of undisclosed principal to sue thereon.

The general rule has frequently been stated and applied that an undisclosed principal may sue on any contract not under seal, made by his agent in his behalf. This doctrine apparently originated as corollary to the proposition that an undisclosed principal was liable upon any contract made in his behalf by his agent at the option of the other party thereto, the theory being that inasmuch as the principal was liable upon such contracts he should be permitted to sue thereon.

It is not intended to include herein the many cases where this general rule has been applied without reference to the character

APPEAL by plaintiff from a judgment of the District Court for Shelby County entered upon a directed verdict for defendant in an action brought to recover damages for alleged breach of a contract to loan money. Affirmed.

Statement by McClain, J.,

Action to recover damages for a breach of a contract for the loaning of money by defendant to plaintiff, represented in the transaction by her husband, Patrick Shields. At the close of plaintiff's evidence, the court sustained a motion for defendant to direct a verdict in his favor, and from judgment on such directed verdict, the plaintiff appeals.

Messrs. T. E. Brady and Cullison & Cullison, for appellant:

An undisclosed principal may claim the benefit of any contract made by his duly authorized agent, and sue and recover thereon.

Young v. Lohr, 118 Iowa, 624, 92 N. W. 684; Darling v. Noyes, 32 Iowa, 96; Pow-

ell v. Wade, 109 Ala. 95, 55 Am. St. Rep. 915, 19 So. 500; Mechem, Agency, 769; 1 Am. & Eng. Enc. Law, 2d ed. p. 1168; Bishop, Contr. 1080; 31 Cyc. Law & Proc. p. 1598.

of the contract, or whether it was executed or executory.
A restriction generally made upon the power of an undisclosed principal to sue upon a contract made in his behalf by his agent is that the contract must not be under seal, it being generally recognized that an undisclosed principal cannot sue upon a contract under seal. Clarke v. Courtney, 5 Pet. 319, 8 L. ed. 140; Moline Malleable Iron Co. v. York Iron Co. 27 C. C. A. 442, 53 U. S. App. 580, 83 Fed. 66 (stated); New England M. Ins. Co. v. De Wolf, 8 Pick. 56; Briggs v. Partridge, 64 N. Y. 357, 21 Am. Rep. 617; Nicoll v. Burke, 78 N. Y. 580; Elliott v. Brady, 192 N. Y. 221, 18 L.R.A. (N.S.) 600, 127 Am. St. Rep. 893, 85 N. E. 69; Smith v. Pierce, 45 App. Div. 628, 60 N. Y. Supp. 1011; Hopkins v. Mehaffy, 11 Serg. & R. 126; Cocke v. Dickens, 4 Yerg. 35, 26 Am. Dec. 214; Kempner v. Dillard, 100 Tex. 505, 123 Am. St. Rep. 822, 101 S. W. 437 (stated); Dancer v. Hastings, 4 Bing. 2; Sims v. Bond. 5 Barn. & Ad. 389.

In Briggs v. Partridge, it was held that a contract under seal for the sale of real estate could not be turned into the simple contract of a person not in any way appearing on its face to be a party to or interested in it, on proof *de hors* the instrument that the nominal party was acting as agent of another, especially in the absence of any proof that the alleged principal had received any benefit from it or in any way ratified it.

It is immaterial that the seal was not essential to the validity of the contract. Smith v. Pierce, *supra*.

But see Lancaster v. Knickerbocker Ice Co. 153 Pa. 427, 26 Atl. 251, wherein it is said that a seal where not essential to 29 L.R.A. (N.S.)

ell v. Wade, 109 Ala. 95, 55 Am. St. Rep. 915, 19 So. 500; Mechem, Agency, 769; 1 Am. & Eng. Enc. Law, 2d ed. p. 1168; Bishop, Contr. 1080; 31 Cyc. Law & Proc. p. 1598.

Messrs. Byers & Byers, for appellee:

If a person, in contracting with an agent, whose agency is unknown, gives exclusive credit to the agent, as where he imposes personal trust or confidence in the agent, or relies upon his solvency, or his special knowledge or skill, the principal cannot come forward and hold the other party to the contract.

31 Cyc. Law & Proc. p. 1598, Subdiv. B: Cowan v. Curran, 216 Ill. 598, 75 N. E. 322; 1 Mechem, Agency, §§ 769-771, 777; Kelly v. Thuey, 102 Mo. 522, 15 S. W. 62; Powell v. Wade, 109 Ala. 95, 55 Am. St. Rep. 915, 19 So. 500.

McClain, J., delivered the opinion of the court:

The evidence tends to show an oral agreement between the defendant and Patrick Shields, the husband of plaintiff, by which,

the validity of a contract may be treated as surplusage, and hence will not prevent the general rule already stated from applying.

It is also well settled that this general rule does not apply to negotiable instruments, and an undisclosed principal cannot merely by virtue of the agency sue upon a negotiable instrument received by the agent in his own name. Van Ness v. Forrest, 8 Cranch, 30, 3 L. ed. 478; Nave v. Hadley, 74 Ind. 155; McClure v. Livermore, 78 Me. 390, 6 Atl. 11; Fuller v. Hooper, 3 Gray, 341; Bank of British N. A. v. Hooper, 5 Gray, 567, 66 Am. Dec. 390; Fairfield v. Adams, 16 Pick. 381; National L. Ins. Co. v. Allen, 116 Mass. 398; Lancaster v. Knickerbocker Ice Co. and Briggs v. Partridge, *supra*; Pentz v. Stanton, 10 Wend. 271, 25 Am. Dec. 558; Chandler v. Coe, 54 N. H. 561; Bank of United States v. Lyman, 20 Vt. 666; Cramlington v. Evans, 2 Vent. 307 (bill of exchange); Fenn v. Harrison, 3 T. R. 757; Beckham v. Drake, 11 Mees. & W. 315.

Another exception to the general rule permitting an undisclosed principal to maintain an action upon a contract not under seal, entered into in his behalf by an agent, are contracts of guaranty or indemnity. Such contracts are personal in their nature, and there is a mutual trust between the parties thereto which renders the general rule inapplicable. Second Nat. Bank v. Diefendorf, 90 Ill. 396; Mitchell v. Railton, 45 Mo. App. 273; King v. Batterson, 13 R. I. 117, 43 Am. Rep. 13.

In addition to the foregoing exceptions to the general rule, it has generally been recognized, when the point has been raised, that a party to an executory contract may refuse to carry it out or to permit perform-

on certain contingencies not here material to mention, the defendant agreed to loan to said Patrick Shields \$9,600 at 5½ per cent interest for five years, to enable the latter to purchase a piece of land, and that subsequently, when the conditions had been complied with, the defendant refused to advance the money in accordance with the agreement, rendering it necessary for this plaintiff, who alleges that the agreement was made for her and in her behalf, to borrow the money elsewhere at 6 per cent. Plaintiff seeks to recover, by way of damages for breach of the contract, the difference in the interest which she was compelled to pay. It is not claimed that plaintiff's husband purported in the negotiations to be acting for his wife or for any person

other than himself, or that defendant knew or had any reason to suppose that plaintiff's husband was making the contract as the agent of another. Indeed, we are unable to discover in the brief record presented to us any evidence of an arrangement or understanding between plaintiff and her husband, that her husband was to act in her behalf in procuring the loan from defendant. This is a very material matter, for without some such arrangement or understanding between plaintiff and her husband, the contract would not be binding on the plaintiff, and therefore, as between her and defendant, there would be no mutuality. It does appear that the plaintiff, during the time these negotiations between her husband and defendant were pending, was carrying on a

ance where the other party thereto was an agent acting for an undisclosed principal. In general it may be said that it is the right of every party to choose with whom he will have business dealings, and ordinarily the court will not enforce an executory contract in behalf of an undisclosed principal where the other party thereto objects to performance, on the ground that he executed the contract under the belief that the agent was the real party to it, and he would not have entered into same with the undisclosed principal of such agent. *Birmingham Matinee Club v. McCarty*, 152 Ala. 571, 13 L.R.A. (N.S.) 156, 44 So. 642, 15 A. & E. Ann. Cas. 237; *Sullivan v. Shailer*, 70 Conn. 733, 40 Atl. 1054; *Panecost v. Dinsmore*, 105 Me. 471, 134 Am. St. Rep. 582, 75 Atl. 43; *Whiting v. Wm. H. Crawford Co.* 93 Md. 300, 49 Atl. 625; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Moore v. Vulcanite Portland Cement Co.* 121 App. Div. 667, 106 N. Y. Supp. 393; *King v. Batterson*, supra; *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 119 N. W. 960.

In *Edwards v. Ezell*, 2 Tex. App. Civ. Cas. (Willson) 208, the doctrine was asserted that if an agent possesses authority to make a written contract not under seal, and makes it in his own name, whether he describes himself to be an agent or not, or his principal be known or unknown, the principal is entitled to sue thereon unless, by the attendant circumstances, it is clearly manifested that an exclusive credit was given the agent. For a similar statement of the doctrine, see also *Brown v. Morris*, 83 N. C. 254, 3 Mor. Min. Rep. 177.

An undisclosed principal is not entitled to enforce an executory contract made by an agent in his own name for the sale of land of the principal, where the contract contains stipulations that the agent as the ostensible seller will grant, by warranty deed, an unencumbered title. *Birmingham Matinee Club v. McCarty*, supra. In reaching the foregoing conclusion the court reasoned: "If the party contracting without knowledge of the agency were bound to take the service or conveyance or property from

the undisclosed principal, the well-recognized rule that one may determine for himself with whom he will deal, with whom he will contract, would be directly infringed; and the elements of the contract reasonably attributable to personal confidence and trust, including the financial responsibility of the agent, with whom he alone deals as principal, would be stricken of force to which, under all principles of substantial justice and right, the relying party is entitled to the benefit. Of course, it follows that for a failure or refusal, by the party dealing with the agent, to perform the contract, which was in reality, but unknown to be, the undertaking of an undisclosed principal, and not the undertaking of the individual with whom made, the recalcitrant party cannot be mulcted in damages by the developed principal."

On the same theory, in *Winchester v. Howard*, supra, a purchaser of oxen by executory contract was held entitled to refuse to take them upon ascertaining that the seller was not the owner, but was acting in the sale merely as the undisclosed agent of the owner. The court said: "There may be good reasons why one should be unwilling to buy a pair of oxen that had been owned or used or were claimed by a particular person, or why he should be unwilling to have any dealings with that person, and, as a man's right to refuse to enter into a contract is absolute, he is not obliged to submit the validity of his reasons to a court or jury."

And in *Sullivan v. Shailer*, it was said that the law "will not, however, extend to an undisclosed principal the right to perform himself the executory contract of his agent which involves a personal trust or confidence imposed in the latter by the other contracting party. But if a contract so made by a third party in consideration of the personal character, ability, or skill of the agent, has been fully performed by the latter, or if performance by the principal has been accepted, there would seem to be no reason why the undisclosed principal should not be entitled to enforce, by an action against the third party, a per-

farm in her own name, and that all the marketing, buying, and selling was done by him for her. But we think that this evidence falls far short of constituting any proof that, even as between plaintiff and her husband, it was understood that the proposed loan was being procured by plaintiff's husband for her, as undisclosed principal.

Under this state of facts it is very clear that plaintiff cannot maintain an action for the breach of this contract: First, because plaintiff's allegation that she entered into such contract through her husband as her agent, which allegation is covered by defendant's general denial, was not proven; and, second, because, if proven, the contract would not be binding as between her and the defendant, who had no knowledge that

her husband was acting as her agent in the matter. One who sues as undisclosed principal on a contract purporting to have been made by his agent in the agent's own name has the burden of proving the fact of agency, and that in the making of a contract the alleged agent was acting for him. *Powell v. Wade*, 109 Ala. 95, 55 Am. St. Rep. 915, 19 So. 500.

While the first of these reasons appears to us to be conclusive of the case, the argument of counsel relates to the second proposition, and we shall briefly express our views as to appellant's contentions. It is true that if one, as agent and acting for another, make a contract in his own name for the benefit of his undisclosed principal, the principal may be sued for breach of such

formance, by him of his part of the contract."

So, in *Rayner v. Grote*, 15 Mees. & W. 359, it was remarked that, had the contract sued upon been executory and one in which the skill or solvency of the principal could have been reasonably considered as an ingredient, or if the contract had been wholly unperformed or partially performed without knowledge of the real principal, such principal where undisclosed could not sue thereon.

And in *Pancoast v. Dinsmore*, in holding an agent liable upon an executory contract to sell real estate where he was unable to convey, but offered a conveyance by his undisclosed principal, which was held not to be a compliance with his contract, the court remarked: "It is good sense, as well as sound law, that in case of a purely executory contract, a party dealing with another as principal, though in fact he is agent, is not compellable at all events to accept performance from the undisclosed principal when discovered, though he may do so."

In *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322, the right to specific performance of an executory contract for the sale of real estate was denied where sought by an undisclosed principal claiming to be the real vendee in the contract, where the vendor, in making the sale, relied upon representations as to the standing and financial responsibility of the vendee, and extended to her exclusive credit.

And in *New York Brokerage Co. v. Wharton*, specific performance of a contract to exchange a stock of goods for real estate was denied where the stock of goods was not owned by the party to the contract, but by an undisclosed principal, of which fact the other party to the contract had no knowledge. The court said: "It is the right of a party to a contract to know with whom he deals, unless he consents to deal with an agent in behalf of an undisclosed principal. He has a right to rely upon representations made as to the identity of the other party to the contract, and if deceived by such representations he has a right to rescind."

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An undisclosed principal is not entitled to the specific performance of a contract where, at the time of executing the same, the agent who executed it claimed to be acting for another as his principal, and the other party to the contract would not have entered into it had he known who the real principal was. *Real Estate Invest. Co. v. Richmond*, Rap. Jud. Quebec, 23 S. C. 151.

But see *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300, wherein an executory contract for the sale of real estate was specifically enforced in behalf of an undisclosed principal. In this respect the doctrine of 102 Mo. 522, 15 S. W. 62, was overruled, and the rule was asserted that an agent may enter into a contract for the purchase of land for an undisclosed principal, and the principal may maintain a suit in his own name to enforce the contract, and it is immaterial whether the principal was known or unknown during the transaction, or whether the seller supposed he was dealing with the agent acting in his own behalf.

In line with the distinction already pointed out between the right of an undisclosed principal to enforce an executed and an executory contract, according to the weight of authority where the agent acting in behalf of his undisclosed principal has fully performed the contract and performance has been accepted by the other party thereto, although without knowledge that same was in behalf of an undisclosed principal, such undisclosed principal may maintain an action in his own name to recover the agreed consideration for performance. *Prichard v. Budd*, 22 C. C. A. 504, 42 U. S. App. 186, 76 Fed. 710; *Sullivan v. Shailer*, supra; *Warder v. White*, 14 Ill. App. 50; *Kelly Asphalt Block Co. v. Barber Asphalt Paving Co.* 136 App. Div. 22, 120 N. Y. Supp. 163; *Grojan v. Wade*, 2 Starkie, 443.

This rule was applied where the clerk of an attorney procured the probate of a will for a client, and the attorney was held entitled to recover for such services, although the client supposed the clerk was acting in his own behalf and for himself. The court said that if any prejudice had arisen to the defendant from the supposition that the

contract, and on the other hand may recover damages for breach thereof by the other party. But this general rule is subject to well-recognized exceptions, one of which is that if the party contracting with the agent, having no knowledge of the agency, may reasonably be supposed to have entered into such contract in consideration of some element of personal trust and confidence, and the contract remains wholly executory, the undisclosed principal cannot enforce the contract in his own name and right. This exception is based on the very good reason that a contracting party is not bound to accept performance of personal services from, or extend confidence or credit to, another person than the one with whom he supposed he was entering into the contract relation. *Mechem, Agency*, §§ 769-771; *Birmingham Matinee Club v. McCarty*, 13 L.R.A. (N.S.) 156, 15 A. & E. Ann. Cas. 237 and notes (152 Ala. 571, 44 So. 642); *Kelly v. Thuey*, 102 Mo. 522, 16 S. W. 62; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *Barns v. Barrow*, 61 N. Y. 39, 19 Am. Rep. 247; *Cowan v. Curran*, 216 Ill. 598, 75 N. E. 322; *New York Brokerage Co. v. Wharton*, 143 Iowa, 61, 119 N. W. 969; *Ellsworth v. Randall*, 78 Iowa, 141, 16 Am. St. Rep. 425, 42 N. W. 629.

The facts of this case bring it clearly within the exception to the rule that the undisclosed principal may sue for breach of contract made by his agent. There is no

evidence that Patrick Shields agreed to secure the payment of the money to be loaned by a mortgage of the land which, as he represented, he proposed to purchase, and even if it appeared that the loan was to be thus secured, there is no evidence that the defendant relied entirely upon such security, and not to any extent upon the personal responsibility of Patrick Shields. It is clear that he was under no obligation therefore to make the loan to plaintiff, and if he were under no such obligation, he is not liable for damages to plaintiff for refusing to make it. If the contract was by Patrick Shields as agent for plaintiff, it could only be carried out by the loan of the money to plaintiff, and plaintiff cannot recover damages if the contract was only for the loan of money to her husband.

The cases relied upon for appellant are not in point. In *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93, it is said that an agent may sell the property of his principal without disclosing the fact of his agency, or that the property is not his own, and the principal may maintain an action in his own name to recover the price. But the court follows this general proposition with the statement that, on the other hand, every man has a right to elect what parties he will deal with, and to take into account in such dealing the character, credit, and substance of the person with whom he contracts. And in *Kelly v. Thuey*, 143 Mo. 422,

clerk was the principal the case might have been different, but that did not appear, and the sum claimed was clearly due from the defendant, since the services had been performed. *Grojan v. Wade*, supra.

Compare with *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9, which denied the right of the purchaser of an ice business to recover the value of ice furnished by him to another under a contract entered into with the seller. It appeared in this case that the plaintiff had formerly furnished ice to the same party, who had refused longer to deal with him, and that later he furnished ice under an arrangement made by the defendant with a third person, whose business he had acquired after the defendant had entered into the arrangement. The case was based on the proposition that there was no privity of contract between plaintiff and defendant, and, without such privity, possession and use of the property would not support an implied assumpsit, and not upon the theory that the plaintiff was an undisclosed principal of the party to the contract, whose business he had acquired. Upon this point it is distinguishable from the foregoing cases which sustain the right of an undisclosed principal to recover the consideration of a contract after performance by the agent, as in such cases there is no question but what there is a privity of contract be-

tween the undisclosed principal and the other party thereto.

The doctrine of this case was also stated and applied to a very similar state of facts in *Boulton v. Jones*, 2 Hurlst. & N. 564. The only substantial distinction between the two cases, as to the facts, was that while in *Boston Ice Co. v. Potter*, it appeared that a third person had previously refused to buy of the plaintiff, and he was seeking to enforce a similar contract made with another, this fact did not appear in *Boulton v. Jones*. The two cases, however, were both disposed of on the theory of a lack of privity between the plaintiff and the defendant. Cases disposed of on this theory are not included herein. The two mentioned have been included merely by way of illustrating the distinction in principle, and because of the fact that the Massachusetts case has frequently been cited as asserting a doctrine contrary to that of the weight of authority, to the effect that where a contract by an undisclosed principal is fully performed by him, and there is nothing remaining toward the completion of the same except the payment of the consideration by the other party thereto, the principal is entitled to recover same, although he would not have been entitled to have enforced the contract even though it had remained executory. A. G. S.

45 S. W. 300, the court, commenting upon the case of the same title above cited, simply holds that an agent may enter into a contract for the purchase of land for an undisclosed principal, and the principal may maintain suit in his own name and enforce the contract; but it is not indicated that any credit was extended, or was to be extended, to the agent as supposed principal in the transaction.

The reasons assigned by the defendant for refusing to carry out the contract with plaintiff's husband were wholly immaterial. If he incurred no obligation to this plaintiff, then his reasons for not carrying out his contract with her husband, even though not sufficient to justify him as against the husband, would not give rise to any right of action in favor of the plaintiff.

The judgment was correct, and it is affirmed.

OKLAHOMA SUPREME COURT.

C. F. GILPIN, Plff. in Err.,
v.

NETOGRAPH MACHINE COMPANY et al.

SAME, Plff. in Err.,
v.

E. G. RANKIN.

(— Okla. —, 108 Pac. 382.)

Note — fraud — evidence — sufficiency — waiver by renewal.

Where, in a suit on two promissory notes, the testimony disclosed that the same were executed in renewal of two other notes given by defendant to plaintiff in payment for his share of the purchase price of a worthless patent right; that defendant was induced to sign the original notes by the agent of plaintiff and L., one of defendant's copartners, by representing to him that L., on whose honesty, good faith, and judgment defendant relied, thought it a good investment and would join his copartner in the purchase thereof, and pay for and share therein equally with them; that after the deal was closed, pursuant to a secret agreement between said agent and L., plaintiff returned to L. unpaid his note and check given in payment for his share of the purchase price of said patent right, — held, that the evidence was sufficient to take the case to the jury on the ground of fraud; held, also, that the execution of the renewal notes before the discovery by defendant of the fraud did not constitute a waiver thereof.

(January 11, 1910.)

Headnote by TURNER, J.
29 L.R.A. (N.S.)

ERROR to the District Court for Oklahoma County to review a judgment affirming judgments of the Probate Court in plaintiffs' favor in consolidated actions brought to recover the amounts alleged to be due on certain promissory notes. Reversed.

The facts are stated in the opinion.

Messrs. Burwell, Crockett & Johnson for plaintiff in error.

Messrs. H. H. Grant and E. G. McAdams for defendants in error.

Turner, J., delivered the opinion of the court:

On May 5, 1904, defendant in error, Netograph Machine Company, a foreign corporation, sued C. F. Gilpin, plaintiff in error, in the probate court of Oklahoma county on his promissory note for \$800, dated January 25, 1904, payable to it March 19, 1904, with interest and attorneys' fees in case of suit. After issue joined there was trial to a jury, which resulted

Note. — Validity of subscription induced by false statements that certain other persons were to invest in the enterprise.

This note is limited strictly to cases such as the GILPIN v. NETOGRAPH MACH. Co., where it was sought to rescind or avoid a contract for the investment of money in an enterprise, merely because such contract was entered into because of false statements made by the promoter or his agent that certain other persons in whom the maker of the contract had confidence were also to invest or had invested therein. The note therefore does not include cases passing on the question whether a person can avoid his subscription to an enterprise merely because the promoter, or the corporation itself, had made secret agreements with other subscribers for a refunding of the whole or a part of their subscription; neither does it include those cases where it appears that certain persons, for the purpose of inducing subscriptions, were made or held out as directors of the company.

In accordance with the GILPIN CASE it has been held in a number of cases that when the promoters of an enterprise or the agents of a corporation induce a person to subscribe for shares by representations, among possibly others, that other persons well known in the community had subscribed for a number of shares, whereas such subscriptions were in fact merely made for the purpose of influencing others, and under a secret agreement that they would not be required to pay for their shares, or that the money paid would be refunded to them, such a fraud is imposed upon the subscriber as will entitle him to rescind, or to defeat a note given for such subscription. And this seems to be so,

in judgment for plaintiff for \$680.60 and costs, from which defendant appealed to the district court. There the cause by stipulation was consolidated with the case of *E. G. Rankin v. C. F. Gilpin*, also appealed by him from the probate court; the same being a suit upon a promissory note for like amount, made by defendant at the same time, payable to plaintiff, and by it indorsed to said Rankin, who had sued and recovered judgment in that court. In the district court, after amended answer and reply filed, there was trial anew to a jury, and judgment for plaintiff on both notes for \$1,632. Defendant brings the case here for review.

For amended answer defendant admitted the execution of both notes, and among other defenses thereto pleaded fraud in the execution thereof, and, assuming the burden of proof, introduced testimony to maintain the issue. At the close of all the testimony, plaintiff demurred to the evidence, which was sustained; and the first question for us to determine is whether the evidence is sufficient to take the case to the jury on the ground of fraud. Without undertaking to weigh conflicting testimony, but viewing it all in the light most favorable to defendant and allowing all reasonable inferences in his favor, on this point the evidence disclosed that on August 20, 1903, defendant in error was a corporation doing business under the laws of Missouri, with its principal office in St. Louis; that G. W. Fryhofer

was its agent at Oklahoma City, with full power to make contracts for the sale of the exclusive right to use the patent "Coin Netograph Machine No. 55241" in the Indian territory and Oklahoma territory; that some time prior thereto said agent put on exhibition at the Grand Avenue hotel in said city a sample of said machine for the purpose of selling its use as a patent right; that about that time defendant, being out of business, was approached by J. L. Ladd, and induced to go with him to inspect said machine, which Ladd told him was a good investment; that defendant had known Ladd as a business man in said city for a number of years; that he was regarded by defendant and generally as honest and intelligent, and upon whose business judgment defendant relied. After inspecting the machine, concerning which defendant knew nothing and so informed Ladd, and that he had no faith in patents and could see nothing, owing to defective eyesight, Ladd again informed him that it was a good investment and was going to put some money in it, and wanted defendant to join the company when formed, and likewise invest. This he agreed to do, and later a "partnership" was formed for the purpose of handling said machines, consisting of defendant, Scott Thompson, J. D. Speaker, J. L. Ladd, and A. J. Brown, under the name of the Netograph Machine Company, of which defendant was elected "secretary." Concerning the deal, the testimony further discloses that defendant

whether the persons themselves whose names were thus used were active in securing subscriptions or not. Cases so holding are *Alabama Foundry & Mach. Works v. Dallas*, 127 Ala. 513, 29 So. 459 (shares in corporation); *Coles v. Kennedy*, 81 Iowa, 360, 25 Am. St. Rep. 503, 46 N. W. 1088 (the same); *State Bank v. Cook*, 125 Iowa, 111, 100 N. W. 72 (the same); *Cox v. Cline* (Iowa) 126 N. W. 330 (purchase of a stallion); *Elgin City Bkg. Co. v. Hall*, 119 Tenn. 548, 108 S. W. 1068 (purchase of a horse); *Talmadge v. Sanitary Security Co.* 31 App. Div. 498, 52 N. Y. Supp. 139 (representation by agent of corporation that two well-known persons had subscribed for stock, when in fact it had been given to them); *Henderson v. Lacon*, L. R. 5 Eq. 249 (persons appointed as directors of a hotel company, and held out as having subscribed for a number of shares).

And see *Coles v. Kennedy*, supra; *Walker v. Mobile & O. R. Co.* 34 Miss. 245, and *Coulter v. Clark*, 160 Ind. 311, 66 N. E. 739,—sufficiently set out in the *GILPIN CASE*.

So in *Byers Bros. v. Maxwell* (Tex. Civ. App.) 73 S. W. 437, where persons were induced to subscribe for stock, by the statement of the president of the company that he would take a certain number of shares, 29 L.R.A. (N.S.)

which however he in effect failed to do, it was recognized that the former would not be bound on their subscription.

However, in *Chouteau Ins. Co. v. Floyd*, 74 Mo. 286, it was held that a stockholder cannot defeat an assessment by showing that he subscribed for his stock in reliance upon representations of the agent of the corporation that certain persons in whom he had confidence were stockholders, when in fact they were not bona fide subscribers for stock. The court said: "With respect to the second of the above defenses, if one subscribe for the capital stock of a corporation, under a parol promise by the agent who procures the subscription that the subscriber shall not be called upon to pay for the stock or respond to any assessment made upon it, he is nevertheless bound, and such promise or agreement offers no defense to a suit on an assessment."

"It is equally well settled in this state and elsewhere, that a release, by the directors of a corporation, of a stock subscriber from his liability on such a subscription, is of no avail, and that he remains bound for the amount of such subscription as to the other stockholders and creditors of the corporation."

So, in *Haskell v. Worthington*, 94 Mo. 560, 7 S. W. 481, it was held no defense to

talked to the other partners, but mostly with Ladd, and went into it in good faith, and supposed he did, and relied entirely on Ladd and Fryhofer as to the workings of said machine. Fryhofer assuring him that Ladd was to go in and pay therefor and share therein equally with the rest; that through said Ladd and Fryhofer he was induced to enter into an arrangement, whereby all five of said partners were to join in the purchase of a number of said machines for said Netograph Machine Company, with the understanding that each would own a one-fifth interest in the purchase, and pay or secure therefor his proportionate share of the purchase price; that as a result of said understanding, on the date aforesaid, they entered into a written contract with defendant in error, in which for \$6,000 it granted them as parties of the second part the exclusive right and license to sell, use, lease, and employ and license others so to do for and within said territories, sixty of said machines, pictures, and phonograph records, the property of defendant in error, f. o. b. at St. Louis, said \$6,000 to be paid as follows: " . . . Each of said parties of the second part shall, at the time of the approval of the patents hereinafter mentioned by the attorney of the party of the second part, pay the sum of five hundred (\$500) dollars, and each of said parties shall execute their individual note to the party of the first part, due in six months after the date thereof, with 6 per cent in-

terest from date, and said notes and money to be deposited with the Oklahoma Trust & Banking Company, at Oklahoma City, Oklahoma territory, to be delivered to the parties of the first part, only when the parties of the second part shall have received the said sixty machines and the said pictures and phonograph records: . . . Provided, further, that the payment of said money by the parties of the second part shall be deemed and considered as a several contract. . . . " After said contract was signed by defendant in error and by all of said partners, defendant, in payment for his one-fifth interest in the property, executed two notes for \$600 each, payable to defendant in error, and deposited the same in the bank pursuant to the terms of said contract, and on January 5, 1904, renewed the same by executing the notes sued on. At the same time Ladd, after signing the contract, in payment for his one-fifth interest in the property, executed his note for \$600, payable to defendant in error, and drew a check for \$500, likewise payable, deposited them in the bank, but which were later returned to him unpaid by defendant in error, pursuant to a prior secret arrangement between Ladd and Fryhofer to the effect that Ladd should pay nothing for his interest in the property. About half of the machines arrived November 13, 1904, the other half later. Each was intended to show a picture under an electric light and sing a song when

an action on a stock subscription, that the subscriber was induced to take stock by the false representations of the promoter that certain of the former's neighbors and friends had agreed to take stock. The court, in coming to this conclusion, said: "Even if it be conceded that Tilden's false representations could avoid the contract made by the defendant, yet they cannot avail the defendant in this case, for three reasons: (1) Before he subscribed, he could have ascertained whether the representations were true or false; (2) the terms of the subscription contemplated an organization before the first day of September, 1879, and he had time enough to ascertain whether those representations were true or false before the organization, and to have notified his associates of his withdrawal from the enterprise, before they acted on the faith of his subscription, in case he found them to be false; (3) the representations were not the existence of a fact essential to the success of the enterprise, however desirable it may have been to the defendant that his neighbors and friends should have been his associates, and however beneficial he may have believed their becoming interested therein would have been to the enterprise. If he

intended that their becoming so should be a condition of his subscription, he should have put it into the contract; for ordinarily it cannot be deemed essential to the success of an enterprise to be carried on by a corporation, that its stock shall be owned by any particular persons. As soon as created, it becomes transferable personal property; the owners of stock to-day cannot tell who their associate owners will be tomorrow. It is put upon the market, and bought and sold by whomsoever will. The essential fact is behind the subscription to the stock and its ownership; it matters not who the subscribers are, or whence they come. It is the capital they bring that is necessary to carry on the enterprise; that is the essential fact."

And where the agent for the sale of stock, as well as the person subscribing, was deceived by the representations of the owner that certain persons were subscribers, the subscriber cannot hold such agent liable for the amount paid in *Eblin v. Sellars*, 15 Ky. L. Rep. 539.

As to liability of one whose signature to commercial paper is secured by trick or fraud, see note to *Yakima Valley Bank v. McAllister*, 1 L.R.A.(N.S.) 1075.

G. V.

a nickle was dropped in a slot and a lever pulled. They were worthless.

It is impossible to read this record without being impressed that Ladd was simply acting as a decoy for Fryhofer as agent for defendant in error, to get his copartners into this deal whereby, unknown to any of them, his one-fifth interest in the property should cost him nothing. Any such trick as that is a fraud. The representation by Fryhofer and Ladd as an inducement to defendant to purchase, that Ladd, whom defendant regarded highly for his honesty, good faith, and judgment, had agreed to likewise purchase on the same terms, without disclosing the fact that Ladd's interest in the machine was to be given him as a gratuity for securing defendant and others to purchase, was such a fraud as will entitle defendant to defeat a recovery on the notes sued.

Coles v. Kennedy, 81 Iowa, 360, 25 Am. St. Rep. 503, 46 N. W. 1088, was a suit to recover upon a contract in writing for the purchase of stock in a mining company. Defendant pleaded, among other things, that he was induced to execute the contract by reason of the fraud of the appellant. The fraud alleged was that, to induce him to subscribe for the stock and to execute the agreement, appellant, among other things, exhibited specimens of the ore, and represented to him that one Mallory had subscribed and paid for 5,000 shares in the company; that the representation was false and fraudulent; that said Mallory had subscribed for said shares with a secret contract with appellant that they should cost him nothing. Mallory had resided in appellee's town for many years, and was known in the community as a man of much business experience, capacity, and success, whose name as a subscriber would be influential in inducing others to take stock. His name appeared upon the subscription list, and such fact was held out as an inducement to appellee to execute the contract. The court in passing said: "The testimony shows that Mr. Mallory was to have his stock free of charge, and that it was given to him to secure the influence of his name in procuring appellee and others to subscribe. The fact that Mr. Mallory was not to pay for his stock was concealed from the appellee. To have disclosed it would have been to defeat the very purpose for which the 5,000 shares were given to Mallory. We have no doubt but the belief that Mr. Mallory had subscribed for 5,000 shares of the stock, and that he had or was to pay for the same, operated as an inducement to appellee to subscribe for stock and execute the contract in question. This was such a fraud as cannot have the approval of a court of equity, and 29 L.R.A.(N.S.)

for which the contract induced by it should be canceled and held for naught."

Walker v. Mobile & O. R. Co. 34 Miss. 245, was a suit by said road to recover certain instalments then past due upon the subscription of the defendant, Walker, for capital stock in said company. Defendant, among other things, pleaded fraud in the procurement of the contract of subscription in that one Wheeler, the agent of the road, procured one Nelson, an influential man in the community, who was supposed and represented by him to be well informed as to the costs and profits of certain enterprises engaged in by the road, ostensibly to subscribe for five shares of the capital stock in the same. Said Wheeler at the same time executed to him his obligation in writing, as agent of said road, at any time on request of said Nelson, to release him from said subscription. That said Wheeler fraudulently represented to defendant that said subscription was in good faith, and that said Nelson was willing to invest money in said road; whereas, in truth, the same was only colorable and made with a fraudulent design of inducing defendant and others to subscribe to its stock. On demurrer to this plea, the lower court held, in effect, that the same was bad, which holding was sustained on appeal, in that the same failed to allege that defendant was thereby induced to subscribe, but simply stated that Nelson was falsely held out to the community by the agent as a subscriber, thereby clearly implying that, had the plea averred such inducement as is disclosed by the testimony in this case, it would have been good.

In Coulter v. Clark, 160 Ind. 311, 66 N. E. 739, the complaint, in substance, stated that theretofore the Indiana Hedge & Wire Fence Company owned the right under letters patent to manufacture, sell, and erect in Clinton county, Indiana, and elsewhere, an improvement known as "a Growing Hedge & Wire Fence," and desired to sell and erect such fence in said county; that appellant, who was a banker and business man therein, known to the inhabitants thereof, agreed with a certain agent of said company to induce appellee, among others, to purchase said right from said company for said county; that, pursuant thereto, appellant with other agents of said company called upon appellee and represented said right to be of great value, that he was ready to join with other citizens of said county in the purchase thereof, and to organize a corporation to be known as the Clinton County Hedge & Wire Fence Company with a capital stock of \$25,000 for the purpose of engaging in said enterprise; that the plan of such proposed organization was

that the persons forming said new corporation were to execute their promissory notes to the former corporation in consideration of the assignment to it of said patent right for said county, whereupon the new corporation was to issue to the persons so associated shares of its capital stock to the amount of \$2 for every \$1 for the sums for which their representative notes had been so executed to the former company; that, pursuant to an agreement between appellant and other agents of said company, appellant solicited appellee and other citizens to join him in the purchase of said patent right, and pretended that he was one of the joint purchasers thereof, and was executing his notes for the same, with the understanding between appellant and said other agents that, if appellant should induce the appellee and others to purchase said patent right and enter into said scheme, then the notes executed by appellant for his part of the purchase money thereof were to be returned to him by said Indiana company; that, pursuant to said scheme, appellee and others were induced to join in said purchase and the organization of said new corporation, appellant assuring appellee and others that in his judgment it was a good investment; that appellee, having no knowledge of the facts, believed and relied thereon, and with twenty-three other citizens executed his two notes to said Indiana company for a sum certain payable at certain intervals, and caused said new corporation to be organized and said patent right transferred to it; that soon thereafter said Indiana company caused the notes executed by appellant to be handed back to him for his service in carrying out said scheme; that said patent right was of no value, as appellant well knew at the time; that, before appellee discovered the fraud practised upon him, he paid said notes, and thereafter brought suit against appellant for said alleged fraud practised upon him by appellant as a promoter of said new company.

A demurrer to the complaint was overruled in the trial court, and said ruling sustained on appeal. In passing the supreme court, in effect, held that the secret agreement securing a special advantage to appellant, upon whose representations appellee relied in entering the contract, was a fraud on the rights of the appellee, and cited in support thereof: *Western U. Teleg. Co. v. Union P. R. Co.* (C. C.) 1 McCrary, 418, 3 Fed. 1; *Chandler v. Bacon* (C. C.) 30 Fed. 538-540; *Davenport v. Buchanan*, 6 S. D. 376, 61 N. W. 47; *Walker v. Mobile & O. R. Co.* supra; *Coles v. Kennedy*, 81 Iowa, 360, 25 Am. St. Rep. 503, 46 N. W. 1088; *Tolman v. Smith*, 43 Ill. App. 562.

We are therefore of opinion that the notes

given in purchase of said machines were in their inception void for fraud; that said fraud was not waived by a renewal of said notes resulting in the execution of the notes sued on, for the reason that the testimony disclosed that said fraud was not discovered until after said renewal; that a discussion of a waiver of fraud by defendant retaining the machines after they were discovered to be worthless is not necessary to a proper decision of this case; and that the judgment of the trial court should be reversed, and it is so ordered.

All the Justices concur.

WASHINGTON SUPREME COURT.

MARGARET C. ENGELKING, Resp.,
v.

CITY OF SPOKANE, Appt.

(— Wash. —, 110 Pac. 25.)

Master — common laborer — unusual work — duty to supervise.

1. A common laborer directed to construct a raft and float it in the current of a river above a fall for the purpose of performing some labor there does not assume, as matter of law, the risk of the effect of the current upon the raft and mooring line, so as to preclude holding his employer liable in case the raft is torn from its fastenings and he is swept over the falls.

Same — mooring raft in river — duty to supervise.

2. A master must furnish a skilled superintendent where he directs common laborers to construct a raft and moor it in the current above falls in a river as a platform upon which to perform labor, failure to do which will render him liable for the death of the laborers, in case the current tears the raft from its moorings and sweeps them over the falls.

Municipal corporation—building bridge — ministerial duty — injury to employee.

3. A municipal corporation, in constructing a bridge as part of its highway system, acts in its ministerial capacity, and is therefore liable for negligent injury to employees engaged in the work.

(August 1, 1910.)

Note. — Duty of master to furnish superintendence where the work is complicated and dangerous.

The question of the duty of the master to furnish a competent superintendent where the work to be done by the servant is complicated and also dangerous has been passed upon by but few cases, yet there appears to be a well-defined rule to the effect that the master will be held liable for

APPEAL by defendant from a judgment of the Superior Court for Spokane County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's husband, which was alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. **E. O. Connor and Danson & Williams**, for appellant:

Every danger to which deceased was subjected was open and obvious, and the risks of the service which he was ordered to perform, as a matter of law, were assumed.

Trudeau v. American Mill Co. 41 Wash. 465, 83 Pac. 725; Stewart v. Balfour, 51 Wash. 127, 98 Pac. 103; Raven v. Seattle Electric Co. 47 Wash. 637, 92 Pac. 451; Denny v. Kleeb, 40 Wash. 634, 82 Pac. 920; Olson v. McMurray Cedar Lumber Co. 9 Wash. 500, 37 Pac. 679; Bullivant v. Spokane, 14 Wash. 577, 45 Pac. 42; Jennings v. Tacoma R. & Motor Co. 7 Wash. 276, 34 Pac. 937; Tham v. J. T. Steeb Shipping Co. 39 Wash. 271, 81 Pac. 711; Bier v. Hosford, 35 Wash. 544, 77 Pac. 867; Bundy v. Union Iron Works, 46 Wash. 231, 89 Pac. 545;

injuries to a servant caused by the master's failure to furnish a competent superintendent where the work is complicated and dangerous, and requires, in order to be done with safety, the supervision of an experienced and competent superintendent.

Thus, in Hill v. Big Creek Lumber Co. 108 La. 162, 58 L.R.A. 346, 32 So. 372, it was held that a master must be held responsible for such reasonably constant and steady supervision of his workmen that they will not be permitted to become grossly and criminally negligent. The court said that he was in a position to exercise that supervision, and that no other person is.

And in Trainor v. Philadelphia & R. R. Co. 137 Pa. 148, 20 Atl. 632, the master was held liable where the plan adopted for taking down a pole required the superintendence of a competent person, but the laborers were left to manage for themselves. The court said that the fact that some slight inconvenience or expense might have been caused by employing a superintendent could have no weight in a matter affecting the safety of the employees.

So, in Reynolds v. Barnard, 108 Mass. 226, 46 N. E. 703, where the plaintiff was injured by the fall of a staging upon which he was at work while engaged in slating a roof, and which became overloaded with slate, the court said that it could not be said as a matter of law that the careful oversight of the work by a superintendent would not have prevented the loading of the staging with slate to such an extent as to make it dangerous.

So, too, in Doyle v. Melendy (Vt.) 75 Atl. 881, the court said that it was unnecessary for the plaintiff to allege that the defendant knew that another servant

Leary v. Boston & A. R. Co. 139 Mass. 580, 52 Am. Rep. 733, 2 N. E. 115; Raines v. Great Northern R. Co. 53 Wash. 570, 102 Pac. 431; McKenzie v. North Coast Colliery Co. 55 Wash. 495, 28 L.R.A. (N.S.) 1244, 104 Pac. 801.

Where the manner of performing a given work and the material and appliances to be used are left to the discretion and judgment of the employees, the master is not liable for a failure of such employees to select suitable material or appliances, nor for the negligent manner in which such materials and appliances are used.

Metzler v. McKenzie, 34 Wash. 470, 76 Pac. 114; Denny v. Kleeb, supra; Anderson v. Oregon R. & Nav. Co. 28 Wash. 467, 68 Pac. 863; Labatt, Mast. & S. p. 1722.

There can be no recovery, because defendant is a municipal corporation and, at the time of the accident, was in the exercise of a delegated governmental function, viz., building a bridge which was to form a continuation of a public highway.

Cunningham v. Seattle, 40 Wash. 59, 42 Wash. 134, 4 L.R.A. (N.S.) 629, 633, 82 Pac. 143, 84 Pac. 641, 7 A. & E. Ann. Cas.

was incompetent, if that servant was charged with the performance of an absolute duty owing by the master to the servant, "like the duty of providing necessary supervision for a complicated and dangerous service."

And in Haworth v. Seever's Mfg. Co. 87 Iowa, 765, 51 N. W. 68, 62 N. W. 325, it was held that reasonable care must be exercised to have the work of constructing stagings and platforms on which men are to stand for such work as putting rafters in a building in position done by or under the supervision of men that have knowledge of the material and workmanship necessary for their safety.

As is stated in ENGELKING v. SPOKANE, the court in Anderson v. Globe Nav. Co. 57 Wash. 502, 107 Pac. 376, said that the business of loading a schooner with lumber could not be safely carried on without supervision on the part of someone. The court further said: "When, therefore, the master undertook to supervise the work, it was bound to exercise ordinary care in the performance of the duty, and its failure to do so renders it liable to its servants for injuries caused thereby."

Where the nature of the work is such as to require the presence of a superintendent, and the master has undertaken to furnish one, some cases have held that the master is not excused by the mere furnishing of a superintendent, but will be held liable for injuries caused solely by the failure of the superintendent to remain at his post during the accomplishment of the work.

Thus, in Gerrish v. New Haven Ice Co. 63 Conn. 9, 27 Atl. 235, the court held that the master was liable for injuries to a servant caused by the pulling of a bell cord, which was a signal for the engine to

805; *Russell v. Tacoma*, 8 Wash. 156, 40 Am. St. Rep. 895, 35 Pac. 605; *State ex rel. Wood v. Schweickardt*, 109 Mo. 496, 19 S. W. 47; *Daly v. New Haven*, 69 Conn. 644, 38 Atl. 397.

One who knowing and appreciating danger enters upon perilous work must bear the risk.

Anderson v. Morrison, 22 Minn. 274.

There can be no question for the jury of the reasonableness of a direction to perform work in the usual and ordinary way commonly adopted.

Titus v. Bradford, B. & K. R. Co. 136 Pa. 618, 20 Am. St. Rep. 944, 20 Atl. 517; *Hoffman v. American Foundry Co.* 18 Wash. 287, 51 Pac. 385.

A master is not bound to supervise the merely executive details of the work to be done by his servants.

Labatt, Mast. & S. pp. 14, 1719; *Anderson v. Oregon R. & Nav. Co.*; *Metzler v. McKenzie*; and *Denny v. Kleeb*,—*supra*; *Griffiths v. Craney*, 38 Wash. 90, 80 Pac. 274.

Messrs. Robertson & Miller and Harry Rosenhaupt, for respondent:

It is the duty of the master to supervise,

start, where the superintendent whose duty it was to attend to the pulling of the bell cord at the proper times, when the servants were out of danger, was absent from his post, and the bell cord was pulled in some unexplained way.

And the fact that unsuitable ropes for the work of removing a gear wheel weighing upwards of 12 tons were selected by a fellow servant of the plaintiff's testator, although the master had also furnished suitable ropes, will not defeat a recovery for the injury causing testator's death, where none of the servants engaged in the work were experienced mechanics, and the suitable and unsuitable ropes were mingled together, and the superintendent left the men to their own resources shortly after the work had begun. *McElligott v. Randolph*, 61 Conn. 157, 29 Am. St. Rep. 181, 22 Atl. 1094.

But in *National Tube Works Co. v. Bedell*, 96 Pa. 175, it was held that the trial judge erred in holding that the absence of the superintendent for a single instant at the moment of the injury was negligence rendering the master liable. Of course this case is not necessarily in conflict with the foregoing cases, as it could hardly be expected that the superintendent would be present every instant during the progress of the work; and it cannot be considered authority upon the question of the master's liability where no superintendent at all was furnished, or where the superintendent was absent for a considerable portion of the time, and the servants were left to their own resources in planning and carrying out the dangerous and complicated work.

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direct, and control the operation and management of his business, so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor.

Thomp. Neg. § 3805; *Anderson v. Globe Nav. Co.* 57 Wash. 502, 107 Pac. 306.

Deceased neither assumed the risk nor was guilty of contributory negligence.

DeMase v. Oregon R. & Nav. Co. 40 Wash. 108, 82 Pac. 170; *Illinois Steel Co. v. Wierzbicky*, 206 Ill. 201, 68 N. E. 1101; *Morgan v. Rainier Beach Lumber Co.* 51 Wash. 335, 22 L.R.A. (N.S.) 472, 98 Pac. 1120.

The defendant city was not in the exercise of a delegated governmental function.

Abbott, Mun. Corp. §§ 945, 955, 984; 28 Cyc. Law & Proc. pp. 260, 1266, 1341; *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Lorence v. Ellensburg*, 13 Wash. 341, 52 Am. St. Rep. 42, 43 Pac. 20; *Saylor v. Montessano*, 11 Wash. 328, 39 Pac. 653; *Mischke v. Seattle*, 26 Wash. 616, 67 Pac. 357; *Peterson v. Seattle*,

So, a master is not bound to have present at every moment a representative at the place where the work is being carried on, to keep safe the position which an employee may chance to occupy, as against possible negligence on the part of employees. *Southern Indiana R. Co. v. Harrell*, 161 Ind. 689, 63 L.R.A. 460, 68 N. E. 262.

There is no duty imposed upon the master of supervising or directing the details of such a simple work as loading steel rails on a flat car. *Anderson v. Oregon R. & Nav. Co.* 28 Wash. 467, 68 Pac. 863. And as is shown in a note to *Lafayette Bridge Co. v. Olsen*, 54 L.R.A. 108, the authorities very generally hold that supervision of the mere details of the work is not one of the duties of the master.

Of course, the master is liable for injuries due solely to his failure to employ a competent mining boss, where such a duty is expressly imposed upon him by statute. *Graham v. Newburg Orrel Coal & Coke Co.* 38 W. Va. 273, 18 S. E. 584.

Cases of this character, however, are not strictly within the scope of this note. The liability of the master upon his failure to perform a duty expressly imposed by statute is different and greater than the duty imposed upon him by the general principles of law.

Upon the general question of the duty of the master with respect to the employment of his servants, see note to *Smith v. St. Louis & S. F. R. Co.* 48 L.R.A. 368.

As to the duty of the master to provide sufficient help, see note to *Di Bari v. J. W. Bishop Co.* 17 L.R.A. (N.S.) 773.

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40 Wash. 33, 82 Pac. 141, 5 A. & E. Ann. Cas. 735; *Hayes v. Seattle*, 43 Wash. 500, 7 L.R.A.(N.S.) 424, 117 Am. St. Rep. 1062, 86 Pac. 852; *Prather v. Spokane*, 29 Wash. 549, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55; *Stone v. Seattle*, 30 Wash. 65, 67 L.R.A. 253, 70 Pac. 249; *Taylor v. Ballard*, 24 Wash. 191, 64 Pac. 143; *Neel v. King County*, 53 Wash. 490, 102 Pac. 396; *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705; *Turner v. Indianapolis*, 96 Ind. 51; *Hourigan v. Norwich*, 77 Conn. 358, 59 Atl. 487; *Brabon v. Seattle*, 29 Wash. 6, 69 Pac. 365; *Hilgar v. Walla Walla*, 50 Wash. 470, 19 L.R.A.(N.S.) 367, 97 Pac. 498.

The rule requiring the master to supervise and control his business so that no injury shall ensue to his servants through his own carelessness applies to negligence in the construction or maintenance of bridges.

Benson v. Spokane, 39 Wash. 101, 80 Pac. 1106; *Stone v. Augusta*, 46 Me. 127; *Jordan v. Hannibal*, 87 Mo. 673; *Briggs v. Guilford*, 8 Vt. 264; *Bentley v. Atlanta*, 92 Ga. 623, 18 S. E. 1013; *Conrad v. Ithaca*, 16 N. Y. 158; *Houfe v. Fulton*, 34 Wis. 608, 17 Am. Rep. 463; *Williams v. Petoskey*, 108 Mich. 260, 66 N. W. 55; *Meadville v. Erie Canal Co.* 18 Pa. 66; *Howard v. Snohomish County*, 38 Wash. 149, 80 Pac. 293; *Reidhead v. Skagit County*, 33 Wash. 174, 73 Pac. 1118; *Collensworth v. New Whatcom*, 16 Wash. 224, 47 Pac. 439; *Hilgar v. Walla Walla*, *supra*.

Assumption of risk cannot be predicable upon knowledge of conditions alone.

Labatt, Mast. & S. § 279a; *Pearson v. Federal Min. & Smelting Co.* 42 Wash. 90, 84 Pac. 632.

Chadwick, J., delivered the opinion of the court:

At the time of his death H. W. Engelking was a common laborer in the employ of the city of Spokane. The city was engaged in erecting a concrete bridge over the Spokane river, a short distance above the falls. The bridge had been so far completed as to warrant the removal of the false work sustaining the arches, of which there were several. High water had taken out the false work from under the second arch, and the wooden forms had been moored by cables to the Great Northern Railway bridge, a structure which paralleled the city bridge about 200 feet up the stream and to the east. These forms were lying near the shore, with the bow of the arch to the center of the stream. In consequence, the flow of the current along the shore line was naturally deflected toward the center arch of the city bridge. A few feet below the concrete structure, a temporary bridge had been erected. A part of this had gone out a short time

before, but it was in place below the south arch, so that anything floating under the south arch would lodge against it and be thus prevented from being carried over the falls. Engelking and four others were directed by the foreman in charge for the city to take some timbers then at hand and make a raft, to be floated down under the south arch and upon which they could stand while removing the false work. No further direction or superintendence was given or had over the men, although one of their number "seemed to take the lead." Accordingly the men took eight sticks, 10 by 10, with cross pieces, leaving a space between each two of them, so that when the frame-work was completed the raft was about 14 feet wide and 20 feet long. Upon this they erected a superstructure to bring them within reach of the top of the arch. When the raft had been completed it is estimated that it weighed from 8,000 to 9,000 pounds. Between the moored arches and the south span of the bridge, there was an eddy in the stream. In this, and about 30 or 40 feet above the city bridge, the raft was moored; that point being also about 60 or 65 feet south of the pier upon which the center and south arches centered. The raft had been let down into the eddy and was secured by a long rope, 2 inches in diameter, attached to the Great Northern bridge, about 75 feet from the shore. The other ropes were attached to the raft. There is testimony going to show that one of these should have been used as a guy rope, to be held or tied on the shore while the raft was let down under the arch; while the other was to be used in securing the raft to the bridge. On the other hand, there is testimony showing that the large cable was alone depended on to let the raft down, while both of the smaller ropes were intended to secure the raft to the bridge when in proper position. The jury having found for plaintiff, we shall accept her theory as the true fact in the case. When all was done, one of the workmen crossed the river to get some tools. Another went up to the Great Northern bridge, to man the cable, the end of which was wrapped around a batter post on the Great Northern bridge. While the workman was going up the bank of the stream to man the cable, the rope which snubbed the raft to the shore was cut loose, so that when he first observed the raft after reaching his post, it was drifting up and out into the stream, carried up on the eddying waters, and out by the long sweep of the 250-foot cable, the most of which was submerged and a part of which had been struck by the main current of the stream. The cable described a sweep or curve so that, at some time the segment of the curve must have been below

or to the west of the upper end of the raft. Whether Engelking and one of his companions pushed the raft out with pike poles is a disputed fact, but not material as we view the case. As the raft caught the swift current, the force of the current fell upon the cable, drifted the raft rapidly out to the center, and, as soon as the cable straightened out, pulled it under the surface. Those on the raft having no means of controlling it, the workman on the bridge was signalled to let out more rope, and when he did so the raft rose to the surface, but when the rope came taut the raft was again pulled under the water, this time about $2\frac{1}{2}$ or 3 feet, or to the waistline of the men thereon. This continued until the workmen could no longer hold the rope, and the raft, being then opposite and almost under the center arch, was carried through it and over the falls. One of the workmen escaped and was a witness at the trial. The other two lost their lives. This action is prosecuted by the widow of Engelking, and from a judgment in her favor the city has appealed.

Counsel for appellant has aptly summarized the theories upon which a recovery was sought and must rest if sustained. He said: (1) That these 10x10 timbers, forming the foundations of the raft, had, a month previous, been green timbers, and had, during the month preceding, been lying in the water. (2) That the rope by which the raft was moored to the Great Northern bridge was too heavy. (3) That there was no foreman over these men and in charge of the construction of the raft." The first two grounds may be summarily disposed of. It may be conceded, for the testimony shows, that the raft and the rope would, under ordinary conditions, or under the anticipated conditions,—that is, if the raft had been floated under and moored beneath the south arch,—have been a sufficient and proper appliance. The scheme failed because the workmen did not appreciate the danger arising from the submerged cable, the rapid flow, and conflicting currents of the stream which carried the raft beyond the south arch and opposite the center arch, and the other fact that the strength of the current was sufficient to pull the raft under the water when its weight came squarely upon the rope.

It is argued that these things resulted because of natural laws known to all, and that, by an exercise of the faculties with which all men are endowed, the danger could have been foreseen and avoided. *Itz v. American Mill Co.* 37 Wash. 399, Pac. 981; *Bier v. Hosford*, 35 Wash. 4, 77 Pac. 867, and *Cavaness v. Morgan* member Co. 50 Wash. 232, 96 Pac. 1084, are cited to sustain this contention. Not-

withstanding the forceful argument of counsel, the cases cited cannot be made to apply here. The workmen were directed to meet, not an ordinary, but an extraordinary, condition. 1 *Labatt, Mast. & S.* 240; *Anderson v. Columbia Improv. Co.* 41 Wash. 83, 2 L.R.A.(N.S.) 840, 82 Pac. 1037. It is true that, as viewed by learned counsel and by those versed in the laws of mechanics, the result might have been expected as a consequence of the violation of natural laws. But it is not to be expected that a common laborer will have knowledge of, or be bound by, natural laws, unless they are so obvious as to prompt the instinct of self-preservation in men of ordinary prudence and understanding. The wonders of this age of invention come from the application of natural laws. The touch of genius, rather than the strength of reason, has unlocked their mysteries, so that even learned men would not be charged with knowledge of them. Men are not bound to observe or act upon natural laws, unless they are within the range of common understanding. That four men acting in harmony, having no understanding that the cross currents and torrential flow of the stream striking against a 2-inch cable would overcome the natural law which held the raft in its place before it was pushed out into the stream, is the best evidence that they are not to be charged with the assumption of risk or contributory negligence as a matter of law; for, if they knew or appreciated the danger, the instinct of self-preservation, which is the first law of nature, would have restrained them. In any event, it is a question upon which the minds of reasonable men may differ, and the jury having found by special verdict that Engelking and his companions did not appreciate the danger satisfies us that he was not guilty of assumption of risk or of contributory negligence.

The weight of the raft, the heavy rope, the current of the stream, and the proximity of the falls, made the superintendence of a qualified person an imperative necessity. In *Anderson v. Globe Nav. Co.* 57 Wash. 502, 107 Pac. 376, we held that the business of loading a schooner with lumber could not be carried on without superintendence. While this case is not in point upon the facts, it nevertheless furnishes a source from which the legal conclusion may be drawn that the duty of superintendence is not a fixed legal duty, but may arise from the facts of any given case. In that case the servant was entitled to the immediate and watchful care of one who could warn him against dangers that he could not foresee. In this, the servant was entitled to the superintendence and direction of a

skilled person, so that dangers which would not be foreseen by a person of only common understanding might be avoided. The hazard was extraordinary. "When the servant is thus required to work amidst new surroundings or to undertake new duties, the master becomes at once chargeable with the obligation of giving him instructions in any case where there is a real augmentation of the risks, owing to the fact that the servant has not sufficient experience or intelligence to enable him to safeguard himself." *Labatt, Mast. & S. p. 541.* "It is the duty of the master to supervise, direct, and control the operation and management of his business so that no injury shall ensue to his employees through his own carelessness or negligence in carrying it on, or else to furnish some person who will do so, and for whom he must stand sponsor." *Thomp. Neg. § 3805.*

That it is the ordinary, and not the extraordinary, danger arising from the violation of some rule of science or mechanics not likely to be appreciated by the man of ordinary prudence, which binds the servant to the law of assumption of risk, is the logic of *Cook v. Chehalis River Lumber Co.* 48 Wash. 619, 94 Pac. 189, where the court said: "The rule undoubtedly is that a servant assumes the risk of injury from dangers incident to his employment which are apparent to him, and which the master does not undertake to remedy as an inducement to keep the servant at work, or is under no duty of positive law to discover and remedy. But this doctrine, it seems to us, has no application to the case before us. Here, clearly, the danger causing the injury was not one ordinarily incident to the employment. On the contrary, if the respondent's evidence is to be believed, the injury was caused by the grossest kind of negligence on the part of the appellant's foreman, who was in immediate charge of the work. He directed a thing to be done which the slightest investigation must have told him would be highly dangerous to both of the men who were engaged in work at the foot of the trestle. The tightening of the rope, in the position it was placed by his orders, must necessarily throw off the planking from the projecting timbers, and it was gross carelessness to do this without warning the men below of their danger. This danger was not therefore a danger incident to the employment. It was one caused by the negligent acts of the appellant's foreman, and one which he could have avoided by using even ordinary prudence."

Many cases are cited by counsel on both sides, but, inasmuch as this case depends upon general and obvious rules of law, it 29 L.R.A. (N.S.)

would extend our opinion to an inordinate length to review them.

Among other instructions complained of, the following is vigorously assailed: "The law also provides that the servant is held to assume the ordinary risks usually incident to his employment so far as they may fairly be presumed to be within his knowledge in the exercise of ordinary care, *provided the master has used ordinary diligence to eliminate them.*" It is insisted that the italicized part denies to appellant its defense of assumption of risk. We are not advised as to the theory of the court in injecting the words objected to, and if this instruction stood alone it might not be sufficient for the guidance of the jury. Its meaning is not plain, but in other instructions, not in one but in a number, the law of assumption of risk is clearly set forth, so that upon the entire charge the jury could not have been misled. The verdict being consistent with the evidence, we had rather believe that the jury followed the true rule, emphasized as it was by the repeated utterances of the court, than that it was governed entirely by what seems to us to be a misprision on the part of the court. *Hoseth v. Preston Mill Co.* 49 Wash. 682, 96 Pac. 423. Objections are made to other instructions, but we think they state the law when considered in connection with other instructions, and are consistent with the law of the case as we have found it to be.

Lastly, it is contended that the city cannot be held liable, because it was acting in a governmental capacity, and not in the capacity of a private corporation. While there is a diversity of opinion and a divided authority upon this question, it seems to have been settled by this state that the construction and repair of highways is to be regarded as a ministerial rather than a governmental function, and that the city is therefore answerable for its negligence. *Sutton v. Snohomish*, 11 Wash. 24, 48 Am. St. Rep. 847, 39 Pac. 273; *Prather v. Spokane*, 29 Wash. 549, 59 L.R.A. 346, 92 Am. St. Rep. 923, 70 Pac. 55. In *Cunningham v. Seattle*, 40 Wash. 59, 42 Wash. 134, 4 L.R.A. (N.S.) 629, 633, 82 Pac. 143, 84 Pac. 641, 7 A. & E. Ann. Cas. 805, the case upon which appellant principally relies, the distinction between that case and the case at bar is noted by a quotation from *Sutton v. Snohomish*: "In the first place, we are of the opinion that the laying out, repairing, and controlling of streets by a chartered municipal corporation does not call forth the exercise of strictly governmental functions. In the performance of such duties, however imposed, the municipality acts primarily for the benefit of the inhabitants of the particular locality. In preserving

the peace, caring for the poor, preventing the destruction of property by fire, and preserving the public health, it assumes duties which are said to be in their nature solely governmental (Jones, Neg. Mun. Corp. chap. 4), and for the nonexercise or negligent exercise of which the corporation is not generally liable to individual citizens. But the duty to keep streets in repair is a municipal or ministerial duty, for a breach of which an action will lie in favor of a party injured thereby. *Denver v. Dunsmore*, 7 Colo. 328, 3 Pac. 705." Whether the reasoning employed to draw the distinctions between the Sutton Case and the case of Cunningham be good or bad, it is the established law in this state, and we are not disposed to question it in the absence of legislative direction. This conclusion makes it unnecessary for us to notice specifically other assignments of error; they being covered by the general propositions advanced.

The judgment of the lower court is affirmed.

Rudkin, Ch. J., and Gose, and Fullerton, JJ., concur.

Petition for rehearing denied.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JACKSON M. EWING, by Next Friend,
v.
LANARK FUEL COMPANY, Plff. in Err.
(65 W. Va. 726, 65 S. E. 200.)

Negligence — contributory negligence — questions for jury.

1. Negligence is generally a mixed question of law and fact; and when the evidence is conflicting in relation to the existence of such facts as would show negligence if the facts were undisputed, or when the facts admitted to be true, or clearly proven and not denied, are such that reasonable men might draw different conclusions from them, the question of negligence is for the jury. The same is also true in relation to contributory negligence, which, under the law of West Virginia, is a matter of defense.

Master — infant servant — duty to warn.

2. It is the duty of the master to warn his servant of the dangers incidental to his employment, unless they are so obvious that it may be fairly assumed that the servant fully comprehended them. If the servant is an infant, this duty becomes more imperative.

Headnotes by WILLIAMS, J.
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Same — injury — determination of liability.

3. Whether or not a master is liable to his infant servant for injury received by him in the course of his employment depends upon the mental capacity of the infant to comprehend and avoid the dangers incidental thereto, and upon the question whether or not he was fully informed in relation to such dangers, so as to charge him with having voluntarily assumed the risk of injury.

Same — age — capacity to comprehend.

4. Between seven and twenty-one years, the age of the infant is only an evidential fact bearing on the question of his mental capacity to comprehend and avoid danger.

Same — presumptions.

5. An infant fourteen years of age or over is presumed to possess sufficient mental capacity to comprehend and avoid danger; and if he relies on his want of such capacity, the burden of proving it is on him; but if under the age of fourteen, he is presumed not to possess such capacity, and in an action by him for negligently causing his injury, the burden of proving his capacity is on the defendant.

Same — mental capacity — questions for jury.

6. Whether or not an infant possessed sufficient mental capacity to comprehend and avoid the dangers incidental to his employment, and whether or not he was aware

Note. — Presumption and burden of proof as to capacity of minor servant to comprehend and avoid danger.

In many cases involving the liability of persons other than employers for injuries to a minor child, the question of the capacity of minors to appreciate and avoid the danger is discussed, and in many the same rules as to presumption and burden of proof as to the capacity or incapacity of the minor are applied as in cases where the suit is brought by a minor servant against the master; but the peculiar relationship between a master and servant, together with the greater responsibility imposed upon the former by virtue of the contract, presents in many cases different questions than would arise where that relationship does not exist, and consequently the present note will be confined to cases of master and servant.

As to the duty to warn minor servant of dangers of which he is already aware, see note to *Cronin v. Columbian Mfg. Co.* ante, 111.

This note does not include cases which merely pass upon the questions of the assumption of risk and contributory negligence where minor servants are injured, without discussing the further questions of presumptions arising because of the minority of the servant, and of the burden of proof resulting from such minority.

Upon the somewhat analogous question, May incompetence of a minor to perform the

of his danger, and could have avoided it by the use of such care as might reasonably be expected in one of his age, are questions of fact for the jury. If he did not possess such capacity, he could not be guilty of contributory negligence.

Same — liability — lack of mental capacity — effect.

7. The master will not be relieved from liability to an infant for an injury received in the course of his employment, on the ground that the injury was the result of mere accident or of the negligence of a fellow servant, if the infant did not have sufficient capacity to comprehend and avoid the dangers incidental to his employment.

Same — knowledge of servant — imputation to.

8. A servant who is authorized by his

duties of a particular employment be inferred from his minority alone, see note to *Wilkinson v. Kanawha & H. Coal & Coke Co.* 20 L.R.A.(N.S.) 331. In that note, however, it is not the liability of the master to the servant which is the essential question, but it is the liability of the master to a third person who has been injured because of the alleged incompetency of a minor servant employed by the master.

The courts have very generally fixed upon the age of fourteen as the time when the presumption of the child's incapacity to understand and avoid danger will no longer be indulged, and when the burden of showing such incapacity will rest upon him who asserts it.

At what age the presumption as to a child's capacity to understand and appreciate danger arises is a question of law, and not of fact. *Burnett v. Roanoke Mills Co.* 152 N. C. 35, 67 S. E. 30; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *E. S. Higgins Carpet Co. v. O'Keefe*, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900.

But whether the burden of showing the child's capacity or incapacity, as the case may be, to understand and avoid the danger, has been met by him upon whom the law declares that burden to rest, is generally a question for the jury, as is shown by the cases set out below.

So, in *Bromberg v. Evans Laundry Co.* 134 Iowa, 38, 111 N. W. 417, 13 A. & E. Ann. Cas. 33, it was held to be for the jury to determine whether a master employing a young child under the statutory age had, by proof of the child's intelligence and capacity, overcome the statutory presumption of the child's incapacity.

The general rule in respect to the presumption as to a child's capacity to understand and appreciate danger is well expressed in *McIntosh v. Missouri P. R. Co.* 58 Mo. App. 281, where the court said: "There is no specific age at which the courts will or will not declare a party to be possessed of sufficient experience or discretion to look after his own safety. The circumstances have much to do in settling 29 L.R.A.(N.S.)

master to employ and to discharge other servants, and to assign their duties, is, to the extent of such authority, the agent of his master; and whatever knowledge he may have of matters pertaining to the ability and capacity of a servant employed by him to perform a particular kind of work, and to comprehend and avoid the dangers incidental thereto, will be imputed to the master.

(June 11, 1909.)

ERROR to the Circuit Court for Raleigh County to review a judgment in plaintiff's favor in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

that question. The child is often of such tender years that the courts will say, as matter of law, that ordinary care cannot be expected of it, and that it should not be charged with contributory negligence. Then there comes an age, attended or not with experience or inexperience, when capacity is a question of doubt, and in such cases the courts submit the question to the jury or triers of the fact. Passing this, the party injured may be of such age and experience that there is no longer doubt as to the possession of sufficient capacity, and then the courts will treat the matter as beyond dispute, and hold the party to the exercise of ordinary care."

So, in *Saller v. Friedman Bros. Shoe Co.* 130 Mo. App. 712, 119 S. W. 794, the court said that there is no period of minority at which a court can say that, as a matter of law, a minor servant, in respect to assumption of risk and contributory negligence, stands on the same plane as an adult, for his capacity, and not his age, is the criterion by which his responsibility and conduct should be measured.

A minor will be presumed to have the capacity usual to ones of his age, and the burden of proving that he had greater than the usual capacity of minors of the same age rests upon the employer; and the burden of proving that the minor had less than such usual capacity rests upon the minor, or the one seeking to recover damages on account of his death. *Bare v. Crane Creek Coal & Coke Co.* 61 W. Va. 28 8 L.R.A.(N.S.) 284, 123 Am. St. Rep. 966 55 S. E. 907.

Presumption of incapacity.

Between the ages of seven and fourteen or, as some cases put it, prior to fourteen years of age, a child is *prima facie* incapable of exercising judgment and discretion.

Pratt Coal & I. Co. v. Brawley, 83 Ala. 371, 3 Am. St. Rep. 751, 3 So. 555; *Love v. De Bardelaben Coal & I. Co.* 90 Ala. 117 So. 756; *Jefferson v. Birmingham R. Electric Co.* 116 Ala. 299, 38 L.R.A. 450

Messrs. Price, Smith, Spilman, & Clay, for plaintiff in error:

The plaintiff assumed the risks incidental to his employment.

Bare v. Crane Creek Coal & Coke Co. 61 W. Va. 28, 8 L.R.A.(N.S.) 284, 123 Am. St. Rep. 968, 55 S. E. 907; Laverty v. Hambrick, 61 W. Va. 687, 57 S. E. 240; Williams v. Belmont Coal & Coke Co. 55 W. Va. 84, 46 S. E. 802; Labatt, Mast. & S. § 291; Ciriack v. Merchants' Woolen Co. 146 Mass. 182, 4 Am. St. Rep. 307, 15 N. E. 579; Hickey v. Taafe, 105 N. Y. 26, 12 N. E. 286; Hettechen v. Chipman, 87 Md. 729, 41 Atl. 65; Coullard v. Tecumseh Mills, 151 Mass. 85, 23 N. E. 731; Downey v. Sawyer, 157 Mass. 418, 32 N. E. 654; Bohn Mfg. Co. v. Erickson, 5 C. C. A. 341, 12

67 Am. St. Rep. 116, 22 So. 546; Tutwiler Coal, Coke & I. Co. v. Enslen, 129 Ala. 336, 30 So. 600; Hazlerigg v. Dobbins (Iowa) 123 N. W. 196; Kehler v. Schwenk, 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; Greenway v. Conroy, 160 Pa. 185, 40 Am. St. Rep. 715, 28 Atl. 692; Goodwin v. Columbia Mills Co. 80 S. C. 349, 61 S. E. 390; Owens v. Laurens Cotton Mills, 83 S. C. 19, 64 S. E. 915; Ghaner v. Leaphart Lumber Co. (S. C.) 67 S. E. 242; Lynchburg Cotton Mills v. Stanley, 102 Va. 590, 46 S. E. 908.

But, of course, this presumption may be rebutted by evidence.

Pratt Coal & I. Co. v. Brawley, and Lynchburg Cotton Mills v. Stanley, supra. Under fourteen years of age, and down to seven, there is a presumption of incapacity, but it is not an irrebuttable presumption; when all the facts and circumstances of any given case have been offered in evidence before the jury, it becomes a question of fact, and the burden rests upon him who asserts the capacity of an infant under that age to understand and appreciate the obvious dangers, to prove it to the satisfaction of the jury. Tucker v. Buffalo Cotton Mills, 76 S. C. 539, 121 Am. St. Rep. 957, 57 S. E. 626; Goodwin v. Columbia Mills Co. 80 S. C. 349, 61 S. E. 390.

The law presumes that an infant between seven and fourteen years of age cannot be guilty of contributory negligence, and in an action by such infant the burden is on the defendant to overcome this presumption by proof of intelligence and capacity. Lynchburg Cotton Mills v. Stanley, supra.

As the servant was under fourteen years of age, the presumption is that she could not assume the risk arising from the negligence of a fellow servant. Owens v. Laurens Cotton Mills, supra.

It is not error for the trial court in its charge to impose upon the master the burden of satisfying the jury that the plaintiff, being under fourteen, not only had sufficient capacity to appreciate the danger, but that he was sufficiently informed there-

U. S. App. 260, 55 Fed. 943; Briggs v. Newport News & M. Valley Co. 15 Ky. L. Rep. 618, 24 S. W. 1069; Buckley v. Gutta Percha & Rubber Mfg. Co. 113 N. Y. 540, 21 N. E. 717; Ludwig v. Pillsbury, 35 Minn. 266, 28 N. W. 505; Cudahy Packing Co. v. Marcan, 54 L.R.A. 258, 45 C. C. A. 515, 106 Fed. 645; Ash v. Verlenden Bros. 154 Pa. 246, 26 Atl. 374; Wilkinson v. Kanawha & H. Coal & Coke Co. 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875; Palmer v. Harrison, 57 Mich. 182, 23 N. W. 624; White v. Wittemann Lithographic Co. 131 N. Y. 631, 30 N. E. 236; Kelly v. Barber Asphalt Co. 93 Ky. 363, 20 S. W. 271; McCann v. Mathison, 12 Misc. 214, 33 N. Y. Supp. 263; Downey v. Sawyer, 157 Mass. 418, 32 N. E.

of. Ghaner v. Leaphart Lumber Co. supra.

So, in Hazlerigg v. Dobbins, supra, a minor servant barely twelve years of age was injured while, in charge of the horses, he was riding the sweep of a circular horse power; and the court said that, as he was only twelve years of age, mere knowledge on his part or opportunity to know that the method in which he was allowed to work in connection with this piece of machinery was dangerous would not be imputed to him as contributory negligence.

And the presumption that a child under fourteen years of age is incapable of exercising judgment and discretion is not rebutted by evidence that he was "bright, smart, and industrious." Tutwiler Coal, Coke & I. Co. v. Enslen, supra.

But merely because a boy is but fourteen years of age, a jury will not be permitted to draw an inference that the master has been guilty of negligence to him. Hettechen v. Chipman, 87 Md. 729, 41 Atl. 65.

In O'Brien v. Sanford, 22 Ont. Rep. 136, Boyd, C., during the argument, said: "Under twelve, the presumption would be that the child did not understand; over twelve, it would be for the jury to say whether he understood or not."

Presumption of capacity.

If the child is over the age of fourteen, the prima facie presumption that he is capable of exercising judgment and discretion will be indulged.

Lovell v. De Bardelaben Coal & I. Co. supra; King v. Woodstock Iron Co. 143 Ala. 632, 42 So. 27; Burnett v. Roanoke Mills Co.; Nagle v. Allegheny Valley R. Co.; Kehler v. Schwenk; and Greenway v. Conroy,—supra; Wilkinson v. Kanawha & H. Coal & Coke Co. 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875.

And in Kehler v. Schwenk, supra, it was held that the degree of care and prudence which must be exercised by a child to avoid the charge of negligence is measured by his capacity to see and appreciate danger, whether he is under or over fourteen years

654; *Carrington v. Mueller*, 65 N. J. L. 244, 47 Atl. 564.

Defendant was not negligent in changing the employment of the plaintiff.

Labatt, Mast. & S. §§ 21, 456-458, 462; *Anderson v. Morrison*, 22 Minn. 274.

Defendant was not liable for the act of Laing in employing plaintiff.

McMillan v. Middle States Coal & Coke Co. 61 W. Va. 531, 11 L.R.A.(N.S.) 840, 57 S. E. 129; *Williams v. Thacker Coal & Coke Co.* 44 W. Va. 599, 40 L.R.A. 812, 30 S. E. 107; *Purkey v. Southern Coal & Transp. Co.* 57 W. Va. 595, 50 S. E. 755.

Defendant's negligence was not the proximate cause of the injury.

Mire v. East Louisiana R. Co. 42 La. Ann. 385, 7 So. 473; *Nickey v. Steuder*, 164 Ind.

190, 73 N. E. 117; 2 *Labatt, Mast. & S.* §§ 803, 806-809, p. 2210, note 5(a); *Burnes v. Kansas City, Ft. S. & M. R. Co.* 129 Mo. 41, 31 S. W. 347; *Bennett v. Long Island R. Co.* 21 App. Div. 25, 47 N. Y. Supp. 258; *Norfolk & W. R. Co. v. Cromer*, 101 Va. 667, 44 S. E. 898; *Persinger v. Alleghany Ore & Iron Co.* 102 Va. 350, 46 S. E. 325; *Ketterman v. Dry Fork R. Co.* 48 W. Va. 606, 37 S. E. 683; 7 *Thomp. Neg.* § 3827; *Borek v. Michigan Bolt & Nut Works*, 111 Mich. 129, 69 N. W. 254; *White v. Witteman Lithographic Co.* 58 Hun, 381, 12 N. Y. Supp. 188; *Evans v. American Iron & Tube Co.* 42 Fed. 519; *Stephen v. Stevens*, 49 N. Y. S. R. 850, 21 N. Y. Supp. 721; *Christner v. Cumberland & E. L. Coal Co.* 146 Pa. 67,

of age; and, in the absence of evidence to the contrary, such capacity will be held to be that which is usual to children of his age and experience. Fourteen years is simply the age after which capacity is presumed, and the burden of showing lack of it is placed on the child.

So, in *Nagel v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413, it was held that the presumption that a boy of fourteen has capacity to avoid danger can be rebutted only by clear proof of the absence of discretion.

And in *Burnett v. Roanoke Mills Co.* 152 N. C. 35, 67 S. E. 30, the court said that an infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger, and to have power to avoid it; and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual in infants of that age. And to the same effect was the decision in *Wilkinson v. Kanawha & H. Coal & Coke Co.* supra.

A person of the age of seventeen is presumed to have sufficient capacity to be sensible of danger, and to have power to avoid it; and this presumption will stand until overthrown by evidence of the absence of such discretion as is usual in persons of that age. *Sanborn v. Atchison, T. & S. F. R. Co.* 35 Kan. 202, 10 Pac. 860; *Wiggins v. E. Z. Waist Co. (Vt.)* 76 Atl. 36.

A boy of eighteen years of age, in the absence of averments to the contrary, will be presumed to have ordinary intelligence and sufficient capacity to observe dangers that are apparent to casual observers. *Baird Bros. v. Deering*, 13 Ky. L. Rep. 271.

And if a boy of eighteen needed special instructions, the burden of proof is upon him or his representatives to show it. *King v. Woodstock Iron Co.* supra.

Unless the complaint or petition alleges that the minor is under fourteen, it will be presumed that he is over that age. *Lowell v. De Bardelaben Coal & I. Co.* 90 Ala. 13, 7 So. 756.

Being of an age to appreciate and having full knowledge of the danger, the fact

that a servant is a minor does not alter the general rule of law upon the subject of employees taking upon themselves the risks which are patent and incident to the employment. *Hickey v. Taaffe*, 105 N. Y. 26, 12 N. E. 286; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 546, 21 N. E. 717; *Rikel v. Ferguson*, 25 N. Y. S. R. 960, 5 N. Y. Supp. 774, affirmed without opinion in 117 N. Y. 658, 22 N. E. 1134.

And in *Levey v. Bigelow*, 6 Ind. App. 677, 34 N. E. 128, the court said that, in respect to all matters wherein a young and inexperienced employee is competent to understand and avoid the dangers, such employee stands upon the same footing with an experienced adult.

So, a lad eighteen years of age will be presumed to have been of sufficient intelligence to assume the risks of the employment, the same as if he were over twenty-one. *King v. Woodstock Iron Co.* supra.

Whatever there was of danger or of risk in having the hand cut by a knife which moved slowly and in full view, a bright boy of fourteen years of age could see and appreciate as well as an adult, and, as far as the danger is known and obvious to him, is as legally responsible for his own protection as a person of full age. *Malsky v. Schumacher & Ettlinger*, 7 Misc. 8, 27 N. Y. Supp. 331.

Any child of ordinary intelligence must know that to place its hand upon a bar of iron heated to a great heat must result in its being burned; or to place its fingers between two heavy rollers where the space is too small to admit them must result in their being crushed. *Phillips v. Michaels*, 11 Ind. App. 672, 39 N. E. 669.

The danger of keeping hold of a shipper rod which is outside of the elevator well until the crossbeam of the elevator on which he is standing catches his hand or arm between it and the edge of the floor through which the elevator is descending is one which a boy nineteen years of age must be presumed to understand and appreciate as thoroughly as would an older person. *Rood v. Lawrence Mfg. Co.* 155 Mass. 590, 30 N. E. 174.

23 Atl. 221; Poland v. Earhart, 70 Iowa, 235, 30 N. W. 637.

The law does not presume every boy under fourteen years of age incapable of understanding and appreciating the dangers incident to any employment whatever, no matter how simple and free from complication the work may be, and no matter how slight the danger.

Buckley v. Gutta Percha & Rubber Mfg. Co.; Ludwig v. Pillsbury; Cudahy Packing Co. v. Marcan; Ash v. Verleden Bros.; and Ciriack v. Merchants' Woolen Co.—supra; Rickert v. Stephens, 133 Pa. 538, 19 Atl. 410; Central R. & Bkg. Co. v. Golden, 93 Ga. 510, 21 S. E. 68; Savannah, F. & W. R. Co. v. Smith, 93 Ga. 742, 21 S. E. 157; Manchester Mfg. Co. v. Polk, 115 Ga. 542,

41 S. E. 1015; Evans v. Josephine Mills, 119 Ga. 448, 46 S. E. 674; Central R. & Bkg. Co. v. Rylee, 87 Ga. 491, 13 L.R.A. 634, 13 S. E. 584; Krenzer v. Pittsburg, C. C. & St. L. R. Co. 151 Ind. 587, 68 Am. St. Rep. 252, 43 N. E. 649, 52 N. E. 220; Smillie v. St. Bernard Dollar Store, 47 Mo. App. 402; Chicago, B. & Q. R. Co. v. Russell, 72 Neb. 114, 100 N. W. 156; Wills v. Ashland Light, Power & Street R. Co. 108 Wis. 255, 84 N. W. 998; Fitzgerald v. Chicago, B. & Q. R. Co. 114 Ill. App. 118; Cook v. Houston Direct Nav. Co. 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475; Rock v. Indian Orchard Mills, 142 Mass. 522, 8 N. E. 401; Glover v. Gray, 9 Ill. App. 329; Pekin v. McMahon, 154 Ill. 141, 27 L.R.A. 206, 45 Am. St. Rep. 114, 39 N. E. 484; Hestonville Pass. R. Co. v.

A servant between sixteen and seventeen years of age, in the absence of all proof that he possessed less mental capacity than the average youth of his age and class, must be held to have assumed the risk of feeding billets of wood to a circular saw. Sheetram v. Trexler Stave & Lumber Co. 13 Pa. Super. Ct. 219.

And following the Kehler Case, cited supra, it was held in Greenway v. Conroy, 160 Pa. 185, 40 Am. St. Rep. 715, 28 Atl. 602, that the court could not assume that a boy over fourteen years of age, with six months experience in a machine shop, was incapable of forming a judgment of the danger of attempting to put a belt on a moving pulley, especially when he had had the aid of the warning of an older and more experienced person.

And in Worthington v. Goforth, 124 Ala. 36, 26 So. 531, the court said: "The presumption of fact is that he was possessed of that degree of intelligence which is common to boys of sixteen years of age, and the presumption of law, in the absence of evidence to the contrary, is that a boy of that age is capable of recognizing and appreciating such ordinary and patent danger as is incident to climbing, or attempting to jump upon moving cars."

The fact that a young man nineteen years of age testifies that he did not know that there was danger of his hand being caught in inward revolving rolls, and that he did not know that if his hand was caught he could be injured, is not sufficient evidence to carry his case to the jury. Roth v. S. Barrett Mfg. Co. 96 Wis. 615, 71 N. W. 334.

So, a girl of ordinary intelligence, fifteen years of age, must be presumed to know that if she gets her fingers caught between inward revolving rollers, or between a roller turning from her and the surface against which it runs in contact, she will be injured, and testimony to the contrary does not raise a question for the jury. Groth v. Thomann, 110 Wis. 488, 86 N. W. 178.

In the following cases the court, without expressly passing upon the question of presumption (L.R.A. (N.S.)

sumption or burden of proof, held that the rules applicable to adults were applicable to the minor injured in the manner indicated. It is possible that this list might be extended.

E. S. Higgins Carpet Co. v. O'Keefe, 25 C. C. A. 220, 51 U. S. App. 74, 79 Fed. 900 (boy fifteen years of age, hand caught in cogwheels of "wool picker"); Alabama Mineral R. Co. v. Marcus, 115 Ala. 389, 22 So. 135 (boy nineteen years of age, injured by falling off hand car being run at high speed); Sims v. East & West R. Co. 84 Ga. 152, 20 Am. St. Rep. 352, 10 S. E. 543 (boy seventeen years of age, loading lumber on flat car); Ryan v. Armour, 166 Ill. 568, 47 N. E. 60 (boy nearly nineteen years of age, hanging hogs' tongues on hooks in cooling room); Levey v. Bigelow, supra (a boy of seventeen, injured by the starting of a printing press which he was operating); Williams v. Churchill, 137 Mass. 243, 50 Am. Rep. 304 (boy of nineteen employed on a tugboat, and injured by becoming entangled in the loose end of a line which he was engaged in fastening to a cleat toward the bow of the vessel); Prentiss v. Kent Furniture Mfg. Co. 63 Mich. 478, 30 N. W. 109 (boy of nineteen engaged in running a split saw); Berger v. St. Paul, M. & M. R. Co. 39 Minn. 78, 38 N. W. 814 (boy of nineteen, employed in a boiler-making shop, who was injured by having his fingers caught in the inward revolving rollers); McIntosh v. Missouri P. R. Co. 58 Mo. App. 281 (boy nearly twenty-one, employed as brakeman and engaged in coupling cars).

And see note to Cronin v. Columbian Mfg. Co. ante, 111, for cases holding that the master is under no obligation to instruct minor servants of such dangers as having their fingers caught in inward revolving rollers. While the majority of these cases do not expressly hold that a child must be presumed to know of such danger, yet that is in effect the position which the court takes when it holds that the master is under no obligation to instruct the minor servant of that danger.

But, in Atlanta & W. Pt. R. Co. v.

Connell, 88 Pa. 520, 32 Am. Rep. 472; Strawbridge v. Bradford, 128 Pa. 200, 15 Am. St. Rep. 670, 18 Atl. 346; Neilson v. Hillside Coal & I. Co. 168 Pa. 256, 47 Am. St. Rep. 886, 31 Atl. 1091; Kehler v. Schwenk, 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 633, 22 Atl. 910; Lehigh & W. B. Coal Co. v. Hayes, 128 Pa. 294, 5 L.R.A. 441, 15 Am. St. Rep. 680, 18 Atl. 387; Tucker v. New York C. & H. R. R. Co. 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916; Labatt, Mast. & S. §§ 249, 348; 1 Thomp. Neg. § 307; 6 Thomp. Neg. § 7660; 7 Thomp. Neg. § 311; Bare v. Crane Creek Coal & Coke Co. supra.

Messrs. McGinnis & Hatcher also for plaintiff in error.

Messrs. M. F. Matheny and Sanders & Crockett for defendant in error.

Williams, J., delivered the opinion of the court:

Jackson M. Ewing, an infant thirteen years and nine months old, was injured on the 7th day of January, 1907, while engaged in coupling cars in the defendant's coal mine in the county of Raleigh, as a result of which injury his right leg was amputated 2 or 3 inches above the knee. He sued the company, by next friend, for negligently causing the injury, and obtained a judgment for \$8,000. There was a single track leading into the mine for a distance of about 500 feet. At this point it branched into two parallel tracks called a parting. This parting was about 200 feet in length, with a space of 5 or 6 feet between the two tracks. From the entrance to the center of the parting it was down grade, then for a short distance it was level, and continuing in the mine the grade was upward. There was a swag near the center of the parting. This parting was designed for the passing of the cars. The empty cars were hauled into

the mine, five or six at a time, coupled together, and each one was "spragged" so as to prevent its rolling down the grade, and all were left coupled together, standing on the grade on the right-hand track of the parting. The loaded cars were hauled, one at a time, by mules from the various working places in the mine, and were left standing in the swag on the left-hand track of the parting until a train of them, five or six in number, was collected. They were then coupled together. The device for coupling consisted of two or three links forming a short chain, each end of which was attached to a car by means of a clevis and pin. The couplings were removed from the train of empty cars as they were hauled into the mine, and were used to couple together the loaded cars. Plaintiff had been employed on the motor which ran on the outside of the mine; but on the day of his injury the motor was not running, and he was placed in the mine to uncouple the empty cars and to couple the loaded ones. He did this by removing the pin from one end of the coupling, unspragging the car, and allowing it to run down the grade. He would then follow the car down the grade, remove the coupling from the car, and attach it to the loaded ones. At the time of his injury, he had let down all the empty cars of the train except one, which he supposed was spragged, and, while removing the coupling from the one which he had last let down, the last one of the train, from some unexplained cause, ran down the grade, caught him between it and the one from which he was removing the coupling, and crushed his leg. Defendant took several bills of exceptions to the rulings of the court in giving certain instructions at the instance of the plaintiff, and in refusing certain other instructions asked for by defendant, and also in admitting certain testimony on

Smith, 94 Ga. 107, 20 S. E. 763, the court laid down the proposition that there is no presumption of law that a minor over fourteen years of age, who applies for a position involving dangerous service, is aware of the danger and needs no instruction. In this case the boy was seventeen years of age, and in applying for a position stated that he knew the duties of a car coupler and could discharge them, and it was contended that the company had a right to presume that he knew the duties of such a position without instruction. Of course, in contention in reference to instruction implies a much broader rule than the general rule above stated.

So, in *Evansville & R. R. Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, 34 N. E. 511, where an inexperienced minor employed on a railroad construction train was injured by defects in the track, the court said that it would be too harsh a rule to hold that

the burden was upon him to see and discover what might have been seen and discovered by the exercise of ordinary care.

And in *Crocker v. Banks*, 4 Times L. R. 324, it was held that the jury was not bound to say that a girl of seventeen years was guilty of contributory negligence in failing to put on a mask while handling bottles charged with soda water, although she admitted that she knew that the bottles frequently burst, where she swore that she did not know the necessity of wearing the mask.

In *Wolski v. Knapp-Stout & Co. Co.* 90 Wis. 178, 63 N. W. 87, although the deceased servant was eighteen years of age, the court said that, as the deceased was a minor, there was no presumption that he understood and appreciated the danger. This case is apparently contrary to the other cases, and is opposed to the great weight of authority.

W. M. G.

behalf of plaintiff over defendant's objection, and in refusing certain testimony offered by defendant. The case is here upon writ of error awarded defendant.

Plaintiff in error insists that its demurrer to the declaration should have been sustained, but we think it sufficiently avers a cause of action. The negligence averred is not the particular accident which caused plaintiff's injury, but is the employment of plaintiff, an infant, and negligently requiring him to perform a duty, the dangers of which he was incapable of comprehending and avoiding, and failing to instruct him how to perform the work, and to guard against the dangers incidental thereto.

These averments state a good cause of action. The demurrer was properly overruled.

Plaintiff in error insists that the testimony of John Ewing, plaintiff's father, relative to the growth, development, and training of plaintiff, his lack of travel, and his incapacity, in his present condition, to earn money, was improper evidence, and that it should not have been admitted. The father admitted that he was an illiterate man, unable to write, or even to read, and he may have improperly estimated plaintiff's incapacity to comprehend danger, and to avoid accident and injury, on account of the boy's lack of education. He may not have shown himself very well qualified as an expert to testify on the subject; but the jury was competent to weigh and consider such testimony and to give to it such value only as it merited, and no doubt did so. Such testimony is of little value; but we fail to see how plaintiff in error could have been prejudiced by it. *Jarrett v. Jarrett*, 11 W. Va. 584; *Farnsworth v. Noffsinger*, 46 W. Va. 410, 33 S. E. 246. The boy grew up in the home of his father, and he had ample opportunity to observe his actions. He was therefore certainly competent to give testimony concerning the boy's capacity, notwithstanding he may have given a wrong reason for his estimate of it. It is a matter of common knowledge that many illiterate boys are more astute and alert, and are more capable of taking care of themselves when in the presence of danger, than many other boys of the same age who have had the advantages of a technical education. No doubt the jury considered this fact in estimating the father's testimony. It was not error to permit the father to testify concerning the boy's incapacity to earn money since his injury. *Lawson v. Conaway*, 37 W. Va. 159, 18 L.R.A. 627, 38 Am. St. Rep. 17, 16 S. E. 564.

The testimony of the boy's father, and of Ben Cary and John Kelly, in relation to the father's having told Dave Laing, the mine boss, to keep plaintiff out of the mine, is 29 L.R.A. (N.S.)

also objected to. It was not negligence in the company to employ the boy against his father's will. 1 Labatt, Mast. & S. §§ 18, 21. The father is not suing for loss of his boy's services, and proof that the defendant in error had sufficient capacity to understand the dangers attending his employment, and that he did in fact so understand them, and that he possessed the ability to avoid them, would be a complete defense, whether the employment was with or without the father's consent. But is this not a fact proper to be proved, as tending to show incapacity of the boy, for the purpose of charging plaintiff in error with knowledge of his incompetency to perform the service? It certainly tends to prove that the father thought the work was dangerous, and that he did not regard the boy as competent to perform it, and would be sufficient, at least, to put plaintiff in error on inquiry concerning the boy's capacity, provided it is properly chargeable with knowledge of this conversation. Whether it is chargeable with such knowledge or not depends upon the question whether the mine boss was its agent for the purpose of employing plaintiff. For some purposes the mine boss is to be regarded as a fellow servant with other employees, and not agent, and for other purposes he may be the agent of his employer. This depends upon the authority given him. The testimony is that Laing employed and discharged men. This testimony is not denied by Mr. Laing, nor by any other witness. It must therefore be taken as a fact proven. And, if he had power to employ and to discharge men, it must be inferred that he had power to assign their duties. To the extent of this authority, therefore, he was agent, or vice principal, of plaintiff in error, and any knowledge which he obtained within the scope of this authority would be knowledge of his principal. 4 *Thomp. Neg.* § 4956; 1 *Shearm. & Redf. Neg.* §§ 230, 233; *Criswell v. Pittsburgh, C. & St. L. R. Co.* 30 W. Va. 798, 6 S. E. 31; *Core v. Ohio River R. Co.* 38 W. Va. 456, 18 S. E. 596. We think this testimony was proper.

It is assigned as error that it was not proper to permit plaintiff to exhibit to the jury the stump of his injured leg. But this court has held that, in an action for injury, it was not improper to exhibit to the jury the injured part. *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 86, 24 L.R.A. 50, 19 S. E. 571.

The evidence shows that the father was willing that the boy should have a job on the outside of the mine, which necessitated his riding upon the motor; and the defendant offered to prove that this was a more hazardous employment than that of coupling and uncoupling cars on the inside of the

mine. But the court excluded this evidence, and this is assigned as error. We think this was properly excluded. It is not a question of comparative dangers; neither does it appear that the father knew that the outside work was more dangerous than the work inside the mine. We cannot see how the matter of a comparison of dangers could, in the remotest degree, prove the extent of the danger of the work of coupling the cars on the inside of the mine, unless the extent of the dangers of the work outside was also proved, and this would make another and an immaterial issue; neither do we see how such evidence could prove the capacity of the boy to comprehend and avoid the danger of the work he was actually put to perform. There was no error in excluding this testimony.

The giving of plaintiff's instructions Nos. 1 and 2, and the refusal to give defendant's instructions Nos. 1 and 3, is also assigned as error. Plaintiff's instruction No. 1 reads as follows: "The court instructs the jury that, if they believe from the evidence in this case that the plaintiff, Jackson M. Ewing, was employed by the defendant company to work in its mine, and that, pursuant to such employment, he entered into the service of said company, and, while engaged in the service of the defendant company under the said employment, he was injured, as alleged in the plaintiff's declaration, and if the jury further believe that at the time of said injury the said plaintiff, Jackson M. Ewing, was under fourteen years of age, then the presumption is that he was incapable of understanding and appreciating the dangers incident to his employment; and unless it has been shown by a preponderance of the evidence in this case that the plaintiff was at the time of said injury capable of understanding and appreciating the dangers incident to his employment,—then they should find for the plaintiff, and assess his damages at a sum commensurate with the injuries sustained." This instruction tells the jury that if the plaintiff was under fourteen years of age, the presumption is that he was incapable of understanding and appreciating the danger incident to his employment, and casts upon the defendant the burden of proving that he was in fact competent to appreciate the dangers. If this is not law, the instruction is clearly prejudicial. Does it correctly state the law?

This court held in *Wilkinson v. Kanawha & H. Coal & Coke Co.* 64 W. Va. 93, 20 L.R.A.(N.S.) 331, 61 S. E. 875 "that an infant, after reaching the age of fourteen years, is presumed to have sufficient discretion and understanding to be responsible for his wrongs, to be sensible of danger, and to have power to avoid it." Is not the con-

verse also true? Why say that at the age of fourteen years an infant is presumed to have capacity to understand the dangers of his employment, unless he is presumed, before that age, not to have it? The positive rule necessarily implies the negative one. We understand the law to be this: That the right of an infant to recover for an injury received while in the service of his master, on account of the master's negligence in setting him to perform a dangerous duty, depends upon the question whether or not the infant assumed the risk. And in order to show that the infant did in fact assume the risk, it is necessary to prove that he had knowledge of the danger, and ability to avoid it. This may be done by proving that the master instructed him, or that he gained the knowledge from others, or from actual experience, or that his natural capacity and the nature of the employment were such that he must be presumed to have such knowledge. In the latter case the law charges him with constructive knowledge of the danger. Lack of capacity is never conclusively presumed from infancy, unless the infant is under seven years of age. Age is only an evidential fact, tending to prove constructive knowledge or lack of knowledge. If over fourteen, it tends to prove capacity and knowledge; if under fourteen it tends to prove the reverse of this. It is not conclusive. Capacity may be shown notwithstanding the infant is under fourteen years of age, and incapacity may be shown notwithstanding the infant may be over fourteen years of age. The presumption of capacity at fourteen years, and of incapacity under that age, are both rebuttable presumptions. *Labatt, Mast. & S.* § 249; *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413; *Kehler v. Schwenk*, 151 Pa. 505, 31 Am. St. Rep. 777, 25 Atl. 130; *May v. Smith*, 92 Ga. 95, 43 Am. St. Rep. 84, 18 S. E. 360; *Ciriack v. Merchants' Woolen Co.* 146 Mass. 132, 4 Am. St. Rep. 307, 15 N. E. 579, second appeal 151 Mass. 152, 6 L.R.A. 733, 21 Am. St. Rep. 438, 23 N. E. 829; *Buckley v. Gutta Percha & Rubber Mfg. Co.* 113 N. Y. 510, 21 N. E. 717; *Evans v. American Iron & Tube Co.* (C. C.) 42 Fed. 519. It is a mere rule of evidence, and does not affect the right of either master or servant. It only serves to fix on one party or the other, as the case may be, the burden of supplying the proof of such facts as will show whether or not the risk was really assumed by the infant. If under fourteen years old, the burden of proof is on the master; if over fourteen it is on the infant. It would seem to be no hardship in either case to discharge the burden. All infants of the same age have not the same capacity. If they had

the presumption would necessarily be conclusive. But it is a matter of common knowledge that all persons are not born equal in respect to mental capacity and physical powers; and therefore the presumption in either case may be rebutted by other evidence.

If an infant voluntarily enters into a hazardous employment, with a full comprehension of its attendant dangers, he may fairly be said to have assumed the risk, not only of the injury which might result on account of his own negligence, or by mere accident, but also the risk of injury from the negligence of a fellow servant. Labatt in his work on Master and Servant, § 291, states the rule as follows: "The principle has frequently been laid down or recognized that a minor assumes the ordinary risks of any employment which he undertakes in so far as those risks are, or ought to have been, known to and appreciated by him, whether the source of this knowledge be his own observation and experience, or the instructions which he has received from his employer or his employer's representative. In other words, the fact that the servant was a minor does not enlarge his rights, where it is once established that he understood the danger."

Of course, it could not be said that one had assumed the risk of a danger which he did not comprehend or understand, because assumption of a risk is a voluntary act requiring a positive operation of the mind. It is based upon knowledge, actual or constructive, of possible dangers. Without such knowledge there could be no assumption. One cannot be said to assume the risk of a thing which he never thought could happen. This is axiomatic. Neither could it be said, on the other hand, that the master was negligent in failing to instruct his minor employee concerning the dangers attending his employment, when his duties are so simple and the danger so obvious that the minor could not fail to see them himself, nor when the minor is possessed of the requisite knowledge by any other means. The rule requiring the master to instruct his servant and to warn him of danger is only for the purpose of supplying him with information which he is not presumed to have; and if it is shown that the servant did in fact possess the knowledge, the failure to warn could in no sense be said to be the proximate cause of the injury, and if not the proximate cause of the injury, of course it could not be actionable negligence.

In discussing the question of the assumption of risk by an adult, and by a minor servant, Labatt, in the same section above quoted from, further says: "In the case of 29 L.R.A. (N.S.)

an adult, the servant's inability to recover for injuries resulting from ordinary risks is declared in terms which are indicative of the fact that his comprehension of those risks is presumed in the absence of evidence which justifies the opposite conclusion. In the case of a minor, on the other hand, the defense of an assumption of ordinary risks is viewed as one which is merely conditional upon the production of specific and positive evidence going to show that the risk in question was, as a matter of fact, comprehended. In short, where a minor is concerned, ordinary risks are, for evidential purposes, always treated at the outset of the inquiry as extraordinary, and the burden of establishing the servant's comprehension of the particular risk is cast upon the employer." And in discussing the rule of presumption of capacity from the age of fourteen, which seems to have been first announced by the supreme court of Pennsylvania, in the case of *Nagle v. Allegheny Valley R. Co.* supra, the same author, in § 249, says: "But the theory that at the age of fourteen years the stage reached in the development of the child's faculties is so definite that the burden of proving his non-appreciation of the risks of the service is shifted is contradicted by the weight of authority, and does not seem to rest upon any adequate logical basis." If the law does not shift the burden from the master after the infant reaches fourteen years of age, *a fortiori* it would not be shifted before that age. But this court has held in *Wilkinson v. Kanawha & H. Coal & Coke Co.* supra, that if the infant is fourteen years of age, the burden is shifted to him to show incapacity.

It would therefore seem that the presumption of incapacity in an infant under fourteen years to comprehend the hazards of a dangerous employment is well established. Only a few courts have held that the age of fourteen years raises a presumption of capacity; none have held that capacity is presumed under that age. The following authorities hold that there is a presumption of incapacity if the infant is under fourteen years of age, *viz.*: *Molaske v. Ohio Coal Co.* 86 Wis. 220, 56 N. W. 475; *Trumbo v. City Street Car Co.* 89 Va. 780, 17 S. E. 124; *Roanoke v. Shull*, 97 Va. 419, 75 Am. St. Rep. 791, 34 S. E. 34; *Lynchburg Cotton Mills v. Stanley*, 102 Va. 590, 46 S. E. 908.

The rule adopted by Wisconsin, Virginia, and by this court in *Wilkinson v. Kanawha & H. Coal & Coke Co.* 64 W. Va. 93, 20 L.R.A. (N.S.) 331, 61 S. E. 875, is decidedly in favor of the master, as it puts the burden of proving incapacity on the infant after that age; and it would seem to be a wise

departure from the ancient rule, if it be a departure at all, justified by experience, and by legislative enactments which fix upon that age as the time when an infant is permitted to perform many important acts. It operates to the benefit of many boys of poor families who earn their living, many of whom are as capable as men to perform much of the labor necessary in and about mines and factories. Much of the labor to be performed in coal mines is attended with very little danger, except from those greater calamities which affect all servants employed in that business alike, such as explosions of gas, coal dust, etc. This rule will encourage their employment, and is therefore favorable to both employer and employee. It is also in harmony with the spirit of our law which permits the employment of boys over fourteen years of age in coal mines. In most states, including West Virginia, contributory negligence is a matter of defense, the burden of proving which is on the defendant; and in the case of an infant plaintiff under the age of fourteen years, in order to charge him with contributory negligence, it is just as essential to prove his capacity to comprehend the dangers that might result from his negligent act as it is to prove his capacity in order to establish the fact that he assumed the risk of dangers connected with his employment. The burden of proving capacity is upon defendant in either case. 1 Shearm. & Redf. Neg. § 108; 1 Thomp. Neg. §§ 308, 309; 4 Thomp. Neg. §§ 4688, 4689; Comer v. Consolidated Coal & Min. Co. 34 W. Va. 533, 12 S. E. 476; Riley v. West Virginia C. & P. R. Co. 27 W. Va. 146.

Infants under fourteen years are often chargeable with contributory negligence, but not generally, as a matter of law deducible from the nature of the act causing the injury, which is generally the case when applied to an adult. There must be evidence of ability to understand and to guard against the danger; and hence the negligence of an infant under fourteen is a question of fact for the jury, because it involves capacity, concerning which the jury must decide. 1 Labatt, Mast. & S. §§ 250, 348, and cases cited in note. In Turner v. Norfolk & W. R. Co. 40 W. Va. 675, 22 S. W. 83, this court held that a boy seventeen years old was not guilty of contributory negligence in performing an act which would unquestionably have been contributory negligence in an adult.

If the nature of the employment is simple, and attended with little risk of danger, less capacity is required to perform it; but if attended with much danger, more capacity is necessary. And when an infant is under the age of fourteen years, it can rarely be said that, as a matter of law, he is 29 L.R.A. (N.S.)

chargeable with contributory negligence. The majority of the courts regard the question of his negligence one of fact to go to the jury, even when he is much older than fourteen years. 1 Thomp. Neg. § 310, and cases cited; 1 Labatt, Mast. & S. § 390, and note of cases. Negligence itself, as well as contributory negligence, in the great majority of cases, is a mixed question of law and fact; and if the court has correctly instructed the jury concerning the law, and the evidence is conflicting as to the facts, courts are not justified in disturbing the verdict, unless it is clearly and palpably wrong. 6 Thomp. Neg. §§ 7408, 7409; Foley v. Huntington, 51 W. Va. 396, 41 S. E. 113; Tompkins v. Kanawha Board, 21 W. Va. 224; Johnson v. Baltimore & O. R. Co. 25 W. Va. 570. "When a given state of facts is such that reasonable men may differ upon the question whether there was negligence or not, the determination of the matter is for the jury." Raines v. Chesapeake & O. R. Co. 39 W. Va. 50, 24 L.R.A. 226, 19 S. E. 565. We think plaintiff's instruction No. 1 correctly states the law.

It is insisted by counsel for plaintiff in error that defendant's negligence is not the proximate cause of the injury. This may be true in fact, but it is not true in law. The car rolling down the grade and striking against plaintiff is the actual and immediate cause of his injury. This may not have resulted from any direct omission of duty by defendant, or by any of its servants. But, although this is the immediate physical cause of the injury, it does not constitute the negligence complained of, which is the employment of the infant plaintiff to perform a dangerous work when he was too young to understand it and to avoid its dangers. If the evidence is not sufficient to establish the fact that plaintiff, notwithstanding his infancy, did comprehend the danger, and could have avoided the injury by the exercise of reasonable care, his employment was negligence, and it then becomes an immaterial question as to what agency set the car in motion. It was a thing that was liable to happen; and the defendant's negligence in employing plaintiff is, in law, the cause of the injury. It reaches over all intervening causes that may have contributed to the injury, and is, in law, the primary or proximate cause. If plaintiff lacked proper capacity, he was not guilty of contributory negligence.

It follows from what we have already said that it was not error to refuse defendant's instruction No. 1, which is as follows: "The court instructs the jury that if they believe from the evidence that the plaintiff was injured while at his post of duty in the employment of defendant, by being struck by an empty coal car in motion,

while he, the plaintiff, was removing a coupling from another empty coal car which was at the time stationary, and if they further believe from the evidence that the said car which struck the plaintiff was set in motion by some person, agency, or cause unknown to the defendant, and of which the defendant did not, and could not, have knowledge, they must find for the defendant." As before stated, the negligence for which defendant is liable is employing a minor and placing him to perform a work attended with danger which he was not capable, on account of his age, of comprehending and avoiding; and not that it, or any of its employees, were negligent in respect to the particular act which was the immediate cause of the injury.

Plaintiff's instruction No. 2, on the measure of damage, is objected to. We think it states the law correctly. It instructs the jury that, in estimating his damage, they are at liberty to compare plaintiff's health and condition before the injury with his present condition, in determining the effect of the loss of his leg upon his capacity to earn money; but instructs them to exclude from their computation the time until he should arrive at the age of twenty-one years of age. The proof showed that he was, at the time of the injury, earning \$1.25 a day for his father. If he could earn \$1.25 at that age, he could certainly earn at least the same when he becomes twenty-one years of age. From the nature of the case we do not see how any better criterion could be furnished than the wages he was earning at the time of his injury. An instruction similar to this was approved by this court in *Riley v. West Virginia C. & P. R. Co.* 27 W. Va. 145 (see page 161, where other decisions are cited in support of it). The time of plaintiff's infancy was very properly excluded by the instruction, because the suit was for his own benefit, and his earnings during infancy belonged to his father. *Comer v. Ritter Lumber Co.* 59 W. Va. 688, 6 L.R.A. (N.S.) 552, 53 S. E. 906, 8 A. & E. Ann. Cas. 1105. If plaintiff was entitled to recover anything, we cannot say that \$8,000 for the loss of his leg is excessive. His injury is both severe and permanent. We affirmed a judgment at this term where \$16,000 was allowed for the loss of an arm. *Goshorn v. Wheeling Mold & Foundry Co.* 65 W. Va. 250, 64 S. E. 22.

Did the court err in refusing to set aside the verdict? Notwithstanding the legal presumption of incapacity, which has to be overcome by evidence, the testimony of witnesses on the question of plaintiff's mental capacity to comprehend and avoid danger is conflicting. It is unnecessary to review it at all. On the one hand it is shown that

plaintiff had worked in the mine for about nine months prior to the accident, but nearly all the time at "trapping,"—opening and closing doors, and giving signals to approaching trains of coal cars by waving his lamp,—and, furthermore, that he had coupled cars in the mine about two weeks before the day of the accident. But there is no evidence that he ever before knew of a car getting loose and running down the grade where he was coupling, or that he had ever been warned against such an accident. Mr. Laing was asked: "Did you give him instructions with reference to the dangers on the parting, where he was coupling and uncoupling cars? A. He didn't uncouple them. It wasn't his duty. His duty was simply to couple the loads." But, in contradiction of this, plaintiff says he was put to work by Mr. Laing at the place where he was hurt, and that he had not been given any warning of dangers, or even instructions how to do the work, but that he learned by seeing others do it. There is evidence also that the electric light bulb at this point had been broken some time before the accident, and that it was dark in the mine; the only light being a small miner's lamp which plaintiff carried in his hat. In addition to this conflicting evidence, the jury had a right to take into consideration plaintiff's appearance at the time he gave his testimony as an evidential matter in determining his capacity to comprehend and avoid the danger. The evidence in this case is such that reasonable minds might differ as to the correct conclusion to be reached from it, and to set it aside would be to invade the province of the jury.

Defendant's instruction No. 2 is the same as its No. 1, with these words added, viz.: "Unless they further believe from the evidence that the plaintiff did not have sufficient mental capacity at the time to know and appreciate the dangers of his employment." This correctly states the law, and was given at the request of defendant. It must therefore be inferred that the jury found plaintiff not to have sufficient capacity to comprehend the dangers of his employment; otherwise the verdict would have been for the defendant. This was a question to be determined by the jury. 1 *Shearm. & Redf. Neg.* § 73a; 5 *Thomp. Neg.* § 5369; 1 *Labatt, Mast. & S.* § 390; *Renne v. United States Leather Co.* 107 Wis. 305, 83 N. W. 473; *Williams v. South & North Ala. R. Co.* 91 Ala. 635, 9 So. 77; *Atlanta & W. Pt. R. Co. v. Smith*, 94 Ga. 107, 20 S. E. 763; *Sims v. East & West R. Co.* 84 Ga. 152, 20 Am. St. Rep. 352, 10 S. E. 543; *Camp v. Hall*, 39 Fla. 535, 22 So. 792; *Hanson v. Ludlow Mfg. Co.* 162 Mass. 187, 38 N. E. 363; *Smith*

v. Irwin, 51 N. J. L. 508, 14 Am. St. Rep. 699, 18 Atl. 852; Verdelli v. Gray's Harbor Commercial Co. 115 Cal. 517, 47 Pac. 364; Hayden v. Smithville Mfg. Co. 29 Conn. 548.

The court did not err in refusing to set aside the verdict, and the judgment is affirmed.

MAINE SUPREME JUDICIAL COURT.

MOWRY & PAYSON, Incorporated,
v.
HANOVER FIRE INSURANCE COMPANY.

(— Me. —, 76 Atl. 875.)

Insurance — arbitration — inability of arbitrator — waiver.

The unwillingness or inability of the arbitrator chosen by insured from the list furnished by the insurer, to serve, from a cause arising after he is chosen, will constitute a waiver on the part of the insurer of its right to arbitrate the amount of loss, where the statute provides that if the company shall not, within ten days after request, name three men each of whom shall be willing to act as a referee, it shall be deemed to have waived its right to arbitration.

(Emery, Ch. J., and Cornish and King, JJ., dissent.)

(December 20, 1909.)

EXCEPTIONS by plaintiff to rulings of the Supreme Judicial Court for Knox County in defendant's favor made during the trial of an action brought to recover the amount alleged to be due on a fire insurance policy. Sustained.

The facts are stated in the opinion.

Messrs. Littlefield & Littlefield, for plaintiff:

Doubts in connection with the construction of arbitration clauses in an insurance policy are to be resolved against the insurance company.

Bartlett v. Union Mut. F. Ins. Co. 46 Me. 500; Witherell v. Maine Ins. Co. 49 Me. 200; McLaughlin v. Washington County Mut. Ins. Co. 23 Wend. 525; Hoffman v. Aetna F. Ins. Co. 32 N. Y. 405, 88 Am. Dec. 337; Reynolds v. Commerce F. Ins. Co. 47 N. Y. 597; Dilleber v. Home L. Ins. Co. 69 N. Y. 256, 25 Am. Rep. 182; Hay v. Star F. Ins. Co. 77 N. Y. 235, 33 Am. Rep. 607; Herr-

man v. Merchants' Ins. Co. 81 N. Y. 188, 37 Am. Rep. 488; Allen v. St. Louis Ins. Co. 85 N. Y. 473; Steen v. Niagara F. Ins. Co. 89 N. Y. 315, 42 Am. Rep. 297; Griffey v. New York Cent. Ins. Co. 100 N. Y. 417, 53 Am. Rep. 202, 3 N. E. 309; Kratzenstein v. Western Assur. Co. 116 N. Y. 54, 5 L.R.A. 799, 22 N. E. 221; Davis v. American Cent. Ins. Co. 7 App. Div. 488, 40 N. Y. Supp. 248, affirmed in 158 N. Y. 688, 53 N. E. 1124; Lite v. Firemen's Ins. Co. 119 App. Div. 410, 104 N. Y. Supp. 434; Matthews v. American Cent. Ins. Co. 9 App. Div. 364, 41 N. Y. Supp. 304; Yeaton v. Fry, 5 Cranch, 335, 3 L. ed. 117; Palmer v. Warren Ins. Co. 1 Story, 364, Fed. Cas. No. 10,698; Friezen v. Allemania F. Ins. Co. 30 Fed. 356; Vette v. Clinton F. Ins. Co. 30 Fed. 668; Cotten v. Fidelity & C. Co. 41 Fed. 506; Wallace v. German American Ins. Co. 4 McCrary, 123, 41 Fed. 742; Steel v. Phenix Ins. Co. 2 C. C. A. 463, 7 U. S. App. 325, 51 Fed. 723; Burkheiser v. Mutual Acci. Asso. 26 L.R.A. 112, 10 C. C. A. 94, 18 U. S. App. 704, 61 Fed. 816; First Nat. Bank v. Hartford F. Ins. Co. 95 U. S. 673, 24 L. ed. 563; Grace v. American Cent. Ins. Co. 109 U. S. 278, 282, 27 L. ed. 932, 934, 3 Sup. Ct. Rep. 207; Moulou v. American L. Ins. Co. 111 U. S. 335, 28 L. ed. 447, 4 Sup. Ct. Rep. 466; Travellers' Ins. Co. v. McConkey, 127 U. S. 661, 666, 32 L. ed. 308, 310, 8 Sup. Ct. Rep. 1360; Burkhard v. Travellers' Ins. Co. 102 Pa. 262, 48 Am. Rep. 205; Philadelphia Tool Co. v. British American Assur. Co. 132 Pa. 236, 19 Am. St. Rep. 596, 19 Atl. 77; Fritz v. British America Assur. Co. 208 Pa. 268, 57 Atl. 573; Hartford F. Ins. Co. v. Tewes, 132 Ill. App. 321; Illinois Mut. Ins. Co. v. Hoffman, 132 Ill. 523, 24 N. E. 413; Wilson v. Conway F. Ins. Co. 4 R. I. 141; Northwestern Mut. L. Ins. Co. v. Hazelett, 105 Ind. 212, 55 Am. Rep. 192, 4 N. E. 582; Rogers v. Phenix Ins. Co. 121 Ind. 570, 23 N. E. 498; DeGraff v. Queen Ins. Co. 38 Minn. 501, 8 Am. St. Rep. 685, 38 N. W. 696; Rottier v. German Ins. Co. 84 Minn. 116, 86 N. W. 888; State Ins. Co. v. Maackens, 38 N. J. L. 572; Allibone v. Fidelity & C. Co. (Tex. Civ. App.) 32 S. W. 571; Fowkes v. Manchester & L. Life Assur. Co. 3 Best & S. 925; Meyer v. Queen Ins. Co. 41 La. Ann. 1000, 6 So. 899; Sun Ins. Co. v. Jones, 54 Ark. 376, 15 S. W. 1034; Dresser v. Hartford L. Ins. Co. 80 Conn. 681, 70 Atl. 39; Furry v. General Acci. Ins. Co. (Grinnell v. General Acci. Ins. Co.) 80 Vt. 526, 15 L.R.A. (N.S.) 206, 130 Am. St. Rep. 1012, 68 Atl. 655, 13 A. & E. Ann. Cas. 515; Rogers v. Modern Brotherhood, 131 Mo. App. 353, 111 S. W. 518; Royal Union Mut. L. Ins. Co. v. McLendon, 4 Ga. App. 620, 62 S. E. 101; Anderson v. Fitzgerald, 4 H. L. Cas. 484; Du-

Note. — Arbitration as condition precedent to action on insurance policy, see notes to Graham v. German American Ins. Co. 15 L.R.A. (N.S.) 1055 and German-American Ins. Co. v. Jerrils, 28 L.R.A. (N.S.) 104, 29 L.R.A. (N.S.)

ran v. Standard Life & Acci. Ins. Co. 63 Vt. 437, 13 L.R.A. 637, 25 Am. St. Rep. 773, 22 Atl. 530; State Ins. Co. v. Meesman, 2 Wash. 459, 26 Am. St. Rep. 870, 27 Pac. 77; American Acci. Co. v. Reigart, 42 Am. St. Rep. 374 and note 377, 94 Ky. 547, 21 L.R.A. 651, 23 S. W. 191; Moody v. Amazon Ins. Co. 52 Ohio St. 12, 26 L.R.A. 313, 49 Am. St. Rep. 699, 38 N. E. 1011; Georgia Home Ins. Co. v. Bartlett, 91 Va. 305, 50 Am. St. Rep. 832, 21 S. E. 476; Schuermann v. Dwelling House Ins. Co. 161 Ill. 437, 52 Am. St. Rep. 379, 43 N. E. 1093; Robertson v. French, 14 Eng. Rul. Cas. 19, and note 7 T. R. 535; Vorse v. Jersey Plate Glass Ins. Co. 97 Am. St. Rep. 330 and note 335, 119 Iowa, 555, 60 L.R.A. 838, 93 N. W. 569.

Mr. F. W. Brown for defendant.

Whitehouse, J., delivered the opinion of the court:

This is an action on a fire insurance policy issued by the defendant corporation in the form known as the "Maine standard policy," prescribed by chapter 49, § 4, ¶7, as amended by chapter 158 of the Public Laws of 1905. The policy contains the following clauses:

"In case of loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be, within a reasonable time, rendered to the company, setting forth the value of the property insured, the interest of the insured therein, all other insurance thereon, in detail, the purposes for which and the persons by whom the building insured or containing the property insured, was used, and the time at which and manner in which the fire originated, so far as known to the insured."

"In case of loss under this policy and a failure of the parties to agree as to the amount of loss, it is mutually agreed that the amount of such loss shall be referred to three disinterested men, the company and the insured each choosing one out of the three persons to be named by the other, and the third being selected by the two so chosen; the award in writing by a majority of the referees shall be conclusive and final upon the parties as to the amount of loss or damage, and such reference, unless waived by the parties, shall be a condition precedent to any right of action in law or equity to recover for such loss."

Respecting the latter clause, § 5 of the same chapter contains the following provisions:

"If the insurance company shall not, within ten days after a written request to appoint referees under the provision for arbitration in such policy, name three men under such provision, each of whom shall be a resident of this state, and willing to act as
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one of such referees; or if such insurance company shall not, within ten days after receiving the names of three men named by the insured under such provision, make known to the insured its choice of one of them to act as one of such referees, it shall be deemed to have waived the right to an arbitration under such policy and be liable to suit thereunder, as though the same contained no provision for arbitration as to the amount of loss or damage."

The policy in suit was for insurance to the amount of \$1,000 on certain stock of cloths and clothing and all materials for the manufacture of same, while contained in a frame factory building situated in Rockland, Maine. This property was damaged by fire on the 4th of June, 1907, and on the 25th of the following July the plaintiff executed and delivered to the defendant a sworn statement purporting to contain the information required by the first clause of the policy above quoted. On the 9th day of the following September, being unable to agree with the defendant as to amount of his loss, the plaintiff requested the defendant to appoint referees in accordance with the provisions of the policy and of the statutes of Maine, and named three persons from whom the defendant might select one. In accordance with this request, on the 18th of the same month, the defendant named three persons from whom the plaintiff might select one. Each of the persons so named by the defendant was a resident of Maine, and before his nomination had stated to the defendant that he was willing to serve if chosen by the plaintiff.

Of the three persons so named by the defendant, the plaintiff on the 11th of October, 1907, chose Charles L. Brackett as one of the referees, but on the 14th of the same month Mr. Brackett informed the defendant that, on account of the death of his father and the many calls upon him in connection with his regular business, he should be unable to serve as referee. The next day the defendant informed the plaintiff by letter of Mr. Brackett's inability to serve as referee, stating that it would "do whatever is necessary to bring the reference about at once," and three days later submitted the name of another person in place of Mr. Brackett. On the 30th of the same month the plaintiff notified the defendant that it did not recognize the right of the defendant to submit any other name, and that it declined to make any choice. On the same day this action on the policy was brought without a reference.

The case comes to the law court on exceptions to the ruling of the sitting justice in favor of the defendant made on an agreed statement of facts and the correspondence between the parties. It appears from the

statement of facts that the defendant waived any unreasonable delay in furnishing the proof of loss; but it is contended that the action is not maintainable, because a reference in accordance with the provisions of this policy is made a condition precedent to any right of action thereon, unless the reference has been waived, and that there has been no such waiver in this case.

On the other hand, the plaintiff contends that inasmuch as the defendant did not, within ten days after request, submit the names of three persons, each of whom was willing to act as one of the referees, it must, by the express terms of the statute, "be deemed to have waived the right of an arbitration under such policy, and be liable to suit thereunder as though the same contained no provision for arbitration as to the amount of loss or damage." This is the only question presented for the determination of the court.

The submission of the question of damages to arbitration, as required by the terms of the policy, is expressly made a condition precedent to the plaintiff's right of action; and it is admitted that no such reference was had and no award of referees made respecting the "amount of loss or damages" before the commencement of this action. It is not questioned that, within the time prescribed by the statute, the defendant in good faith responded to the plaintiff's request for a reference, by naming for referees three persons who had expressed a willingness to act as referees. It is admitted that the ultimate declination of Mr. Brackett to serve was not occasioned through any fault of the defendant, and that, after the refusal of Mr. Brackett to act, the defendant promptly offered to do whatever was necessary to secure a reference, and submitted a new name in place of Mr. Brackett.

Upon this state of facts, it is earnestly contended that it would be unreasonable to hold that the defendant must be deemed thereby to have waived the right to arbitration. It is argued that the practical effect of such a construction of the statute would be to make the company guarantee that the persons named by it for referees should not only be willing to serve when named, but that they shall remain alive and able and willing to serve during the entire limit of two years within which the action may be commenced.

Several cases are also cited which are claimed to be in some respects analogous to that at bar, and to lend some support to the defendant's contention. In *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282, the referees were duly selected and made their award; but the plaintiff claimed that the award was

invalid by reason of misconduct on the part of "the referees," and sought to recover his damages in an action on the policy, irrespective of the amount awarded by the referees. There was neither allegation nor proof, however, that such misconduct was caused or participated in by the defendant, and it was accordingly held that, if the award was invalid without fault of the defendant, "it was the duty of the plaintiff to seek a new determination . . . in the manner provided by the contract." It will be seen that the question here decided was wholly different from that at bar, and that no reference whatever was made to the provisions of the statute here involved. A precisely similar question was decided in *Levine v. Lancashire Ins. Co.* 66 Minn. 138, 68 N. W. 855, cited in *Fisher v. Merchants' Ins. Co.* supra. In *Fire Assn. of Philadelphia v. Appel*, 76 Ohio St. 1, 80 N. E. 952, it was held that, when the company's appraisers withdrew, neither party appearing to be in fault, it was the duty of the company, upon request of the insured, to select another appraiser in his place and go on with the appraisal, and that, if the company refused so to do and insisted on a new appraisal, such conduct would amount to a waiver on its part of the right to arbitration. Similar questions were decided in *Westenhaver v. German American Ins. Co.* 113 Iowa, 726, 84 N. W. 717, and *Grady v. Home F. & M. Ins. Co.* 27 R. I. 436, 4 L.R.A. (N.S.) 288, 63 Atl. 173; but no reference was made in any of these cases to any stipulation in the policy or provision of the statute fixing the time within which the referees must be named or selected.

In *Smith v. California Ins. Co.* 87 Me. 190, 32 Atl. 872, an action on a Massachusetts policy issued prior to the enactment of the statute fixing the number of days within which the persons must be named for referees, this court said: "It was as much the duty of one party as of the other to initiate the proceeding, unless it may have possibly been more the duty of the plaintiff as the affirmative party." Thus the law appeared to be left in a state of doubt and uncertainty respecting the party upon whom it was incumbent to initiate the proceedings. That opinion was announced January 25, 1895, and the statute now under consideration was enacted by the legislature then in session, and was a part of § 1 of chapter 18 of the laws of that year, the same chapter and section which prescribed the form of the Maine standard policy. It declares that "if the insurance company shall not, within ten days after a written request to appoint referees, . . . name three men, each of whom shall be a resident of this state and willing to act as one of such ref-

erees, . . . it shall be deemed to have waived the right to arbitration." It was apparently enacted for the special purpose of removing the previously existing uncertainty in regard to the mode of procedure, and of definitely prescribing the conditions under which the privilege of arbitration might be enjoyed or the right deemed to be waived. In *McDowell v. Aetna Ins. Co.* 164 Mass. 447, 41 N. E. 865, the efficacy of a statute of substantially the same tenor as our own was brought in question, and it was held that if the insurance company failed to name three persons for referees within ten days after request, or failed to choose one of the three named by the insured, it must be deemed "to have waived its right to have the amount of the loss determined by arbitration." There was no suggestion that the provisions of this statute might be construed as merely directory. They were treated as definite, imperative, and controlling.

The statute is manifestly one of more than ordinary importance to the parties. In concise and definite terms, it states the conditions upon which the insured is compelled to surrender his right to a jury trial if he should prefer a jury trial upon the question of damages, as well as the obligations to be discharged by the company, if it would receive any advantages that might be derived from a settlement of the damages by arbitration. It fixes a brief and definite limit of ten days within which the names must be presented and a referee chosen, for the obvious purpose of securing a more prompt administration of justice. The statute requires the company, within ten days after request, to name three men "each of whom shall be willing to act as one of the referees." It gives the insured the right to select from three who are willing to serve. It contains no provision which gives the defendant the right to present a new name in lieu of the one refusing to serve. Respecting the course to be pursued in the event that one or two of the three named shall refuse to serve, the statute is silent. It fails to anticipate such a contingency. It contains no provision giving the company the right either to present a new name in lieu of one refusing to serve, or to name three new men from whom the insured could make a second selection. If it should be held that, in the contingency named, the company should have the opportunity to present either one or three new names, no limitation of time is fixed by the statute within which such a new submission of name might be made. It specifies no limit beyond the single term of ten days.

When the language of a statute is clear and unambiguous, admitting of only one meaning, it is not permissible to interpret

what has no need of interpretation. It is not the province of the court to incorporate into the statute by judicial construction provisions which the legislature did not see fit to insert.

It is true that in this case the good faith of the defendant is not questioned; but in determining the justice and propriety of the rule contended for by the defendant, its practical operation and possible consequences may properly be considered. By selecting Mr. Brackett as referee in this case, the plaintiff thereby distinctly preferred him to the other two, and by implication necessarily rejected the other two. It would be an injustice to compel the plaintiff to accept one of those men after Mr. Brackett declined to serve, and, if the opportunity were given the defendant to designate a new man in place of Mr. Brackett, the plaintiff would be practically forced to accept any name which the defendant might deem it advantageous to present.

Again, if the court should assume to establish a rule that would authorize the men named by the defendant for referees to refuse to serve after the expiration of ten days, and still permit the defendant to retain the benefit of the arbitration clause irrespective of the limitation of time now prescribed by the statute, it is evident that, through the adroit management of a zealous insurance agent, the insured would, in some instance, be effectually deprived of the choice given him by the statute, and find himself reduced to the necessity of accepting for referee the only one who had not declined to serve and the one especially desired by the defendant. While there is no suggestion that the company designedly sought to create the situation that existed in this case it is an illustration of the possible results of such a rule. The company failed to give the plaintiff the opportunity to make the choice to which he was legally entitled, within the time limited by the statute. It failed to name three men each of whom was willing to act as one of the referees, not only at the time he was named, but at the time he was required to serve. It failed to comply with the imperative terms and absolute conditions of the statute, and must be held legally responsible for the failure of the arbitration, and, according to the language of the statute, "be deemed to have waived the right to it." It is not a question of the good faith or actual intentions of the defendant. It is not an intentional waiver, but a statutory waiver, that deprives the defendant of the right to arbitration. A statutory waiver may be established without proof of an actual intention to relinquish a known right. The defendant failed to comply with a definite and positive require-

ment of the statute, and it is immaterial whether such failure was the result of a controversy respecting the legal duty of the defendant, or of its misfortune in selecting for referee one who was not willing to act as such at the time he was required to serve.

The rule contended for by the defendant would enable the company to defeat the purpose of the statute through a "change of mind" on the part of one of the men named for referees, and leave the insured in practically the same state of uncertainty, and subject to the same delay, as before the adoption of the amendment. If it be deemed just and proper to preserve to the defendant the right of arbitration in the contingency which occurred in this case, or in the event of the death of one of those named for referees, it is the province of the legislature to take appropriate action to accomplish that result. It is not the duty of the court to seek to accomplish it by judicial legislation.

Exceptions sustained.

Emery, Ch. J., and Cornish and King, JJ., dissenting:

We are unable to concur. We think the case, though naturally different in some details, is essentially within the spirit, the principle, of the case *Fisher v. Merchants' Ins. Co.* 95 Me. 486, 85 Am. St. Rep. 428, 50 Atl. 282, and cases there cited. That principle is that, when the first proceeding to procure the stipulated appraisal fails without fault of the defendant, it is incumbent upon the plaintiff to initiate another proceeding for that purpose. In this case the failure was admittedly without the fault of the defendant.

KENTUCKY COURT OF APPEALS.

WESTERN UNION TELEGRAPH COMPANY, Appt.,

v.

L. BIBB.

(136 Ky. 817, 125 S. W. 257.)

Telegraph — delay in delivery — negligence.

1. A telegraph company which receives a message eighteen minutes before the time arrives for closing the office cannot be held negligent in failing to find the addressee before closing hours, where he is not a householder; and his name is not in the city directory.

Same — rules — Sunday closing.

2. A regulation of a telegraph company closing on Sunday an office at which it does only a small amount of business on that day, except during two hours in the morning and two in the afternoon, is reasonable 29 L.R.A. (N.S.)

and may be enforced, although a person sending a message to that office has no notice of it.

(February 23, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Daviess County

Note. — The questions as to the duty to inform the sender of a telegram that the terminal office is closed, and as to the liability of a telegraph company accepting a message after the closing hour of the terminal office, were considered in the notes in 24 L.R.A. (N.S.) at pages 1283 and 1286 respectively. Cases decided since those notes were prepared will be found below.

It was held in *Western U. Teleg. Co. v. Cleveland (Ala.)* 53 So. 80, that a telegraph company waived its rule as to hours at the terminal office by accepting, during the closing hours thereof, a message giving information of a mother's illness, without notifying the sender that such office was not then open; and that the company could not therefore contend that it performed its duty by undertaking the transmission of the message at the hour prescribed for the opening of the terminal office.

It was held in *Western U. Teleg. Co. v. Price, post, —, (Ky.)* 126 S. W. 1100, that where a message notifying the addressee of the serious illness of her husband was received by the night operator at the terminal office, at a time when, in pursuance of a reasonable rule, there was no messenger boy on duty, it was the company's duty to use reasonable diligence to deliver the message by means of the telephone line, to which both the company and the addressee were subscribers, and especially where it appeared that it was the custom to deliver, by telephone, messages received during the night which were addressed to persons having telephones in their residences. And it was further held that, upon failure to deliver the message that night, it was the duty of the night operator to notify the day operator when he came on duty the next morning, of the arrival of the telegram, and that it then became the latter's duty to use reasonable diligence to effect prompt delivery.

It was held in *Western U. Teleg. Co. v. Weeks (Tex. Civ. App.)* 128 S. W. 674, that a telegraph company receiving at 5:45 P. M. a message announcing the illness of a relative, for transmission to an office which, in accordance with an established rule, closed at 6 P. M., was not bound to transmit the message that day, where it appeared that it would require one hour to transmit it to such office. And it was further held that the rule as to office hours was not waived by the fact that the operator at such office had occasionally received and transmitted messages during closing hours, as a matter of accommodation to certain individuals.

in plaintiff's favor in an action brought to recover damages for the alleged negligent failure promptly to deliver a telegram. Reversed.

The facts are stated in the opinion.

Messrs. Richard & Ronald and George H. Fearens for appellant.

Messrs. Ben D. Ringo and LaVega Clements for appellee.

Hobson, J., delivered the opinion of the court:

Leslie Bibb lived in Owensboro. In September, 1905, his wife, with their two little children, went to visit her mother at Valley Park, Missouri, about 18 miles from St. Louis. On Sunday, October 15th, at 4:42 P. M., the following message was delivered to the Western Union Telegraph Company at Valley Park to be sent to him: "Doctor says Beulah has diphtheria. May die before midnight." The message reached Owensboro at 5:42 P. M. The manager looked in the city directory, but Bibb's name was not in it. It was a custom of the office when they could not find a man's name in the directory to inquire at the postoffice; but the postoffice was closed at 5:40 on Sunday, and so the manager delivered the message to a delivery boy. By a regulation of the company the office at Owensboro was only kept open on Sunday from 8 to 10 in the morning and from 4 to 6 in the afternoon. The messenger, being unable to find Bibb, returned the message undelivered. The next morning he took the message to the postoffice, and, learning Bibb's address, delivered the message to him about 8 o'clock. The child died at 1 o'clock that night. If the message had been delivered to him when received, he could have taken a train which left Owensboro at midnight, and thus reached Valley Park about 8 o'clock the next morning. When he received the message at 8 o'clock the next morning, the first train he could take was one leaving Owensboro at noon on that day, and this took him to Valley Park about 10 o'clock that night. He reached Valley Park in time to attend the funeral of his child, and he could not have reached it in any event before the child died. He brought this suit against the telegraph company to recover damages for the delay in the delivery of the telegram, and in the circuit court recovered a judgment for \$300. The telegraph company appeals.

The only question we deem it necessary to consider is whether the regulation of the telegraph company as to the hours of closing its office on Sunday was reasonable and protected it, although the sender of the message was not notified of the regulation, 29 L.R.A. (N.S.)

if it used ordinary care under the circumstances.

Bibb's name was not only not in the directory, but he was not a housekeeper. His place of residence was at Seventh and Sycamore streets, some distance from the telegraph office. His place of business was near the telegraph office, but the telegraph manager did not know this, and nobody was there on Sunday. The message could not have been delivered there, and no information could have been gotten there as to where he was. Only eighteen minutes elapsed after the receipt of the message before the closing hour of the office, and it cannot be said that there was a lack of ordinary care in failing to learn where Bibb was in eighteen minutes, under the circumstances. So that, if the regulation of the company is valid and protects it, the jury should have been instructed peremptorily to find for the defendant. The circuit court submitted to the jury the reasonableness of the regulation, and also, in effect, told them that it did not protect the telegraph company, unless the sender of the message had notice of it. The regulation had been in effect in Owensboro for a great many years. There is no controversy in the record as to the facts. The volume of business done there is small on Sunday, amounting in all not over \$1.50 a day. The statute of the state requires that no work shall be done on Sunday except in matters of necessity and mercy. A telegraph company, like other persons, cannot be required to do business all day Sunday. While a railway company may run trains on Sunday, it is not required to run trains on Sunday as on other days. The regulation of the telegraph company closing the office on Sunday except during the hours named was a reasonable and proper one. In *Western U. Teleg. Co. v. Van Cleave*, 107 Ky. 469, 92 Am. St. Rep. 366, 54 S. W. 828, we said: "We think it likewise competent for such companies to establish reasonable hours within which their business may be transacted, and they may fix those hours with reference to the quantity of business done. They may not be required to employ both a day and night messenger, if it be apparent that the business of the office will not justify such employment. This we understand to be the rule everywhere. *Western U. Teleg. Co. v. Harding*, 103 Ind. 505, 3 N. E. 172; *Western U. Teleg. Co. v. Wingate*, 6 Tex. Civ. App. 394, 25 S. W. 439; *Western U. Teleg. Co. v. McCoy* (Tex. Civ. App.) 31 S. W. 210. Under the proof on the points last named, the law is for the defendant, and a peremptory instruction should have been given." In *Western U. Teleg. Co. v. Steenbergen*, 107

Ky. 472, 54 S. W. 829, we also said: "Again, the office hours of the company where the message was to be delivered to the sendee were from 7 o'clock A. M. to the same hour in the evening, and the message in question, having been received during the night, of the 19th, need not have been delivered until within a reasonable time after 7 o'clock on the morning of the 20th." In *Western U. Teleg. Co. v. Crider*, 107 Ky. 600, 54 S. W. 963, we again said: "We think, under the proof, the court should have instructed peremptorily for the company. It seems to be well settled that telegraph companies may make reasonable rules and regulations for the conduct of their business, and may, where the volume of the business does not require it or justify the expense, close their office for night delivery. Ordinarily whether such a rule or regulation is a reasonable one is a question for the court, and not one for the jury. And certainly such is the law when, as in this case, there is no contrariety of testimony on the subject." See also *Davis v. Western U. Teleg. Co.* 23 Ky. L. Rep. 1758, 66 S. W. 17; *Western U. Teleg. Co. v. Scott*, 27 Ky. L. Rep. 975, 87 S. W. 289.

In none of these cases did it appear that the sender of the message had notice of the regulation, and, while there is some conflict of authority on the question, the great weight of authority sustains the rule we have heretofore laid down. In *Sweet v. Postal Teleg. & Cable Co.* 22 R. I. 344, 63 L.R.A. 732, 47 Atl. 881, the supreme court of Rhode Island, adopting the same view, said: "The controlling question is whether the receipt of the message for transmission after the terminal office had closed was an act of negligence. This depends upon whether the receiving agent was bound to know the time of closing in the terminal office. The decisions on this point are practically unanimous that a receiving agent is not so bound, for the reason that in view of the great number of telegraph offices all over the country, and their variant conditions, some large and requiring constant service, others small and with infrequent calls, a requirement that every agent should know the hours of every office would be unreasonable, if not impossible. To hold a company to such a duty would either require a uniform time of closing in all offices which are not constantly open, or a directory of all such offices with their various hours at different seasons of the year. The former alternative would compel a service at small stations far beyond their needs, and the latter, as Mr. Justice Miller said in *Given v. Western U. Teleg. Co.* (C. C.) 24 Fed. 119, would be 'onerous and inconvenient to a degree which forbids 29 L.R.A. (N.S.)

it to be treated as a duty to its customers for neglect of which it must be held liable for damages.'" In a note to that case, on page 733 of 53 L.R.A., the learned editor thus states the rule: "The general rule is that, in the absence of a special contract to transmit a telegram immediately, or an express request for information as to its delivery, it is not obligatory upon a telegraph company to acquaint the customer with the office hours of the company at the point to which a message delivered by him for transmission is directed." The rule is also thus stated in 27 Am. & Eng. Enc. Law. 2d ed. pp. 1038, 1039: "Similarly, where a message is transmitted to the receiving office after its regular hours, the company is not guilty of negligence, in the absence of a special undertaking, in deferring delivery until the next morning. . . . The rule upheld by the weight of authority is that the sender of the message is bound by a reasonable rule fixing office hours, without regard to his knowledge of it; but the contrary has been held."

We therefore conclude that, under the evidence, the court should have instructed the jury peremptorily to find for the defendant. This conclusion makes it unnecessary for us to consider the other questions urged by counsel.

Judgment reversed, and cause remanded for further proceedings consistent herewith.

NEW MEXICO SUPREME COURT.

TERRITORY OF NEW MEXICO

v.

THOMAS W. HARWOOD, Appt.

(— N. M. —, 110 Pac. 556.)

Statute — repeal by subsequent statute.

1. The penal provisions of chapter 31, *Sess. Laws 1875-76* (Comp. Laws 1897, § 1427), directed against the uniting of persons in marriage under age, were not repealed by chapter 32 of the laws of the same session (Comp. Laws 1897, § 1430).

Appeal — erroneous charge — review.

2. Alleged errors in the charge of the court not called to the latter's attention.

Headnotes by POPE, Ch. J.

Note. — Ignorance that parties to marriage are under age, as defense to prosecution for officiating at the marriage.

The decision reached in *TERRITORY OF NEW MEXICO v. THOMAS W. HARWOOD*, that ignorance by the officiating officer that the parties married by him were under age constitutes no defense to prosecution for unlawfully uniting them

by motion for new trial will not be considered by this court.

Marriage — solemnization — person under age — elements of offense — knowledge.

3. Uniting in marriage a female under the age of fifteen is penalized by Comp. Laws 1897, § 1427, and knowledge by the officiating officer that such female is under such age is not a necessary element of the offense.

Witness — memorandum to aid recollection — use — when permissible.

4. A written memorandum may not be used to aid or supplement the recollection of a witness, unless its correctness when made is first established, and a conviction based solely upon the contents of a memorandum which has not been so verified cannot be sustained.

(August 9, 1910.)

marriage, is supported by the few cases which have passed upon the question.

Thus, in *Sikes v. State*, 30 Ark. 496, where the statute provided that "if any minister, civil officer, or priest shall marry any minor without the consent of parent or guardian, as prescribed by law, such person so offending shall be deemed guilty of a misdemeanor, and on conviction shall be fined, etc.," it was held that a minister could not justify or excuse his agency in the violation of the law, by showing that it was without any criminal intent on his part, or by reason of a deception practised upon him by the parties, who informed him that they were of age. The court said: "A public offense is any act or omission for which the law has prescribed a punishment, and an intention to commit an offense may be imputed to the actor from criminal negligence; at least he is answerable in many instances for such negligence. Our law treats marriage as a civil contract, and the applicant, in undertaking to perform a marriage ceremony, was acting not strictly as a minister of the Gospel, but as a minister of the law, or quasi officer, for he derived his authority from the statute to perform the ceremony, and he was obliged not only to know the requirements of the law, but to conform to them carefully and without negligence. The jury had the right, however, to take into consideration, when they came to fix the measure of punishment to be inflicted upon him, the fact that he may not have wilfully violated the law, but negligently confided in the representation of the parties applying to him to unite them in marriage, that the female had arrived at an age when she could legally disregard the will of her parents."

And in *Beckham v. Nacke*, 56 Mo. 546, it was held that an honest mistake of a magistrate as to the age of a person married by him was no defense in an action for the penalty provided for, where the ceremony in case of minors is performed without the consent of the parent or guardian. 29 L.R.A. (N.S.)

A PPEAL by defendant from a judgment of the District Court for Valencia County convicting him of unlawfully uniting in marriage a female under the statutory age. Reversed.

The facts are stated in the opinion.

Messrs. Modesto C. Ortiz and Edward A. Mann, for appellant:

A change in the elements of a penal offense, or in the elements or amount of the penalty attached, will destroy the identity of the offense, and effect a repeal to the extent of the repugnancy.

1 *Lewis's Sutherland*, Stat. Constr. § 251; *Norris v. Crocker*, 13 How. 429, 13 L. ed. 210; *United States v. Tynen*, 11 Wall. 88, 20 L. ed. 153; *Nichols v. Squire*, 5 Pick. 168; *People v. Tisdale*, 57 Cal. 104; *State v. Massey*, 103 N. C. 356, 4 L.R.A. 308, 9 S. E. 632.

So, in *Smyth v. State*, 13 Ark. 696, where the question was as to the sufficiency of a verbal message of consent, transmitted through a third person, the court said: "The minister or magistrate performing the ceremony does so at his peril; and he must assure himself that the consent of the parent or guardian, in one or the other mode, is in fact given. He cannot justify or excuse his agency in the violation of the law, by showing that it was without any criminal intent on his part, or by reason of a deception practised upon him, as for instance, it had been falsely represented to him that the minor was of age."

In *Bonker v. People*, 37 Mich. 4, 2 Am. Crim. Rep. 79, which was an information for solemnizing a marriage of a girl under the age of consent, a statute required the officiating officer to examine one of the parties on oath, and it appeared that the justice of the peace who performed the ceremony had neglected to make such examination. Judge Cooley said: "This, in view of the extreme youth of the girl, was a very significant fact, and looks like a careful avoidance of the proper means of information. Had he taken the proper evidence under oath, and been deceived, perhaps he would have been justified, even though he had had reason to believe the age of consent had not been reached; but where he neglects the testimony which he is required to take, and pretends to rely upon the less satisfactory oral statement, which he is not required to take, the neglect may well be imputed to illegal intent."

Other concrete aspects of the general question as to the effect of a mistake of fact upon criminal responsibility are presented in the note to *Brown v. State*, 25 L.R.A. (N.S.) 661, as to effect of mistake as to age of girl under statute denouncing sexual offenses; and in note to *Harper v. State*, 25 L.R.A. (N.S.) 669, as to effect of seller's ignorance of minority of purchaser as a defense to a prosecution for the sale of intoxicating liquor to minor.

J. T. W.

An entry of baptism in the church register is not of itself proof of age.

2 Greenl. Ev. § 363; Blackburn v. Crawford, 3 Wall. 175, 18 L. ed. 186; Sitler v. Gehr, 105 Pa. 577, 51 Am. Rep. 207; Clark v. Trinity Church, 5 Watts & S. 266.

Actual knowledge that the female was under the prohibited age was an essential element of the offense.

United States v. Claypool, 14 Fed. 127; United States v. Cassidy, 67 Fed. 698; United States v. Terry, 42 Fed. 317; United States v. Kirby, 7 Wall. 482, 19 L. ed. 278; Territory v. Cortez (N. M.) 103 Pac. 264.

Mr. Frank W. Clancy, Attorney General, for appellee:

Knowledge by defendant of the age of Amelia Perea was not essential to his conviction.

Territory v. Church, 14 N. M. 226, 91 Pac. 720.

Pope, Ch. J., delivered the opinion of the court:

The defendant, Harwood, was indicted for unlawfully uniting in marriage a female under the age of fifteen years. From a sentence following a conviction and the overruling of the usual motions, he has appealed.

The first assignment of error is that the indictment states no offense. This proceeds upon the contention that the penal provisions of the statute under which the proceedings were brought have been repealed. The indictment is under chapter 31, Laws 1875-76, appearing as Comp. Laws, §§ 1426-1429. Sections 2 and 3 of that act (Comp. Laws, §§ 1426, 1427) are as follows:

"No person authorized by the laws of this territory to celebrate marriages shall unite in marriage, knowingly, any male under the age of twenty-one years, nor any female under the age of eighteen years, without the consent of their parents or guardians, under whose care and control such minor may be; and all marriages of any male under the age of eighteen years and of any female under the age of fifteen years are absolutely invalid." Comp. Laws, § 1426.

"If any person prohibited from contracting marriage by §§ 1425 and 1426 shall violate the provisions thereof by contracting marriage contrary to the provisions of said sections, he or they shall be punished by fine on conviction thereof, in any sum not less than \$50; and every person authorized under the laws of this territory to celebrate marriages, who shall unite in wedlock any of the persons whose marriage is declared invalid by the previous sections of this act on conviction thereof, shall be fined in any sum not less than \$50." Comp. Laws, § 1427. 29 L.R.A. (N.S.)

Section 1426, it will be noted, prohibits knowingly uniting in marriage any male or female under the ages, respectively, of twenty-one and eighteen. In the case of males under eighteen and females under fifteen, the prohibition is absolute, and the marriage is declared invalid. In the case of others, the marriage is permissible by consent of parents or guardians. It is thus seen that only in cases where the male is under eighteen and the female under fifteen is the marriage declared invalid, and as to these the act of uniting in marriage is made penal. The same legislature by an act passed seven days after that above quoted (Laws 1875-76, chap. 32; Comp. Laws, § 1430) provides that "no marriage . . . between or with infants under the prohibited ages shall be declared void except by a decree of the district court, upon proper proceeding being had therein." The argument is that by this later act making such marriages not *ipso facto* void, but simply voidable by decree of court, there has been repealed the provisions of chapter 31 denouncing as penal the uniting in marriage of persons where marriage is declared invalid by that chapter. We cannot, however, concur in that view. It will be noted that Comp. Laws, § 1427, does not denounce the celebrating of invalid marriages, but of marriages which are by the preceding sections "declared invalid." These latter are marriages within prohibited degrees of consanguinity (Comp. Laws, § 1425), and, as we have seen, the marriages of males under eighteen and females under fifteen. When the legislature provided that such marriages should be declared void only by court decree, it left them none the less contrary to law, and none the less among those "declared invalid" by the preceding act. The effect of the later act was simply to render less harsh the operation of the statute upon the participants in such illegal marriage and their possible and innocent offspring. That the cohabitation of the former should not necessarily be concubinage and the status of the latter bastardy, the legislature provided that the marriage should be declared void only by decree of court. But this was entirely apart from the penalties upon one who celebrated such a marriage. It was manifestly not intended that he should be absolved from punishment simply because a degree of consideration became expedient for those whom he had assisted into the predicament of a prohibited marriage. We therefore deem the earlier act still in force, and the indictment founded upon it good against the attack upon it.

Complaint is also made of certain instruc-

tions of the court. It being the settled rule of this court that only such errors of this character as are brought to the attention of, and sought to be corrected in, the trial court, will be considered by us, we will confine our consideration of the criticisms upon the charge to what is stated in the motion for a new trial. This latter alleges as to the charge solely that the court erred "in giving the jury the following instructions, attached to this motion and made part of this motion, conveying the idea to the jury to find the defendant guilty, as he, the defendant, knowingly had violated the law, when there was no evidence to warrant said charge." To the motion is attached the entire charge of the court. The criticism above set out is not clear. Whether construed as an attack upon the charge because there was no evidence to show knowledge of the age of the female, or because the definitions of "knowingly" were inaccurate, we deem it equally untenable, for the reason that in our opinion the statute does not make such knowledge an element of the offense. A reference to the language of the act above quoted will show that while there is a prohibition against knowingly uniting in marriage males and females under twenty-one and eighteen respectively, when we reach the portions of the statute where the marriages therein declared invalid—i. e., marriages between relatives and of females under fifteen—are treated, the penalty is for simply "uniting in wedlock any of the persons whose marriage is declared invalid." The reasons for a difference in the degree of legislative strictness in the cases of very youthful persons, as compared with those who while minors are of more mature years, need no elaboration. We are of opinion that the marrying of a female under fifteen belongs to the class of statutory misdemeanors where knowledge of the person's age and an intent to marry one under age is not a necessary element of the offense. In a matter of such importance in the race, the law imposes upon the officiating officer the duty of ascertaining at his peril the age of the persons marrying. We deem this case within the principle of *Territory v. Church*, 14 N. M. 226, 91 Pac. 720, where the authorities on this point were fully reviewed.

It is finally urged that the verdict below is without evidence to sustain it, for the reason that there is no adequate proof of the age of the female. This contention we feel, upon a careful examination of the record, constrained to sustain. The only evidence upon this point is that of the priest who testified that he christened the girl in July, 1894, at which time she was eight days

old. The marriage having been performed on June 24, 1907, this was for the moment a showing that she was when married under fifteen. The further examination of the witness showed, however, that he personally did not know the girl in question, and that he had no recollection of her birth or the christening, and that his only knowledge of the matter came from a memorandum made about the time, which latter, however, he failed to state was correct when made. This memorandum was in the form of a church record showing baptisms, which, while clearly and indeed confessedly not admissible as a church record, under Comp. Laws, § 3030, constituted a memorandum which, upon the proper showing, the witness was at liberty to consult to refresh his recollection. It was referred to once or twice by the witness while on the stand, but was not offered in evidence. The rule, of course, is that a witness may refresh his recollection by consulting a memorandum known by him to be correct, and, if after so doing he can testify to the facts, such testimony is competent evidence thereof. If, however, such consultation fails to stimulate memory and to bring knowledge, the testimony is not necessarily lost. He may still, if he can, testify that the memorandum was made at the time when recollection was fresh, and that when so made it spoke the truth. Then, according to the ancient practice, he might state or read its contents to the jury. *State v. Brady*, 100 Iowa, 191, 36 L.R.A. 693, 6 Am. St. Rep. 560, 69 N. W. 290; *Lipscomb v. Lyon*, 19 Neb. 511, 522, 27 N. W. 731; *Mims v. Sturdevant*, 36 Ala. 636; *Mason v. Phelps*, 48 Mich. 126, 131, 11 N. W. 413, 837; *Mineral Point R. Co. v. Keep*, 22 Ill. 21, 74 Am. Dec. 124; *Haven v. Wendell*, 11 N. H. 112; 1 Greenl. Ev. § 437. Or, according to the weight of modern authority, the paper might be introduced in evidence. 1 Wigmore, Ev. § 754; *Curtis v. Bradley*, 65 Conn. 99, 28 L.R.A. 143, 48 Am. St. Rep. 177, 31 Atl. 591; *Haven v. Wendell*, supra; *Bryan v. Moring*, 94 N. C. 687; *Nehrling v. Herold Co.* 112 Wis. 558, 88 N. W. 614; *Moots v. State*, 21 Ohio St. 653. In the latter event, the paper, in connection with the testimony of the witness as to its verity, becomes, to quote from the leading case of *Acklen v. Hickman*, 63 Ala. 498, 35 Am. Rep. 54, "the equivalent of a present positive statement of the witness, affirming the truth of the contents of the memorandum." This question as to whether the memorandum itself may be admitted, or whether the witness, having theoretically refreshed his recollection by consulting a paper that arouses no recollection, may simply read or state its contents to the jury,

is left an open question in courts, controlled by the Federal decisions by *Bates v. Preble*, 151 U. S. 154, 38 L. ed. 109, 14 Sup. Ct. Rep. 277. The absurdity of perpetuating the latter legal fiction is impressively pointed out in *Curtis v. Bradley and Mason v. Phelps*, supra.

In the present case, however, we are not called upon to determine the true rule on this point, for the memorandum was not introduced and the witness without objection stated its contents to the jury. The sole question here is as to the sufficiency of the proof. Whether one or the other of the rules above outlined is followed, or whether the memorandum is used simply to stimulate memory, which thereupon becomes awakened thereby, it is an essential at the basis of the use of all memoranda, that they shall be shown to have been correct when made. 1 *Wigmore*, Ev. § 747; *Acklen v. Hickman*, supra; *Imhoff v. Richards*, 48 Neb. 590, 67 N. W. 483; *Nehrling v. Herold Co.* supra.

Without such proof the memorandum lacks all probative or auxiliary value, and is available for no purpose. In the present case we find this fatal lack, in that nowhere in the record is there testimony to show that the memorandum consulted by the witness was correct when made. While the vocation of the witness, and the purpose for which the memorandum was made, are matters calling for judicial respect, they do not supply the fact uniformly held essential to the use of a memorandum for any purpose, that its accuracy shall be guaranteed. The record in this condition presents the case of a conviction based solely upon the contents of a memorandum many years old, the correctness of which when made is in no wise legally established. This we cannot sustain.

The cause is accordingly reversed and remanded, with directions for a new trial.

McFie, Parker, Mechem, and Wright, JJ., concur.

Abbott, J., having tried the case, did not participate.

Petition for rehearing denied.

NORTH DAKOTA SUPREME COURT.
NORTH DAKOTA HORSE & CATTLE
COMPANY, Resp't.,

v.

SIVER SERUMGARD, Appt.

(17 N. D. 466, 117 N. W. 453.)

Mortgage — foreclosure — “redemption” — enforcement.

1. A “redemption” from the purchaser at

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a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at the foreclosure sale, and such redemption can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right.

Same — redemption by superior mortgagee — “redemptioner.”

2. The holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner, when not made so by statute, who tenders the amount necessary to redeem, becomes, by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a “redemptioner.”

Same — obligations and liabilities.

3. One who is not made by statute a redemptioner, but thus acquires the rights of a redemptioner, also assumes the obligations and liabilities of a redemptioner, and it follows that he must permit the lawful redemptioner to redeem from him within the period given by statute to a subsequent lien holder by judgment or mortgage for such purpose.

Same — tender by check — acceptance — effect.

4. The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner or his agent for the purpose

Note. — May a purchaser or mortgagee from the original owner, after a sale under a prior mortgage and during the redemption period, be a redemptioner.

This question is considered at length and the reasoning of the court fully set forth in the opinion in the above case, and the conclusion there reached, that “the holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from the sale, is a redemptioner,” seems to be correct on principle, and in accordance with the few decisions involving this precise question.

The right to redeem from a mortgage after a foreclosure sale thereunder is purely statutory, and can be exercised only by those to whom it is given by the statute, and then only by pursuing the method prescribed by the statute conferring the right: but redemption statutes, being remedial in their nature, have been liberally construed, and purchasers or mortgagees from the original owner, though after a foreclosure sale under a prior mortgage, have been held clearly to be entitled to redeem as owners, successors in interest, subsequent mortgagees, or lienors, under redemption statutes giving the right to some or all of those classes.

Under the Indiana statute providing that any person having a lien otherwise than

of receiving redemption money, effects a redemption, unless refused because it is a check instead of legal tender, and the subsequent lien holder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate.

Same — foreclosure — conductor of sale — agent of purchaser — authority.

5. The sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive redemption money, but is not such an agent as can bind his principal to accept a check instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made so by statute.

Same — right to redeem from previous redemptioner.

6. Under § 7465, Rev. Codes 1905, the property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 for redemption of real property sold upon execution, so far as the same may be applicable, by

(1) The mortgagor or his successor in interest in the whole or any part of the property.

(2) By a creditor having a lien by judgment or mortgage upon the property sold,

by judgment on the land may redeem at any time within one year, "a mortgagee, although his mortgage may have been executed after the sale, has the right of redemption secured to him, provided his mortgage shall have been duly recorded within the year for redemption." *Harvey v. Krost*, 116 Ind. 268, 19 N. E. 125.

In *Scobey v. Kinningham*, 131 Ind. 552, 31 N. E. 355, it appeared that a husband, after a sale of premises on foreclosure of a mortgage executed by himself and wife, and within the redemption period, had executed to plaintiff a deed for the land, absolute on its face, but in fact intended as a mortgage, and that thereafter plaintiff redeemed from the foreclosure sale, and brought this action against the wife to foreclose a statutory lien claimed under the redemption so made by him. The wife questioned the validity of the redemption, but the court said: "Whether Scobey's interest or estate in the land be regarded as that of a mortgagee or as that of an owner, it is evident that he had a right to redeem. . . . It cannot be doubted that he had a right to redeem either as mortgagee or as owner, since he either has an estate in the land under an absolute deed, or an interest in it as an encumbrancer, by virtue of the mortgage executed to him."

The grantee in a quitclaim deed of mortgaged premises, executed by the mortgagor 29 L.R.A. (N.S.)

or on some share or part thereof, subsequent to that on which the property was sold.

Only those mentioned in subdivision 2 of the above section are redemptioners, and as such entitled to sixty days in which to redeem from a previous redemptioner.

Same — right to mortgage property during redemption period.

7. Real estate is subject to mortgage by the holder of the legal title between the act of sale on foreclosure under a power contained in a prior mortgage, and the expiration of the period allowed by statute for redemption.

Same — redemption statute — nature and purpose.

8. The redemption statute is remedial in its nature, and is intended not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and should be liberally construed.

Same — who may redeem.

9. Every person having an interest in property subject to a lien has a right to redeem it from the lien, at any time after the claim is due, and before his right of redemption is foreclosed. Rev. Codes 1905, § 6141.

Same — certificate of sale — statutory provision — construction.

10. The provision of § 7404, Rev. Codes

after a foreclosure sale thereof under a power in the mortgage, and the illegal purchase of the property by the mortgagee at such sale, may maintain a bill to redeem,—such right not being limited to the mortgagor and those claiming under him at the date of the illegal sale. *Houston v. National Mut. Bldg. & L. Asso.* 80 Miss. 31, 92 Am. St. Rep. 565, 31 So. 540.

In *Dodge v. Kennedy*, 93 Mich. 547, 53 N. W. 795, an ejectment action, where it appeared that plaintiff had purchased premises at a sale under a mortgage to him, and that, thereafter and within the time allowed for redemption, the mortgagor had executed a quitclaim deed of the premises to defendant, who attempted to redeem from the prior sale, it was assumed, upon a finding that defendant took title under this deed,—the question of the delivery of a prior quitclaim deed being involved,—that he had the same right to redeem that the original owner would have had.

A grantee within the time allowed for redemption from an original owner, whose land has been sold under mortgage foreclosure proceedings, is not a "redemptioner" as defined by the California statute, but is a "successor in interest" of the original owner, as that phrase is used in another section of the statute, and as such is entitled to redeem in the same manner as the judgment debtor in the foreclosure action, and

1905, that the certificate given on the execution of a power of sale contained in a mortgage shall have the same validity and effect as the certificate of sale in like manner furnished upon the sale of real property upon execution, provided for by § 7137, Rev. Codes 1905, does not relate to the effect of the act of sale, but to the validity and effect of the certificate.

Same — purpose.

11. The certificate of sale in such case is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed; and it conveys no title.

Same — "foreclosure sale" under power.

12. A "foreclosure sale" under a power contained in the mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after the expiration of the period allowed for redemption. It includes all the proceedings for the foreclosure of the right of redemption by sale and deed.

Same — title conveyed by.

13. The title conveyed by such completed foreclosure sale is all the right, title, and interest in and to the mortgaged premises, which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him.

Same — redemptioner — statutory definition — "on the property sold" — construction.

14. The phrase, "on the property sold," in the statutory definition of a redemptioner as being one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used.

Same — mortgage given during redemption period — redemptioner.

15. The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner.

Same — foreclosure sale under power.

16. The sale in the exercise of a power contained in a mortgage, which conveys the title of the mortgagor, is the sale as completed by the execution of a deed at

the expiration of the period allowed for redemption.

Same — failure to record — effect on right to redeem.

17. The fact that a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expiration of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage given of the right to redeem on complying with the other statutory requirements.

(July 17, 1908.)

APPPEAL by defendant from a judgment of the District Court for Pierce County in plaintiff's favor in an action brought to determine adverse claims to certain real property. Reversed.

The facts are stated in the opinion.

Messrs. Engerud, Holt, & Frame, with Messrs. Guy L. Whittemore and Scott Rex, for appellant:

It is the fact of the existence of the lien — not the apparent fact as disclosed by the records — which determines whether the right to redeem does or does not exist.

Scheibel v. Anderson, 77 Minn. 54, 77 Am. St. Rep. 664, 79 N. W. 594; Scooby v. Kinningham, 131 Ind. 552, 31 N. E. 355.

Sannan, having in the most formal and solemn manner claimed to be a redemptioner, and having exercised that right, was such in fact and in law.

Todd v. Johnson, 56 Minn. 60, 57 N. W. 320; McDonald v. Beatty, 10 N. D. 519, 88 N. W. 281; Roose v. Gove, 32 Colo. 522, 77 Pac. 246; Hare v. Hall, 41 Ark. 372.

Sannan and his grantee with notice are estopped to claim he was not a redemptioner.

Hill v. Blackwelder, 113 Ill. 283; Power v. Larabee, 3 N. D. 502, 44 Am. St. Rep. 577, 57 N. W. 789.

The unauthorized payment by Sannan of money to the sheriff (who was not the agent of either party) simply extinguished the

need not comply with the conditions imposed on "redemptioners." Phillips v. Haggart, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

In Bovey De Laittre Lumber Co. v. Tucker, 48 Minn. 223, 50 N. W. 1038, an action to foreclose a mechanics' lien, brought under a statute providing that any person holding such lien might "proceed to obtain judgment and enforce the same, in the same manner as in actions for the foreclosing of mortgages upon real estate," and under which statute there was held to be the same right of redemption from a sale foreclosing

a mechanics' lien as in case of foreclosure of a mortgage by action, it appeared that the original owner of the premises involved, after the sale to satisfy the lien and on the last day to redeem therefrom, executed a mortgage for \$2 on the premises, which mortgage was duly recorded that day, and on the same day the mortgagee filed the statutory notice of intention to redeem under the mortgage; and it was held that the mortgagee or his assignee had the right to redeem under this notice.

A. C. W.

mortgage foreclosed, leaving the fee title, so far as the record in this case shows, in Russell, and the first four mortgages still owned by Sannan.

Meyer v. Mintoyne, 106 Ill. 414; *McMillan v. Bagby*, 26 Ky. L. Rep. 1265, 83 S. W. 610; *San José Safe Deposit Bank v. Bank of Madera*, 121 Cal. 539, 54 Pac. 83; *Phyfe v. Riley*, 15 Wend. 248, 30 Am. Dec. 55.

Redemption laws are looked upon with favor, and where no injury is to follow, a liberal construction should be given them, to the end that the property of the debtor may pay as many of his debts as possible.

17 Am. & Eng. Enc. Law, p. 1035; *Lysinger v. Hayer*, 87 Iowa, 335, 54 N. W. 145; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125; *Todd v. Johnson*, supra; *Sprague v. Martin*, 29 Minn. 226, 13 N. W. 34; *Schuck v. Gerlach*, 101 Ill. 338; *Oldfield v. Eulert*, 148 Ill. 614, 39 Am. St. Rep. 231, 36 N. E. 615.

A subsequent mortgage or other lien gives the lien holder rights as a redemptioner only, and not as an assign.

Cuilerier v. Brunelle, 37 Minn. 71, 33 N. W. 123; *Buchanan v. Reid*, 43 Minn. 172, 15 N. W. 11; *Darelius v. Davis*, 74 Minn. 145, 77 N. W. 214.

After foreclosure sale, the legal title remains in the judgment debtor during the year to redeem, and is not divested until the sheriff's deed is executed.

Whited v. St. Anthony & D. Elevator Co., 9 N. D. 224, 50 L.R.A. 254, 81 Am. St. Rep. 562, 83 N. W. 238; *Page v. Rogers*, 1 Cal. 294; *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281.

A lien acquired or accruing after the sale and during the redemption period gives the holder thereof rights as a redemptioner.

Scheibel v. Anderson and Hervey v. Grost, supra; *Phillips v. Demosa*, 14 Ill. 410; *Pollard v. Taylor*, 13 Ala. 604; *Van Rensselaer v. Albany*, 1 Cow. 501; *Freeman, Ex-tortions*, § 317; *Bovey De Laittre Lumber Co. v. Tucker*, 48 Minn. 223, 50 N. W. 133.

Messrs. A. E. Coger and Guy O. H. Merrill for respondent.

Spalding, J., delivered the opinion of the court:

This is an action brought by the respondent for the determination of adverse claims to certain real property situated in Pierce county, North Dakota. The complaint is in the statutory form. The defendant answers, setting forth a series of transactions involving mortgages, redemptions, and an attempted redemption, and prays for judgment that the plaintiff has no right, title, interest, or estate in the premises described, L.R.A.(N.S.)

or any part thereof, but holds the pretended title thereto in trust for the defendant, and demands judgment that the plaintiff be denied the relief asked in its complaint, and that the defendant be awarded affirmative relief: First, that the defendant is the sole owner in fee of said premises, and of the whole thereof; second, that the plaintiff holds said premises in trust for the defendant herein; third, that the plaintiff be required to reconvey said premises to the defendant herein; fourth, that the plaintiff be forever enjoined from asserting any claim, right, title, interest, or estate in or to said premises, or any part thereof, adverse to the defendant herein; fifth, for such other and further relief as, to the court may seem just in the premises; sixth, for his costs and disbursements. The court made its findings, and judgment was entered for the plaintiff, adjudging and decreeing that the plaintiff is the owner in fee of the real estate involved, and that defendant has no title, legal or equitable, in any part thereof, and has no interest or lien thereon, and quieting the title of the plaintiff in and to the property described, as against the defendant, Siver Serumgard, and for its costs and disbursements. The defendant appeals from the judgment, contending that on the facts found judgment should be entered in his favor.

As found by the court, one Russell was the owner of the premises involved, and gave five mortgages thereon for various sums and on different dates between the 8th day of October, 1898, and the 21st day of March, 1902. All such mortgages became the property, by assignment or otherwise, prior to the 28th day of June, 1904, of one Lillian M. Plummer. All these mortgages, and the assignments of those assigned, were duly recorded at about the date of their execution or assignment. On the 2d day of June, 1904, Russell gave a sixth mortgage on the same premises to one Coger, to secure the sum of \$600, and this mortgage was assigned to one Williams on the 25th day of March, 1905, and the assignment thereof duly recorded on the same day. This mortgage was recorded on the 2d day of June, 1904. Mrs. Plummer foreclosed her fifth mortgage by advertisement, and the sale occurred March 26, 1904. She became the purchaser and received the certificate, bearing date March 26, 1904, and it was duly recorded on that day. No question is made as to the regularity and validity of this foreclosure, or of the assignments. March 25, 1905, Williams, holding the sixth or Coger mortgage by assignment, redeemed from the foreclosure sale of the

fifth mortgage as a redemptioner, and received a certificate of redemption, which was recorded on the 25th of March, 1905. The validity of this redemption is not questioned. April 12, 1905, one Sannan acquired by purchase and assignment the first four mortgages on said premises held by Mrs. Plummer, and his assignments were duly recorded on the 14th day of April, 1905. On the 25th day of April, 1905, Sannan filed his affidavit and notice of redemption as required by law for a redemptioner, which were recorded on the same day, and the sheriff executed and delivered to said Sannan his certificate of redemption, dated that day, and recorded April 26, 1905. On the 3d day of March, 1905, Russell executed and delivered to Theo. P. Scotland & Company, incorporated, a seventh mortgage on said premises, which was not recorded till the 22d day of June, 1905. On the 17th day of June, 1905, Scotland & Company assigned this mortgage to the defendant, Serumgard, and this assignment was recorded on the 22d day of June, 1905. On the 22d day of June, 1905, the defendant, Serumgard, as assignee of the Scotland mortgage, attempted to redeem the land in controversy from the foreclosure sale made on the fifth mortgage, by serving and filing his affidavit and notice of redemption, which were recorded on that date, and tendering to the sheriff of Pierce county a banker's check for \$3,187.50, as and for the total amount due on account of said foreclosure, together with interest and costs; and thereupon such sheriff, without knowledge or consent of Sannan, the holder of the certificate of sale, issued to Serumgard his certificate of redemption, bearing date and recorded on that day. After Sannan was informed of the delivery of such check by Serumgard to the sheriff for the purpose stated, and of the issuance of a certificate of redemption by the sheriff to Serumgard, he refused to acknowledge the right of Serumgard to redeem the property, and repudiated the act of the sheriff, and refused to acknowledge his right to issue said certificate of redemption; and when the sheriff delivered the banker's check, hereinbefore referred to, to Sannan, Sannan forthwith returned it to the sheriff, with instructions to return the same to Serumgard. In returning said check to the sheriff, Sannan did not object to the manner in which Serumgard had attempted to make redemption; that is, he did not object to it by reason of its having been tendered in form of a check, instead of legal tender money. After the check was returned to the sheriff, he, on the same day, by mail returned it to Serumgard, who subsequently returned it to the sheriff, and some time

after the 24th of June, 1905, the check was paid by the bank which issued it, it being a reputable and solvent bank, and the sheriff deposited the proceeds of the check to his own credit in the First National Bank of Rugby, North Dakota, and since such deposit the money derived from such check has been held by the sheriff for, and subject to the control of, Serumgard, on deposit in that bank. The court found that Sannan had at no time in any manner recognized the right of Serumgard, as assignee of the mortgage given to Scotland & Company, to redeem said land from foreclosure sale, and that on the 26th day of June, 1905, the sheriff of Pierce county, refusing to recognize the validity of the redemption of Serumgard, or of the certificate of redemption issued to said Serumgard, executed to said Sannan, under the certificate of redemption theretofore issued to him, and on the theory that there had been no lawful redemption of the property since his redemption, a sheriff's deed in due form, in and by which he conveyed, as such sheriff, title to said premises in fee simple to Sannan. After the execution of said sheriff's deed, Sannan, on the 26th day of June, 1905, executed and delivered to the plaintiff a deed of conveyance of said premises. The seven mortgages referred to constituted and were the only liens affecting the premises or any part thereof, at any time during the period covered by the events described.

The court found, as conclusions of law, that the mortgage executed and delivered by Russell to Scotland & Company, under which Serumgard attempted to redeem, was not a mortgage of the property sold under the foreclosure, but only of such interest as Russell retained after the foreclosure sale to Plummer, and that, at the time of the attempted redemption by Serumgard as assignee of the Scotland mortgage, Serumgard was not a redemptioner, and was not entitled to redeem the land from such foreclosure sale, and that the certificate of redemption issued to him by the sheriff was void and should be canceled of record. It also found that the sheriff's deed executed by the sheriff to Sannan, as well as the certificate of redemption issued to him, were lawful instruments, and conveyed title to the land involved in this action in fee simple, and that the plaintiff, as the assignee of Sannan, is the owner in fee of said real estate, and that defendant had no title, either legal or equitable, and no interest therein or lien thereon, and that the plaintiff is entitled to the possession of said real estate. Judgment was entered on these findings, as hereinbefore recited. The appellant raises many points in his brief, and we shall

consider them nearly in the order in which they are submitted.

1. He contends that Sannan, as assignee of the four mortgages, which were all prior liens to the mortgage foreclosed, was not a redemptioner, strictly and technically, within the statute, but maintains that, nevertheless, in fact he was a redemptioner, and cites § 7465 of the Revised Codes of 1905, which provides that property sold may be redeemed within one year from the day of sale in like manner and to the same effect as provided in chapter 12 of this Code for redemption of real property sold upon execution, so far as the same may be applicable, by (1) the mortgagor or his successor in interest in the whole or any part of the property, or (2) a creditor having a lien by judgment or mortgage on the property sold, or some share or part thereof, subsequent to that on which the property was sold, and such creditor is termed a "redemptioner," and has all the rights of a redemptioner under that chapter, and the mortgagor or his successor in interest has all the rights of a judgment debtor and his successor in interest, as provided therein, and that in law he is a redemptioner by reason of having asserted himself as such, and having exercised the right of redemption, and because the money paid by him for redemption, on the issuance of the sheriff's certificate of redemption, was accepted and retained. If Sannan is not to be considered and treated as a redemptioner, Serumgard was not entitled to sixty days after Sannan's attempt to redeem, in which to redeem from him, and therefore his attempt at redemption came too late. Respondent contends that Sannan is not a redemptioner, because he does not come within the definition of a redemptioner under the section of the statute quoted. Redemption from the purchaser at a foreclosure sale, by the holder of a subsequent lien by judgment or mortgage, is a compulsory sale of the interest acquired by the purchaser on foreclosure, and such redemption can only be enforced by one given this right by statute, and then only by pursuing the method prescribed by the statute conferring the right. The title acquired by redemption on the part of a redemptioner is the same which he would acquire by a voluntary sale and purchase of the sheriff's certificate of sale, except that the statutes recognize the equity of requiring one given this right by law to permit those similarly situated to purchase from him within a specified time; in other words, it gives the subsequent lien holder the same right given him. A redemptioner is a statutory purchaser, and his right under the statute to redeem is the right to

buy the purchaser's interest at the price paid by him, with interest. *Tinkcom v. Lewis*, 21 Minn. 132.

Sannan, not being a subsequent lien holder, could not compel Williams to accept his money and issue to him a certificate of redemption; but having asserted himself as a redemptioner, and having paid to Williams the money which would have entitled him to his certificate of redemption, had he been a statutory redemptioner, and Williams having accepted and retained the money, and issued a certificate of redemption to Sannan, Sannan at least became, as between himself and Williams, a redemptioner, and entitled to all the rights of a redemptioner. It has been so held by several courts. See *Hare v. Hall*, 41 Ark. 372; *Roose v. Gove*, 32 Colo. 522, 77 Pac. 246; *Smith v. Jackson*, 153 Ill. 399, 39 N. E. 130; *MacGregor v. Pierce*, 17 S. D. 51, 95 N. W. 281; *McDonald v. Beatty*, 10 N. D. 511, 88 N. W. 281; *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125; *Carver v. Howard*, 92 Ind. 173. In *McDonald v. Beatty* this court said: "Concededly the plaintiff paid to the holder and owner of the sheriff's certificates the amount required to make redemption, and such payments were made for that purpose. It might be conceded that the owners of the sheriff's certificates could have successfully challenged plaintiff's right to redeem on the ground now urged; but they did not see fit to do so. On the contrary, they accepted and retained the redemption money, and by so doing waived any question as to his right to redeem which may have existed, and thereby validated the redemption, and clothed plaintiff with their statutory right under the sheriff's certificate. That such effect follows the retention of redemption money is well settled, and in cases where the persons redeeming did not possess the strict statutory right of redemption. . . . It is also well settled that the holder of the sheriff's certificate and the person redeeming are the only persons concerned in the regularity of the redemption. The owner of the certificate may deal with it as he sees fit. He may sell and assign it; or he may retain it, and insist that anyone who wishes to secure his right thereunder by redemption shall do so only by strictly complying with the statute; or he may waive his right to require exact and formal observance of the statutory mode, and his acceptance of the redemption money will be such a waiver." *Carver v. Howard*, supra. In this case it makes no difference to the defendant whether the rights evidenced by the sheriff's certificates were owned by the original purchasers or by the plaintiff, McDonald. He could redeem from the plain-

tiff, as well as from the original purchasers, and it did not add anything to the amount required to free his premises from the lien, and, by failing to redeem, his rights in the real estate were lost." In 3 Freeman on Executions, 3d ed. § 317, Mr. Freeman says: "If a redemption made by a disqualified person is acquiesced in by the purchaser or other person from whom the redemption is made, it will estop such person, after he has received the redemption money, from denying the validity of the redemption." Numerous other authorities, which it is not necessary to cite, hold that the party who receives and retains the money from one not entitled to redeem is estopped from questioning the validity of the redemption.

These cases, it will be observed, take into consideration only the rights of the two parties dealing together; that is, the party who holds the certificate of sale and the unqualified redemptioner whose money is accepted. More than that question, however, is involved in this case, because it may be assumed that, whatever the relations of the two parties themselves or their status as to each other may be, the unqualified redemptioner is not a redemptioner, and not to be treated as one by, and does not assume any of the obligations of a redemptioner to, subsequent lien holders who might otherwise be entitled to redeem. The respondent contends that this redemption by Sannan gave him and his assigns the rights of a successor in interest to the mortgagor, freed from the obligations of a redemptioner, and that the statute allowing sixty days in which a redemptioner may redeem from a prior redemptioner does not apply; but we are of the opinion that it does apply, and that as Sannan voluntarily placed himself in a position where he became a redemptioner, as between himself and Williams, as is held in *McDonald v. Beatty*, supra, then he must be considered a redemptioner for all purposes. This is implied in the decision above quoted, and we hold that a holder of a mortgage superior to the one foreclosed, assuming to be a redemptioner, and who, in the method prescribed by statute, tenders the amount necessary to redeem, becomes by the issuance to him of a certificate of redemption, and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a redemptioner, and that, thus acquiring the rights of a redemptioner, he in equity assumes the obligations and liabilities of a redemptioner. Hence he must permit a lawful redemptioner to redeem from him within 29 L.R.A. (N.S.)

the sixty days which the statute gives a subsequent lien holder by judgment or mortgage for such purpose. It necessarily follows that Sannan became a redemptioner under the circumstances and facts of this case, and that a qualified redemptioner holding a lien subsequent to his could redeem from him within sixty days after his redemption. We are satisfied that this is in accordance with sound principles of equity.

Respondent's counsel quotes at some length from *White v. Costigan*, 134 Cal. 33, 66 Pac. 78, where it was held that one unqualified to redeem, but whose money was accepted and retained, became an equitable assignee of the interest of the party from whom he redeemed, and entitled to have his equitable right perfected. We see nothing in that case in conflict with our theory on this point. A certificate of redemption is only an assignment of the rights of a prior holder under the sale. It is a statutory assignment, and we simply go a step further than it was necessary for the court to go in the California case, by holding that, having assumed the attitude of, and obtained the benefits accruing to, a redemptioner, which he was not entitled to, Sannan must also assume the obligations of a redemptioner, precisely the same as though he had been entitled to enforce a redemption, and that he cannot now change his attitude to the prejudice of other redemptioners. *Ohio & M. R. Co. v. McCarthy*, 96 U. S. 258, 24 L. ed. 693; *Daniels v. Tearney*, 102 U. S. 415, 26 L. ed. 187; *Power v. Larabee*, 3 N. D. 510, 44 Am. St. Rep. 577, 57 N. W. 789; *Davis v. Wakelee*, 156 U. S. 680, 39 L. ed. 578, 15 Sup. Ct. Rep. 555.

2. The next point in logical order is made by the respondent. It is to the effect that Serumgard has no rights in the premises, because the payment made to the sheriff in his effort to redeem from Sannan was not in money, but in the form of a bank check issued by a solvent and reputable bank. Objection was made on other grounds, but no objection was made as to the form of payment. We find some very early cases to support this doctrine, but the decisions in such cases were made when a very small part of the business of the country was conducted by means of checks and drafts; in these days, when the commercial transactions of the country are almost universally carried on by means of bank checks and drafts, we feel that a business custom so universal should be recognized, and that payment by check issued by a reputable and solvent bank should constitute payment, unless seasonable objection is

made to its receipt and the reason specifically given, so as to give the person tendering the check an opportunity to procure and tender legal tender currency, if available. This is in accordance with the weight of modern authority. *Jessup v. Carey*, 61 Ind. 584; *Boyd v. Olvey*, 82 Ind. 294; *Koehler v. Buhl*, 94 Mich. 496, 54 N. W. 157; *Lathrop v. O'Brien*, 57 Minn. 175, 58 N. W. 987; *McGrath v. Gegner*, 77 Md. 331, 39 Am. St. Rep. 415, 26 Atl. 502; *Moynahan v. Moore*, 9 Mich. 9, 77 Am. Dec. 468; *Ball v. Stanley*, 5 Yerg. 199, 26 Am. Dec. 263; 28 Am. & Eng. Enc. Law, p. 26.

3. The sheriff having at first accepted the check and issued his certificate of redemption to Serumgard, the question arises whether he could, by so doing, bind Sannan, and make the certificate of redemption valid as against the protest and objection of the person entitled to receive the money. In this class of proceedings the person making the sale may be the sheriff or any other person properly designated for that purpose, and under our statute the person making the sale may issue the certificate of sale, as well as the certificate of redemption, and such sheriff or other person who conducts the sale on foreclosure by advertisement is the agent of the purchaser or holder of the certificate to receive the redemption money; but this does not make him an agent for all purposes, or for the purpose of binding the principal on an illegal redemption, if his principal promptly repudiates the action of the sheriff or other person. In the very nature of things it should not make him an agent for such purpose. He is a statutory agent, and possesses only a limited authority on behalf of his principal. The distance between them may be so great as to preclude speedy communication, and necessitate delay between the time of the attempted redemption and the receipt of information concerning the same by the holder of the certificate. For this and many other reasons, to hold the sheriff's acts binding on his principal in this respect might often work great injustice. We are of the opinion that he is not such an agent as to bind his principal to accept a check instead of money, from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes a seasonable objection to the form of payment or refuses forthwith to recognize the party making the tender as entitled to redeem, when he is not made a redemptioner by statute. *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390.

4. Having concluded that a qualified redemptioner, whose lien was subsequent to

that of Sannan, had sixty days after his redemption in which to redeem from him, and that the payment by bank check was good, because not objected to for the reason that it was a check instead of legal tender currency, it becomes necessary to consider whether, under the statute, the defendant, Serumgard, himself, was entitled to redeem. He had become the owner and holder of the seventh mortgage. The foreclosure sale which we are considering occurred on the 26th day of March, 1904. The owner or his successor in interest had until the 26th day of March, 1905, to redeem. Sannan redeemed from this sale as a redemptioner on the 25th day of April, 1905, and the holder of any lien by judgment or mortgage on the property sold, subsequent to the mortgage on which the sale occurred, therefore, had until June 24, 1905, in which to redeem. Serumgard contends that he is a redemptioner, because he says he holds a lien by mortgage upon the property sold subsequent to the one foreclosed. In considering this question, it is necessary to determine what right or property in real estate may be the subject of mortgage, whether appellant's mortgage is upon property which may be mortgaged, and, if so, whether he is given by the statute the right of a redemptioner. In this state a mortgage is not a conveyance of title, but is simply evidence of a lien. It is defined by § 6149, Rev. Codes 1905, as a contract by which specified property is hypothecated for the performance of an act, without the necessity of a change of possession. Section 6154 provides that any interest in property which is capable of being transferred may be mortgaged, and § 6162 that a mortgage is a lien upon everything that would pass by a grant of the property, and upon nothing more. Section 4945, Rev. Codes 1905, defines a transfer as an act of the parties or of the law, by which the title to property is conveyed from one living person to another, and § 4947 permits property of any kind to be transferred, except as otherwise provided by the two following sections, which sections are in no way material to this case. Section 4965 provides that a transfer vests in the transferee all the actual title to the things transferred which the transferor then has, unless a different intention is expressed or is necessarily implied. A transfer, as applied to real estate, is termed a "grant."

According to the authorities, the power to mortgage and the right to sell are governed by the same principles, as likewise are the rights to redeem from execution sale and from the foreclosure of a mortgage.

While there are few statutes on these subjects identical with ours, yet these questions are largely governed by certain general principles of substantially uniform application in those states where a mortgage is held only to be a lien; and authorities supporting this construction of the provisions of the statutes cited above are not lacking. In *Fish v. Fowlie*, 58 Cal. 373, it is held that the holder of the legal title to real estate can mortgage it. Such is the express provision of our Code, Rev. Codes 1905, § 6154. In *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460, it is held that, prior to the sheriff's deed, land is subject to sale under execution or to conveyance by deed, and that a judgment rendered after execution sale, and before the expiration of the time for redemption, attaches as a lien on the debtor's interest. In *Bridgeport v. Blinn*, 43 Conn. 274, the supreme court of that state held that the mortgagor, during the period allowed for redemption, had a right which he could alienate, and one which his creditor could attach. In *Atwater v. Manchester Sav. Bank*, 45 Minn. 345, 12 L.R.A. 741, 48 N. W. 187, it is held that an attachment levied on the last day for redemption constitutes a lien, and the attaching creditor a redemptioner. Freeman, in his work on Executions, at § 182, states the rule to be that, pending the expiration of the time for redemption, while the debtor has possession of the property, he has a beneficial as well as a legal estate therein, which is subject to his voluntary disposition, and that a preponderance of authorities now affirm that such an estate is susceptible of levy and sale under execution against him; and at § 173, says the legal title may always be bound to the extent of the beneficial interest covered by it. In *Kaston v. Storey*, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217, the question was whether a judgment obtained during the period of redemption could form a basis for a sale as against the successor in interest of the mortgagee under a prior sale, and the court says: "The legal title remains in the mortgagor or his successor in interest until a sale under a foreclosure decree has ripened into a title by the execution and delivery to the purchaser of a sheriff's deed. . . . Therefore, at the time [of the second judgment] . . . the legal title to the property was in Lundin, subject to the inchoate right of the purchaser at the foreclosure sale, and the judgment became a lien on such property, subject to be defeated only by the consummation of such sale by the execution and delivery of a sheriff's deed." *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 29 L.R.A. (N.S.)

120, relied upon as an authority in favor of the respondent in this case, recognizes throughout that a creditor attaching land during the period of redemption obtains a valid lien upon it. It is plain that during the time allowed by law for redemption, the debtor possesses such an interest in the real property sold as will support a mortgage thereon.

We feel that we might rest the right to redeem on the right to mortgage, as, after a very careful consideration of all the authorities to which our attention has been called, and many others, we are satisfied that the right to redeem is coincident with the right or power to mortgage, when by the terms of the statute subsequent mortgagees are included among redemptioners; and that no technical or strained construction should be given the terms of the statute, which may prevent the exercise of the right. This is evidenced by the object and policy of the law in providing for redemption by holders of liens by mortgage or judgment. The redemption statute is remedial in its nature and purpose, and is intended not only for the benefit of creditors holding liens, but more particularly for the purpose of making the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice, and it should be liberally construed. In the case at bar the mortgage of the appellant is \$1,500, the amount necessary to redeem when he attempted to make redemption was \$3,187.50, and the property is alleged to be worth \$10,000. Concerning facts similar to these, and the policy of the law in such cases, the remarks of Judge Pardee in *Bridgeport v. Blinn*, supra, are quite appropriate. He says: "The law intends to apply the property of debtors to the payment of their debts. Burns owes Blinn about \$400, and has secured payment of the debt by the mortgage of land worth \$1,500. He owes the petitioner about \$250. This land, upon every equitable principle, should be disposed of so as to pay both debts; and this can be done without violence to Blinn's rights. He allowed Burns to become his debtor. He took the mortgage by way of security for his claim. All that he is entitled to is payment. The decree passed in his favor reserved to Burns the right to pay and redeem. If the mortgage performs its office, first in securing, and lastly in paying, the debt, Blinn can ask for no more. After payment, the land should go back to the mortgagor or to his representative, or to his creditors. The tender by the petitioner prevented the title from becoming absolute in Blinn, prevented him from obtaining the inequitable right

to retain, as against other creditors of Burns, land worth \$1,500 for a debt amounting to less than \$500." See also *Williams v. Lash*, 8 Minn. 496, Gil. 441; *Van Rensselaer v. Albany*, 1 Cow. 501; and *Atwater v. Manchester Sav. Bank*, *supra*.

But in view of the fact that this case has been twice exhaustively argued, and that on this feature we have arrived at a conclusion opposed to that entertained after the first argument, as well as the great importance of the rule to be established as affecting titles, we deem it advisable to give our reasons somewhat more at length. Every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed. Rev. Codes 1905, § 6141. Section 7464 provides that, upon a sale of real property by virtue of a power of sale contained in a mortgage, the officer making it shall give the purchaser a certificate containing a description of the real property, the price bid, the price paid, the costs and fees, and that it shall have the same validity and effect as the certificate of sale in like manner furnished upon sale of real property upon execution. Section 7137, being the corresponding section under executions, provides that such certificate shall be taken and deemed evidence of the facts therein recited and contained, and also that, upon a sale of real property, the purchaser is substituted to and acquires all the right, title, and claim of the judgment debtor thereto, and that, in cases like the one at bar, the real property is subject to redemption. It is strenuously argued by the respondent that this last-mentioned provision applies in the case of foreclosure by advertisement. If this is correct, it can only be so by reason of the reference made in § 7464 to the validity and effect of the certificate; but we are of the opinion that that reference is limited to the validity and effect of the certificate only, and does not refer to the effect of the sale. The provision mentioned in § 7137 relates to the effect of the sale, and not to the effect of the certificate of sale. The certificate of sale is only evidence of what transpired for the purposes of record, notice, and to protect purchasers against intervening claims, and as showing who is entitled to a deed; and it, of itself, conveys no title. It is said in *Smith v. Colvin*, 17 Barb. 157, that it "only operates as a lien by way of action to protect the purchaser against intervening claims, except the right of redemption. . . . This mode of transferring title to real estate is in derogation of law, which requires the owner's consent, and the statute should,

therefore, be construed strictly, or, in other words, title should not be regarded as divested or transferred by the sale alone, unless such is the plain import of the statute." See also *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680; *Lightcap v. Bradley*, 186 Ill. 510, 58 N. E. 227.

First, the question arises as to what is meant by the sale,—whether the word "sale" is used in this connection to refer simply to the act of knocking down the property to the highest bidder at auction, or whether it means the proceeding which commences at that time and terminates on the execution of the deed at the expiration of the period allowed by law for redemption. Some provisions in the statute regarding executions and foreclosures unquestionably, in referring to the sale, mean simply the act of receiving and accepting a bid; but in the connection in which it is used in relation to the title conveyed by foreclosure by advertisement, we have concluded that it must be taken in the broader sense, and as applying to the whole proceeding from the auction to the deed,—that the sale referred to means the foreclosure of the right of redemption by sale and deed. This is made clear by § 7467, wherein the officer or other person making the sale is required, if the premises are not redeemed, to complete such sale by executing a deed of the premises so sold, and it is provided that such deed shall have the same force and effect as if it had been executed pursuant to a sale under foreclosure of the mortgage by action. Section 7483 makes the deed on foreclosure by action vest in the grantee all the right, title, and interest of the mortgagor in and to the property sold at the time the mortgage was executed, or which was subsequently acquired by him, etc. The provision that the deed shall vest all the right, title, and interest of the mortgagor in and to the property sold, is an idle and meaningless provision, if, as contended by the respondent, all such title vested at the time the purchase occurred. In *Daniels v. Smith*, 4 Minn. 172, Gil. 117, it is said "It is perhaps not strictly correct to say that the purchaser takes the title, inasmuch as the sale is not complete until the expiration of the time allowed for redemption, and a deed has been executed as provided by statute. . . . Strictly speaking, no title passes by the sale itself. The sale, payment of the amount bid, and giving of the certificate provided for by statute, has about the same effect as an escrow, which is a deed executed and delivered to some third person to keep until some act is done or condition performed, and then is to be delivered to the grantee

and to become of full effect. . . . But until this second delivery, the title to the premises remains in the grantor." And in *Donnelly v. Simonton*, 7 Minn. 167, Gil. 110, the court of that state says further on this subject: "I think it is true, as claimed by respondent, that upon the sale of mortgaged premises by advertisement, the legal title vests in the purchaser, and he becomes the owner of the land. The principal difficulty in the matter is to determine what constitutes a sale, or when the sale becomes an act fully completed. Is it when the sheriff or other proper person offers the premises at public auction, and knocks them down to the highest bidder? Or not until the time for redemption expires, and the purchaser obtains his deed in pursuance of the provisions of the statute? It is somewhat difficult to determine from the language of the statute . . . what the intention of the legislature was in this regard, since sometimes the one and sometimes the other are spoken of as the sale. From a careful examination of the whole chapter, however, and subsequent enactments, it becomes, I think, apparent that the intention was not to vest the title (certainly not the absolute title) in the purchaser until the expiration of the time for redemption. Section 12, chap. 75, Comp. Stat. above cited, provides for the completion of the sale by the execution of a deed after the expiration of the time for redemption. . . . By our statute a mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure." And in *Standish v. Vosberg*, 27 Minn. 175, 6 N. W. 489, it is held that a foreclosure is not complete, so as to operate as a sale, until the time allowed by statute for redemption has expired; that till then the title does not pass. See also *Horton v. Maffitt*, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222. In *Smjth v. Colvin*, supra, the New York court says "the sale is not consummated until conveyance by the sheriff; and in *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 460, it is held that there is no sale in a legal sense under a judgment or decree until the title passes, and till that time the purchaser has a mere inchoate and indefeasible right to conveyance of the legal title." And in *National Bank v. Union Ins. Co.* 88 Cal. 497, 22 Am. St. Rep. 324, 26 Pac. 509, the supreme court of California holds that the foreclosure of a mortgage embraces the sale of the property and the execution of the sheriff's deed, as well as the decree of the court ordering sale, and that a mortgage cannot be said to be foreclosed, even in the 29 L.R.A.(N.S.)

sense of the California Code, until the mortgagor's right of redemption is cut off, and that where the time for redemption had not elapsed, and no deed had been made to the purchaser, there has been no foreclosure of the mortgage, and that, unless the right of redemption has been extinguished, there is no payment *pro tanto* by the mortgagor in the sale; that, where no deed is passed, the foreclosure is incomplete, and no payment has been made. To the same effect, by the same court, see *Goldtree v. McAlister*, 86 Cal. 93, 24 Pac. 801. See also *Puffer v. Clark*, 7 Allen, 80.

In this connection it is strenuously argued by the respondent that all the title of the mortgagor passed at the time of the auction, except the bare, naked, legal title, and it relies upon the case of *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454, as an authority sustaining such position, and that therefore the mortgage held by appellant did not constitute a lien upon the property sold under the proceedings through which respondent claims. But the *Pollard* Case cannot be construed as an authority on that point, when carefully analyzed. The facts are entirely different. Foreclosure proceedings had taken place on two mortgages by action, and the holder of the certificate under the second mortgage sought to redeem from the holder of the certificate under the prior mortgage. The Code of California, like that of this state, provides that from such foreclosure, redemption may be made by the mortgagor or his successor in interest, or by a creditor having a lien by judgment or by mortgage on the property sold, etc. It was contended that the holder of the second certificate was not entitled to redeem, either as a redemptioner or as a successor in interest. The court held that she was not entitled to redeem as a redemptioner, because her judgment foreclosing the second mortgage was satisfied by the sale to her under that mortgage, and that the lien of the judgment had ceased to exist, and that this fact left her with neither a lien by judgment nor mortgage, and therefore placed her outside the statutory definition of a redemptioner. The opinion was a commissioner's opinion, and discusses the subject of the interest sold at the sale under the judgment foreclosing the first mortgage. The argument of the commissioner at first appears to sustain the theory of the respondent in this case, yet they expressly disclaim passing definitely on the question as to what title passed by the act of sale—i. e., whether it was legal or equitable—and held that, whatever it might be, the holder of the second certificate was a successor in interest and entitled to redeem.

as such. The decision hinges upon the extinction of the judgment lien by the act of sale. No such principle is involved in the case at bar. The Serumgard mortgage had not been foreclosed. It was a mortgage by description on the same land on which foreclosure proceedings on the prior mortgage had been instituted, and, if that mortgage constituted a lien upon the premises, its lien had not been extinguished, as in the California case, by any act of sale. If Serumgard comes within the definition of a redemptioner by holding a lien by mortgage upon the property sold, then he is entitled to redeem. The supreme court of California considered the Pollard Case on petition for rehearing, reported in 138 Cal. 394, 71 Pac. 648, and repudiated the argument of the commissioners in the first opinion, but concurred in the conclusion by saying: "It is enough for the purposes of the decision of the case to say that such purchaser acquires a qualified title, which is sufficient to, and does, carry with it the right to redeem from another sale." *Robinson v. Thornton*, 102 Cal. 675, 34 Pac. 120, is also cited; but while there are sentences contained in the opinion which tend to support respondent's theory, when read in the light of the facts before the court and of the many other decisions of the supreme court of California, we think it cannot properly be given much weight as an authority in the case at bar. The most relevant authority cited by respondent is *Dickinson v. Kinney*, 5 Minn. 409, Gil. 332, where the supreme court of that state held, through Judge Flandrau, that an execution sale carried all the estate that the debtor had in the land, subject only to the right of redemptioners to purchase it, and that, therefore, the purchaser could assign his interest by deed or quitclaim deed. The latter case, taken by itself, appears to sustain respondent's contentions; but unfortunately the supreme court of that state has in the decisions of other cases, from some of which we have quoted, at least modified the view it there expressed.

There are, however, other reasons for disaffirming the views of respondent. It relies upon some of the later California cases, as above noted, to support its theory. In those cases the reasoning of that court was based upon the provisions of § 700 of the Code of Civil Procedure of that state, which is identical with § 7137, *supra*. In that state foreclosures are made by action only, and the sales are made upon execution, and hence the provision that, upon the sale of real property, the purchaser is substituted to and acquires all the right, title, interest, and claim of the judgment debtor thereto,

is clearly as applicable on foreclosures as it is to sales under other judgments and executions; but, as we have seen, § 7464 of our Code omits all reference to title conveyed. Without considering or determining what the effect of § 7137, *supra*, is on those sales to which it applies, or the distinction, if any, which it effects under our Code between sales under execution and those under a power of sale contained in a mortgage, it certainly has no controlling force in determining what title is conveyed by the bare act of sale under a power. Many of the California cases wherein that section has been in question may readily be construed as extending its meaning to the sale when completed by the deed. Most of the cases from that state which we shall cite were decided on facts which arose before the enactment of that section into the law of that state, and when the statute, like ours on foreclosure by advertisement, was silent as to what title passed before the time for redemption expired. It is unnecessary to analyze all the California cases, or trace the reasons for the apparent changes of construction by the courts of that state relating to the title retained by the mortgagor, and that passing to the purchaser at the time the sale occurs, because, as we have shown, the paragraph relating to the purchaser acquiring all the right, title, and interest of the debtor, does not apply to sales under a power contained in a mortgage. We, however, in view of the argument, call attention to the doctrine of the earlier California cases, which, as we have shown, are the only cases in point. Those decisions have often been misinterpreted, both by counsel and courts.

One early leading case on the subject is *McMillan v. Richards*, 9 Cal. 365, 70 Am. Dec. 655, wherein Judge Field, speaking on behalf of the court, and upon an exhaustive discussion of the subject of mortgages under the modern theory, and the rights of the different disinterested parties, says: "The settled doctrine of equity is that a mortgage is a mere security for a debt, and passes only a chattel interest; that the debt is the principal, and the land the incident; that the mortgage constitutes simply a lien or encumbrance; and that the equity of redemption is the real and beneficial estate in the land, which may be sold and conveyed by the mortgagor in any of the ordinary modes of assurance, subject only to the lien of the mortgagee. . . . Proceedings for the foreclosure of mortgages, in the sense in which the terms are used in England and in several of the states, by which the mortgagor, after default, is called upon to repay the loan by a specified

day, or to be forever barred of his equity of redemption, are unknown to our law. The owner of the mortgage in this state can in no case become the owner of the mortgaged premises, except by purchase upon sale under judicial decree consummated by conveyance. A foreclosure suit by our law results only in the legal ascertainment of the amount due, and a decree directing the sale of the premises for its satisfaction. . . . The estate of the mortgagor and of the judgment debtor after sale stand upon the same footing. . . . The decisions as to the estate of the judgment debtor after sale become, therefore, authorities for determining the estate of the mortgagor after sale under decree, and from them it will be found that the estate must remain in the mortgagor until a consummation of the sale by conveyance, as it does in the judgment debtor, and that the conveyance, when executed, will take effect in the one case from the date of the mortgage, as it does in the other from the time the lien of the judgment attached. . . . There is no difference, so far as the liens of judgments are concerned, between our statute and that of New York. Here the statute requires the lien by the judgment of the creditor to be subsequent to that on which the property is sold. There the statute requires the judgment which creates the lien to be recovered before the expiration of the time of the redemption. The period within which the judgment creating the lien must be recovered is not limited in either case by the sale. In *Kent v. Laffan*, 2 Cal. 595, the judgment under which a redemption was claimed was recovered after the sale of the premises under the decree of foreclosure. . . . It follows, from the views above expressed, that the legal title of the premises remained in Randall after the sale under the decree of foreclosure, and that the plaintiff acquired a lien by his judgments. . . . The title remained in the debtor until conveyance executed. Until then the purchaser had no legal estate in the premises, but only a right to an estate which might be perfected by conveyance." And this is followed by *People ex rel. Mulford v. Mayhew*, 26 Cal. 656, in which the court says: "When a judgment debtor pays to the purchaser, at a sale under an execution or an order of sale, a sum of money for the purpose of effecting redemption of the land, what can that which he pays be properly denominated? Suppose, first, that the judgment creditor is the purchaser, that the sum bid equals the amount of his judgment, and that thereupon the execution is credited by the sheriff with the amount bid. The purchaser does not thereby acquire the de-

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pendant's title to the land, for that passes to him by the execution and delivery of the sheriff's deed. This is manifest by the provisions of § 232 of the practice act [Stat. 1851, chap. 5, p. 88], which declares, in effect, that upon a redemption being made by the debtor, the sale becomes null and void, which could not be the case if the title had passed, and by the fact that the purchaser can neither take nor recover the possession of the land previous to the sheriff's deed. His judgment is not satisfied by the sale; for, if the sale should for any reason be set aside, the judgment remains in full force, and such could not be the case if it had been satisfied. The purchaser, prior to the execution of the sheriff's deed, holds merely a lien upon the land, differing from the lien of the judgment in this: that it is more specific and may continue after that of the judgment has expired, and that the lien is much nearer a complete enforcement than that of the judgment; the single act of the execution and delivery of the sheriff's deed being required."

This was likewise followed by *Page v. Rogers*, 31 Cal. 294, which has been cited many times by the California courts and the courts of both Dakotas. In some cases it has been cited to show that during the period allowed for redemption the debtor or his successor in interest retains only the mere dry, naked, legal title; but a careful perusal of the opinion discloses that this was not what that court held, and that the definition so used in the opinion in that case applies to the title of the debtor or his successor in interest between the date of the expiration of the time allowed for redemption and the execution and delivery of the sheriff's deed, and does not apply to the period between the sale and the expiration of the time for redemption. The court says: "To call the interest of the purchaser at a sale on execution before the making of the sheriff's deed a lien merely is not very exact. In a general sense it may be a lien; but it is more. The purchaser obtains an inchoate right, which may be perfected into a perfect title without any further act than the execution of a deed in pursuance of a sale already made. . . . The sale is simply a conditional one, which may be defeated by the payment of a certain sum by certain designated parties within a certain limited time. If not paid within the time, the right to a conveyance becomes absolute, without any further sale or other act to be performed by anybody. The purchaser acquires an equitable estate in the lands, conditional, it is true, but which may become absolute by simple lapse of time without the performance of the

only condition which can defeat the purchase. The legal title remains in the judgment debtor, with the further right in him and his creditors having subsequent liens to defeat the operation of a sale already made during a period of six months, after which the equitable estate acquired by the purchaser becomes absolute and indefeasible, and the mere dry, naked, legal title remains in the judgment debtor, with authority in the sheriff to divest it by executing a deed to the purchaser." And this construction is followed in *Bennett v. Wilson*, 122 Cal. 509, 68 Am. St. Rep. 61, 55 Pac. 390, after the enactment of § 700 of the Code of Civil Procedure of that state. See also *Freeman*, Executions, §§ 193, 323; *Horton v. Maffitt*, 14 Minn. 289, Gil. 216, 100 Am. Dec. 222; *Reynolds v. Harris*, 14 Cal. 667, 76 Am. Dec. 459; *Swain v. Stockton Sav. & L. Soc.* 78 Cal. 600, 12 Am. St. Rep. 118, 21 Pac. 365; *Donnelly v. Simon-ton*, 7 Minn. 167, Gil. 110; 8 Current Law, 576; *Smith v. Colvin*, 17 Barb. 157; *Foor-man v. Wallace*, 75 Cal. 552, 17 Pac. 680.

The statute of Oregon is in effect like that of this state, and in the well-considered case of *Flanders v. Aumack*, 32 Or. 19, 67 Am. St. Rep. 504, 51 Pac. 447, the court of that state says: "During the interim between the sale and the deed the rights of the parties interested are measured by the statute. The sale is inchoate, and does not transfer title until consummated by the execution and delivery of the deed in due course of law. If subsequent lienors . . . redeem, the course of the sale is not thereby impeded or precluded, but finally culminates in a deed as if no redemption was had by anyone, and the deed puts an end to the lien of the judgment or decree under which the sale was made, and all other liens subsequently acquired; but a redemption by the judgment debtor has a very different effect. It terminates the sale and restores the estate." The effect is the same on a redemption by a successor in interest. The lien of the judgment is only partially satisfied by the sale, is not arrested or eradicated, but is simply suspended, as are the liens of all creditors having subsequent judgments, decrees, or mortgages pending the sale. If the sale is perfected, all these are swept away. See also *Kaston v. Storey*, 47 Or. 150, 114 Am. St. Rep. 912, 80 Pac. 217; *Baber v. McLellan*, 30 Cal. 136; *Curtis v. Millard*, 14 Iowa, 128, 81 Am. Dec. 400; *Phillips v. Hagart*, 113 Cal. 552, 54 Am. St. Rep. 369, 45 Pac. 843.

In construing redemption statutes, to determine whether one is included in their terms, the principle is stated to be that if one is in privity in title with the mortga-

gor, and has such an interest that he would be a loser by the foreclosure, he may redeem, and that any person who may have acquired any interest in the premises, legal or equitable, by operation of law or otherwise, in privity with the mortgagor, may redeem and protect such interest in the land, provided it be an interest in the land derived in some way, mediate or immediate, from or through or in the right of the mortgagor, so as in effect to constitute a part of the mortgagor's original equity of redemption, and is a lien at the time when he comes to redeem, and that it need not be a lien at the time of the sale. See *Mr. Freeman's note*, 21 Am. St. Rep. 245, and cases cited; *Story*, Eq. Jur. § 1023; *Poin. Eq. Jur.* § 1220; supplement to *Wiltzie*; *Mortg. Foreclosure*, §§ 959, 960; *Van Rensselaer v. Albany*, 1 Cow. 501; *Perkins v. Center*, 35 Cal. 713. To construe the phrase, "upon the property sold," as applying only to the fraction of the title to the land, rather than to the land itself, would be extremely technical, and we are unable to find any authorities to bear out any such construction. On the contrary, the terms "property sold," "real estate," "premises," and "land" are applied in such cases indiscriminately and interchangeably by the authorities, and we are satisfied that the legislature, in enacting the law relating to redemptions, intended it to apply to the "land" or the "premises," as those words are used commonly, and not in any technical sense. In *Phillips v. Hagart*, supra, the California court expressly held that a deed executed by the mortgagor after foreclosure sale constituted the grantee in the deed a successor in interest, and entitled him to redeem. If the grantor had a right to convey the land, and thereby constitute his grantee a successor in interest, the same grantor, under § 6154, supra, had a right to execute a mortgage upon the land and make the mortgagee a subsequent mortgagee or a lien holder, and therefore a redemptioner.

Still farther, as we have seen, under the statutes of this state, the deed executed by the sheriff relates back to and covers the whole title of the mortgagor at the time the mortgage was given. From this fact, and from the construction which is given the words "sale" and "foreclosure" in this connection, it necessarily follows that the property sold is the whole title and interest of the mortgagor in the mortgaged premises at the time the foreclosed mortgage was given, and that, if the contention of the respondent be correct, no other conclusion can be drawn than that the holder of no mortgage given after the one on which the foreclosure proceedings occurred can be a redemp-

tioner, or have the right to redeem, and therefore the inevitable effect of respondent's construction of the law would be to completely thwart the intention and the purpose of the legislature in providing for redemption by holders of subsequent mortgages. We conclude that the sale in the exercise of the power contained in a mortgage which conveys the title of the mortgagor is the sale as completed by the execution of deed at the expiration of the period allowed for redemption.

It is contended in respondent's original brief that, Sannan having, as a redemptioner, redeemed from the holder of the prior certificate of sale when the records disclosed no subsequent encumbrance on the property, he is entitled to the protection of the recording act as against any attempted redemption by the holder of a mortgage given during the period allowed for redemption, and not recorded until just before the expiration of the sixty days allowed for a redemption from a redemptioner. On the first argument we were impressed with the soundness of this contention, and that it followed the conclusion there reached on the preceding point; but on reargument respondent did not insist upon it. We have, however, made a careful examination of authorities. The decision of the preceding point would seem to dispose of this question, because the mortgage held by Serumgard could not possibly have been recorded until after the sale under the prior mortgage, for the reason it had not been given at the time of such sale. It therefore becomes plain that, when we hold that Serumgard was a redemptioner under the redemption statute, the recording law cannot be held to deprive him of that right. If there is any conflict between the redemption law and the recording law, in view of the object of the former, it, rather than the latter, must control. The general recording law has no application. That applies only where it is sought under an instrument executed prior, but not recorded, to assert rights superior to those claimed under an instrument subsequently executed, but first recorded. In the case at bar Serumgard is not attempting to assert rights superior to the plaintiff, but inferior thereto. He is asserting rights as a redemptioner, and necessarily thereby he concedes they are inferior, and not superior, to those of the prior lien holder. *Pollard v. Taylor*, 13 Ala. 604, squarely sustains this proposition. Nothing in *Foorman v. Wallace* conflicts with it, and we construe *Phillips v. Hagart*, su-29 L.R.A. (N.S.)

pra, as authority on this point, as well as the preceding one. This holding does not deprive the plaintiff of any legal right. He still obtains payment of his lien against the land, and repayment of all he has invested in making his redemption, with interest on both sums.

A purchaser at a foreclosure sale and those redeeming from him are bound to know the law; i. e., they are bound to know that the mortgagor may, at any time before the year for redemption expires, give a mortgage upon the property sold, and that the mortgagee in such mortgage is a redemptioner. Hence there is no possibility of the purchaser or the first redemptioner being prejudiced because the mortgage of the last redemptioner is not recorded. The purchaser and the prior redemptioner act with knowledge that there may be a subsequent redemptioner. Indiana cases are not authority, because the statute of that state permits the party seeking to redeem to do so, if his mortgage was recorded within the year for redemption. In *Condit v. Wilson*, 36 N. J. Eq. 370, there is practically no discussion of the question, and, even if it may be construed as in point, we are not justified in following it, in view of the plain purpose of the redemption law and the finding that defendant is a redemptioner. Several authorities establish the rule that a party seeking to redeem by virtue of holding a subsequent lien need only hold a lien at the time he seeks to redeem. It cannot be contended that an unrecorded mortgage is not a lien. Sannan suffers no loss by permitting a redemption. While he may suffer the loss of an opportunity to speculate on the land, or obtain it for less than its value, yet this is not such a loss as the redemption statute is intended to protect against. Respondent cites several cases holding that assignment of a mortgage is a conveyance within the meaning of the recording act, as being analogous to a certificate of redemption; but they are so held to protect debtors who make payment to the original mortgagee without notice of the assignment required by law.

We therefore conclude that the appellant must prevail. The judgment of the District Court is reversed, and the case is remanded, with directions to that court to enter judgment in conformity with this opinion. All concur.

Fisk, J., disqualified; Hon. Chas. F. Templeton, judge of the first judicial district, sitting by request.

SOUTH DAKOTA SUPREME COURT.

STATE BANKING & TRUST COMPANY,
Appt.,

v.

F. W. TAYLOR, Impleaded, etc., Respt.

(— S. D. —, 127 N. W. 590.)

Pledge — consideration.

1. A pledge of stock as security for an existing overdue note is supported by a sufficient consideration.

Corporation — pledge of stock — attachment — priority.

2. Statutes requiring corporations to keep stock transfer books which shall be open to the inspection of any stockholder, member, or creditor, and providing that transfers shall not be valid, except between the parties thereto, until entered on the corporate books, are not intended for the protection of the public, and therefore an unregistered pledge of stock is valid against a subsequent attachment, against the stockholder, by a creditor without notice.

Sale — corporate stock — unregistered transfer.

3. A statute making transfers of personal property without immediate change of possession void as against creditors has no application to a transfer of corporate stock not entered on the books of the corporation, but the certificates of which were delivered to the transferee.

Jurisdiction — published service — attachment.

4. Jurisdiction over a debtor upon whom the service of summons and complaint is by publication may be secured by levying an attachment upon his equity in corporate stock which he has pledged as security for a debt, so far as is necessary to uphold a sale of such stock under execution.

(June 4, 1910.)

APPEAL by plaintiff from a judgment of the Circuit Court for Minnehaha County in defendant's favor in an action brought to recover the amount alleged to be due on a certain promissory note and to foreclose a pledge of certain corporate stock which had been given as security. Reversed.

The facts are stated in the opinion.

Note. — As to validity of pledge or other transfer of corporate stock not made on the books of the company as against creditors or purchasers, see notes to *Mapleton Bank v. Standrod*, 67 L.R.A. 656, and *Everitt v. Farmers' & M. Bank*, 20 L.R.A. (N.S.) 990. And see later case of *National Bank v. Western P. R. Co.* 27 L.R.A. (N.S.) 987.

In Iowa it is provided by statute that when stock has been transferred as collateral security, the secretary of the corporation shall be notified, and, from the time of no-

Mr. Joe Kirby, for appellant:

The entering of the assignment of stocks under § 423 of the Revised Civil Code is not for the benefit of the public, but purely for the use of the corporation.

Mapleton Bank v. Standrod, 8 Idaho, 740, 67 L.R.A. 656, 71 Pac. 119; *Lund v. Wheaton Roller Mill Co.* 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Strange v. Houston & T. C. R. Co.* 53 Tex. 162; *Kellogg v. Stockwell*, 75 Ill. 68; *Clark v. German Security Bank*, 61 Miss. 611; *Merchants' Nat. Bank v. Richards*, 74 Mo. 77; *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369; *Masury v. Arkansas Bank*, 35 C. C. A. 476, 93 Fed. 603; *Port Townsend Nat. Bank v. Port Townsend Gas & Fuel Co.* 6 Wash. 597, 34 Pac. 155; *Kentucky Nat. Bank v. Avery*, 12 Nat. Corp. Rep. 111; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145; *Weston v. Bear River & A. Water & Min. Co.* 6 Cal. 425, overruling same case 5 Cal. 186, 63 Am. Dec. 117.

A sale and transfer of corporate stock, although not entered on the books of a corporation, is effectual as between the parties, and takes precedence of a subsequent attachment in behalf of a creditor of the vendor.

Lund v. Wheaton Roller Mill Co. and Strange v. Houston & T. C. R. Co. supra.

Only constructive service was made on Mr. Mack, unless his property was seized by a valid attachment, and the court acquired no jurisdiction whatever.

Pennoyer v. Neff, 95 U. S. 714, 24 L. ed. 565.

Messrs. Boyce & Warren and Bates & Parllman, for respondent:

To constitute a valid transfer there must be either an actual delivery and change of possession, or some entry of record sufficient to give notice of the transfer to creditors and purchasers.

Ft. Madison Lumber Co. v. Batavian Bank, 71 Iowa, 270, 60 Am. Rep. 789, 32 N. W. 338.

The attaching creditors had no notice of the purported transfer of the shares to the plaintiff bank. The notice claimed to have been given at the execution sale came too

tice until notice that the stock has ceased to be held as collateral security, the stock in question shall be considered in law as transferred on the books of the corporation without an actual transfer. The purpose of this provision, as declared in *Tierney v. Ledden*, 143 Iowa, 286, 121 N. W. 1050, is to enable stockholders to hypothecate their stock without cancelation and issuance of new stock, and yet protect the pledgee against the claims of creditors of the pledgeor and purchasers without notice.

late. The creditors, having secured a valid lien, had the right to sell the property in satisfaction of that lien.

Naglee v. Pacific Wharf Co. 20 Cal. 530.

The books of the corporation are the only criterion to determine the question of ownership.

Strout v. Natoma Water & Min. Co. 9 Cal. 78.

An unregistered sale or pledge of corporate shares is presumptively fraudulent and void as against the attaching creditors of the transferor.

Re Murphy, 51 Wis. 519, 8 N. W. 419; *Ft. Madison Lumber Co. v. Batavian Bank*, supra; *Skowhegan Bank v. Cutler*, 49 Me. 315; *Naglee v. Pacific Wharf Co.* 20 Cal. 529; *Buttrick v. Nashua & L. R. Co.* 62 N. H. 413, 13 Am. St. Rep. 578; *Pinkerton v. Manchester & L. R. Co.* 42 N. H. 424; *People's Bank v. Gridley*, 91 Ill. 457; *Noble v. Turner*, 69 Md. 519, 16 Atl. 124; *Abels v. Planters' & M. Ins. Co.* 92 Ala. 382, 9 So. 423; *Berney Nat. Bank v. Pinckard*, 87 Ala. 577, 6 So. 364; *Commercial Nat. Bank v. Farmers' & T. Nat. Bank*, 82 Iowa, 192, 47 N. W. 1080; *Ottumwa Screen Co. v. Stodghill*, 103 Iowa, 437, 72 N. W. 669; *Central Nat. Bank v. Williston*, 138 Mass. 244; *Newell v. Williston*, 138 Mass. 240; *Conway v. John*, 14 Colo. 30, 23 Pac. 170; *Lyndonville Nat. Bank v. Folsom*, 7 N. M. 611, 38 Pac. 253; *Perkins v. Lyons*, 111 Iowa, 192, 82 N. W. 486; *Shipman v. Aetna Ins. Co.* 29 Conn. 245; *First Nat. Bank v. Hastings*, 7 Colo. App. 129, 42 Pac. 691; *Re Argus Printing Co.* 1 N. D. 434, 12 L.R.A. 781, 26 Am. St. Rep. 639, 48 N. W. 351.

Whiting, P. J., delivered the opinion of the court:

The sole question before us upon this appeal is whether the rights of the respondent, Taylor, as purchaser under an attachment of certain shares of corporate stock, are superior to those of plaintiff, a pledgee of such stock, the pledgee being the debtor against whom the attachment issued. The cause was tried to the circuit court without a jury, and such court made findings of fact. No question is raised as to the correctness of such findings, but it is the contention of the appellant that such findings do not support the conclusions and judgment of the trial court, by which judgment said court held the rights of the purchaser under the attachment superior to those of the pledgee.

The findings herein are quite voluminous, but, so far as they are necessary for the determination of the issues before us, they may be condensed into the following statement of a supposed case. On or about August, 10, 1907, one A, being indebted to B.

in the sum of \$3,500, gives to B his promissory note, due October 1, 1907. August 9, 1907, a South Dakota corporation, which we will designate as the D company, issues to A four stock certificates representing certain shares of common stock in said D company. In January, 1908, A indorses said certificates, assigns and delivers each of them to B, such assignments being in form as follows:

For value received, I hereby sell, assign, and transfer to B forty-five and five-sixths (45 $\frac{5}{6}$) shares of the capital stock, represented by the within certificates, and do hereby irrevocably constitute and appoint B my attorney to transfer said stock in the books of the withinnamed company, with full power of substitution in the premises.

Dated [Date given.] [Signed] A.

On the 9th of August, 1907, D company issues to A a certificate for 16 $\frac{2}{3}$ shares of its preferred capital stock; and on March 15, 1908, A indorses, assigns, and delivers such stock certificates to plaintiff in the same manner and form as in the assignment of common stock. The assignment of such certificates is intended and received as collateral security for the payment of the above-mentioned note from A to B. The transfer of said stock certificates to B. is never entered upon the books of D company, but such books at all times show said stock as standing in the name of A. A, being indebted to C, gives C his promissory note, dated October 9, 1907, and, the same remaining unpaid, C, on March 9, 1908, commences an action against A and takes out a warrant of attachment issued against the property of A. On the same day the sheriff attempts to levy upon all of the above-mentioned stock by serving notice on the secretary of D. company that he "attached all the stock or interest in the stock held by the defendant 'A' in the said D company," and by demanding a certificate of said secretary designating the rights and shares of said A in said company, together with encumbrances on said shares. At the time of such levy the secretary of D company delivers to the sheriff a certificate signed by him, to the effect that A owns the above stock, describing the same, and that there are no encumbrances thereon, as shown by the books of the corporation. March 25, 1908, the sheriff files the warrant, with his return thereon. A summons and complaint are duly served upon A. Judgment thereafter enters in favor of C against A, which judgment is in all things attested, filed, and docketed. Execution thereafter issues upon such judgment, upon which execution, and after due notice given, the sheriff sells at

public auction all of the said stock to E. after the execution issues upon such judgment, and prior to the sale thereunder, B notifies the sheriff and C that the stock has been pledged to him as collateral security for the note he holds, and warning the sheriff and C not to sell, purchase, or in any manner interfere with the rights of B in said stock. At the time of the sale under execution, and prior to such sale, B reads the last-mentioned notice to the sheriff and all parties in attendance upon the sale, including D, and B warns all purchasers at his interest in said stock, to the amount of his note, naming such amount, will be asserted upon the maturity of the note given by A to B. On the 9th day of October, 1907, B gives to B a new note in renewal of such note, said renewal note being dated October 1907, and due on or before February 9, 1908. Thereafter, and before all of the shares of stock are delivered to B, B decides to neglect the original note, and not to make any extension thereon, and does not make any extension of the time of payment of such indebtedness, but concludes to rely upon the original note, and treat the indebtedness as due at the date of the maturity of the original note. Was the court correct in holding, under the above statement of facts, that the respondent, whom we have designated as E, is the absolute owner of the said shares of stock, and that B has no interest therein?

It is the contention of the appellant that the rights of a pledgee take precedence over those of an attachment creditor of the pledgee, even though the attachment creditor had no notice of the pledge prior to the levy of the attachment. On the other hand, the respondent contends that under the statute this state the attachment lien takes priority over any rights of a purchaser who has not had his transfer recorded in the stock transfer book of the corporation; and the respondent further claims that, under the facts in this case, the pledge of stock was wholly without consideration, for the reason that the pledgee elected to treat the original note as due, instead of allowing the extension of the note to stand. We do not think there is anything in this last contention, for the reason that it is specifically found by the court that the stock was pledged as security for the original note, and there is no evidence that this security was given for any extension of such note.

This leaves for our consideration the sole question of the effect of our statute upon the rights of an attaching creditor in stock pledged, as against an assignee of such stock whose assignment, together with possession of the stock, was taken prior to the attachment, but who has failed to have such

assignment noted on the corporate records. This question has been before the courts of the different states many times, and it would be impossible to harmonize their decisions. There is some difference in the statutes of the several states, yet there are several states whose statutes are practically identical with that of this state, and this same lack of harmony is to be found in the decisions of the courts of such states. We shall not attempt to analyze the reasonings found in these varying opinions, but in placing upon our statute the interpretation which seems to us most consistent with the fundamental ideas underlying our laws, not only those pertaining to corporations, but those pertaining to other subjects, we shall call attention to some authorities which we deem in point.

Appellant claims that the question before us has been determined in its favor by our territorial court in its opinion in *Van Cise v. Merchants' Nat. Bank*, 4 Dak. 485, 33 N. W. 897. This case is found cited, as supporting this position, in the different textbooks and encyclopedias, but it is not on all fours with the case at bar. A careful reading of the *Van Cise Case* shows that in that case the notice of the assignee's claim was given to the sheriff at the time of levy. Appellant contends that, inasmuch as such notice was given to the sheriff only, it did not affect the rights of the attachment creditor, who had no notice, and that for that reason that case was the same as this one in principle. While approving much of the reasoning in the *Van Cise Case* and agreeing with the conclusion arrived at therein, yet we prefer not to rest our decision herein solely upon that case, although it should have great weight when we consider the number of years it has stood as the announced law of this jurisdiction, and we might be fully justified in holding with the supreme court of Minnesota in *Lund v. Wheaton Roller Mill Co.* 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268, wherein (in a case involving the same question which we have here) that court said: "However that may be and even if a consideration of the provisions of § 8 might possibly have led to a different conclusion as to the validity of the pledge, that decision, made nearly thirteen years ago, and hitherto unquestioned, should now be deemed decisive of the question. It has probably been generally so regarded, and it is believed that transfers of stocks in pledge and by sale have been extensively made, without having the transactions entered on the books of the corporations. The rule of *stare decisis* should deter us from now declaring the statute law to be different from what it has heretofore been pronounced to

be. We therefore follow former decisions, without entering upon a consideration of the construction which might be given to § 8 of the statute if the question were a new one. In deciding the case in this way we would not be understood as expressing the new opinion that a proper construction of the statute would lead to a different conclusion. The tendency of many decisions is in accordance with the rule heretofore announced in this court and now followed. See *Robinson v. National Bank*, 95 N. Y. 637; *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 331, 7 Am. Rep. 341, and cases cited; *Finney's Appeal*, 59 Pa. 398; *Telford & F. Turnp. Co. v. Gerhab*, 9 Sadler (Pa.) 550, 22 W. N. C. 175, 13 Atl. 90; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24; *Hunterdon County Bank v. Nassau Bank*, 17 N. J. Eq. 496; *Thurber v. Crump*, 86 Ky. 408, 6 S. W. 145; *Continental Nat. Bank v. Eliot Nat. Bank* [C. C.] 7 Fed. 369; *Cook, Stock & Stockholders*, § 487."

The determination of this case must rest upon the construction to be given to §§ 423 and 445 of the Revised Civil Code of this state. Section 423 reads as follows: "All corporations for profit must issue certificates of stock when fully paid up, signed by the president and secretary, and may provide in their by-laws for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide. Whenever the capital stock of any corporation is divided into shares, and certificates therefor are issued, such shares of stock are personal property, and may be transferred by indorsement by the signature of the proprietor, or his attorney or legal representative, and delivery of the certificate; but such transfer is not valid except between the parties thereto, until the same is so entered upon the books of the corporation as to show the names of the parties by and to whom transferred, the number or designation of the shares, and the date of the transfer." Section 445, after providing for certain records that must be kept by a corporation, and providing that "all such records to be open to the inspection of any director, member, stockholder, or creditor of the corporation," provides by the second paragraph of such section: "In addition to the records above required to be kept, corporations for profit must keep a book, to be known as the 'stock and transfer book,' in which must be kept a record of all stock; the names of the stockholders or members, alphabetically arranged; instalments paid or unpaid; assessments levied and paid or unpaid; a statement of every alienation, sale, or transfer of stock made, the date thereof, and by and to whom; and all such other records as the by-laws pre-

scribe. Corporations for religious and benevolent purposes must provide in their by-laws for such records to be kept as may be necessary. Such stock and transfer book must be kept open for the inspection of any stockholder, member, or creditor." Was it the intention of the lawmakers in enacting the above statutes to provide a general registration law for the protection of the public by providing a record open to the public, and which should be held as giving constructive notice of its contents to all parties about to deal in any manner with the stock of the corporation, and giving them the right to rely fully upon such records by making all transfers, not appearing upon such records, absolutely invalid except as between the parties to the transfer, or was it rather the intent to provide a record for the protection of the corporation, its members, and creditors only, and to make unrecorded transfers invalid as against the corporation, its members, and creditors only? The prior Minnesota case, referred to in *Lund v. Wheaton Roller Mill Co.* supra, was that of *Baldwin v. Canfield*, 26 Minn. 43, 1 N. W. 261, in which the court construed a section of the Minnesota statute providing: "The stock of any such corporation shall be deemed personal property, and be transferable only on the books of such corporation, in such form as the directors prescribe," and held: "Provisions of this kind are intended solely for the protection and benefit of the corporation. . . . Except as against the corporation, the owner and holder of shares of stock may, as an incident of his right of property, transfer the same as any other personal property of which he is owner." The court in the *Baldwin Case* made no reference to § 8, title 1, chap. 34, Minn. Gen. Stat. 1878, which provides: "The transfer of shares is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, so far as to show the names of the persons by and to whom transferred, the numbers or other designation of the shares, and the date of the transfer. . . . The books of the company shall be so kept as to show intelligibly the original stockholders, their respective interests, the amount which has been paid in on their shares, and all transfers thereof; and such books, or a correct copy thereof, so far as the items mentioned in this section are concerned, shall be subject to the inspection of any person desiring the same." And it was this § 8 that is referred to in our first quotation from the *Lund Case*. It will readily be seen that the Minnesota statute might well be held to provide a law for public registration, and that therefore any transfer of stock unrecorded is void as against attaching cred-

itors without notice, because the transfer book in that state is "subject to the inspection of any person desiring the same," while in this state, under § 445, Rev. Civ. Code, supra, it is "kept open for the inspection of any stockholder, member, or creditor;" and a reading of the whole section shows clearly that by the word "creditor" is meant only a creditor of the corporation. Under our statute, a person contemplating extending credit to another, or contemplating taking a mortgage or transfer of corporate stock from that other, has absolutely no right to inspect the books of the corporation to see whether such other is the recorded owner of some of its stock. Our § 445 is not a registration law for the benefit of the public.

Cook, in his great work on Corporations, vol. 2, at § 486 of the sixth edition, says: "The courts of the different states are in irreconcilable conflict on this question of whether the unregistered transferee is protected in his purchase. The better rule, and the rule which ultimately will prevail, is that an unrecorded transfer of stock is in this respect like an unrecorded deed of land, and gives good title as against subsequent attachment or executions, even though the latter are levied in ignorance of the unrecorded transfer or deed." And, in § 487, further states: "The decided weight of authority holds that he who purchases for a valuable consideration a certificate of stock is protected in his ownership of the stock, and is not affected by a subsequent attachment or execution levied on such stock for the debts of the registered stockholder, even though such purchaser has neglected to have his transfer registered on the corporate books, thereby allowing his transferor to appear to be the owner of the stock upon which the attachment or execution is levied. Such is the rule prevailing in the Federal courts and in the courts of the above-named states [referring to twenty-one states]. Frequently this rule is justified and explained on the ground that registry, and by-laws or charter provisions requiring registry of transfers on the corporate books are not for the purpose of notifying the creditors of the old registered stockholder that he no longer owns the stock, nor for any similar purpose, but are for the purpose of protecting the corporation in paying dividends and allowing the stock to be voted. Another and stronger reason is that the law favors the transfer of stock certificates, and discountenances, so far as possible, all secret dangers incurred in their purchase. By protecting the purchaser against subsequent attachments and executions, the law removes one of the chief risks incurred in holding certificates of stock without a registry, and thereby increases the safety and desirability of such

investments." If, in the case at bar, there had been no attachment of A's stock, but E had gone to A, after A had pledged the stock to B and delivered the certificates to B, and, for full value, had purchased such stock from A, he would have acquired absolutely no rights as against B. He would have occupied a position similar to one who attempts the purchase of a promissory note from a party who has already delivered such note as a pledge to another. He gets simply the equity left in A.

Almost exhaustive consideration of this question is found in the case of *Lipscomb v. Condon*, 56 W. Va. 416, 67 L.R.A. 670, 107 Am. St. Rep. 938, 49 S. E. 392. This case cites *Scripture v. Francetown Soapstone Co.* 50 N. H. 571, holding what certainly, under our statute, must be conceded as true, "that the ownership of the shares passes from the seller to the buyer by force of the contract of sale, and not by operation of law." In the *Lipscomb Case* it is said: "If a transfer on the books of a corporation is not required by the charter or by-laws, nor by any general law, it is not necessary to give a transferee a perfect title. In such a case a transfer by delivery of the certificate of stock duly assigned, although not registered on the books of the corporation, will prevail in all jurisdictions over a subsequent attachment by a creditor of the transferor, whether he had notice of the transfer or not. And the same is true where registration of transfers is required by statute, not for all purposes, nor for the protection of creditors, but merely for the protection of the corporation and its creditors." And again this court says: "*In Continental Nat. Bank v. Eliot Nat. Bank* (C. C.) 7 Fed. 369, holding that an unrecorded transfer of national bank stock will take precedence of a subsequent attachment in behalf of a creditor without notice, Lowell, Judge, delivering the opinion, discusses the question most lucidly and exhaustively, reviewing many of the authorities, both American and English. In speaking of the statutes concerning transfers of the shares upon the books of the company, he says: 'No doubt it is some time intended as a record of persons liable for the debts of the company, and is so in the case of national banks; but the great weight of authority is that it is not intended for the benefit of creditors of the individual shareholder. Some of the courts hold that the unrecorded transfer passes only an equitable title; others, that it gives a legal title. I assume that by the decisions in the courts of the United States only an equitable title is required. That point is unimportant.' Again he says at page 371: 'It is a general rule that creditors, whether they proceed by an attachment on meane

process, seizure on execution creditors' bill, or through an assignee in bankruptcy, must take their debtor's property subject to all equitable as well as legal charges, liens, or opposing titles. Willes, J., in giving judgment in the common pleas in 1868, in a case quite analogous to this, against the right of seizing shares of the apparent owner, said that it was a rule applied by that court more than a hundred years before in the analogous case of the statutory execution under the bankrupt law, that the creditors can have no more than a debtor was entitled to in equity or at law. *Pickering v. Ilfracombe R. Co.* L. R. 3 C. P. 235, 251, 37 L. J. C. P. N. S. 118, 17 L. T. Rep. N. S. 650, 16 Week. Rep. 458. It has been the law of the lord mayor's court in London, from the time of Richard I., that an equitable assignment of a chose in action should prevail against an attachment.' " After discussing the question as to whether the legal or mere equitable title to the stock in that case had passed, the court said: "As, by the assignment or transfer from the debtor to his transferee, evidenced by the informal written instrument executed and delivered by the former to the latter, title to the stock, legal or equitable, passed, what is the status of that title as against the attaching creditor, assuming that it is only the equitable title? In addition to the authorities already noted as maintaining its superiority to the attachment lien, the following is quoted from that latest and invaluable work, 4 Cyc. Law & Proc. p. 632: "The right of a creditor to property attached must be determined by the state of the title at the time the attachment was made, and, in the absence of fraud and statutory regulations, he only obtains the rights which the debtor had in the property at the time, for the creditor is not in the position of a bona fide purchaser.'" This court further said: "This inquiry as to the grounds upon which some of the courts give precedence to an attachment over an unregistered transfer results in the conclusion that they put it upon the statutes, either authorizing or requiring transfer to be made on the books of the corporation, some of them adopting the view that, as there can be no visible change of the possession of a share, the legislature intended the record to take the place of visible possession by way of analogy to the common-law rule relating to tangible property, and others adopting the view that the statutory provision is in the nature of a registration law for the protection of the public. It has been shown that, where the former theory was adopted, it has either been abandoned or displaced by statutes. Moreover, there never was any basis for the assumption

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tion of legislative intent to require recorded evidence of ownership of shares, when the statute did not make the record a public one. It might as well be assumed that some record ought to show who owns other choses in action, evidenced by notes, bonds, and other obligations. The latter has been almost universally condemned as imputing to the legislature an intent not warranted by the language of the statute or the nature of its subject-matter. Of it Thompson on Corporations, vol. 2, § 2411, says: 'But this view which makes the stock and transfer books public records, open to the inspection of the public, is plainly untenable unless the statute law (as it does in some states) obliges the corporation to expose such records to the inspection of the public. Otherwise they are strictly private records, sustaining no analogy to the records of transfers of title required to be made and kept in public recording offices; and even these last records import no notice except in those cases where the statute law expressly so provides.' " Holding, as we do, that § 445, Rev. Civ. Code, is not a public registration act, the following words from the Lipscomb Case become applicable to the case at bar: "It is obvious that unless § 36 or some other provision of the statute is to be regarded as a registration law for the protection of the public, who have no access to the books of the company, these sections are intended only to protect the corporation and those who claim under the certificates of stock."

It is also urged that the pledge of stock to B would be absolutely void under § 2369, Rev. Civ. Code, making certain transfers of personal property without immediate change of possession void as against creditors and others. But when we consider that the shares of stock were not tangible property, and that in their case the only tangible evidence of the property was the certificates which were in the possession of B, it becomes very clear that such section has no application any more than it would to any chose in action evidenced by a writing, where, upon transfer of such chose in action, the evidence thereof was delivered to the transferee.

Appellant contends that in this case, inasmuch as service of summons and complaint upon A was under an order of publication and therefor constructive, and inasmuch as no property of A's was levied upon under the attachment, the court acquired absolutely no jurisdiction to render judgment against A, but in this the appellant is clearly in error, as the attachment would be good as against the equity held by A in and to such stock. It follows that the sale upon the execution would be good as to such equity.

The judgment appealed from is reversed, and the lower court is directed to make conclusions of law and render judgment in conformity with this opinion.

NEW HAMPSHIRE SUPREME COURT.

HETTY E. DE ROCHEMONT

v.

NEW YORK CENTRAL & HUDSON RIVER RAILROAD COMPANY.

(75 N. H. 158, 71 Atl. 868.)

Attachment — cars — parties.

1. A foreign railroad company having a traffic contract with a local company cannot defeat an attachment of its cars within the state, because of the rights of the local company under the contract, where the latter is not made a party to the proceeding.

Commerce — cars — attachment — legality.

2. Attaching a car of a foreign railroad company when found idle within the state, under a state statute permitting it to enable local creditors to collect their debts, is not an unlawful interference with interstate commerce.

Same — Federal statute.

3. Attaching idle freight cars of a foreign railroad company is not invalid under the Federal statute giving railroad companies authority to carry property on its way to other states, and to contract with roads of other states, so as to form continuous lines of transportation.

Same — interstate commerce act.

4. A state statute permitting the attachment of idle cars of foreign railroad companies is not invalid as tending to promote the evils at which the interstate commerce act of Congress is aimed, nor as directly or indirectly tending to defeat any of the purposes which Congress had in view when that statute was enacted.

(January 5, 1909.)

TRANSFER by the Superior Court for Rockingham County for the opinion of the Supreme Court of the question as to the validity of an attachment of one of defendant's railroad cars. Case discharged.

Defendant, a foreign railroad company, has a traffic contract with the Boston & Maine Railroad whereby its cars are de-

Note. — As to attachment or garnishment of cars of foreign railroad company, see notes to Wall v. Norfolk & W. R. Co. 64 L.R.A. 501, and Seidels v. Northern C. R. Co. 16 L.R.A. (N.S.) 1026. See also later case, Davis v. Cleveland, C. C. & St. L. R. Co. 27 L.R.A. (N.S.) 823. 29 L.R.A. (N.S.)

livered over the roads of the latter. The Boston & Maine Railroad pays for the use of all such cars from date of receipt until their return, and has a right to use them on the return trip provided they are routed toward the point of receipt. The defendant's car in question was attached after being unloaded at Greenland, New Hampshire, and before the Boston & Maine Railroad had time to return it to defendant. The Boston & Maine Railroad was not made a party to the proceeding. Defendant appeared specially, and moved to vacate the attachment and to dismiss the suit on the following grounds: (1) That, because of the contractual agreement, the right of the Boston & Maine Railroad to hold its car and return it to the defendant under the contract was superior to the right of the plaintiff's subsequent attachment, and gave the attaching officer no right; and (2) that the car was engaged in interstate commerce at the time of the attachment.

Further facts appear in the opinion.

Mr. Samuel W. Emery, Jr., for plaintiff.

Messrs. Kelley, Harding, & Hatch for defendant:

The freight car was in use as an instrument of interstate commerce, which is affected directly and interfered with by its attachment.

Davis v. Cleveland, C. C. & St. L. R. Co. 146 Fed. 409; Johnson v. Southern P. Co. 196 U. S. 21, 49 L. ed. 371, 25 Sup. Ct. Rep. 158; Shore v. Baltimore & O. R. Co. 76 S. C. 472, 57 S. E. 526, 11 A. & E. Ann. Cas. 909; Connery v. Quincy, O. & K. C. R. Co. 92 Minn. 20, 64 L.R.A. 627, 104 Am. St. Rep. 659, 99 N. W. 365, 2 A. & E. Ann. Cas. 347; Southern Flour & Grain Co. v. Northern P. R. Co. 127 Ga. 626, 9 L.R.A. (N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 A. & E. Ann. Cas. 437; Johnson v. Union P. R. Co. 145 Fed. 249; Voelker v. Chicago, M. & St. P. R. Co. 116 Fed. 867, 70 L.R.A. 264, 65 C. C. A. 226, 129 Fed. 522; United States v. Great Northern R. Co. 145 Fed. 438; United States v. Chicago, M. & St. P. R. Co. 149 Fed. 486; United States v. Northern P. Terminal Co. 144 Fed. 861; Kelley v. Great Northern R. Co. 152 Fed. 232; United States v. Pittsburgh, C. C. & St. L. R. Co. 143 Fed. 360.

Although the Boston & Maine Railroad is not a party, the contract between it and the defendant must be considered in relation to whether the attachment of the car in question directly affects interstate commerce.

Wall v. Norfolk & W. R. Co. 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; Michigan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill App. 399.

Young, J., delivered the opinion of the court:

1. The fact that the Boston & Maine Railroad is not party to this proceeding is an answer to the defendant's first position. It will be time enough to consider whether that corporation had an interest in the car, which the sheriff was bound to respect, when it sues him for attaching the property. *Southern R. Co. v. Brown*, 131 Ga. 245, 62 S. E. 177.

2. It was decided in *Boston, C. & M. R. Co. v. Gilmore*, 37 N. H. 410, 72 Am. Dec. 336, that §§ 1 and 2, chap. 184, Rev. Stat. (Pub. Stat. 1901, chap. 220, §§ 1, 2), authorized the attachment of freight cars which were not in actual use, as well as other property belonging to a railroad; that is, the mere fact that railroads are public service corporations does not render their property exempt from attachment, even though it is needed to enable them to perform their public duty. Although that case holds that freight cars may be attached when not in actual use, the question whether the attachment of such property is forbidden by the commerce clause of the Federal Constitution, or by the laws Congress has enacted in pursuance of the power vested in it by that clause, was neither raised nor considered; so, even if the defendants in that action were in fact engaged in interstate commerce, the case is not decisive of the present defendants' contention, that the attachment of the car in question was an illegal interference with it. *Wyatt v. State Bd. of Equalization*, 74 N. H. 552, 70 Atl. 387.

Although the precise question raised by the defendants' motion to dismiss has never been considered by this court, it has been considered by the courts of Georgia, West Virginia, South Carolina, Illinois, Minnesota, and the eighth judicial circuit of the United States. The Georgia court holds that such an attachment is not an illegal interference with interstate commerce. *Southern Flour & Grain Co. v. Northern P. R. Co.* 127 Ga. 626, 9 L.R.A.(N.S.) 853, 119 Am. St. Rep. 356, 56 S. E. 742, 9 A. & E. Ann. Cas. 437. The West Virginia, South Carolina, Minnesota, and Federal courts hold that it is an illegal interference with interstate commerce. *Wall v. Norfolk & W. R. Co.* 52 W. Va. 485, 64 L.R.A. 501, 94 Am. St. Rep. 948, 44 S. E. 294; *Shore v. Baltimore & O. R. Co.* 76 S. C. 472, 57 S. E. 526, 11 A. & E. Ann. Cas. 909; *Connery v. Quincy, O. & K. C. R. Co.* 92 Minn. 20, 64 L.R.A. 624, 104 Am. St. Rep. 659, 99 N. W. 365, 2 A. & E. Ann. Cas. 347; *Davis v. Cleveland, C. C. & St. L. R. Co.* (C. C.) 146 Fed. 403. The Illinois court holds that the statutes of that state do not authorize the attachment of such a car. *Michi-*

gan C. R. Co. v. Chicago & M. L. S. R. Co. 1 Ill. App. 399. All the courts, therefore, which have considered the question, except those of Georgia and possibly California (*Humphreys v. Hopkins*, 81 Cal. 551, 6 L.R.A. 792, 15 Am. St. Rep. 76, 22 Pac. 592, hold that such attachments are void; but they do not agree as to why they are void, nor lay down any rule to determine what constitutes an interference with interstate commerce, within the meaning of the Federal Constitution. The reasons the defendants urge for holding the attachment void are that it is forbidden (1) by the commerce clause of the Federal Constitution; (2) by § 5258 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3584; and (3) by the interstate commerce act.

(1) Is this attachment forbidden by the commerce clause of the Federal Constitution? Although the Supreme Court of the United States has not passed upon the precise point involved in this case, it has frequently considered the question of what constitutes an illegal interference with interstate commerce (*Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1032, 28 Sup. Ct. Rep. 638; *The Winnebago*, 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; *Delamater v. South Dakota*, 205 U. S. 93, 51 L. ed. 724, 27 Sup. Ct. Rep. 447, 10 A. & E. Ann. Cas. 733; *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 51 L. ed. 415, 27 Sup. Ct. Rep. 188, 9 A. & E. Ann. Cas. 736; *Martin v. Pittsburg & L. E. R. Co.* 203 U. S. 284, 51 L. ed. 184, 27 Sup. Ct. Rep. 100, 8 A. & E. Ann. Cas. 87; *New Mexico ex rel. McLean v. Denver & G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Foppiano v. Speed*, 199 U. S. 501, 50 L. ed. 288, 26 Sup. Ct. Rep. 138; *Old Dominion S. S. Co. v. Virginia*, 198 U. S. 299, 49 L. ed. 1059, 25 Sup. Ct. Rep. 686, 3 A. & E. Ann. Cas. 1100; *Field v. Barber Asphalt Paving Co.* 194 U. S. 618, 48 L. ed. 1142, 24 Sup. Ct. Rep. 784; *American Steel & Wire Co. v. Speed*, 192 U. S. 500, 48 L. ed. 538, 24 Sup. Ct. Rep. 365; *New York ex rel. Pennsylvania R. Co. v. Knight*, 192 U. S. 21, 48 L. ed. 325, 24 Sup. Ct. Rep. 202; *Pennsylvania R. Co. v. Hughes*, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Wisconsin & M. R. Co. v. Powers*, 191 U. S. 372, 48 L. ed. 229, 24 Sup. Ct. Rep. 107; *Allen v. Pullman's Palace Car Co.* 191 U. S. 171, 48 L. ed. 134, 24 Sup. Ct. Rep. 39; *Louisville & N. R. Co. v. Eubank*, 184 U. S. 27, 46 L. ed. 416, 22 Sup. Ct. Rep. 277; *Plumley v. Massachusetts*, 155 U. S. 461, 39 L. ed. 223, 5 Inters. Com. Rep. 590, 15 Sup. Ct. Rep. 154; *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6; *Sherlock v. Alling*, 93 U. S. 92

23 L. ed. 819); and "the argument in each case leads to the conclusion that if the thing attempted is in pursuance of a valid state law, its enforcement will not be stayed because it may incidentally affect interstate commerce" (*Southern Flour & Grain Co. v. Northern P. R. Co.* supra). The test, therefore, to determine whether the attachment in this case was forbidden by the commerce clause is to inquire (1) whether the statute which authorized it is a valid state law; and, if it is (2), whether the attachment of the car was a direct interference with interstate commerce. That the statute under which the attachment was made is a valid state law, enacted to enable creditors to collect their debts, and for no other or ulterior purpose, is not questioned. Hence the attachment of the car was not forbidden by the commerce clause of the Federal Constitution; for it is obvious that seizing a car when it is not in use does not directly affect either intrastate or interstate commerce.

(2) The next question is as to the effect of § 5258 of the Revised Statutes of the United States, U. S. Comp. Stat. 1901, p. 3564, on the validity of the attachment. That section provides that "every railroad company in the United States . . . is hereby authorized to carry upon and over its road . . . freight and property on their way from any state to another state, . . . and to connect with roads of other states so as to form continuous lines for the transportation of the same to the place of destination." As this section has been construed, it gives railroads, no matter where they are incorporated, the right to engage in interstate business in all parts of the United States, and to become jointly interested with roads in other states, in the interstate business originating on their lines. *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 192, 40 L. ed. 935, 938, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700. Consequently when the defendants made their contract with the Boston & Maine Railroad, they became jointly interested with that road in all the interstate business originating on either road, to be delivered to the other for purpose of carriage to its destination. When the defendants delivered the car in question to the Boston & Maine Railroad, they engaged in business in this state by their duly authorized agent,—the Boston & Maine Railroad. There is no force, therefore, in their contention that the attachment is a direct interference with interstate commerce because it compels them to come into a state in which they are not doing business, for the purpose of defending this suit; for they were doing business here when the car was attached, and will continue to do 29 L.R.A. (N.S.)

business here as long as their contract with the Boston & Maine Railroad remains in force. If § 5258 compelled the defendants to send their cars into this state, there would be force in their contention that it must be assumed Congress did not intend to compel them to follow cars all over the United States, in the defense of actions begun by attaching them. But as has been seen, § 5258 permits, but does not compel, the sending of cars by the defendants over other roads. Consequently, the presumption is that Congress intended, in case they availed themselves of the provisions of the section and sent their cars into this state, that they should stand as well as they would, and no better than they would, if they were incorporated here, or if they were the owners or lessees of the Boston & Maine Railroad. Neither does the defendants' contention that delivering freight to a connecting carrier outside this state, to be hauled into it, is not doing business here, come to anything. Even if it is sound as an abstract legal proposition, it has no application to the facts of this case. As has been seen, the defendants were jointly interested with the Boston & Maine Railroad in the safe delivery of the contents of the attached car to the consignee at Greenland. Act June 29, 1906, chap. 3591, 34 Stat. at L. 591, U. S. Comp. Stat. Supp. 1907, p. 892. Consequently they were doing business here in the same way every member of a partnership does business wherever any of his partners carry on the joint enterprise. But if it be conceded that the defendants are not doing business here, it is not a greater hardship to compel them to come here to defend this suit than it would be to send the plaintiff to New York to prosecute her claim against them.

If, therefore, the attachment in this case is forbidden by § 5258, the reason for it is not because the defendants have no place of business in this state, but because they were engaged in interstate commerce and used the car in question in that branch of their business; for, as has been seen, the section permits, but does not compel, them to engage in that traffic. *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.* (C.C.) 2 L.R.A. 289, 2 Inters. Com. Rep. 351, 37 Fed. 567, 625; *Cincinnati, N. O. & T. P. R. Co. v. Interstate Commerce Commission*, supra. Consequently there can be no presumption that Congress intended, in case the defendants accepted the provisions of the interstate commerce act, to exempt their cars from the operation of the laws of the states into which they were sent, when they would not be so exempted if they owned the roads over which the cars were sent, or if they hauled the cars over those roads

with their own engines. *Western U. Teleg. Co. v. Atty. Gen.* 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411, 32 L. ed. 229, 2 Inters. Com. Rep. 59, 8 Sup. Ct. Rep. 1127; *Leloup v. Mobile*, 127 U. S. 640, 32 L. ed. 311, 2 Inters. Com. Rep. 134, 8 Sup. Ct. Rep. 1380; *Atty. Gen. v. Western U. Teleg. Co.* 141 U. S. 40, 35 L. ed. 628, 11 Sup. Ct. Rep. 889; *Pullman's Palace Car Co. v. Pennsylvania*, 141 U. S. 18, 35 L. ed. 613, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; *Western U. Teleg. Co. v. Missouri*, 190 U. S. 413, 47 L. ed. 1116, 23 Sup. Ct. Rep. 730; *Central Stock Yards Co. v. Louisville & N. R. Co.* 192 U. S. 568, 48 L. ed. 565, 24 Sup. Ct. Rep. 339.

Since this is so, the same test should be applied to determine the validity of the attachment, in so far as § 5258 is concerned, as would be applied if the car were owned by the Boston & Maine Railroad. 20 *Harvard L. Rev.* 319, 320. As has already been stated, that test is to inquire whether the interference is direct or merely incidental. *Maine v. Grand Trunk R. Co.* 142 U. S. 217, 35 L. ed. 994, 3 Inters. Com. Rep. 807, 12 Sup. Ct. Rep. 121, 163. That this is the proper test will be apparent from an examination of any one of the different lines of cases which decide whether a particular act constitutes an illegal interference with interstate commerce. Take, for example, the decision relating to taxation. An examination of the cases shows that the test applied to determine the validity of a tax is not to inquire where the owner of the property resides or does business, but whether the tax directly affects interstate commerce; for although states cannot legally tax such commerce (*Galveston, H. & S. A. R. Co. v. Texas*, 210 U. S. 217, 52 L. ed. 1031, 28 Sup. Ct. Rep. 638), they may tax railroads as going concerns (*Maine v. Grand Trunk R. Co.* supra). Cars employed within the borders of a state may be taxed as capital employed there, notwithstanding they are used in interstate traffic, and their owners neither reside nor have places of business in the state. *New York ex rel. New York C. R. Co. v. Miller*, 202 U. S. 584, 50 L. ed. 1155, 26 Sup. Ct. Rep. 714; *Pullman's Palace Car Co. v. Pennsylvania*, supra.

(3) The attachment, therefore, created a valid lien on the car in favor of the plaintiff, unless the making of such an attachment is forbidden by the interstate commerce act (Act Feb. 4, 1887, chap. 104, 24 Stat. at L. 379, U. S. Comp. Stat. 1901, p. 3154). Sections 1, 6, 8, 9, and 10 of 29 L.R.A. (N.S.),

the act provide that it shall apply to all steam railroads engaged in interstate commerce, either over their own roads, or by virtue of the provisions of § 5258 of the Revised Statutes of the United States, that railroads shall make and post rates, and not change them without notice; and that one injured by a railroad's failure to comply with the provisions of the act shall have a civil remedy against the offending corporation, and also the right to enter a complaint with the interstate commerce commission. Sections 2, 3, 4, 5, and 7 forbid the railroads to which the act applies to make special rates or pooling agreements; to give preferences to either persons or places to charge more for a short haul than for a long haul in the same direction; or to combine to prevent the continuous carriage of goods. Sections 11 to 24 create the commission, impose its duties, and prescribe its mode of procedure. It is clear from the synopsis of the act that it was intended to enable railroads engaged in interstate commerce to avoid payment of their just debts, but to compel them to carry for all on equal terms and for a fair price, without unnecessary persons or places, and to prevent railroads which engage in the business, under the provisions of § 5258, from transshipping car-load lots of freight at connecting points. *Cincinnati, N. O. & T. P. R. v. Interstate Commerce Commission*, 184 U. S. 184, 187, 40 L. ed. 936, 5 Inters. Com. Rep. 391, 16 Sup. Ct. Rep. 700.

Is the attachment of freight cars which are not in actual use forbidden by the act? In other words, is a statute which permits their attachment in conflict with the provisions of the act? It seems clear that it is not. Such a statute is not open to the objection that it intends to promote the commerce at which the interstate commerce act is aimed, or that it directly, or indirectly, tends to defeat any of the purposes of the act. It was had in view when the legislation was acted. If our statute permitted the attachment of cars in transit, or even when they are in use, there would be some foundation for the contention that it is calculated to produce a direct interference with interstate commerce; but, as it does not forbid the attachment of cars which are not in use, it is not open to that objection.

Case discharged.

All concur.

Petition for rehearing denied.

OHIO SUPREME COURT.

JOHN PFANZ, Plff. in Err.,

v.

MAGDALENA HUMBURG et al.

(82 Ohio St. 1, 91 N. E. 863.)

Broker — commission — refusal of purchaser to take property — effect.

P., a real-estate agent, accepted the following written proposition: "Cincinnati, Ohio, May 2, 1905. John Pfanz, Agent: I hereby authorize you to sell for me the following described real estate, located at 2241 Flora place, for the sum of three thousand five hundred (\$3,500) dollars, on the following terms: Title to be perfect, free, and unencumbered; payments to be cash; and I agree to give you sole authori-

ty to sell the same for the period of ten days, and agree to pay you for services when the property is sold. Magdalena Humburg. William Humburg."

P. procured one who said he was willing to take the property at said price, and he paid the agent \$9.75, for which the agent gave a receipt, and turned the payment over to the vendors; but no written contract of purchase was entered into, nor was possession taken by the alleged purchaser, who afterwards refused to take the premises or complete the purchase by entering into an enforceable contract.

Held that the condition in said contract of employment, "to pay for services when the property is sold," has not been complied with by the agent, and he is not entitled to recover commission.

(March 15, 1910.)

Headnote by the COURT.

Note. — Effect of contract expressly making broker's right to commissions dependent upon "sale" of property or other condition beyond that ordinarily implied.

This note does not concern itself with the general question whether, under an ordinary contract with a broker for the sale of property, he must do anything more than to find a purchaser who is ready, willing, and able to take the property; but is limited strictly to such cases as *PFANZ v. HUMBURG*, which deal with the question as to what is necessary to entitle the broker to his commission when, according to the terms of a special contract, the payment thereof is dependent upon some condition to be fulfilled by the broker himself or by the vendor or purchaser.

Cases concerning contracts by the terms of which commissions were payable to a broker even though the sale of the property was effected by another broker or by the principal himself have been expressly excluded. Such cases may be found included in the notes to *Jennings v. Trummer*, 23 L.R.A.(N.S.) 164, and *Dalke v. Sivyver*, 27 L.R.A.(N.S.) 195.

The question of broker's right to commissions where he procures a purchaser at the price stated by his principal, but on slightly different terms in regard to cash or time of payment, and the owner refuses to consummate the sale, is discussed in a note to *Jepsen v. Marohn*, 21 L.R.A.(N.S.) 935.

In *Dorrington v. Powell*, 52 Neb. 440, 72 N. W. 587, it was held that commissions cannot be recovered for merely finding a purchaser, upon a sale never consummated, where there is a special contract on the part of the broker "to sell" and "dispose" of the property.

So, in *Schlansky v. Hillman*, 111 N. Y. Supp. 696, where commissions were to be paid a broker "when a contract for the sale was signed," it was held that he is not entitled thereto when no contract was ever signed, and the purchaser, although having

made an oral offer which the vendor accepted, abandoned the sale. The court said: "Plaintiffs' commissions depended upon plaintiffs' bringing the buyer and seller to an actual agreement, not a prospective or contemplated one. The commissions depended upon a sale of the property through their efforts, and where no binding contract for a sale is made, through the fault of the proposed purchaser procured by plaintiffs, the latter are not entitled to a recovery."

In *Reichard v. Wallach*, 91 N. Y. Supp. 347, it was held that failure to show that a contract was signed, where an agreement for broker's services provided that "commissions or brokerage will be paid only to the one who actually makes and finally completes the sale, and has the contract signed," showed no such compliance with the contract as to entitle the broker to commissions.

In *Parmly v. Head*, 33 Ill. App. 134, it was held that, where compensation is to be paid a broker "if the sale goes through," he does not entitle himself to claim it, if he brings a purchaser who says he will buy and verbally agrees to do so, but who, for no legal reason, refuses to complete the transaction.

In *Wenks v. Hazard* (Iowa) 121 N. W. 1058, it was held that a promise of commissions for finding a purchaser of a laundry business, "to whom the owner was willing to sell," contemplated finding a purchaser who was ready, willing, and able to buy. The court said: "The appellee contends here that his undertaking was to procure 'a purchaser to whom the defendant was willing to sell.' His argument is, in effect, that he did not undertake to procure a purchaser who was 'ready, willing, and able to buy.' If this distinction could be tolerated at all, the ground upon which the plaintiff so stands is not supported by his own testimony as a witness. There seems to be an attempt in his petition to preserve a line of distinction between the ordinary procuring of a purchaser ready,

ERROR to the Circuit Court for Hamilton County to review a judgment affirming a judgment of the Court of Common Pleas entered on a directed verdict for defendants in an action brought to recover commissions for procuring a purchaser for certain real estate. Affirmed.

Statement by Price, J.:

The controversy between the parties was first heard by a justice of the peace, where the plaintiff in error prevailed and recovered judgment against the defendants in error. The latter appealed to the court of common pleas, where an issue was made up by the petition and answer thereto. As the contract between the parties is copied in the petition, we make the petition a part of this statement, as follows: "For his cause of action against the defendants herein, plaintiff says that on May 2, 1905, he entered into a contract in writing with the defendants herein, a copy of which is as follows, to wit:

willing, and able to buy, and the procuring of a purchaser 'to whom the defendant was willing to sell.' Even under this allegation, the plaintiff was required to find 'a purchaser.' A purchaser must be deemed one who actually purchases, or is ready, willing, and able to purchase. McLeod is not shown to be a purchaser within either view. We may as well say, however, that the distinction pressed upon us at this point is without merit. An owner of property who wishes to sell can have no occasion to employ brokers to find persons to whom he is 'willing to sell.' He is confronted with no difficulty at this point. There are thousands of persons constantly within his range of vision, to any one of whom he would be 'willing to sell.' His problem is to find the man who is ready, willing, and able to buy on his terms. And this is the very basis of the recognition which the law gives to the business of the broker as such."

But in *Lunsford v. Bailey*, 142 Ala. 319, 38 So. 362, where a real-estate broker agreed "to procure a customer" for certain property for a stated price, it was held that a complaint alleging compliance with such agreement was not demurrable for failing to allege that the customer was ready, able, and willing to pay for the property.

It has been held that where a broker for the sale of property was to be paid commissions "when title passed," he is not entitled thereto, if for some reason the purchaser fails to complete the transaction. *Fittichauer v. Van Wyck*, 92 N. Y. Supp. 241; *Couper v. O'Neill*, 53 Misc. 319, 103 N. Y. Supp. 122.

So, where commissions are due and payable when goods are "shipped, accepted, and paid for," such conditions are precedent to the right of the broker to demand the com-

"Cincinnati, Ohio, May 2, 1905.

"John Pfanz, Agent:

"I hereby authorize you to sell for me the following described real estate, located at 2241 Flora place, for the sum of three thousand five hundred (\$3,500) dollars, on the following terms: Title to be perfect, free, and unencumbered; payments to be cash; and I agree to give you sole authority to sell the same for the period of ten days, and agree to pay you for services when the property is sold.

"Magdalena Humburg.

"William Humburg.

"Plaintiff says that on or about May 9, 1905, he procured in writing a purchaser for the said premises, in accordance with the terms of said contract, who was ready, able, and willing to purchase said property in accordance with the terms of the contract above set forth, and so notified the defendants. Plaintiff says further that, having done and performed all the things by

mission for bringing about the sale. *Hillman v. Joseph*, 9 Pa. Super. Ct. 1.

However, a contract which provided that no commissions were to be paid until title passed, and if for any reason title could not be passed, no commissions were to be paid whatever, was held, in *Greenwald v. Rosen*, 61 Misc. 260, 113 N. Y. Supp. 764, not to contemplate an arbitrary refusal of the vendor to complete the transaction, but was intended to take effect only if the consummation of the transaction was prevented by circumstances beyond the vendor's control.

In *Micks v. Stevenson*, 22 Ind. App. 475, 51 N. E. 492, it was held that a sale was "consummated" so as to entitle a broker to commissions for effecting it, when the contract of sale was executed, although such contract of sale was conditional, and the conditions were never complied with.

And where the payment of commissions is dependent upon the "consummation" of the sale, if the vendors elect to sue for specific performance, and recover a collectable judgment for the price of the property sold, the broker is entitled to his commission, as the sale is thereby consummated. *Lawler v. Armstrong*, 53 Wash. 664, 102 Pac. 775.

In *Alvord v. Cook*, 174 Mass. 120, 54 N. E. 499, where a broker had obtained for his principal a contract with a third person for the exchange of real estate, which, however, was never enforced, it was held that a promise to pay commissions, part in the land to be received in exchange and part in cash, "when the agreement is carried into effect," fixed the time beyond which the broker was not called upon to wait, and was not a condition of payment. The court took occasion to say: "The plaintiffs had done all they were employed to do. They had obtained for the defend-

him to be done under said contract on his part, he made demand of said defendants for \$70, being the amount due him for compensation on said sale, and a reasonable sum due him for services thus rendered; but that the defendants refused to pay him said sum of \$70 thus due him as aforesaid." Then follows a prayer for judgment for the amount and interest thereon.

The following answer was filed: "And now come the defendants, and for answer say that they admit that this cause comes into this court on appeal from the judgment of James M. Brant, justice of the peace in and for Cincinnati township, and that they entered into the written contract dated May 2, 1905, a copy of which is set out in the petition. For further answer these defendants deny each and every other allegation in the petition contained."

The case came to trial before a jury, and, after the plaintiff had introduced his testimony and rested, the defendants moved the court to direct a verdict in their favor, and

the court sustained the motion, overruled motion for new trial, and rendered judgment on the directed verdict. The circuit court affirmed the judgment.

Messrs. A. L. Herrlinger and Edward T. Dixon for plaintiff in error.

Messrs. Renner & Renner and Eugene Helm for defendants in error.

Price, J., delivered the opinion of the court:

When the plaintiff closed his evidence he had made no better case than he had stated in a very vulnerable petition. The petition shows that the right to compensation depended upon a completed sale. The contract under which this agent was acting authorized him to sell the property therein described on terms clearly stated: "Title to be perfect, free, and unencumbered." He was given sole authority to make the sale for a period of ten days, and the owners agreed to "pay you [the agent] for services when the property is sold."

ants a contract with Jewell, which the defendants could compel him to carry out, and all parties expected it would be carried out. The plaintiffs had no further power in the matter,—the rest was to be done by the defendants. But they had the right to assume that the defendants would use all reasonable efforts to do the rest, and to avail themselves of the agreement with Jewell. The defendants needed nothing to protect them, because all parties assumed that the contract was valid, and the defendants were masters of the situation as to whether it should be carried out. It is not reasonable to suppose that the plaintiffs intended to leave the question of the payment of their commission in a matter where they had performed their whole duty by obtaining a valid enforceable agreement for the exchange of the property, to the chance of a subsequent cancellation of the agreement between the defendants and Jewell, or to the whim or caprice of either of the principals. Such an interpretation does not seem natural under the circumstances."

So, in *Meltzer v. Straus*, 61 Misc. 250, 113 N. Y. Supp. 583, it was held that a contract agreeing to pay brokers commissions on "closing of title" fixes the time when the commission shall be payable, and is not a condition precedent to a recovery of the brokerage.

So, in *Morgan v. Calvert*, 126 App. Div. 327, 110 N. Y. Supp. 855, where a broker was promised a certain sum of money as commissions on the execution of the contract of sale for a certain sum or over, and the balance "at the closing of the title," it was held that this merely fixed the time of payment, and such being set for a certain day by the contract of sale, the commissions were then payable, though defects in the title rendered it impossible for the owner to complete the sale at that time. 29 L.R.A. (N.S.)

A case closely related to the above, although not strictly in point, is *Kerfoot v. Steele*, 113 Ill. 610, where it was held that brokers who had been authorized to buy certain property from certain persons, and, in consideration of their services in connection "with said purchase," had been promised a commission, are not entitled to further compensation because, in addition to securing a conditional contract of sale from the person who had the apparent title, they aided the principal in various ways in foreclosure proceedings found necessary to secure complete title. The court said that the services sued for were all performed anterior to the execution of the foreclosure deed, and in and about the consummating of the title, and might be fairly considered as services "in connection with said purchase."

The general question of performance by a real-estate broker of his contract to find a purchaser or effect an exchange of his principal's property is discussed in a note to *Lunney v. Healey*, 44 L.R.A. 593.

The power of a real-estate broker to make a contract of sale is discussed in notes to *Weatherhead v. Ettinger*, 17 L.R.A. (N.S.) 210, and *Jasper v. Wilson*, 23 L.R.A. (N.S.) 982.

For cases on broker's right to commission on failure of employer's title, see notes to *Yoder v. Randol*, 3 L.R.A. (N.S.) 576, and *Little v. Fleishman*, 24 L.R.A. (N.S.) 1182.

The question of mutuality of contract giving a real-estate broker exclusive authority to sell, or promising him commissions in case of sale by anyone else, but which does not in terms impose any obligations upon him, is discussed in a note to *Schoenmann v. Whitt*, 19 L.R.A. (N.S.) 598.

G. V.

There is no averment in the petition that the property was sold; but the averment is that plaintiff, on or about the 9th of May, 1905, "procured in writing a purchaser for the said premises, in accordance with the terms of said contract, who was ready, able and willing to purchase said property in accordance with the terms of the contract above set forth, and so notified the defendants." This falls far short of making a sale, for many untoward incidents may occur after a purchaser is procured, which may defeat a sale, without any fault on the part of the owners, the principals. This agent knew a Mr. Ohlinger, who had made inquiry about property, and the agent took him to the Humburg premises, and they were examined by Ohlinger and also by his wife. They seemed satisfied with the property and the terms, and orally agreed to pay the price. But no contract was reduced to writing, and of course none signed. Ohlinger paid the agent \$9.75, for which the latter gave a receipt. This receipt signed by plaintiff, the agent, stated: "The title to said property must be good and unencumbered, except the taxes in December, 1905, and thereafter." The agent turned the \$9.75 over to the Humburgs, taking their receipt therefor. But Ohlinger signed no writing whatever. And aside from the above contract of agency, the Humburgs signed nothing except a receipt to the agent for the \$9.75. Ohlinger did not take possession, and nothing further was done towards completing a sale. The plaintiff's testimony shows that, after Ohlinger had paid the \$9.75, his attorney examined the title, pronounced it bad, and advised Ohlinger against buying the property, and he acted on that advice, and there all negotiations ended. Neither the owners in person or by the agent, nor the prospective purchaser, signed any contract of sale, and, as possession was not taken, there was nothing but an unenforceable parol agreement. If this be true, it is quite certain there had been no valid sale made. The agent failed to procure a contract of purchase and sale, which the owners could enforce, and under his contract of agency he was required to make a sale, or secure a valid contract for the same, in order to receive compensation. This agency contract was not to merely procure an able, willing, and ready purchaser, but the owners agree to pay for services when the property is sold. This condition is not met where a parol contract is made which cannot be enforced.

As said in *Wilson v. Mason*, 158 Ill. 304-311, 49 Am. St. Rep. 162, 42 N. E. 134, 136: "The true rule is that the broker is entitled to his commissions, if the purchaser pre-

sented by him and the vendor, his employer, enter into a valid, binding, and enforceable contract. . . . An agreement by a real-estate broker to procure a purchaser not only implies that the purchaser shall be one able to comply, but that the seller and the purchaser must be bound to each other in a valid contract. So, where the agreement of the real-estate broker is to make a sale, his commission is earned when a contract is entered into, which is mutually obligatory upon the vendor and vendee, even though the vendee afterwards refuses to execute his part of the contract of sale or purchase. . . . An oral agreement upon the part of the purchaser of land would not be a valid agreement; and if he refused to complete the sale of land after such oral agreement, without fault upon the part of the seller, the obligation of the broker would not be fulfilled, and he could not recover his commissions."

This authority fully covers the present question, and we are satisfied with it. The failure to complete the sale in the present case was not through the fault of the sellers, for the record shows they tendered a deed to Ohlinger and urged his acceptance. The reason for refusal given by Ohlinger was that the title was not good; but the nature of the defect, if any, does not appear in the record. The above case cites others, and they may be found in the brief. Many of the authorities cited for plaintiff in error treat of cases where the sale failed of completion because of the conduct or default of the principal, and where the agent had performed his whole duty.

The plaintiff in error, through his counsel, makes the proposition that, "where the real-estate agent finds a purchaser who is ready, willing, and able to take the property at the stipulated price, no written contract of purchase signed by the prospective purchaser is necessary to enable the agent to recover his commission." As a general rule, we may assent to it; but it cannot be used to determine every case, especially in a case where the contract of agency is specific and clear as to the condition upon which commission can be recovered. Nor do we intend to hold that as a general rule it is a part of the agent's duty to enter into a written contract with the purchaser for the sale of the property. This court held, in *Weatherhead v. Ettinger*, 78 Ohio St. 104, 17 L.R.A.(N.S.) 210, 84 N. E. 598, that "a real-estate broker is without authority to execute a contract of sale which shall be binding upon one who places real estate in his hands for sale, unless such authority is specially conferred." But the agent should go far enough to find a ready,

able, and willing purchaser, and bring him and the owner together so that they may enter into a binding contract of sale and purchase. However, we need not further notice or discuss cases cited for plaintiff in error, because it appears in the evidence in this case that the agent drafted the contract of agency involved here, and prepared it for the signature of his principals. He placed in it a condition not frequently found in such agency contracts, and it differentiates this from the numerous cases cited in brief for plaintiff in error. After giving him sole authority for ten days to sell the property at the price named, title to be perfect, free, and unencumbered, the owners agree to pay the agent for services when the property is sold. It is not averred in the petition, nor is it established by any evidence introduced by the agent, that a sale was made.

The writing, and the only writing between the purchaser and agent, was merely a receipt which the agent gave Ohlinger for \$9.75 to be applied on the purchase price of the premises. He procured no obligation signed by Ohlinger. Therefore there was no sale made,—no enforceable contract entered into by either vendor or vendee.

We find no error in the judgment of the lower court, and its judgment is affirmed.

Summers, Ch. J., and Crew, Spear, Davis, and Shauck, JJ., concur.

RHODE ISLAND SUPREME COURT.

MARIA KEARNER, Admr., etc., of Albert C. Kearner, Deceased,
v.

CHARLES S. TANNER COMPANY.

(— R. I. —, 76 Atl. 833.)

Evidence — explosion in factory — res ipsa loquitur.

1. The doctrine of *res ipsa loquitur* obtains in case of an explosion in a starch factory, throwing the walls outward upon a person passing upon the adjoining highway, placing upon the owner of the factory the burden of explaining the cause of the explosion and showing that it was not caused by his negligence.

Note. — Opinion of expert witness as basis of question to other witnesses.

As a general rule it is not proper, in asking hypothetical questions, to incorporate in them the opinions of other expert witnesses, for the reason that an opinion of a witness must rest upon the facts.

"If it were otherwise," says the court in *Louisville, N. A. & C. R. Co. v. Falvey*, 29 L.R.A. (N.S.);

Same — presumption as to location of origin.

2. In the absence of proof to the contrary, it will be presumed that the cause of an explosion in a portion of a building originated where the explosion occurred, and one contending that it originated elsewhere has the burden of establishing that fact.

Same — expert testimony — predicated upon opinions.

3. Hypothetical questions to expert witnesses cannot be predicated upon the opinion of witnesses as to the possible cause of an explosion in a starch factory.

Appeal — hypothetical questions based on opinion — method of showing.

4. A reviewing court will not examine and analyze the testimony in a case, to determine whether or not hypothetical questions to an expert witness were based on opinions of other witnesses, but to make such question objectionable in form because of that fact it must be determinable upon the mere inspection of the question.

Same — objectionable questions — effect.

5. A verdict cannot be disturbed by a reviewing court on the theory that the jury must have been impressed with the truth of the opinions of a witness upon which hypothetical questions to experts were founded, by the reiteration of such questions containing assumptions founded upon such opinions.

(July 7, 1910.)

EXCEPTIONS by defendant to rulings of the Superior Court for Providence County made during the trial of an action brought to recover damages for the death of plaintiff's intestate which was alleged to have been caused by defendant's negligence, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Messrs. Vincent, Boss, & Barnefield, Charles A. Wilson, and Alexander L. Churchill, for defendant:

The plaintiff failed to show that the explosion originated in that part of the building occupied by the defendant, and the verdict is against the law and the evidence in that respect.

Chester v. Cape May Real Estate Co. (N. J. L.) 73 Atl. 836; *Wadsworth v. Boston Elev. R. Co.* 182 Mass. 573, 66 N. E. 421; *McGee v. Boston Elev. R. Co.* 187 Mass.

104 Ind. 409, 3 N. E. 389, 4 N. E. 908, opinions might be built upon the opinions of experts, and the substantial facts driven out of the case.

To the same effect is *Williams v. State*, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512, which is set out in the opinion of *KEARNER v. CHARLES S. TANNER Co.*

Thus, a hypothetical question propounded to a physician as to the cause of death was

669, 73 N. E. 657; Ruppert v. Brooklyn Heights R. Co. 154 N. Y. 90, 47 N. E. 971; Searles v. Manhattan R. Co. 101 N. Y. 661, 5 N. E. 66; Musbach v. Wisconsin Chair Co. 108 Wis. 57, 84 N. W. 36.

Where there are several possible causes to account for the explosion, the burden of proof rests on the plaintiff to prove the one for which the defendant would be liable.

Musbach v. Wisconsin Chair Co. supra; Babcock v. Fitchburg R. Co. 140 N. Y. 308, 35 N. E. 596; McGee v. Boston Elev. R. Co. and Searles v. Manhattan R. Co. supra; Warn v. Davis Oil Co. 61 Fed. 631; Dunlavey v. Racine Malleable & Wrought Iron Co. 110 Wis. 391, 85 N. W. 1025.

Messrs. Comstock & Canning and Jeremiah E. O'Connell, for plaintiff:

The doctrine of *res ipsa loquitur* is applicable.

Cox v. Providence Gas Co. 17 R. I. 199, 21 Atl. 344; Bridges v. North London R. Co. L. R. 6 Q. B. 391; Parker v. Providence & S. S. B. Co. 17 R. I. 376, 14 L.R.A. 414, 33 Am. St. Rep. 869, 22 Atl. 284, 23 Atl. 102; Ellis v. Waldron, 19 R. I. 369, 33 Atl. 869; Edwards v. Manufacturers' Bldg. Co. 27 R. I. 248, 2 L.R.A.(N.S.) 744, 114 Am. St. Rep. 37, 61 Atl. 646, 8 A. & E. Ann. Cas. 974; Gorman v. Hand Brewing Co. 28 R. I. 180, 66 Atl. 209.

not open to the objection that it did not fairly reflect the evidence, because it did not include the statement that the physician who had treated the deceased for the injury had discharged him as cured. Ward v. Aetna L. Ins. Co. 82 Neb. 499, 118 N. W. 70. To have done so, said the court, would have required the witness to base his opinion partly upon the opinion of the attending physician, when he should be required to give his judgment independently upon the facts stated to him. *Ibid*.

So, an offer to show incompetency of a brewer, by expert testimony, as to the quality of beer made, was held in Texas Brewing Co. v. Walters (Tex. Civ. App.) 43 S. W. 548, to be properly excluded where the evidence to be given by the witness was derived from the investigations of other experts employed by the witness, but not shown to have been made in his presence.

In Howland v. Oakland Consol. Street R. Co. 110 Cal. 513, 42 Pac. 983, in an action for personal injuries resulting in a miscarriage, it was held permissible to ask the physician who had been called in consultation too late to know personally the immediate character of the injuries, as to what, in his judgment, was the cause of the miscarriage, assuming the statement made by the attending physician to be true, and the character of the injuries described by him to have been inflicted by the collision, since the question did not improperly call for the 29 L.R.A.(N.S.).

Dubols, Ch. J., delivered the opinion of the court:

This is an action of trespass on the case for negligence brought by the widow of Albert C. Kearner, in her capacity as administratrix of his estate, to recover, for the benefit of herself and minor children, damages from the defendant corporation arising from the death of her intestate husband, which she alleged was caused by the negligence of the defendant company on the 12th day of February in the year 1908. The case was tried in the superior court before a jury, and resulted in a verdict for the plaintiff, which the justice presiding at the trial refused to disturb upon a motion for a new trial; and the case was brought to this court upon the defendant's exceptions to various rulings of said justice, including his denial of the motion for a new trial.

It appears in evidence that on the day aforesaid, between 4:10 and 4:30 o'clock in the afternoon, two or more explosions occurred in a building on the easterly side of South Main street, between Coin and Silver streets, in the city of Providence, Rhode Island, which threw the stone walls of the building down into South Water street, as well as into Coin street, on the corner of which streets the body of said Albert C.

opinion of one witness based upon that of another, but that it simply called for the opinion of the witness as to the inducing cause of the condition in which he found the patient, assuming the injuries to have been as described.

In Foster v. Dickerson, 64 Vt. 233, 24 Atl. 253, where the issue was the mental capacity of the testatrix, an expert was asked: "Assuming the testatrix was insane in 1876, what is your opinion of her having recovered at that time in 1885, taking it just as the doctor states it." It was urged that this was error, for the reason that the opinion and the conclusion of the doctor were made a part of the basis of the opinion of the witness, but the court held that the question only called for the witness's opinion upon the facts, to which the doctor deposed as to the mental condition of the testatrix, as bearing upon the question whether she had recovered.

On an issue as to whether an illness suffered by plaintiff had been aggravated by being carried past his destination on defendant's train, whereby he became permanently paralyzed, it was held in Nelson v. Chicago & N. W. R. Co. 130 Wis. 214, 109 N. W. 933, to be proper to take the opinion of the physicians as to plaintiff's condition at the time he was carried past his destination as the basis for hypothetical questions propounded to other medical experts.

A. L. R.

Kearner was found the next day under the *débris*. It was admitted at the trial that the death of the plaintiff's intestate was caused by portions of the wall of the building falling upon him, and that he was rightfully upon the highway as a traveler and in the exercise of due care at the time. The building, which was wrecked by the explosion and partially consumed by the ensuing fire, was a structure $3\frac{1}{2}$ stories in height, was about 80 feet in length by about 48 feet in width, and was bounded as follows: On the north by Silver street, on the east by an area or alleyway running from Silver street to Coin street, on the South by Coin street, and on the west by South Water street. With the exception of two rooms on the ground floor, the entire building was occupied by the defendant company and used in the manufacture of starch, gums, and dextrine. These two rooms were occupied by Abbott L. G. Chase, a grocer and ship chandler. One was on the corner of Coin and South Water streets and fronted on the latter. It was about 18 feet in width by about 40 feet in length and was used by Mr. Chase for his grocery store. The other, a room of equal size, separated from the grocery department by a brick wall, adjoined it on the north and also had its entrance on South Water street. This room was used by Mr. Chase for his ship chandlery shop. The rear wall at the easterly extremity of these rooms was about 2 feet distant from the westerly end of the furnace and oven room of the defendant, and the northerly wall of the chandlery shop was about half-way between Coin and Silver streets. There was no communication between the two rooms aforesaid or between the premises of Mr. Chase and those of the defendant, while there was free communication between the several parts of the building occupied by the defendant. The remainder of the ground floor of the building was used by the defendant, which had its offices in the room at the corner of Silver and South Water streets, and the next room, south of its offices and between them and the ship chandlery shop of Mr. Chase, was a room occupied by the defendant for storage purposes. In the rear of its offices was another storage room, and beyond that to the east was its engine room. To the east of the building occupied by Mr. Chase and the defendant, as aforesaid, was another two-story building adjoining the northerly half of the first-mentioned building, the ground floor of which was used by the defendant in part for storage and furnace and boiler rooms. There were four furnaces in all, which, for the purposes of the trial, were described as though numbered from north to south 1, 2, 3, and 4.

This building measured about 30 feet in width and extended from Silver to Coin streets. The portion that adjoined the premises already described as occupied by the defendant consisted of a room used for storage, the boiler and furnace No. 1, while furnaces Nos. 2, 3, and 4 were opposite the rear end of the premises occupied by Mr. Chase, but separated therefrom by a space, measuring $1\frac{1}{2}$ to 2 feet in width, between the exterior walls of the building.

The furnaces were on the east side of the building wherein they were located. The next building east of the one in which the furnaces were contained was a double tenement house which fronted on South Main street, and extended from Silver to Coin streets. Its western, or rear, wall for a distance of about 58 feet, from Silver street southerly, was 22 feet distant from the further building of the defendant, and for a distance of about 20 feet from Coin street northerly was only 16 feet from the defendant's said building. In other words, there was a projection in the rear of the tenement house which made it 6 feet nearer to that part of the building containing furnaces numbered 3 and 4, than it was to the remainder of the building. The oven room, where the products of the defendant's manufacture were baked, was directly over the furnace room; but there was no flooring between the furnaces and ovens which were directly over them. The floor between the furnace room and the oven room stopped at the entrances to the ovens. Each oven had two iron doors, which were set in grooves and could be raised by handles with the aid of counter weights. Rails were laid inside of the ovens, from the doors to the rear of the oven chambers, and between these rails were placed strips of sheet iron, which could easily be sprung in or out, for the purpose of equalizing the heat in the oven. These rails supported trucks holding pans in which starch was baked. Oven No. 4 was piped in such a manner that it was possible to carry hot gas from the furnace into and around the oven when required. To accomplish this purpose pipes had been connected with the chimney pipe at a point between the damper and the furnace bed, which, after passing around the interior of the oven, returned to the chimney pipe at a point beyond the damper, so that, when it was necessary to create in the oven the degree of heat required to bake starch, a temperature ranging from 220° to 300° Fahrenheit, according to the testimony, the damper would be closed, and thereby the hot gas would be caused to circulate in and around the oven and from thence into the chimney by

this indirect route, which was from 25 to 30 feet more than the distance from the furnace to the chimney through the chimney pipe.

Fifteen minutes before the explosion two men were working in the oven room in front of the ovens, and had nearly filled all the pans provided to be used for that baking. Oven No. 4 was to receive the first load. In the morning after the explosion one door of oven No. 4 was found partly raised, bent over at the top and wedged in its groove, and the other door was found lying on top of the oven, together with part of the roof of the building. The interior of this oven was somewhat damaged at the top and to the right of the door nearest Coin street, and the heat radiating pipes therein were found burst open at the joints. In a section of this pipe between the furnace and damper was found a corroded hole about 2 inches long and several smaller corroded holes large enough to admit the insertion of a lead pencil. The firebox door was found closed. In the furnace bed there was a circle of unconsumed coal forming an outer rim of about 4 inches in width, while in the center was a circle of coal burned to ashes. The diameter of this furnace bed was 14 inches. The damper in the chimney pipe was found partly closed. The oven room was found to contain more or less wreckage, and brick from the outer wall in rear of the ovens was found in the alleyway adjoining the building. The plaintiff contended that the death of her husband was caused by the wrecking of the building through an explosion caused by the negligence of the defendant; that this explosion was the result of fire coming into contact with starch dust, which was shown to be present in large quantities upon the premises of the defendant, and also was shown to be highly explosive under certain conditions.

The defendant did not deny that there was an explosion of starch dust upon its premises, and that this explosion was the cause of the principal damage to the building; but it contended that the initial and more violent explosion occurred in the ship chandlery shop of Mr. Chase, whence it was transmitted to the defendant's premises and caused the second explosion. No eyewitness testified that the first explosion occurred in Mr. Chase's shop; but the theory of the experts who testified in behalf of the defendant is that the first explosion occurred in the shop of Mr. Chase and was the result of spontaneous combustion; that in the storage room of Mr. Chase were a great variety of highly inflammable and explosive substances, including tar, pitch, tur-

pentine, rosin, kerosene, linseed oil, oakum, and solarine, a polish composed partly of naphtha. No fire was kept in this storehouse, and the lantern used to illuminate the place was generally lighted in the other store. If the first explosion occurred within the premises of Mr. Chase, hereinbefore described, and threw down a wall belonging to the same which fell upon and killed Mr. Kearner, the plaintiff cannot recover in this action; but if the deceased was crushed to death by fragments of a wall in that portion of the building aforesaid which was occupied by the defendant, which was thrust out upon him by the force of an explosion of starch dust which the defendant negligently had allowed to accumulate upon its premises in the building aforesaid, another and a totally different question would be presented. There are at least three theories that might be presented in explanation of the cause of the accident in this case: First, that the initial explosion occurred in the ship chandlery shop upon the Chase premises, and, by direct action, threw down the wall upon and thereby caused the death of the plaintiff's intestate. Second, that the first explosion occurred upon the premises of the defendant, and either directly or indirectly, by means of another explosion, upset the wall, which fell upon and killed the decedent. Or, third, that the initial explosion occurred upon the premises of Mr. Chase, through spontaneous combustion, or by reason of the negligence of Mr. Chase or otherwise, and communicated with and caused an explosion of starch dust upon the premises of the defendant, whereby the walls which fell upon and killed Mr. Kearner were thrown down. As it appears that the portions of the building which fell upon and killed Mr. Kearner came from the premises of the defendant, probably from the walls of the second story, and not from the premises of Mr. Chase, it will be unnecessary to consider the first theory. The second theory is the one advanced in behalf of the plaintiff, and the third theory is that of the defendant. It was assumed by the court, as well as by the counsel for the respective parties, and in substance the jury were instructed, that, if the third theory should be adopted by them, a verdict for the defendant must necessarily ensue; that is to say, that the doctrine of concurring causes is not applicable in the case of successive explosions communicated from the premises of one person to those of another. As the jury found for the plaintiff the question of the correctness of the assumption is not presented for our determination in the present case, and the same

may be dismissed without further consideration.

In the trial of the case the parties advocated their respective theories aforesaid, and each offered evidence tending to support his own and to weaken that of his opponent. The efforts of the plaintiff in this behalf necessarily were limited by the scope of her declaration, wherein she sets out the negligence of the defendant, resulting in the death of her husband, in six counts, the gist of which may be said to be the following: First, that the defendant allowed dangerous gases to accumulate and explode upon its premises. Second, that it allowed gas, fumes, and vapor to escape from the pipes of its furnace and ovens, and to come into contact with starch dust in the oven rooms and thereby cause an explosion. Third and sixth, that it failed to inspect the pipes leading from the furnaces to the ovens. Fourth, that it so managed its business as to cause an explosion. Fifth, that it allowed the air of the oven room to become impregnated with starch dust. By its plea of not guilty to each of said counts, the defendants put in issue the foregoing allegations of facts.

After verdict the defendant duly filed its motion for a new trial, alleging therefor nine causes, as follows: "First. Because the verdict is against the law and the evidence and the weight thereof. Second. Because the testimony fails to show that the defendant was guilty of any negligence. Third. Because the testimony fails to show that the defendant was guilty of the negligence alleged against it in the several counts of the plaintiff's declaration. Fourth. Because the testimony fails to show that any negligence of the defendant, as alleged in the several counts of the plaintiff's declaration, was the proximate cause of the accident. Fifth. Because the plaintiff failed to sustain the burden of proof cast upon her by law. Sixth. Because the defendant fully met whatever burden was cast upon it by the doctrine of *res ipsa loquitur*, and no negligence on its part, as the proximate cause of the accident, appeared. Seventh. Because the testimony showed that the proximate cause of the accident was an event happening upon the premises of a third person, beyond the defendant's control, and for which the defendant was in no way responsible. Eighth. Because the damages awarded by the jury are not sustained by the evidence. Ninth. Because the damages awarded by the jury are excessive and unjust."

Said motion was denied by the justice of the superior court for the reasons contained in the following decision "Brown, J.: There 29 L.R.A. (N.S.)

is no reason to doubt from the evidence that the deceased lost his life as a result of the second explosion, which followed immediately after the first. The main contention is as to where the original explosion occurred. If upon the defendant's premises, the defendant is clearly liable; if upon the Chase premises, the defendant is as clearly not liable. The issue upon this point is complicated by a third explosion, which occurred about thirty minutes after the first. The walls of the buildings and the *débris* of the ruins were so disturbed by this third explosion as to make any speculation as to the place of the original explosion based upon the situation of the *débris* of little value. Mr. Scott, who was present and saw the third explosion, testified that as a result of this explosion the remaining walls in the center of the front part of the building went into the street, with pieces of machinery, and barrels and bags and things commenced to go into the street. It is not improbable that this explosion caused the roof to move, and this may account for the fact that the roof which had been thrown up by the first explosions lay somewhat to the east and projected over that side of the building after the third explosion. Both Mr. Scott and Mr. Lincoln saw the lamp chimneys on the shelf attached to the partition wall between the Chase and defendant's premises after the explosion, also ropes coiled up and in order upon the floor of the Chase storage room after the explosion. If the original explosion had occurred in the Chase storage room, it would seem that these chimneys and ropes would have been disturbed. The defendant insisted that an explosion had occurred in the Chase storage room, and this caused the explosion on the defendant's premises, and attempted to account for an explosion at this place by spontaneous combustion of the highly combustible and inflammable material there, and offered expert testimony to the effect that such explosion was possible. Experts of repute gave it as their opinion that the original explosion occurred by reason of spontaneous combustion in the Chase storage room. The plaintiff offered expert testimony to the effect that in their opinion spontaneous combustion could not occur under the conditions prevailing in the Chase storage room at the time. Upon this issue the jury found for the plaintiff. The plaintiff offered expert testimony to the effect that in their opinion the original explosion occurred in one of the defendant's ovens and as a result a flame was admitted to the oven room, where starch dust existed in large quantities, which was ignited, and that the explosion

was produced in this manner. Upon all of the evidence the court cannot say it is clear that the jury was not warranted in finding for the plaintiff, nor is it clear that the damages are so grossly excessive as to warrant interference by the court. Motion for new trial is denied.

After the denial of its motion for a new trial, the defendant filed its bill of exceptions alleging twenty-three errors on the part of said justice in his rulings during said trial, to which the defendant had duly excepted; the exceptions now relied upon being:

"First. To the ruling of the trial justice denying the defendant's motion for a direction of a verdict for the defendant, which motion was made upon the ground that there was no sufficient proof or evidence that the defendant was guilty of the negligence alleged against it in the several counts of the plaintiff's declaration, upon the ground that there was no sufficient evidence under the fourth count of said declaration to enable the plaintiff to invoke the principle of *res ipsa loquitur*, and that, even if said principle could have been properly invoked under said fourth count, the defendant fully met and satisfied by evidence any burden resting upon it by virtue of said principle, upon the ground that the plaintiff failed to locate by sufficient evidence that the place of the original explosion was upon the premises controlled by the defendant, and upon the ground that the testimony conclusively showed that the original explosion occurred on the premises not controlled by the defendant, and for which original explosion the defendant was not responsible. To which ruling denying said motion the defendant duly excepted.

"Second. To the charge of the trial justice to the jury, instructing the jury as follows: 'There is a law which prevails in this state, to the effect that where the cause or the instrumentality of the accident is under the control of the defendant, and an accident occurs, such as does not ordinarily occur when prudence and due care in the conduct of the business has been exercised, in such case the very fact that the accident has occurred is prima facie evidence of negligence on the part of the person under whose control the cause or this instrumentality existed when the accident occurred. So that, if you find by a fair preponderance of evidence in this case that this explosion—the original explosion, I mean—occurred upon the Tanner premises, and was under the Tanner control, in that case there is an inference,—you are entitled to draw an inference, the law draws the inference,—that the explosion was the result of negligence

on the part of the defendant company; and the law imposes upon the defendant the burden of explaining away and freeing itself from the imputation of negligence, which arises from the very fact that the explosion occurred; and if the defendant has failed in your minds to explain away and to free itself from the imputation of negligence which has arisen, in that case you will be justified, under the law, in inferring that the explosion occurred by reason of the defendant's negligence,'—as shown on pages 1034 and 1035 of the transcript of testimony. To which ruling and instruction the defendant duly excepted, as appears on pages 1042 and 1043 of said transcript."

"Tenth. To the ruling of the trial justice allowing question 294, on page 433 of said transcript, to be answered, which ruling was erroneous in that said question was a hypothetical question to an expert for his opinion, for which there was no proper foundation previously laid, the question calling for an opinion upon an opinion. To which ruling the defendant duly excepted, as appears on page 434 of said transcript."

"Twelfth. To the ruling of the trial justice allowing question 53, on page 527 of said transcript, to be answered, which ruling was erroneous in that no proper foundation for said question had been previously laid by any testimony, and in that the answer would tend to and did mislead the jury, to the prejudice of the defendant. To which ruling the defendant duly excepted, as appears on page 527 of said transcript.

"Thirteenth. To the rulings of the trial justice allowing question 70, on page 533 of said transcript, to be answered, which ruling was erroneous in that no proper foundation had been laid for said question, that it called for an opinion based upon a mere assumption, and that its answer would and did tend to mislead the jury, to the prejudice of the defendant. To which ruling the defendant duly excepted, as appears on page 533 of said transcript.

"Fourteenth. To the ruling of the trial justice allowing question 87, on page 542 of said transcript, to be answered, which ruling was erroneous for the same reasons as stated under the thirteenth exception above. To which ruling the defendant duly excepted, as appears on page 542 of said transcript.

"Fifteenth. To the ruling of the trial justice allowing question 89 on pages 542 and 543 of said transcript, to be answered, which ruling was erroneous in that no proper foundation for said question had been previously laid, in that the answer called for was merely an opinion based upon another opinion, and would and did tend to prejudice the de-

fendant. To which ruling the defendant duly excepted, as appears upon page 546 of said transcript.

"Sixteenth. To the ruling of the trial justice allowing question 90, on page 546, to be answered, which ruling was erroneous for the same reasons as stated under the fifteenth exception above. To which ruling the defendant duly excepted, as appears on page 546 of said transcript.

"Seventeenth. To the ruling of the trial justice allowing question 92, on pages 546 and 547 of said transcript, to be answered, which ruling was erroneous for the same reason as stated under the fifteenth exception above. To which ruling the defendant duly excepted, as appears on page 547 of said transcript."

"Nineteenth. To the ruling of the trial justice allowing question 72, on page 580 of said transcript, to be answered, which ruling was erroneous for the same reasons as stated under the fifteenth exception above. To which ruling the defendant duly excepted, as appears on page 580 of said transcript."

"Twenty-third. To the ruling of the trial justice denying the defendant's motion for new trial, upon the grounds stated in said motion. To which ruling an exception was duly taken by the defendant."

The first exception is founded upon the denial of the trial justice to grant the defendant's motion for a direction of a verdict in its favor upon the ground that the plaintiff had failed to sustain her declaration by proof. The defendant argues that the case at bar is not one in which the doctrine of *res ipsa loquitur* applies, and that, even if it did, the defendant has borne the burden of explanation thereby imposed. The defendant admits that the plaintiff's intestate came to his death without fault on his part; i. e., while he was in the exercise of due care. And it was fully proved that his death resulted from his being buried under *débris* composed of fragments from the building, used by the defendant as a starch manufactory, which was wrecked by an explosion of starch dust therein.

As well-regulated starch manufactories do not ordinarily explode while the business therein is conducted with a reasonable degree of care, it would seem as though, after such an explosion has taken place and has caused the death of a person lawfully using the highway while ignorant of the danger to which he was exposed, it is not asking too much to require the proprietor to explain, for the benefit of the representatives of the deceased, the cause of such explosion. As the business is entirely within the control of the defendant, and its methods of manu-

facturing starch may be good, bad, or indifferent, it is called upon to explain when a fatal explosion occurs within its premises. In our opinion the case is included within the doctrine aforesaid. The defendant, being required to explain, offered as an explanation its theory hereinbefore referred to, supported by the opinion of experts, that the first explosion occurred in the premises of Mr. Chase, and therefrom was communicated into the premises of the defendant; that this first explosion so entering its premises stirred up the starch dust therein and mixed it with the air, thus making it explosive, and, having thus rendered the same highly dangerous, exploded it and caused the death and damage for which this suit is brought. The explanation, in effect, is: We had within our premises sufficient quantities of all the constituent elements necessary to form a deadly explosive when combined, and, without our negligence, knowledge, or consent, and against our will, an outsider combined them and exploded the compound. The explanation and expert testimony in support of the same was submitted to the jury, with testimony in behalf of the plaintiff tending to show that the initial explosion occurred in oven No. 4 upon the premises of the defendant, together with counter expert testimony for the plaintiff, to the effect that spontaneous combustion was unlikely to occur under the conditions as they existed at that time of the year in the chandlery shop of Mr. Chase. The location of the origin of the explosion is a question of fact; but, until there is proof to the contrary, it is fair to presume that it originated where it occurred, and the burden of explaining that it had its inception elsewhere is upon the defendant. As testimony was offered in support of each of said contentions, the question was properly left to be decided by the jury, and the defendant takes nothing by its exception. The ruling which is the subject of the second exception is a correct statement of the law.

But the defendant objects to the application of the same to the case at bar, for the reason that the plaintiff has failed to prove that the first explosion originated on its premises. The plaintiff did prove that the explosion which wrecked the building, and threw fragments thereof upon and caused the death of the plaintiff's intestate, occurred upon the premises of the defendant; and this proof, coupled with the presumption heretofore alluded to,—i. e., that until there is proof to the contrary an explosion fairly may be presumed to have originated in the place where it occurred,—were sufficient to justify the court below in its rul-

ing. In our opinion the exception has no merit.

In its consideration of the tenth, twelfth, thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, and nineteenth exceptions the defendant has grouped them together because, as it says, practically the same questions arise.

The questions were as follows:

Question referred to in tenth exception: "Assuming that burning gas was formed in the oven, and that there was an explosion of gas into the oven room, what effect, if any, would the explosion of this gas into the oven room have upon the starch on the walls and rafters?"

Question referred to in twelfth exception: "If the door of the oven were open, and burning gas came out, would this cause any agitation in the air of the oven room into which this burning gas came from the oven?"

Question referred to in thirteenth exception: "Now, professor, if there was an explosive mixture of gas in one part of the oven, and gas was present in other parts of the oven in quantities which would not be explosive, would the explosion of gas in one part cause an explosion in the other part of the oven where the gas alone would not be explosive?"

Question referred to in fourteenth exception: "Now, if coal gas was present in explosive quantities and inflamed in one portion of the oven, what effect, if any, would that have upon the gas in other parts of the oven?"

Question referred to in sixteenth exception: "Now, assuming that there were two men at work in this room filling pans with starch, the starch being taken from burlap bags upon an iron scoop shovel with no cover on the top, and the starch the men were unable to get from the bags by means of the shovel was emptied from the bags into the pans by turning the bags inside out, and there was a hole in the pipe between the bed of the furnace and the damper, about 2 inches in length, and other smaller holes in the same pipe, and that the hole 2 inches in length was corroded, had a corroded edge, and there was a coal fire in the furnace box on the day of the explosion and before the explosion, and an explosion occurred, to what, if anything, would you attribute this explosion?"

Question referred to in nineteenth exception: "Now, assuming that explosive gas, carbon monoxide, was formed in one of these ovens, and that there was an explosion of this gas into the oven room, what effect, if any, would the explosion of the burning gas, or of the gas in the oven, have on the starch on the walls of the oven room?"

Question referred to in seventeenth exception: "If the burning gas came into the oven room, and there was not a sufficient quantity of starch dust in the air of the oven room, would the agitation of starch on the walls increase or diminish the amount of starch dust that would be present in the air of the oven room?"

Question referred to in nineteenth exception: "If burning gas was present in the oven, and there was an explosion of gas into the oven room, and there was starch dust on the walls of the oven room, what effect, if any, would an explosion of burning gas in the oven, into the oven room, have upon the starch on the walls?"

The defendant therefrom argues as follows: "The questions as propounded in these various forms assumed, as proven facts, that there was combustible gas in the oven on the day of the explosion; that there was burning gas in the oven; that there was gas in explosive quantities in the oven; that there was inflamed gas in one corner of the oven; that burning gas rushed out into the oven room; that there was a gas explosion in oven No. 4. There were no facts upon which these hypothetical questions could be based. There was no proof that such a condition of things existed on the day of the accident or had ever existed. The plaintiff's method of proving her case, by experts, deserves attention, and shows clearly the fundamental error in the admission of the questions which are the subject of the exceptions referred to. Mr. Scott testified that in his opinion combustible gases would be formed in the furnace, would escape through holes in the pipe, that in some way flame from the furnace might cause an explosion of this gas, and that when the door was opened the burning gas might rush into the oven room. Scott's opinion was based on certain conditions alleged to have been found by him a day or two after the explosion. The plaintiff then addressed a series of hypothetical questions to her experts, Martin and Groff; and used this highly speculative opinion of Scott as a foundation for such questions. In other words, what had been a mere matter of opinion with Mr. Scott was assumed, in the questions to Martin and Groff, to be proven facts in the case, and their opinions were given on such assumptions. There was no testimony that, as a matter of fact, any combustible gas was forming on the day of the explosion; that there was any escaping; that there was any combustible gas in the oven or any explosion in the oven or any part thereof. All these things Mr. Scott deduced from conditions as he claimed he saw them some time afterwards; and yet, notwithstanding that they were mere possibilities, they were made to do duty as proven

facts with the plaintiff's experts. It is needless to say that such a method of establishing a case by basing the opinion of one expert on that of another is clearly erroneous. The rule is clearly set forth in *Lawson, Expert Ev.* 2d ed. p. 172: 'It is not proper in asking hypothetical questions to incorporate in them the opinions of other expert witnesses. An opinion of an expert witness cannot be based upon opinions expressed by other experts. Facts, and not opinions, must be assumed in the questions. If it were otherwise, opinions might be built upon opinions of experts, and the substantial facts driven out of the case. An opinion cannot rest, in whole or in part, on other opinions, but must rest on facts.' In *McDonald v. Rhode Island Co.* 26 R. I. 467, 9 Atl. 391, the court held that even on cross-examination it was not proper to put a hypothetical question to an expert which involved an assumption concerning which no evidence had been offered. In *Williams v. State*, 64 Md. 384, 1 Atl. 887, 5 Am. Crim. Rep. 512, the issue under an indictment for murder involved whether or not the deceased had his neck broken. Defendant's counsel propounded a question to a physician, who is testifying as an expert, and included the question the inference or opinion of a previous expert witness, a physician. Held inadmissible; the court saying: 'Now, while an expert may give his opinion upon facts assumed to have been established, it could be against every rule and principle of evidence to allow him to state his opinion upon the conclusions and inferences of other witnesses. Here the witness was not asked his opinion in regard to the dislocation of the neck of the deceased, based on the failure of Dr. Gill, who conducted the examination, to reproduce crepitation, but based also upon the conclusion reached by Dr. Gill in regard to subject-matter of inquiry. For this reason the question was clearly objectionable.' also *Louisville, N. A. & C. R. Co. v. Key*, 104 Ind. 409, 3 N. E. 389, 4 N. E. 642. The admission of these questions in the case at bar was not only error, but highly prejudicial to the defendant. The question as to whether or not there had been an explosion of gas in oven No. 4 was an important point in the case. The reiterated questions containing unwarranted assumptions, founded on the opinion of the witness, and the answers thereto, must have misled the jury that such conditions had proved to exist as a matter of fact." Therefore the defendant concludes that the admission of these questions clearly constitutes reversible error.

The objections made by the defendant to the R.A.(N.S.)

the questions aforesaid are: First, to the method of establishing a case by basing the opinion of one expert upon that of another; and, secondly, that the reiterated questions containing unwarranted assumptions founded on the opinion of Scott, and the answers thereto, must have impressed the jury that such conditions had been proven to exist as a matter of fact. The objection, under the rule laid down in *Lawson, Expert Ev. supra*, that a question bases the opinion of one expert upon that of another, necessarily must be to the form of the question itself, and also must be determinable from a mere inspection of the same, as, for instance, if the question had been: If Professor Blank is of the opinion that such is the fact, what is your opinion? The questions objected to contain no intrinsic evidence that one opinion is sought to be based upon another. And it is impossible to determine whether or not such is the fact without examining and analyzing the testimony in the case, a duty which we are not required to undertake in the consideration of exceptions to the form of questions.

Professor Wigmore, in that portion of his comprehensive work on Evidence (Vol. 1, § 672) relating to hypothetical questions, asserts that the hypothetical question to an expert, as to the data for inference, takes the place of the question to the bystander, whether he was in a position to observe the affair which is the subject of investigation. As he says: "The reasoning may be explained in the following propositions: (1) Testimony in the shape of inferences or conclusions rests always on certain premises of fact. That which has been called observation, serving as the basis of belief in matters directly cognizable by the senses—as, the facts of an affray, a conversation, a trespass, and the like—is here replaced by what may be called a consideration of the premises. Just as observation of the situation or affair or surroundings is in the one case essential to the formation of a witness's belief based on his senses, so a consideration of specific data is essential to the formation of an inference or conclusion or opinion. If the witness has not considered or had in mind these premises, his inference or opinion is good for nothing. (2) These premises, a consideration of which is essential to the formation of the conclusion or opinion, must somehow be supplied by testimony. The same witness may supply both premises or conclusion; or one witness may supply the premises and another the conclusion. The two are not necessarily connected. (3) If the latter method is chosen, and a witness is put forward to testify to the conclusion, the premises considered by

him must be expressly stated, as the basis of his conclusion; otherwise, since his conclusion rests for its validity upon a consideration of the premises, and since the tribunal may later decide that certain premises are not proved and may thus reject them, it must, before accepting his conclusion, have the means of knowing whether it is based on a consideration of premises accepted as true by the tribunal. If those premises are not made to accompany the conclusion, the tribunal might be accepting a conclusion for which the witness had considered premises found by the tribunal not to be true. (4) Hence the premises must be stated hypothetically in connection with the conclusion. Then, by other testimony, the material for determining the truth of the assumed premises may be furnished to the tribunal. The key to the situation, in short, is that there may be two distinct subjects of testimony,—premises, and inferences or conclusions; that the latter involves necessarily a consideration of the former; and that the tribunal must be furnished with the means of rejecting the latter if, upon consultation, they determine to reject the former, i. e., of distinguishing conclusions properly founded from conclusions improperly founded."

The objection that the jury must have been improperly impressed by the reiterated questions is untenable. A similar objection was considered by Shaw, Ch. J., in *Dickenson v. Fitchburg* (1859) 13 Gray, 546: "But it is objected that the admission of this evidence would open the door to evidence entirely incompetent, by allowing the witness to state the facts on which the opinion is founded, facts not proved by competent evidence. This objection seems to us to be founded on a misconception of the manner in which the investigation is to be conducted, and the testimony of experts received and applied. It assumes that the facts will be taken to be true, because the witness has stated that he founds his opinion upon them. But this is quite a mistake. In order to obtain the opinion of a witness on matters not depending upon the general knowledge, but on facts not testified of by himself, one of two modes is pursued: Either the witness is present and hears all the testimony, or the testimony is summed up in the question put to him; and in either case the question is put to him hypothetically whether, if certain facts testified of are true, he can form an opinion, and what that opinion is. The jury will then be instructed, if the truth of any such fact is contested, first to consider whether the fact on which such opinion rests is proved to their satisfaction; if it is, then to give such weight

to the opinion resting on it as it deserves; but, if the fact is not proved by the evidence, then to give the opinion no weight. This is necessary to enable the jury, upon the true theory of jury trial, to decide all questions of fact, upon competent evidence laid before them. *McNaghten's Case*, 10 *Clar. & F.* 200. But the consideration submitted in the argument in opposition to this view, namely, that the opinion may be given on the assumption of facts not proved, is a strong additional reason why the grounds and reasons of the opinion should be stated, in order that the jury may see that it is not founded on hearsay, general rumor, or facts of which some evidence may have been given, but, being controlled by other evidence, are not found true by the jury. This inquiry has been more frequently made in cross-examination, yet we are of opinion that it is competent evidence in chief. It is in fact this general knowledge, as the specific facts judicially proved, from which the jury draw their ultimate conclusion, though in matters of science they may be aided by the more exact observation and the larger experience of the trained expert. *Keith v. Lothrop*, 10 *Cush.* 453."

In *Forsyth v. Doolittle*, 120 *U. S.* 77, 30 *L. ed.* 587, 7 *Sup. Ct. Rep.* 408, the supreme court approved a charge to the jury containing the following: "You must readily see that the value of the answers to these questions depends largely, if not wholly, upon the fact whether the statements made in these questions are sustained by the proof. If the statements in these questions are not supported by the proof, then the answers to the questions are entitled to no weight, because based upon false assumptions or statements of facts."

This brings us to the consideration of the twenty-third and last exception of the defendant which was taken to the refusal of the trial justice to grant the defendant's motion for a new trial upon any of the nine grounds therein set forth. Those relating to damages have not been urged before us and are therefore deemed to have been abandoned. The other grounds that the verdict is against the law and the evidence and the weight thereof, in that the plaintiff failed to make out her case by a fair preponderance of the evidence, and that the defendant has borne the burden, imposed by the law, of explaining its freedom from negligence in the explosion, and claim of the defendant that the testimony showed that the proximate cause of the accident was beyond its control and on the premises of a third person, already been considered. This is a case in which the doctrine of *res ipsa loquitur* is peculiarly applicable.

applicable. An explosion occurred upon the premises of the defendant. Starch dust from starch which had been treated with nitric acid was present in quantities.

The manager of the defendant company did not know that starch dust was explosive, as appears from the following extract from the testimony of Walter Lowe, called as a witness by the plaintiff:

Q. 3. What is your business?

A. Superintendent of the Charles S. Tanner Company.

Q. 4. How long have you been superintendent?

A. About seven years, seven or eight years.

Q. 62. Are you familiar with the chemical properties of starch and other substances which are manufactured at the Tanner place?

A. No, sir; I only understand what we manufacture.

Q. 63. But do you understand the chemical properties of what you manufacture?

A. No, sir.

Q. 64. Is there anybody, or was there anybody at the Tanner place on February 12th, that understood the chemical properties of starch?

A. No, sir.

But upon objection the question was again read to him, and he then answered: I don't know.

Q. 318. Now, is it a fact that nitric acid was used in the starch at the factory?

A. It is used when occasion demanded it.

Q. 319. And who had to do with putting nitric acid in the starch?

A. I had the measuring out and fixing it up.

Q. 320. And you made the solution of nitric acid?

A. I made a solution that went on the starch.

Q. 321. Did you know at that time that starch mixed with nitric acid created an explosive, very explosive, substance?

A. No, sir.

No precautions were taken to prevent the accumulation of starch dust or to take care of the same. The men employed were forbidden to light matches upon the premises, but this was a precaution against fire, and not against an explosion. Great heat was maintained in the furnace and ovens (from 220° to 300° Fahrenheit, as hereinbefore stated); and at times upon opening the oven doors men had their jumpers scorched by the heat, and one of them claimed by flame from the oven. At the time of the explosion flames were seen to come from the oven room. Firemen testified to other explosions on the same premises 29 L.R.A. (N.S.)

during the times of fires which they had been called to extinguish. The defendant's business premises contained the potentiality of explosions. To offset the evidence above set forth, the defendant showed a lot of inflammable material capable of spontaneous combustion, under the temperature and conditions favorable thereto, in the Chase ship chandlery shop, which already has been described quite fully. But there was no fire or light kept therein. There had never been an explosion there. There had never been fire there before so far as appears in evidence.

As we have already said, the question of the place of origin of the explosion was a question of fact, and the same was properly submitted to the jury under suitable instructions. The jury rendered their verdict, and the same has been approved by the judge before whom the case was tried. We see no reason for disturbing the same. The doctrine approved in the case of Wilcox v. Rhode Island Co. 29 R. I. 292, 70 Atl. 913, is applicable in the case at bar.

For these reasons the defendant's exceptions are overruled, and the case is remitted to the Superior Court, with direction to enter judgment on the verdict.

NEW HAMPSHIRE SUPREME COURT.

W. E. PEIRCE

v.

MARTIN FINERTY et al.

(— N. H. —, 76 Atl. 194.)

Timber — contract period — failure to remove — effect.

Although a purchaser of standing timber does not lose his title by failure to remove the timber from the land within the time limited in the conveyance, the court cannot give him authority to enter to remove the timber after the expiration of such time.

(May 3, 1910.)

Note. — Rights and remedies of landowner and owner of timber after expiration of time stipulated for removal of the same.

In many contracts involving the sale of standing timber or deeds in which timber has been reserved to the grantor, there is an express provision that, unless the timber is removed within the time limit expressed in the contract or deed, it will revert to the vendor or grantee as the case may be. In other cases, although this provision is not expressed, a fair construction of the contract shows that such was the intention of the parties. In other cases, where such a

EXCEPTIONS by defendants to rulings of the Superior Court for Hillsborough County made during the trial of a suit to restrain the cutting by defendants or certain timber on certain premises and to restrain interference with an entry thereon and the cutting of such timber by plaintiff, which resulted in a conditional decree allowing plaintiff eighteen months in which to remove the growth, permission to enter and cut which was sought. Sustained.

The facts are stated in the opinion.

Messrs. Taggart, Tuttle, Burroughs, & Wyman and Harry E. Loveren, for defendants:

Plaintiff lost title to the timber failing to remove it within the contract period.

Fryat v. Sullivan Co. 5 Hill, 116, 7 Hill,

529; Turner v. Kennedy, 57 Minn. 104, 58 N. W. 823; Bell County Land & Coal Co. v. Moss, 30 Ky. L. Rep. 6, 97 S. W. 354; Midyette v. Grubbs, 145 N. C. 85, 13 L.R.A. (N.S.) 278, 58 S. E. 795; Note to Dennis Simmons Lumber Co. v. Corey, 6 L.R.A. (N.S.) 469; Adkins v. Huff, 3 L.R.A. (N.S.) 649 note; Clark v. Ingram-Day Lumber Co. 90 Miss. 479, 43 So. 813; Beauchamp v. Williams (Tex. Civ. App.) 115 S. W. 130; Noyes v. Goding, 104 Me. 453, 72 Atl. 181; Decker v. Hunt, 111 App. Div. 821, 98 N. Y. Supp. 174; Huron Land Co. v. Davison, 131 Mich. 86, 90 N. W. 1034; St. James v. Erskine, 155 Mich. 606, 119 N. W. 897; Mathews v. Mulvey, 38 Minn. 342, 37 N. W. 794; Patterson v. Graham, 164 Pa. 234, 30 Atl. 247; Boults v. Mitchell,

provision is neither expressed nor inferable from the language used, the courts nevertheless hold that as a rule of law all rights of the vendee or grantor terminate upon the expiration of the time limit expressed in the contract or deed.

But, as is shown in a note to Dennis Simmons Lumber Co. v. Corey, 6 L.R.A. (N.S.) 469, upon the question of the effect of contract with respect to standing timber to pass title to the same, many cases hold that by the contract of sale the title to the timber passes to the vendee, and this title is not affected by the expiration of the time limit, and, although the vendee may have lost his right to go upon the property and remove the timber, nevertheless the title thereto remains in him. In such cases, as in *PEIRCE v. FINERTY* and in *Walcutt v. Treisch*, post, 504, the interesting question is presented, What are the rights and remedies of the parties where the timber belongs to the vendee, but, by his fault in not removing it within the time limit, it remains upon the land of the vendor?

The same question has arisen in a few cases where the grantor of land reserves standing timber by his deed, but, as is shown in a note to *Adkins v. Huff*, 3 L.R.A. (N.S.) 649, the conclusion reached in that case, that the right of a grantor of land who reserves timber standing thereon, to be removed within a specified time, terminates at the expiration of such time, is supported almost unanimously by the cases which pass upon that question.

As to conveyance of title to standing timber without conveying title to the land, see note to *McRae v. Stillwell*, 55 L.R.A. 513. And as to whether a purchase of standing timber to be removed within a specified period of years is a purchase of realty or of personality, see note to *Midyette v. Grubbs*, 13 L.R.A. (N.S.) 278.

In a number of cases the trial court proceeded upon the theory that the failure of the vendee to remove the timber within the time limit, or within a reasonable time where no limit was expressed in the deed or contract of sale, forfeited his interests in the timber, so that he had no rights what-
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ever and consequently no remedy, and upon appeal the appellate court goes no further than to say that the view of the trial court was erroneous, and that the judgment for the landowner must be reversed. Without expressly determining what the rights of the parties are, any expressions in such decisions are, of course, unsatisfactory as authority upon the question under discussion, and no attempt has been made to gather cases of that character.

This class of cases is well illustrated by *Magnetic Ore Co. v. Marbury Lumber Co.* 104 Ala. 465, 27 L.R.A. 434, 53 Am. St. Rep. 73, 16 So. 632, where, in sustaining a demurrer to a bill filed to cancel a deed which had been given to the defendant conveying certain timber standing on land which was afterwards conveyed to the plaintiff, the court said that the failure to cut and remove the timber within a reasonable time under an absolute grant thereof, which specified no time for removal, did not forfeit the title in favor of the subsequent purchaser of the land, whose conveyance recited the prior sale of the timber. The court, however, did not express any opinion as to what the rights and remedies of the parties were.

This note does not purport to include cases in which the owner of the timber has waived his rights to the timber by some act other than the failure to remove the timber within the time limit.

Cases like *Baker v. Kenney* (Iowa) 124 N. W. 901, and *Davidson v. Moore*, 18 Ky. L. Rep. 563, 37 S. W. 280, in which the deed or contract was such as to give the purchaser the perpetual right of going upon the land to remove the timber have not been taken. So, cases have not been taken where it appears that the express privilege given by the deed or contract for the removal of the timber, or an extension thereof, was exercised by the purchaser.

A different question is presented where the contract of sale or deed does not expressly provide a time within which the timber must be removed, and cases of this character have not been included.

Most cases make a distinction between

15 Pa. 371; Union Tanning Co. v. Shug, 22 Pa. Co. Ct. 647; Upton v. Hosmer, 70 N. H. 493, 49 Atl. 96; Bonney v. Foss, 62 Me. 248; Lampton v. Preston, 1 J. J. Marsh. 454, 19 Am. Dec. 104.

The grantee of timber must act as required by the deed in regard to the removal of his property.

Norfolk Lumber Co. v. Smith, 146 N. C. 158, 59 S. E. 543; Stukeley v. Butler, Hobart, 168.

The only right the common law ever gave an owner of personal property to remove it from another's premises after the limitation of an original right was a right to take it within a reasonable time.

Wood v. Leadbitter, 13 Mees. & W. 838,

16 Eng. Rul. Cas. 49; Cornish v. Stubbs, L. R. 5 C. P. 334; Mellor v. Watkins, L. R. 9 Q. B. 400; Webb & Paternoster, 2 Rolle, Rep. 143, 152, Popham, 151, Godb. 282, Palmer, Rep. 71; Plummer v. Webb, Noy, 98; Shaw v. Carbreys, 13 Allen, 463.

The failure of one owning personal property to accept an opportunity to save it in a reasonable time is an abandonment.

Webb & Paternoster, Palmer, Rep. 71; Wood v. Leadbitter, supra; Mumford v. Whitney, 15 Wend. 380, 30 Am. Dec. 60; Dame v. Dame, 38 N. H. 432, 75 Am. Dec. 195.

Messrs. Herbert S. Clough and Burnham, Brown, Jones, & Warren for plaintiff.

the rights of the parties where the timber has been felled and where it is still standing, and so far as possible the condition of the timber in this respect has been noted.

Rights and remedies in general.

Keystone Lumber & Min. Co. v. Brooks, 65 W. Va. 512, 64 S. E. 614, was an action of unlawful entry and detainer, and it was held that, in case of a deed conveying legal title to timber, though the deed contemplates removal of timber, there being no limit of time for removal and no clause of forfeiture for failure to remove, title to the timber is not lost to the purchaser for such failure; and the grantee had a right to retain such partial possession of the land as was necessary to work at the timber.

In a suit to determine the right to remove standing timber, it was held in Butterfield Lumber Co. v. Guy, 92 Miss. 361, 15 L.R.A.(N.S.) 1123, 131 Am. St. Rep. 540, 46 So. 78, that where standing timber is real estate, there is no implied contract of removal within a reasonable time, non-compliance with which will result in a forfeiture.

In Peterson v. Gibbs, 147 Cal. 1, 109 Am. St. Rep. 107, 81 Pac. 121, the contract expressly provided for payment of rent by the purchaser of the timber, if it was not removed within the time limit, and, consequently, in an action by a subsequent grantee of the land to quiet the title, the purchasers of the timber were entitled to have their rights in relation to the timber reserved from the effect of any decree that might be made in the case.

In Hodges v. Buell, 134 Mich. 162, 95 N. W. 1078, the court refused an injunction restraining the vendee from removing the timber, part of which was cut before and part after the expiration of the time limit, although the court recognized the rule that the unsevered timber reverted to the vendor. It was said that equity would not render aid in enforcing forfeiture.

In Watson v. Adams, 32 Ind. App. 281, 69 N. E. 696, it was held that the expiration of the time limit did not work a forfeiture.

feiture; the judgment granting an injunction restraining the timber owner from going on the premises and cutting the timber was reversed, but apparently the reversal was because of errors committed on the trial rather than upon the merits of the case.

In Town v. Hazen, 51 N. H. 596, it was held that, if wood is cut and severed before the expiration of the time limit, then the vendee may enter upon the land and remove the same, by simply making himself liable for the actual damages done to the defendant in removing the same; but at the same time the defendant would not necessarily become liable in trover for the wood by refusing to give permission to the plaintiff to enter his land and remove it after the time fixed upon had expired; nor would he be thus liable for not delivering the wood to the plaintiff on demand, and possibly he would not become liable if he removed the wood himself. But a judgment for the timber owner was reversed upon the ground that there was not sufficient evidence in the case to hold that the conduct of the landowner amounted to a wilful conversion.

Replevin.

The courts have sustained the right of the vendee to maintain an action in replevin for the recovery of timber cut, but not removed, before the expiration of the time limit, where the landowner refused him permission to enter the land and remove the timber.

Thus, in McGregor v. McNeil, 32 U. C. C. P. 538, it was held that the owner of timber who failed to remove it before the expiration of the time limit might, upon the landowner's refusal to permit him to take possession thereof, maintain an action of replevin to recover it. The court said that the landowner might have a cause of action against the timber owner for breach of agreement to remove the timber within the time set, but that that question was not properly before the court in the action in replevin.

So, in Hicks v. Smith, 77 Wis. 146, 46

Parsons, Ch. J., delivered the opinion of the court:

The plaintiff claims under one John Lovejoy, who, being then the owner of the real estate, on December 20, 1892, by an instrument in writing under seal, sold to him "all the timber, wood, and growth of every description on the Osgood farm." The writing contained the following stipulation: "And I give him until January 1st, 1900, A. D., to get the lot off in." November 11, 1898, Lovejoy sold the farm to the defendant Finerty, "reserving to W. E. Peirce all the wood and timber on the above-described premises, with the right to cut and remove the same at any time before January 1, 1900." December 27, 1902, Finerty conveyed the premises to the defendant Paradis

by warranty deed, without reservation or reference to any right of Peirce. Paradis was, however, fully informed of the right claimed by Peirce. In the spring of 1899, Peirce learned that Finerty had purchased the lot, and tried to obtain the right to keep the timber on the lot by paying him \$25 a year. Peirce understood he could do this, but Finerty did not so agree. January 29, 1901, Peirce sent Finerty a check for one year's rent for extension of time for removing the timber. Finerty returned the check, but offered to extend the time for \$150 a year dating from January 1, 1900, payment for subsequent years in advance. Peirce did not accept this offer, and could not after this have reasonably understood that the growth remained by permission or consent

N. W. 133, it was held that the vendee of trees which he had cut down and severed from the soil before the time limit in his contract expired had a right to remove the same within a reasonable time, even after the expiration of the time fixed in the deed, and he might maintain an action in replevin to recover the same.

So, replevin will lie at the suit of the purchaser of standing timber for the recovery of logs cut, but not removed, before the expiration of the time set up in the contract. *Sanborn v. Franklin County Lumber Co.* 55 Fla. 389, 46 So. 85.

But an action in claim and delivery at the suit of the landowner, for the recovery of timber cut after the expiration of the time limit, and removed by the purchaser, will lie; if, however, the timber was cut before the expiration of such limit, the landowner's damages are limited to such as he might have suffered by reason of the trespass and occupation of his land. *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387.

Conversion.

If the landowner converts timber which has been cut, but not removed, before the expiration of the time limit, conversion at the suit of the timber owner will lie.

Thus, in *Macomber v. Detroit, L. & N. R. Co.* 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376, it was held that the owner of the timber could recover the value of the timber which had been cut, but not removed, before the expiration of the time limit, and which had been converted by the owner of the land.

So, where the landowner not only forbade the owner of the timber entering upon the land, but also removing the wood therefrom, and apparently assumed that he owned the wood, it was held in *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242, that the landowner's act was such an exercise of dominion over the wood as to warrant a finding of conversion.

And trover will lie in an action by a grantor who reserved timber on the land conveyed, against the grantee, who converted the timber after the expiration of the time limit. *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193.

ed the timber after the expiration of the time limit. *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193.

Where, after the expiration of the time agreed upon in a contract for the sale of standing timber, the owner of the land took possession of a certain portion of the timber which the vendee had failed to remove, and converted it to his own use, it was held in *Wyckoff v. Bodine*, 65 N. J. L. 95, 47 Atl. 23, that the landowner was liable for the market value of the timber; and he was not entitled to have such damages reduced by the conduct of the vendee in leaving the timber upon the land after the expiration of the time.

Where, by the consent of the landowner, the timber had been removed to another portion of the farm, it was held in *Watson v. Gross*, 112 Mo. App. 615, 87 S. W. 104, that the act of the landowner in refusing to permit the owner of the timber to take possession and remove the timber was an act of conversion.

In *Green v. Bennett*, 23 Mich. 468, the vendor of the property removed the wood, and the vendee brought trover therefor. The court held that if the contract was to be construed as making an absolute sale, the vendee had a clear right of action, although he would have been liable to the vendor for breach of the covenant to remove within the time agreed. If, however, the contract provided for a conditional sale, the vendor had waived the condition by claiming and receiving from the vendee damages for failure to remove the wood in time, so that, in either view of the case, the right of the vendee was complete.

In *Williams v. Flood*, 63 Mich. 493, 30 N. W. 93, in an action of trespass on the case, it was held that the vendee might recover for the value of the cut timber, which the vendor refused to allow him to remove after the expiration of the time limit, but that he could not recover for the timber remaining uncut. The court said: "He would have the right to remove all the timber which he had cut up to the time the defendants forbid his cutting more; and if they refused to permit him to enter upon

of the landowner. Peirce made no reasonable effort to remove the timber, although knowing it remained without right. With reasonable effort he could have removed the property as early as the spring of 1902, and ought to have done so. March 31, 1903, upon notice of Peirce's claim, Paradis informed him that he had a warranty deed of the premises, and should not permit Peirce to enter upon or cut the lot until after the dispute was settled. In the winter of 1904 Paradis cut wood and timber on the lot. This bill was filed May 3, 1904. The substance of the foregoing is that Peirce, the owner of the growth upon the land, did not enter to remove the same within the time limited in the conveyance of the same to him, nor within a reasonable time there-

after, and that after this the owner of the land refused to permit him to enter and cut the growth. Such permission has been granted him by the decree excepted to. The main question argued was whether Peirce has now title to any of the growth thereon. The defendants claim that Peirce's title was forfeited by his failure to enter and remove the same within the time limited in the conveyance or in a reasonable time thereafter, and by his conduct, which is found to have been "wilful and defiant," in permitting it to remain wrongfully upon the land of another.

This question has been elaborately argued with great ability and thoroughness. If the question were an open one, the argument for the defendants would be of great assist-

their land for that purpose, it would in law amount to a conversion by them of the timber so cut." Although this was not an action for conversion, yet the same principles govern.

In *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821, it was held that a timber owner who was refused permission to go upon the land after the expiration of the time limit was entitled to recover damages for the value of the timber, both cut and standing, remaining on the land. The court said: "If, by delay in taking the timber, after the period named damage should accrue to the owner of the land, it could not be questioned that such damage could be recovered. But it would be manifestly unjust that mere delay should forfeit the appellant's money and his timber, and that the appellee should become the owner of the timber upon the strength of an implied forfeiture."

But, on the other hand, an action for conversion will not lie against the owner of the timber for removing the same.

Thus, an action for conversion will not lie against the purchaser of standing timber for removing it after the expiration of the time limit, where he had cut the timber and piled it on the bank of a navigable river, although the bank was within the tract from which the timber was cut. *Plummer v. Reeves*, 83 Ark. 10, 102 S. W. 376.

So, although a purchaser of standing timber who, after the time limit had expired, removed the timber that had been cut before, may be liable for trespass, he is not liable for conversion. *Indiana & A. Lumber & Mfg. Co. v. Eldridge*, 89 Ark. 361, 116 S. W. 1173.

In *Griffin v. Anderson-Tully Co.* 91 Ark. 292, 134 Am. St. Rep. 73, 121 S. W. 297, the decision in the *Eldridge Case* was approved, but the decision turns upon other questions.

Trespass.

A vendee who enters the land after the expiration of the time limit, for the purpose of removing the timber, is generally held liable for trespass, but the value of the timber is not an element of the damages recoverable.

Thus, in *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119, it was held that, in an action in trespass brought by the landowner against the owner of the timber, for entering his land and carrying away timber which had been cut before the expiration of the time, the timber owner was liable in trespass for the entry, but not liable for the value of the timber.

So, in *Plumer v. Prescott*, 43 N. H. 277, it was held that in an action by the landowner for trespass, against the owner of the timber, for entering the land and removing it therefrom after the expiration of the time limit, the value of the timber was not an element of the damages. And in *Goodson v. Stewart*, 164 Ala. 660, 46 So. 239, it was held that, although fifty-one years was an unreasonable time for the removal of timber, yet in an action in trespass the value of the timber could not be considered an element of damage.

Trespass *de bonis* cannot be maintained by the owner of land, for the removal of boards into which the timber had been made before the expiration of the time limit. *Tuttle v. D. W. Pingree Co.* 75 N. H. 288, 73 Atl. 407.

Where no appreciable damage was done to the land by the vendee of timber, in entering and removing it after the time limit had expired, it was held in *C. W. Zimmerman Mfg. Co. v. Daffin*, 149 Ala. 380, 9 L.R.A. (N.S.) 663, 123 Am. St. Rep. 58, 42 So. 858, that a charge that the landowner could, in an action for trespass, recover only nominal damages, should have been given. In this case the timber had been cut after the expiration of the time limit.

In *Heslin v. Bingham*, 56 Ala. 566, 28 Am. Rep. 776, the court said, *obiter*, that, although the right to enter on land to remove timber has been forfeited by an unreasonable delay in doing so, nevertheless, if the purchaser of the timber thereafter does enter upon the land and remove the

A vendee who enters the land after the expiration of the time limit, for the purpose of removing the timber, is generally held liable for trespass, but the value of the timber is not an element of the damages recoverable.

ance, and might prevail; but all the grounds now urged are equally opposed to the conclusion in *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119. It was there held that, unless the sale of standing trees was made conditional upon their removal within a limited time, the property in the trees was not forfeited by the failure to remove them, and that a mere stipulation as to the time of removal did not render the deed conditional. This decision was made in 1873. The reasoning of the case has been frequently referred to, and the decision upon the precise point followed in recent cases. *Stackpole v. Eastern R. Co.* 62 N. H. 493; *Smith v. Furbish*, 68 N. H. 123, 130, 47 L.R.A. 226, 44 Atl. 398; *Kidder v. Flanders*, 73 N. H. 345, 61 Atl. 675; *Dyer v. Hartshorn*, 73 N. H. 509, 63 Atl. 231. Whether the result was reached by a correct application of the reasoning of the case

or not, the rule of the case has been too long settled and followed to be now disturbed. It is a rule of property which must be taken to have been within the contemplation of the parties. If it had been intended that Peirce should lose the property conveyed to him in 1892, by failure to remove it before January 1, 1900, a provision to that effect, in the light of the well-settled and understood law upon the subject, would have been inserted in the conveyance. The absence of such a stipulation conclusively establishes that no such purpose was entertained. As the trees were not forfeited by the failure to remove them, the plaintiff's state of mind during his failure to act is immaterial. His property right rests not upon considerations of equity and good conscience, but upon his legal right under an absolute conveyance, and the absence of anything in the nature of the subject-matter

timber, the value of the trees constitutes no part of the damages in an action for trespass brought by the owner of the land. And see *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387, *supra*.

Where timber has been manufactured into lumber, etc.

Even in those jurisdictions where the vendee's rights are held to be terminated by the expiration of the time limit, the title of the vendee is not lost, if the timber has been manufactured into lumber.

Thus, in *Johnson v. Truitt*, 122 Ga. 327, 50 S. E. 135, it was held that, even though the purchaser of the timber might have no right, without the landowner's permission, to enter upon the land after the expiration of the time fixed in the contract for the purpose of removing cross-ties, which were cut and left there before such time, the purchaser would not, by leaving the cross-ties on the land, lose his title thereto, and the landowner would have no right to convert them to his own use.

So, where the timber had been manufactured into saw logs, telephone poles, and railroad ties, prior to the expiration of the time agreed upon in the contract of sale, it was held in *Mahan v. Clark*, 219 Pa. 229, 68 Atl. 667, 12 A. & E. Ann. Cas. 729, that the vendee might maintain an action in replevin to recover possession of the same, after the expiration of the time limit.

Where the timber had been severed from real estate and converted into personalty, it was held in *Johnson v. Bumpus*, 34 Pa. Super. Ct. 637, that the vendee might maintain an action in assumpsit for breach of contract, upon the landowner's refusal to permit him to remove such personalty.

And in *Taylor Brown Timber Co. v. Wolf Creek Coal Co.* 32 Ky. L. Rep. 1015, 107 S. W. 733, the court, in sustaining an injunction restraining the vendees from interfering with timber upon the vendor's

lands, said that when the contract by its terms expires, the rights of the vendee automatically terminate. But in respect to lumber which had been manufactured out of the timber, the vendee was held to have a right thereto, even after the expiration of the time, as there was no limitation in the contract as to the time that lumber should be removed.

The vendee may maintain an action for the recovery of the possession of timber which had been made into railroad ties but not for the possession of standing timber or that lying in its natural state. *Hubbard v. Burton*, 75 Mo. 65.

An action of conversion will not lie against the grantor of a deed which reserved all the timber suitable to be made into ties, for removing from the land after the expiration of the time limit ties which had been made before the expiration. *Richmond Land Co. v. Watson*, 129 Mo. App. 554, 107 S. W. 1045.

A peremptory instruction for the defendant was held error in *Butler v. McPherson Bros.* (Miss.) 49 So. 257, where the grantor in a deed containing a reservation of certain timber on the land conveyed therein brought suit for the value of certain railroad ties which had been converted by the grantee after the expiration of the time limit in the reservation clause of the deed.

In *Golden v. Glock*, 57 Wis. 119, 46 Rep. 32, 15 N. W. 12, it was held that where the trees had been manufactured into stave bolts before the expiration of the time limit, the vendee of the trees had no right or license, even after the expiration of the time limit, to go upon the premises and take therefrom the bolts so manufactured. While this decision goes further than the others in regard to the right of the vendee to remove the lumber, it should be noted that in Wisconsin the rule prevails that the vendee does not lose title in the timber because of the expiration of the time limit.

which would make conditional of trees what would be an absolute conveyance of other property. *Hoit v. Stratton Mills*, 54 N. H. 109, 116, 20 Am. Rep. 119. The validity of this conclusion is not now an open question. The growth on the defendant's land on January 1, 1900, and still remaining there, is the plaintiff's property.

Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119, was *trespass quare clausum* and *de bonis*. The conveyance of the timber in that case contained an agreement that the grantor, Very, would deliver the timber at a certain place not on the land, on or before April 1, 1866, and that, if the grantor failed to deliver the timber, the grantee, Kingsley, might enter the premises and take the timber. Very did not deliver the timber, and in 1871 the defendants, claiming under the original conveyance, entered, cut some of the timber, and carried it away. Doe, J., says "Very, the former owner of the land, having failed to deliver the timber April 1, 1866 (the time agreed upon), Kingsley, his heirs and assigns, had a reasonable time after that date in which to take it. . . . It would be unreasonable to infer that the parties understood that Kingsley, his heirs and assigns, would have a right to leave the timber encumbering the land forever, or to enter and remove it whenever they pleased at any time or times in the distant future. The reasonable inference is that the parties understood and agreed that the timber not delivered by Very on or before the 1st day of April, 1866, might rightfully remain on the land a reasonable time after that date, and that Kingsley, his heirs and assigns, might rightfully enter within that reasonable time to remove it. The length of the reasonable time is a question of fact for the jury. If the defendants entered after the expiration of the reasonable time, they are liable for the entry." The case was transferred upon a disagreement of the jury, and the ruling was that the plaintiff could maintain *trespass quare clausum*, if the fact of the expiration of a reasonable time were found in his favor. Subsequently, after a trial, the case was again before the court. 54 N. H. 452. The right of the plaintiff to maintain *trespass quare clausum* was reaffirmed, and his damages limited to such as were recoverable in that form of action.

In the present case the parties did not refer to the judgment of a jury the length of time within which the grantee of the timber should have the right to enter and take but expressly limited such entry to January 1, 1900. If, therefore, upon the rule *Hoit v. Stratton Mills*, it must be inferred that the parties understood and agreed L.R.A. (N.S.)

that Peirce's property in the growth would not be lost by his failure to remove it before January 1, 1900, it follows from the same case that they must have understood and agreed that Peirce after that date would have no right to enter to cut and remove the same. "If the time for removing trees or other things from the vendor's land is expressly fixed in the contract of sale, the purchaser is a trespasser in entering after that time to remove them." *Hoit v. Stratton Mills*, 54 N. H. 109, 112, 20 Am. Rep. 119. The further conclusion that the plaintiff in that case could not recover for the value of the trees, since his title thereto was not conditioned upon their removal within a reasonable time, rests upon the rule that "an unconditional conveyance of growing trees without the land instantaneously severs them from the land, in contemplation of law, and transforms them into personal property" (*Kingsley v. Holbrook*, 45 N. H. 313, 86 Am. Dec. 173), and the decision in *Plumer v. Prescott*, 43 N. H. 277, that, if the grantee of trees removes, after the time limited, trees actually severed within the time, the landowner cannot recover the value of the trees. But the holding that the value of the trees belonging to one who enters without right and takes them is not an element in the landowner's damage for the entry furnishes no basis for a claim of right to enter and take them. Inability to maintain *trespass de bonis* will not justify *trespass quare clausum*. That the owner of personal property wrongfully upon the land of another is a trespasser if he enters to take it without an express or implied license to do so—in other words, has no right to enter—has been repeatedly decided in other cases. *Dame v. Dame*, 38 N. H. 429, 432, 75 Am. Dec. 195; *Baker v. Chase*, 55 N. H. 61; *Stackpole v. Eastern R. Co.* supra. In *Dyer v. Hartshorn*, supra, the most recent case relied upon by the plaintiff, the right to maintain *trespass quare clausum* and *de bonis* is denied upon the ground that the plaintiff was neither "the owner of the land or the trees when the alleged trespass was committed." This plainly implies, in accordance with all the authorities, that, if the plaintiff had been the owner of the land, the entry complained of would have been wrongful. There is a right of recaption or reclamation of personal property upon another's land without fault of the owner. In such cases, under certain circumstances, the owner of personal property has a right to enter to retake his property, and is not a trespasser if he does so. *Dame v. Dame*, 38 N. H. 429, 75 Am. Dec. 195; *Carter v. Thurston*, 58 N. H. 104, 107, 42 Am. Rep. 584; 3 Bl. Com. 4. But the right does not extend to cases where the

situation is created by the fault or wrong of such owner.

The decree of the court therefore attempts to give to Peirce a right in Paradis's land which he does not possess, and for which no legal foundation exists. As the plaintiff has no legal right to enter upon Paradis's land, he cannot recover damages if permission to do so is refused him. Paradis's refusal to permit him to enter and cut and remove the trees would not be a conversion of the trees by Paradis (*Town v. Hazen*, 51 N. H. 596; *Stackpole v. Eastern R. Co.* supra), though the assertion of a title to all the growth, and the sale of it by Finerty to Paradis, might be. *Burley v. Pike*, 62 N. H. 495; *Town v. Hazen*, supra. The right of exclusive possession is one element of the property right in real estate. For public purposes, upon the payment of damages, the state may authorize the taking from the owner of some or all of the elements of real-estate ownership; but, as the whole cannot be transferred from one individual to another for a private purpose merely because it seems more equitable that one should own the land and the other its value, no part of the right can be transferred. The court might as well transfer the entire title to the land to the plaintiff as to give him the right to occupy it for eighteen months without permission from the owner. As Peirce has no right to enter the land, the court cannot give him one. The landowner may think the diminution of the injury to his property by the removal of the trees under his direction may be more advantageous to him than the judgment of a jury for compensation for the damage done by the removal by one not the owner. He may prefer to remove first, now or at some future time, the growth belonging to him. Whatever his reasons may be, no ground appears upon which his land ownership right can be legally interfered with for the benefit of a wrongdoer.

It has been suggested that the bill originally asked for relief in another form; but, as the request has been abandoned, the questions of what relief the plaintiff might have in equity, or whether he might maintain trover upon the facts stated, as well as what course the landowner might pursue to rid his land of the encumbrance without subjecting himself to liability, and what remedy he has for the wrong done him by the plaintiff, are questions not now before the court. The conclusion that the court is without authority to license the plaintiff to trespass upon the defendant's close is fatal to the decree permitting such action.

Exceptions sustained. Decree set aside.

All concur.
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OHIO SUPREME COURT.

JAMES J. WALCUTT, Plff. in Err,

v.

ELMER E. TREISCH et al

(82 Ohio St. 263, 92 N. E. 423.)

Timber — contract period — failure to remove — title.

1. Where, in a deed of conveyance of lands, the timber thereon is excepted and reserved by the grantors, with the privilege of removing the same within a stipulated time, and, within the time limited, a portion of said timber is by them cut and severed from the realty, but is not removed from the premises until after the limitation period has expired.

Held: That, in the absence of a forfeiture clause in the deed, grantors' right to the timber so severed from the realty was not lost, nor their title thereto forfeited to the landowner, because of their failure to remove the same within the time stipulated in the deed.

Same — subsequent removal — damages.

2. That under such circumstances the landowner cannot recover from the grantors the value of the timber cut and removed by them, but the extent of his remedy is the damages he may have sustained by reason of the grantors' trespass upon and occupation of his land.

(June 7, 1910.)

ERROR to the Circuit Court for Richland County to review a judgment affirming a judgment of the Court of Common Pleas sustaining a demurrer to the petition in an action brought to recover the value of certain timber which had been removed from plaintiff's premises after the expiration of the time limited in a conveyance of the land for its removal. Affirmed.

Statement by Crew, J.:

In February, 1905, the defendants in error sold, and by deed of general warranty conveyed, to the plaintiff in error, James J. Walcutt, a farm of about 200 acres in Richland county, Ohio. Said deed contained the following exception and reservation: "Saving and excepting that all timber now on west side of this farm (about 60 acres) is hereby reserved by the said grantors, together with the privilege of going on to said farm and removing same any time within two years and six months from February 15, 1905. Grantors further reserve the right

Headnotes by the COURT.

Note. — See note to *Peirce v. Finerty* ante, 547.

or privilege of setting up and operating a mill for the purpose of manufacturing the timber last above mentioned." Prior to August 15, 1907, and within the two years and six months stipulated in said deed as the time within which said timber should be cut and removed, grantors entered upon said premises and cut and felled a large number of trees, many of which they sawed and converted into lumber, but none of which they removed from said premises prior to said 15th day of August, 1907. On August 16, 1907, James J. Walcutt, grantee and owner of said premises, commenced an action in the court of common pleas of Richland county against said grantors, defendants in error herein, asking that they be enjoined "from thereafter going upon said premises, from cutting the standing timber remaining thereon, and from removing lumber or logs of any description from said premises." Upon the filing of the petition a temporary injunction was allowed by the court as prayed for in said petition. Thereafter a motion was made by defendants to dissolve said temporary injunction, and the court, upon hearing said motion, modified the injunction theretofore granted, and dissolved the same in so far as it restrained the defendants from removing from said premises the timber already cut and the lumber sawed therefrom, but refused to dissolve, and continued, said injunction as to the timber still standing uncut on said 60 acres. Subsequently, under an agreement made and entered into between plaintiff and defendants, and entered upon the journal of the court, the defendants took possession of and removed from the premises of plaintiff all of said lumber and all of the trees that had been severed from the realty. Thereafter, to wit, on October 22, 1907, the plaintiff, James J. Walcutt, by leave of the court, filed in said cause what he denominated an "amended and supplemental petition," containing two causes of action; in his first cause of action he alleged and claimed ownership of and title to the property taken and removed by defendants, because the same was not taken and removed by them within the time designated and prescribed in said deed of conveyance for cutting and removing the same, and he prayed judgment against defendants for the value of the property taken. In his second cause of action, after making the necessary and appropriate averments to that end, he asked that the temporary injunction theretofore allowed by the court, restraining defendants from cutting down the standing timber remaining on said premises, might be continued and made perpetual. To each of these alleged causes of action the defendants interposed a general 29 L.R.A. (N.S.)

demurrer. The court of common pleas sustained the demurrer to said first cause of action, and overruled the demurrer addressed to said second cause of action. Thereupon, neither of the parties desiring to further plead, final judgment was entered upon the pleadings. Both plaintiff and defendants prosecuted error to the circuit court, where the judgment of the court of common pleas was affirmed. From this judgment of affirmance by the circuit court, James J. Walcutt alone prosecutes error in this court, no cross petition in error having been filed herein by the defendants in error.

Mr. J. A. Godown for plaintiff in error.
Messrs. Cummings, McBride, & Wolfe, and J. W. McCarron, for defendants in error:

Timber "cut" belongs to the purchaser, and a "cutting" is a removal.

25 Cyc. Law & Proc. pp. 1552, 1553; Brewster, Conveyancing, § 124; Halstead v. Jessup, 150 Ind. 85, 49 N. E. 821; Alexander v. Bauer, 94 Minn. 174, 102 N. W. 387; Erskine v. Savage, 96 Me. 57, 51 Atl. 242; Hodges v. Buell, 134 Mich. 162, 95 N. W. 1078; Macomber v. Detroit, L. & N. R. Co. 108 Mich. 491, 32 L.R.A. 102, 62 Am. St. Rep. 713, 66 N. W. 376; Hicks v. Smith, 77 Wis. 146, 46 N. W. 133; McGregor v. McNeil, 32 U. C. C. P. 538; Hoit v. Stratton Mills, 54 N. H. 109, 20 Am. Rep. 119.

A contract conveying an interest in standing timber, to be removed in a certain time, is a contract of which time is not of the essence.

2 Page, Contr. § 1160; Thacker Wood & Mfg. Co. v. Mallory, 27 Wash. 670, 68 Pac. 199; Halstead v. Jessup, supra.

The failure to remove the timber within the time stipulated in the deed did not pass title to the same to the grantee, but the title still remained in the grantor, the grantee having a right of action for use and occupancy of the premises, and for trespass.

Irons v. Webb, 41 N. J. L. 203, 32 Am. Rep. 193; Heflin v. Bingham, 56 Ala. 566, 28 Am. Rep. 776; Clark v. Guest, 54 Ohio St. 298, 43 N. E. 862.

Crew, J., delivered the opinion of the court:

The case presented by the record now before us is obviously controlled and must be determined by the construction proper to be placed upon the reservation clause found in the deed executed by defendants in error as grantors, to the plaintiff in error, James J. Walcutt, as grantee, in February, 1905. Said deed was a deed of warranty and conveyed to said James J. Walcutt about 200

acres of land situate in the townships of Monroe and Washington in Richland county, Ohio, subject, however, to the following exception and reservation, to wit: "Saving and excepting that all timber now on west side of this farm—about 60 acres—is hereby reserved by the said grantors, together with the privilege of going on to said farm and removing same any time within two years and six months from February 15, 1905." The question here presented is: Did the grantors, by this language, exclude from the operation of said grant, and thus reserve to themselves, the absolute ownership and title to the timber growing upon said 60 acres at the time of the execution of said conveyance? or did they thereby reserve and secure to themselves only the right to cut and remove so much of the timber growing thereon as they might cut and remove within two years and six months from February 15, 1905?

It is the contention of plaintiff in error that the latter construction is the one proper to be given the clause of the deed above cited, and therefore it is claimed that, defendants not having cut and removed all the timber within the time stipulated for its removal, the reservation or exception contained in the deed lapsed, and the title to all of said timber then remaining on the premises—as well that theretofore severed from the realty as that left standing—passed to the owner of the land, and that the latter had the right to hold and retain the same as his own, or, it having been converted, had the right to sue for and recover its value. Such claim we think is contrary to the clear weight of authority, and is not a correct statement of the law governing in such cases. In *Plumer v. Prescott*, 43 N. H. 277, which was an action for trespass, the contract was for the sale of all wood and timber on certain land belonging to plaintiff, the same to be cut and removed within a designated time. The wood and timber was all cut before the time named, and all the timber and part of the wood hauled off the premises. The balance was removed by defendant after the time limited for its removal. The court in that case said: "The question is whether, in an action of trespass for breaking and entering this tract of land after October 1st, the plaintiff is entitled to include in his damages the value of the wood thus hauled off. Assuming that the sale was limited to such trees as were cut during the time specified (as would seem to be the doctrine of *Pease v. Gibson*, 6 Me. 81, recognized in *Putney v. Day*, 6 N. H. 430, 25 Am. Dec. 470, and also of *Kemble v. Dresser*, 1 Met. 271, 35 Am. Dec. 364, and *Reed v. Merrifield*, 10 Met. 155), still it

does not follow that the vendee acquires no property in such trees as he had cut before the expiration of the time limited, although he permitted them to remain until after. Until cut they may be regarded as part of the soil in which they are rooted; and so it is decided in *Green v. Armstrong*, 1 Denio, 550, and *Olmstead v. Niles*, 7 N. H. 522. And it might well be held that no interest remained to the vendee in the land, or in the trees which are parcel of it, after the time limited in the contract. Otherwise, we should be driven to hold that the interest of the vendee in the land was not governed by the contract, but was extended beyond it indefinitely, by an assumption that a property in the trees as chattels, and not as parcel of the soil, was vested in the vendee, and at the same time giving him the use of the land for their support. When, however, these trees are lawfully cut by the vendee, within the time limited by the contract, they cease to be parcel of the land, and become the personal property of the vendee; and unless it can be considered that he has waived or forfeited his title to the timber by neglecting to remove it within the time, it must stand, for aught we can see, upon the footing of any other personal property of the vendee, which, by his fault or neglect, and without any fault of the vendor, is upon the land of the latter. It is very clear, we think, that, having been lawfully severed from the land, it has become personal property, and at any period before the expiration of the limited time, at least, the title is vested in the vendee as fully as any other chattels. If this be the case, it is difficult to see how the title can be lost by the neglect to remove it." For the reasons stated the court held that plaintiff was not entitled to judgment for the value of the wood taken.

The same rule was applied in *Irons v. Webb*, 41 N. J. L. 203, 32 Am. Rep. 193, where the reservation in the deed was in these words: "Excepting and reserving the timber on the said land being conveyed, for the removal of which the said party of the second part agrees to and with the said party of the first part that he, the said party of the second part, that he will give two years from the date hereof to the said party of the first part." In the opinion in this case, Beasley, Chief Justice, says: "The plaintiff founds his action in this case on the proposition that the timber in controversy was conveyed to him in an absolute form and clear of all conditions, and that the subsequent clause in the deed, restricting to the period of two years his right to enter upon the premises to remove such timber, had no effect on his title, either to limit or otherwise condition it. In oppo

sition to this, the contention of the defendant is that the plaintiff, by the right construction of the conveyance, became entitled only to such of the timber as was removed by him from the premises within the period designated. My examination of this subject has led me to the conclusion that the construction of this conveyance claimed in behalf of the plaintiff is correct. . . .

In the present case, if the contention of the defendant is right, then this timber continued to be the property of the plaintiff up to the running out of the two years, and then by its nonremoval it became forfeited and passed to the defendant; and it is entirely obvious that such a condition is not favored in law, and that it will not be raised up by implication, unless by the force of demonstrative indication. Looking at the terms of the present agreement and its subject-matter, I can see no mark, certainly no decisive mark, signifying that it was the intention of these parties that by the plaintiff's neglect to remove the timber it should be forfeited to the defendant. Such a purpose, it is certain, is not contained in any part of the language of the instrument; for it nowhere says that, in any event, the title to the timber is to pass to the grantee. As a consequence, as it is not in the words, such a right must be derived by inference from the nature of the transaction itself. But, then, what feature of the business is to have such an effect? The only particular relied on is the circumstance that, if the timber was permitted to remain on the premises until the time of removal had expired, it became unlawful to enter for the purpose of taking it away. But the effect of such an incident is not in law to work a forfeiture of title. Such a position of property is not uncommon. Chattels are frequently placed, or left, by their owner, on the land of another without his permission, but it will scarcely be pretended that, by so doing, the title to such chattels becomes vested in the proprietor of the land. In such case, the landowner has an adequate remedy for the wrong suffered by him; he is entitled to be indemnified for all the loss he may have sustained by having had his land illegally burdened by chattels placed there without right, and in consequence of the entry to remove them; and in this way, instead of by the exorbitant method of a forfeiture of such chattels, the law applies to the case its ordinary measure of damages, and thus gives compensation."

In *Erskine v. Savage*, 96 Me. 57, 51 Atl. 242, the deed contained the following reservation: "Reserving all hard and soft wood growth thereon, with right of entry upon the premises at any and all times for a

period of five years from the date hereof with men and teams for the purpose of cutting and removing the same." The grantor afterwards sold to the plaintiff by "bill of sale" all rights reserved to himself by the foregoing reservation. Within the five years the plaintiff cut all the wood reserved, but some of it had not been removed before the expiration of that period. Thereupon the defendant forbade the removal of the remaining wood, and for this alleged conversion trover was brought. Held: "That the wood remained a part of the real estate until severed from the soil; that as soon as it was severed, within the period limited, it became personal property; that the title then vested in the plaintiff; and that the plaintiff did not lose his title to the wood cut, but not removed, by failure to remove it within the five-year period."

In the comparatively recent case of *Alexander v. Bauer*, 94 Minn. 174, 102 N. W. 387, under a contract whereby defendant was to have until a certain time to cut and remove several thousand feet of logs from the plaintiff's land, a portion of which was cut before the limitation provided for in the contract expired, but was not removed until six months afterwards, it was held "that, upon the failure to remove the logs before the time limited, the title thereof did not revert to and become reinvested in the owner of the land." The court in the opinion says: "Conceding, as necessary, that the case calls for a construction of the terms of the agreement, which provides that the defendant had a right to 'cut and remove' until June 1, 1902, we are not able to adopt the view that this embraced a provision for forfeiture of defendant's acquired rights, whereby the title to the property was to depend absolutely upon the actual removal of the severed logs before that time. It cannot be doubted that the defendant's right to cut the logs was clear, and that he could avail himself of that privilege previous to the expiration of such limitation; but it does not conclusively follow that the character of the property was changed from personal chattels, the defendant's dominion over which, for the time at least, was plain and absolute, to an interest in real estate, nor that, by the failure to remove, it was to revert to and revest in the plaintiff. If this followed, the defendant would lose the benefit of his entire labor, as well as the right to that which for a period of time had remained in him, with all the benefits and incidents which attach to personal property. It is true that there are decisions which, upon examination, will justify such conclusions,—as, notably, the case of *Boisau-*

bin v. Reed, 2 Keyes. 323, and some other cases of similar import. We are not satisfied with the principles upon which these cases rest. It seems much more equitable and just, as well as consonant with the rights of the parties and the analogies of the law, to hold that as to standing timber, which is a part of the freehold, when cut under the authority of the owner and converted into chattel property, the ownership of which becomes vested in the person cutting the same, while the right to remove is limited to a certain time, there is no implied condition that such title shall revert if the independent duty to remove it is not strictly performed. Or, in other words, that, by failure to perform the agreed duty to remove, the owner's rights would become absolutely and irrevocably forfeited. That there might be an action for trespass against the defendant upon the freehold, if the person cutting the logs should enter thereon after the limitation, may be true, or that damages for occupation of the land would follow from a removal after this time might also be true; but we are not prepared to approve any decision which holds that there is an implied condition upon which the right to the title to property, once vested, can be changed by the failure or breach thereof, and transfer the title to the entire property." The rule and doctrine announced by the authorities above cited was also applied in *Halstead v. Jessup*, 150 Ind. 85, 49 N. E. 821; *Hicks v. Smith*, 77 Wis. 146, 46 N. W. 133; *Goodwin v. Hubbard*, 47 Me. 595; *Hoit v. Stratton Mills*, 54 N. H. 109, 20 Am. Rep. 119.

The authority and reasoning exhibited in the foregoing cases would appear to be, and we think is, decisive of the case at bar, as, obviously, defendants in the present case cannot be held liable to plaintiff for the value of the timber removed by them after February 15, 1907, if at the time of its removal it was their property. The case of *Clark v. Guest*, 54 Ohio St. 298, 43 N. E. 862, relied upon by counsel for plaintiff in error, is clearly distinguishable from the case now under consideration, in that there was involved in *Clark v. Guest* no question whatever as to the ownership of timber that had been severed from the land; and it sufficiently appears from the syllabus in the case that the word "timber," as used by *Burket, J.*, in the opinion in that case, had reference to growing timber; timber which, in the language of the syllabus, "adhered in the land," and was a part of the realty. In the present controversy there is now in dispute only so much of the timber reserved by the grantors (defendants in error) as had by them been severed from the realty

prior to February 15, 1907, no claim being here made by them to any portion of the timber then left standing and uncut. It follows, therefore, that the timber in controversy having all been lawfully cut by defendants in error within the time limited and reserved in their deed, the same ceased to be parcel of the real estate and became their personal property, and in consequence, there being no clause of forfeiture in the deed, they cannot be held liable to plaintiff for the value for the property taken, although the same was not removed until after the limitation period named in the deed had expired. The view we have taken in this case makes it unnecessary for us to notice or consider the effect of the arrangement and agreement entered into between the parties, while this cause was pending in the court of common pleas, touching the removal of this property by the defendants. Judgment affirmed.

Summers, Ch. J., and Davis, Shauck, and Price, JJ., concur.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

JAMES C. LILLY et al., Admrs., etc., of Henry Brooks, Deceased, et al., Plffs. in Err.,

v.

HAMILTON BANK OF NEW YORK CITY.

(102 C. C. A. 1, 178 Fed. 53.)

Bank — knowledge of officer — notice — individual dealing.

1. The knowledge of an officer of a bank who is also a member of its discount committee, and who offers to the bank a note which he had secured by fraud, but who withdraws from the committee meeting

Note. — Imputation of knowledge of bank officers to bank, where officers are personally interested.

This note deals only with the question whether banks are bound by the knowledge of their officers in cases where the officers are personally interested in the transaction. It does not cover the general question as to the extent of the officer's authority in transactions in which they are interested, nor does it cover the question whether the bank is bound by the knowledge of its officers where they are acting as the agent of third persons, without any personal interest, direct or indirect, in the transaction.

A well-recognized exception to the general rule that a principal is chargeable with the knowledge acquired by his agent exists where the officers of a bank are personally interested in a transaction

while the question of the acceptance of the note is under consideration, is not imputable to the bank, so as to prevent its enforcing the note.

Evidence — fraud — inquiry as to conduct.

2. One resisting payment of a note on the ground of fraud may be asked if, when he suspected fraud, he took any steps to recover possession of the note, as bearing upon the consistency of his conduct with his statement that he suspected fraud.

Same — fraud in securing note — bona fide holder.

3. In an action by a bank on a note purchased by it from one who is alleged to have obtained it by fraud for property which he was to deliver, but did not, evidence is not admissible as to his lack of

possession of the property, where the bank is shown to be a bona fide holder.

Note — fraud — transfer — assignment for creditors — effect.

4. The maker of a note obtained by fraud and transferred to a bank is not relieved from his liability to it by the fact that the payee had made an assignment for the benefit of creditors including such bank.

Evidence — course of business.

5. An officer of a bank may testify to its transactions from his knowledge of its course of business, although he has no personal knowledge of them.

Appeal — admission of evidence — grounds not raised below.

6. The admission of evidence cannot be declared to be error on appeal, for a reason different from that claimed at the trial.

which the bank is also a party in interest. The reason for the exception is that the officer will not be presumed to impart knowledge which is adverse to his own interest.

The court in *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, said: "The presumption that the agent informed his principal of that which his duty and the interests of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent, unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

This exception has been recognized:

—where the officer interested was the president of the bank. *People's Bank v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 44, 43 S. E. 269; *First Nat. Bank v. Babidge*, 160 Mass. 563, 36 N. E. 462; *Corran v. Snow Cattle Co.* 151 Mass. 74, 23 N. E. 727; *People's Sav. Bank v. Hine*, 131 Mich. 181, 91 N. W. 130; *First Nat. Bank v. Persall*, 110 Minn. 333, 125 N. W. 506, rehearing denied in 110 Minn. 336, 125 N. W. 675; *State Bank v. Mathews*, 45 Neb. 59, 50 Am. St. Rep. 565, 63 N. W. 930; *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053; *Knoblock v. Germania Sav. Bank*, 50 S. C. 259, 27 S. E. 962; *Staples v. Huron Nat. Bank*, 8 S. D. 222, 66 N. W. 314; *Re Plankinton Bank*, 7 Wis. 378, 58 N. W. 784; *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, affirming 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 10; *Larson v. Beard*, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30; *First Nat. Bank v. Tompkins*, 6 C. C. A. 237, 13 U. S. App. 300, 57 Fed. 20;

—where the officer was president and

cashier. *Koehler v. Dodge*, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; *Camden Safe Deposit & T. Co. v. Lord*, 67 N. J. Eq. 489, 58 Atl. 607; *Commercial Bank v. Burgwyn*, 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623;

—promoter of the bank. *Re European Bank*, L. R. 5 Ch. 358;

—and where the officer was a director. *Terrell v. Branch Bank*, 12 Ala. 502; *English-American Loan & T. Co. v. Hiers*, 112 Ga. 823, 28 S. E. 103; *Lyne v. Bank of Kentucky*, 5 J. J. Marsh, 545; *Sebald v. Citizens' Deposit Bank*, 31 Ky. L. Rep. 1244, 14 L.R.A. (N.S.) 376, 105 S. W. 130; *Louisiana State Bank v. Senecal*, 13 La. 525; *Clarke v. Second Nat. Bank*, 177 Mass. 257, 59 N. E. 121; *Washington Bank v. Lewis*, 22 Pick. 24; *Frost v. Belmont*, 6 Allen, 152; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Commercial Bank v. Cunningham*, 24 Pick. 270, 35 Am. Dec. 322; *Shaw v. Clark*, 49 Mich. 384, 43 Am. Rep. 474, 13 N. W. 786; *Central Bank v. Thayer*, 184 Mo. 61, 82 S. W. 142; *Southern Commercial Sav. Bank v. Slattery*, 166 Mo. 620, 66 S. W. 1066; *Third Nat. Bank v. Tinsley*, 11 Mo. App. 498; *Buffalo County Nat. Bank v. Sharpe*, 40 Neb. 123, 58 N. W. 734; *City Bank v. Barnard*, 1 Hall, 80; *Atlantic State Bank v. Savery*, 82 N. Y. 291; *Westfield Bank v. Cornen*, 37 N. Y. 320, 93 Am. Dec. 573; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 19 N. Y. S. R. 133, 18 N. E. 618; *Loomis v. Eagle Bank*, 12 Ohio Dec. Reprint, 625; *Wardlaw v. Troy Oil Mill*, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658; *Martin v. South Salem Land Co.* 94 Va. 28, 26 S. E. 591; *First Nat. Bank v. Lowther-Kaufman Oil & Coal Co.* 66 W. Va. 505, 28 L.R.A. (N.S.) 511, 66 S. E. 713; *Third Nat. Bank v. Harrison*, 3 McCrary, 316, 10 Fed. 243; *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.* 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 433, modified on other points in 174 U. S. 552, 43 L. ed. 1081, 19 Sup. Ct. Rep. 817;

—also in cases of cashiers. *First Nat. Bank v. Bevin*, 72 Conn. 666, 45 Atl. 954; *Merchants' Nat. Bank v. Demere*, 92 Ga.

Pleading — variance — note — transfer by indorser.

7. That a note sued on is alleged to have been delivered to the holder by the first indorser, while the evidence shows that the indorsement was in blank, and the note was actually delivered to plaintiff by one who received it after the indorsement, does not constitute a fatal variance.

(December 6, 1909.)

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain promissory note. Affirmed.

The facts are stated in the opinion.

735, 19 S. E. 38; Savannah Bank & T. Co. v. Hartridge, 73 Ga. 223, 75 Ga. 149; First Nat. Bank v. Gifford, 47 Iowa, 575; Hummel v. Bank of Monroe, 75 Iowa, 689, 37 N. W. 954; First Nat. Bank v. Northrup, 82 Kan. 638, 109 Pac. 672; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; State Sav. Bank v. Montgomery, 126 Mich. 327, 85 N. W. 879; Ft. Dearborn Nat. Bank v. Seymour, 71 Minn. 81, 73 N. W. 724; State Bank v. Forsyth (Mont.) 28 L.R.A. (N.S.) 501, 108 Pac. 914; Buffalo County Nat. Bank v. Sharpe, supra; Jones v. First Nat. Bank, 3 Neb. (Unof.) 73, 90 N. W. 912; Brady v. Mt. Morris Bank, 64 App. Div. 212, 73 N. Y. Supp. 532; Wilson v. Second Nat. Bank, 4 Sadler (Pa.) 68, 7 Atl. 145; National Bank v. Feeney, 9 S. D. 550, 46 L.R.A. 732, 70 N. W. 874; First Nat. Bank v. Foote, 12 Utah, 157, 42 Pac. 205; First Nat. Bank v. Briggs, 70 Vt. 594, 67 Am. St. Rep. 691, 41 Atl. 580; Rock Springs Nat. Bank v. Lennan, 5 Wyo. 159, 38 Pac. 678; Bank of Overton v. Thompson, 50 C. C. A. 554, 118 Fed. 798; Curtice v. Crawford County Bank, 110 Fed. 830; School Dist. v. DeWeese, 100 Fed. 705.

It was held, however, in Bank of United States v. Davis, 2 Hill, 451, where a bill of exchange was sent to a director for discount, and the director was on the board which ordered the discount, that the bank was chargeable with knowledge of his fraud in representing that the discount was for his benefit.

The exceptions to the rule that the knowledge of the agent is imputed to the principal is also recognized where a bank officer is interested in another company or estate, for which he acts in the transaction with the bank.

Thus, in Seixas v. Citizens' Bank, 38 La. Ann. 424, where the president of a bank was at the head of another firm, and pledged collaterals to the bank, the bank was held not chargeable with knowledge that the firm was insolvent, where the president was driving the bargain for himself. The court said: "It is urged, how-

Argued before Gray, Buffington, and Lanning, Circuit Judges.

Mr. John K. Andre for plaintiffs in error.

Messrs. Thomas Earle White, James M. Gifford, and Anson M. Beard, with Messrs. White, White, & Taulane, for defendant in error:

The declarations of the Thomases were made in the transaction or their private business, and were not binding on the bank in its subsequent purchase of the note.

Third Nat. Bank v. Harrison, 3 McCr., 316, 10 Fed. 248; Davis Improved Wrought Iron Wagon Wheel Co. v. Davis Wrought Iron Wagon Co. 22 Blatchf. 221, 20 Fed. 701; Thomson-Houston Electric Co. v. Capitol Electric Co. 12 C. C. A. 643, 22 U. S.

ever, that, as Emile Carrière was, at the time of this transaction, the president of the bank,—and was, of course, thoroughly cognizant of the insolvency of his firm, of which he was the leading and managing member,—his (Carrière's) knowledge was the knowledge of the bank, and operated as constructive notice of the fact of insolvency of the firm. We have weighed with care and deliberation the able arguments of counsel on this point, and have studied diligently and exhaustively the numerous authorities cited by them, and our conclusion is this: That, as a general rule, the knowledge of an agent is the knowledge of the principal. And even where an agent deals in a double capacity for his principal and himself at the same time, and where his acts are evidently designed and intended to benefit or favor the principal to his own prejudice or that of his creditors, even in such case his knowledge of his condition or other material fact will be regarded as the knowledge of the principal. But where such agent seeks his own personal interest or advantage in the affair, without benefit to his principal, then his knowledge cannot be held to be the knowledge of the principal."

And this exception was recognized in the following cases, where the bank officer was connected with and acting for another concern in which he was interested:

—presidents of banks: Corcoran v. Steer Cattle Co. 151 Mass. 74, 23 N. E. 727; Gallery v. National Exch. Bank, 41 Mo. 169, 32 Am. Rep. 149, 2 N. W. 193; First Nat. Bank v. Strait, 75 Minn. 396, 78 N. W. 101; De Kay v. Hackensack Water Co. 38 N. J. Eq. 158; Crooks v. People's Nat. Bank, 34 Misc. 450, 70 N. Y. Supp. 27, affirmed in 177 N. Y. 68, 69 N. E. 225; Holm v. Atlas Nat. Bank, 28 C. C. A. 29, 55 U. S. App. 570, 84 Fed. 119;

—vice presidents of banks: Merchant Nat. Bank v. Lovitt, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825; Commercial Bank v. Burgwyn, 110 N. C. 267, 17 L.R. (N.S.) 320, 14 S. E. 623; Gunster v. Stanton Illuminating, H. & P. Co. 181 Pa. 31

App. 669, 65 Fed. 343; Hatch v. Ferguson, 14 C. C. A. 41, 29 U. S. App. 540, 66 Fed. 668; Starr & Co. v. Galgate Ship Co. 15 C. C. A. 366, 29 U. S. App. 599, 68 Fed. 243; American Surety Co. v. Pauly, 18 C. C. A. 644, 38 U. S. App. 254, 72 Fed. 481, 170 U. S. 133, 137, 42 L. ed. 977, 979, 18 Sup. Ct. Rep. 552; Louisville Trust Co. v. Louisville, N. A. & C. R. Co. 22 C. C. A. 378, 43 U. S. App. 550, 75 Fed. 469; Niblack v. Cosler, 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 600; Holm v. Atlas Nat. Bank, 28 C. C. A. 297, 55 U. S. App. 570, 84 Fed. 121; Hadden v. Dooley, 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274; Lamson v. Beard, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30; Curtice v. Crawford County Bank, 110 Fed. 843; Bank of Overton v. Thompson, 56 C.

C. A. 554, 118 Fed. 800; Friedlander v. Texas & P. R. Co. 130 U. S. 416, 32 L. ed. 991, 9 Sup. Ct. Rep. 570; Gunster v. Scranton Illuminating, H. & P. Co. 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550; Custer v. Tompkins County Bank, 9 Pa. 27; Wilson v. McCullough, 23 Pa. 440, 62 Am. Dec. 347; Houseman v. Girard Mut. Bldg. & L. Asso. 81 Pa. 256; Barbour v. Wiehle, 116 Pa. 308, 9 Atl. 520; Gordon v. Preston, 1 Watts, 385, 26 Am. Dec. 75; Wilson v. Second Nat. Bank, 4 Sadler (Pa.) 68, 7 Atl. 145; Bracken v. Miller, 4 Watts & S. 102; Hood v. Fahnestock, 8 Watts, 489, 34 Am. Dec. 489; Martin v. Jackson, 27 Pa. 504, 67 Am. Dec. 489; Boggs v. Varner, 6 Watts & S. 473; United Security L. Ins. & T. Co. v. Central Nat. Bank, 185 Pa. 586, 40 Atl.

59 Am. St. Rep. 650, 37 Atl. 550; Holm v. Atlas Nat. Bank, 28 C. C. A. 297, 55 U. S. App. 570, 84 Fed. 119;

—directors of banks. Benton v. German-American Nat. Bank, 122 Mich. 332, 26 S. W. 975; First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 262; First Nat. Bank v. Strait, *supra*; Casco Nat. Bank v. Clark, 139 N. Y. 307, 36 Am. St. Rep. 705, 34 N. E. 908; Manufacturers' Nat. Bank v. Newell, 71 Wis. 314, 37 N. W. 420;

—cashier. National Bank v. Fitze, 76 Mo. App. 356; Wilson v. Second Nat. Bank, *supra*; Hadden v. Dooley, 34 C. C. A. 338, 63 U. S. App. 173, 92 Fed. 274, reversed on other grounds in 179 U. S. 646, 45 L. ed. 357, 21 Sup. Ct. Rep. 259.

And where a cashier has no knowledge of equities existing against the note of a corporation of which he is a stockholder and director, the bank for which he acts in discounting the note is not chargeable with such equities. First Nat. Bank v. Loyhed, 28 Minn. 306, 10 N. W. 421.

It was held in Waynesville Nat. Bank v. Irons, 8 Fed. 1, that if the president of the bank, who was also president of a company whose paper was discounted, did not in fact participate in the negotiations for the discount on behalf of the bank, it was not chargeable with the condition of the company.

In Traders' Nat. Bank v. Smith (Tex. Civ. App.) 22 S. W. 1056, a bank was held chargeable with the conditions of a contract under which a note was given, where the bank president and manager was also a stockholder and director in the company making the note, upon the ground of balanced interest. The court, after recognizing the exceptions to the general rule in case of an agent's personal interest in the contract, said: "But in this case, did Boaz have such adverse interest to the bank as should prevent it from being charged with notice to him? We attach much importance to the fact that Boaz acted for the bank in this transaction, and it is of his acts that it seeks to avail itself. He had no personal interest to be subserved by 29 L.R.A. (N.S.)

injuring the bank other than such as he had as a stockholder and director in the Texas Investment Company, and his interest seems to have been fully offset by the interest he possessed as president, stockholder, and director in the bank for which he was acting. The case, then, was this: If he injured the bank, he injured himself as president, director, and stockholder therein, but benefited the investment company and himself as director and stockholder, and *vice versa*. His interest, then, so far as we can see from the record, was balanced, and in such case we believe he cannot be said to have had such an adverse interest as should prevent his principal from being charged with his knowledge in the transaction, in which he was the active agent negotiating for it."

And in Union Bank v. Wando Min. & Mfg. Co. 17 S. C. 339, a bank was held chargeable with the infirmities existing in the notes of a company of which the president of the bank and a director thereof, were also directors. The court said: "It is well known as the usage of banks to intrust ordinary renewals to the president, and here the president and a director sat on the company board. The knowledge of Mowry was official, for it related to the business of the bank, and the bank is bound by the legal effect of his knowledge."

And it was held in First Nat. Bank v. Erickson, 20 Neb. 580, 31 N. W. 387, where the assistant cashier of a bank was treasurer of the company which was the payee of a note, and the president of the bank was also the president of the other company, that the knowledge of such officers as to defenses to the note was imputable to the bank.

So, in State Bank v. Fish, 120 N. Y. Supp. 365, where some of the directors of a bank were also directors of a company whose property was mortgaged to the bank, the bank was held chargeable with notice that fixtures of the company were bought under a conditional contract of sale.

So, it has been held that where a note is discounted for a firm of which one of the bank directors is a member, and he,

97; *Sproul v. Standard Plate Glass Co.* 201 Pa. 103, 50 Atl. 1003; *National Bank v. Norton*, 1 Hill, 572; *Weisser v. Denison*, 10 N. Y. 68, 61 Am. Dec. 731; *Seneca County Bank v. Neass*, 5 Denio, 337; *New York Cent. Ins. Co. v. National Protection Ins. Co.* 14 N. Y. 85; *Bentley v. Columbia Ins. Co.* 17 N. Y. 421; *Neuendorff v. World Mut. L. Ins. Co.* 69 N. Y. 389; *Murray v. Beard*, 102 N. Y. 505, 7 N. E. 553; *Claffin v. Farmers' & C. Bank*, 25 N. Y. 293; *Voltz v. Blackmar*, 64 N. Y. 440; *New York v. Tenth Nat. Bank*, 111 N. Y. 446, 18 N. E. 618; *Manhattan L. Ins. Co. v. Forty-second Street & G. Street Ferry R. Co.* 139 N. Y. 146, 34 N. E. 776; *Merchants' Nat. Bank v. Clark*, 139 N. Y. 314, 36 Am. St. Rep. 710, 34 N. E. 910; *La Farge F. Ins. Co. v. Bell*, 22 Barb. 54;

City Bank v. Barnard, 1 Hall, 70; *Bank of New York Nat. Bkg. Asso. v. American Dock & T. Co.* 143 N. Y. 564, 38 N. E. 713; *Hanover Nat. Bank v. American Dock & T. Co.* 148 N. Y. 612, 51 Am. St. Rep. 721, 43 N. E. 72; *Henry v. Allen*, 161 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Corcoran v. Snow Cattle Co.* 151 Mass. 74, 23 N. E. 727; *First Nat. Bank v. Babbidge*, 160 Mass. 563, 36 N. E. 462; *Indian Head Nat. Bank v. Clark*, 166 Mass. 27, 43 N. E. 912; *Commercial Bank v. Cunningham*, 24 Pick. 276, 35 Am. Dec.

with knowledge of facts tending to invalidate the note, acts as a director with the board ordering the discount, the bank is chargeable with notice of such facts. *North River Bank v. Aymar*, 3 Hill, 262.

Some cases do not recognize the exception to the general rule on account of the bank officer's interest, where such officer is the sole representative of the bank in the transaction.

Thus, in *LeDuc v. Moore*, 111 N. C. 516, 15 S. E. 888, a bank was held to take a note subject to all equities which might have been asserted against one who indorsed the note for his benefit to a bank of which he was president, and of which he and the cashier constituted the discount committee. In distinguishing cases in which paper of members of discount committees consisting of a number of members was discounted, the court said: "The principle is based upon the presumption that a majority of the members of the discount committee, being aware of the adverse interest of their associate, were in no way influenced by him in their action, and as he was treated as a stranger to the bank in the particular transaction, it would be unfair to assume that he imparted his knowledge to its officials. In other words, the theory is that he cannot be considered, in such a case, as having acted influentially as an officer of the bank. Our case is quite different, as here the discount committee consisted of Moore and the cashier alone, and it required the active official participation of the former in order to discount the paper. Here, then, we have as undisputed facts the active and essential participation of the president as a director, and also his actual knowledge. This leaves no room for the operation of any presumption, and the bank cannot escape its liability for the misconduct of one whom it has placed in such a highly responsible position. If loss must ensue by reason of the bad faith of Moore, it would seem clear that it should be borne by the bank, which, by reason of its selection of an improper agent, has caused a loss which would not have resulted if the instrument employed

by it had come up to the standard of good faith, which it is one of the great objects of the law to secure in commercial dealings."

The court in *First Nat. Bank v. Blake*, 60 Fed. 78, said: "It is claimed, in support of the demurrer, that the knowledge which Cornish had cannot be imputed to the bank, because he acted for himself in the transaction; that his interest was opposed to that of the bank, and that, therefore, there is no presumption of a communication by him against his own interests; but that the presumption is the other way,—that he concealed the knowledge which he had of the infirmity of his own title. A large number of cases are cited in support of this view, and it is well settled that an officer or agent, dealing with a corporation or his principal on his own account, is not presumed to communicate knowledge which it would be to his interest to conceal, and the corporation or principal is not chargeable with such knowledge. But there is no room for the application of this principle where the agent is the sole representative of both parties in the transaction. If Cornish was the sole representative of the bank in the transaction with himself, there was no one from whom information could have been concealed, or to whom it could have been communicated. If he was the sole representative of each party, each must have had equal knowledge. As the representative of the bank, his knowledge was not affected by his private interests, however much his conduct may have been. He necessarily knew as much in one capacity as he did in the other. The bank is charged with the knowledge which Cornish had."

And in the following cases, where the officers interested were the only representatives of the banks in the transactions, the banks were held chargeable with the agents' knowledge, although they were personally interested:

—presidents. *Brobston v. Penniman*, 97 Ga. 527, 25 S. E. 350; *English-American Loan & T. Co. v. Hiers*, 112 Ga. 823, 38 S. E. 103; *Holden v. New York & E. Bank*,

322; Stratton v. Allen, 16 N. J. Eq. 232; Barnes v. Trenton Gaslight Co. 27 N. J. Eq. 36; Porter v. Woodruff, 36 N. J. Eq. 181; DeKay v. Hackensack Water Co. 38 N. J. Eq. 158; First Nat. Bank v. Christopher, 40 N. J. L. 435, 29 Am. Rep. 202; Camden Safe Deposit & T. Co. v. Lord, 67 N. J. Eq. 489, 58 Atl. 607; United States Ins. Co. v. Shriver, 3 Md. Ch. 389; General Ins. Co. v. United States Ins. Co. 10 Md. 527, 69 Am. Dec. 174; Winchester v. Baltimore & S. R. Co. 4 Md. 231; Merchants' Nat. Bank v. Lovitt, 114 Mo. 519, 35 Am. St. Rep. 770, 21 S. W. 825; Third Nat. Bank v. Tinsley, 11 Mo. App. 501; Mercier v. Canonge, 8 La. Ann. 39; Louisiana State Bank v. Senecal, 13 La. 525; Lucas v. Bank of Darien, 2 Stew. (Ala.) 295; Terrell v. Branch Bank, 12 Ala. 502; Frenkel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; Farrell Foundry v. Dart, 26 Conn. 376; Savannah Bank & T. Co. v. Hartridge, 75 Ga. 149; Wheeler v. Home Sav. & State Bank, 188 Ill. 34, 80 Am. St. Rep. 161, 58 N. E. 598; Koehler v. Dodge, 31 Neb. 328, 28 Am. St. Rep. 518, 47 N. W. 913; Wickersham v. Chicago Zinc Co. 18 Kan. 481, 26 Am. Rep. 784; First Nat.

72 N. Y. 286; City Nat. Bank v. National Park Bank, 32 Hun, 105; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A. (N.S.) 193, 65 Atl. 641; Smith v. Wilson & B. Sav. Bank, 1 Tex. Civ. App. 115, 20 S. W. 1119; Nisbet v. Macon Bank & T. Co. 4 Woods, 464, 12 Fed. 686; Ditty v. Dominion Nat. Bank, 22 C. C. A. 376, 43 U. S. App. 613, 75 Fed. 769; Niblack v. Cosler, 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 586; McCalmont v. Lanning, 84 C. C. A. 138, 154 Fed. 353;

—president and general manager. First Nat. Bank v. Blake, supra;

—president and cashier. Hardy v. First Nat. Bank, 56 Kan. 493, 43 Pac. 1125;

—cashiers. Lowndes v. City Nat. Bank, 82 Conn. 8, 22 L.R.A. (N.S.) 408, 72 Atl. 150, First Nat. Bank v. New Milford, 36 Conn. 93; Morris v. Georgia Loan, Sav. & Bkg. Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378; Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953; Tilden v. Barnard, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420; Fishkill Sav. Inst. v. National Bank, 80 N. Y. 162, 36 Am. Rep. 595; Loring v. Brodie, 134 Mass. 453; Merchants' Nat. Bank v. Tracy, 77 Hun, 443, 29 N. Y. Supp. 77, affirmed in 150 N. Y. 565, 44 N. E. 1126; Emerado Farmers' Elevator Co. v. Farmers' Bank (N. D.) 127 N. W. 522; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071; National Bank v. Feeney, 9 S. D. 550, 40 L.R.A. 732, 70 N. W. 874;

—treasurer. Oak Grove & S. V. Cattle Co. v. Foster, 7 N. M. 650, 41 Pac. 522;

—teller. Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Skinner v. Merchants' Bank, 4 Allen, 290; City Nat. Bank v. 29 L.R.A. (N.S.)

Bank v. Gifford, 47 Iowa, 575; Hummel v. Bank of Monroe, 75 Iowa, 689, 37 N. W. 954; Lyne v. Bank of Kentucky, 5 J. J. Marsh. 545; Fairfield Sav. Bank v. Chase, 72 Me. 227, 39 Am. Rep. 319; Stevenson v. Bay City, 26 Mich. 44; State Sav. Bank v. Montgomery, 126 Mich. 327, 85 N. W. 879; Commercial Bank v. Burgwyn, 110 N. C. 267, 17 L.R.A. 326, 14 S. E. 623; Loomis v. Eagle Bank, 1 Disney (Ohio) 285; Wardlaw v. Troy Oil Mill, 74 S. C. 368, 114 Am. St. Rep. 1004, 54 S. E. 658; First Nat. Bank v. Foote, 12 Utah, 157, 42 Pac. 205; First Nat. Bank v. Briggs, 70 Vt. 594, 67 Am. St. Rep. 691, 41 Atl. 580; Washington Nat. Bank v. Pierce, 6 Wash. 491, 36 Am. St. Rep. 174, 33 Pac. 972; Kettlewell v. Watson, L. R. 21 Ch. Div. 707; Re Marseilles Extension R. Co. L. R. 7 Ch. 161; Re European Bank, L. R. 5 Ch. 359; Mecham, Agency, §§ 729, 730; 4 Thomp. Corp. §§ 5206, 5209; Wade, Notice, § 683.

The breach by the Thomases of their promise to perform a future act does not constitute fraud or a fraudulent representation, which must refer to a present existing fact. Nor can their promise to

Martin, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507.

And in National Security Bank v. Cushman, 121 Mass. 490, where it was alleged that a director obtained a note which had been discounted by the bank by fraud, it was held that where he acted with the cashier in discounting the note, his knowledge of the fraud was imputable to the bank.

But in other cases the exception seems to have been recognized, notwithstanding the fact that the bank officer was its only representative in the transaction:

—cashiers. Findley v. Cowles, 93 Iowa, 389, 61 N. W. 998; Seneca County Bank v. Neass, 5 Denio, 329. The last case was affirmed in 3 N. Y. 442, but the point here discussed was not there touched upon.

And it was held in Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912, that the exception applied if the cashier's intention was to commit a fraud on the bank for his own benefit, although he was the only officer acting for the bank.

And in First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186, where the cashier of a bank was employed by a customer to purchase bonds, and after the purchase he placed them on special deposit, and subsequently transferred them to conceal his embezzlement, the bank was held chargeable with notice of the ownership of the bonds.

See further, as to the effect of the fact that the officer of the bank was the sole representative of the bank in the transaction, note to Brookhouse v. Union Pub. Co. 2 L.R.A. (N.S.) 993.

J. T. W.

use the proceeds in a specified way taint the note in the hands of the purchaser.

Treacy v. Hecker, 51 How. Pr. 69; *Lexow v. Julian*, 21 Hun, 577, affirmed in 86 N. Y. 638; *Fisher v. New York Common Pleas*, 18 Wend. 608; *Gray v. Palmer*, 2 Robt. 500, affirmed in 41 N. Y. 620; *Taylor v. Commercial Bank*, 174 N. Y. 181, 62 L.R.A. 783, 95 Am. St. Rep. 564, 66 N. E. 726; *Com. use of Mishey v. Brennehan*, 1 Rawle, 315; *Stitt v. Little*, 63 N. Y. 427; *Farrington v. Bullard*, 40 Barb. 516; *Wright v. Remington*, 41 N. J. L. 48, 32 Am. Rep. 180; *Union P. R. Co. v. Barnes*, 12 C. C. A. 48, 27 U. S. App. 421, 64 Fed. 83; *New York L. Ins. Co. v. McMaster*, 30 C. C. A. 532, 57 U. S. App. 638, 87 Fed. 67; *Van Duzer v. Howe*, 21 N. Y. 531; *Frank v. Lillienfeld*, 33 Gratt. 377; *Redlich v. Doll*, 54 N. Y. 238, 13 Am. Rep. 573.

The maker is estopped from pleading the facts.

Van Duzer v. Howe; *Redlich v. Doll*; and *Frank v. Lillienfeld*, *supra*.

The plaintiff is a holder in due course.

Chemical Nat. Bank v. Kellogg, 183 N. Y. 96, 2 L.R.A. (N.S.) 299, 111 Am. St. Rep. 717, 75 N. E. 1103, 5 A. & E. Ann. Cas. 158; *Setzer v. Deal*, 135 N. C. 429, 47 S. E. 466.

Negligence will not impair the purchaser's title. It is a question simply of good faith in the purchaser. Unless the evidence makes out a case upon which a jury would be authorized to find fraud or bad faith in the purchaser, it is the duty of the court to direct a verdict.

Welch v. Sage, 47 N. Y. 143, 7 Am. Rep. 423; *Phelan v. Moss*, 67 Pa. 59, 5 Am. Rep. 402; *Goodman v. Simonds*, 20 How. 365, 15 L. ed. 937; *Murray v. Lardner*, 2 Wall. 121, 17 L. ed. 859; *Swift v. Smith*, 102 U. S. 442, 444, 26 L. ed. 193, 194.

A bona fide purchaser can recover, even on a lost or stolen note, against all the parties.

Cheever v. Pittsburgh, S. & L. E. R. Co. 150 N. Y. 66, 34 L.R.A. 69, 55 Am. St. Rep. 640, 44 N. E. 701; *Knox v. Eden Musee American Co.* 148 N. Y. 454, 31 L.R.A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *Belmont State Bank v. Hoge*, 35 N. Y. 68.

There is an implied warranty by the party negotiating the note, that the note is a valid, subsisting, and enforceable instrument.

Meyer v. Richards, 163 U. S. 385, 41 L. ed. 199, 16 Sup. Ct. Rep. 1148.

Lanning, Circuit Judge, delivered the opinion of the court:

The Hamilton Bank of New York City, the plaintiff below, recovered a judgment against the defendants below. The plaintiffs in error here, on a promissory note for the 29 L.R.A. (N.S.)

sum of \$50,000. The bank purchased the note before maturity from E. R. Thomas and O. F. Thomas, the former of whom was president, and both of whom were directors and members of the discount committee, of the bank. One of the questions presented by the assignments of error relates to what the defendants insist was a fraud perpetrated by the Thomases upon the defendants, who were makers of the note. The essential facts as to this branch of the case are these: On October 5, 1907, the Thomases and John J. Coyle entered into a written contract by which the Thomases agreed to sell and deliver to Coyle certain stocks and bonds, and Coyle agreed to pay to the Thomases, as part of the consideration therefor, the sum of \$100,000 in cash, and to redeliver to the Thomases the bonds and a portion of the stock, as collateral to secure the payment of the residue of the consideration money. The contract was signed on Saturday afternoon after the banks had closed, and it was then orally agreed, so the defendants contend, that in lieu of the payment of \$100,000 in cash, Coyle should deliver to the Thomases a certificate of deposit for \$50,000 and the note now sued on for \$50,000, on condition that the Thomases should use neither the certificate of deposit nor the note before delivering to Coyle 1,056 shares of the stock of the Provident Savings Life Assurance Society, which it was understood should be done on the following Monday. The stock, except thirty-nine shares, was never delivered to Coyle. Notwithstanding this fact, on October 16, 1907, at a meeting of the Hamilton Bank's discount committee, E. R. Thomas offered the note to the bank. The discount committee was composed of five members, who were Mr. Sullivan, its chairman, Mr. Martin, Mr. Reisenberg, and the two Thomases. Mr. Ives, vice president of the bank, was the discount committee's secretary. Mr. Martin had died before the date of the trial. Mr. O. F. Thomas was not called as a witness by either side. Of the other four persons present, Messrs. Sullivan, Reisenberg, and Ives testified for the plaintiff to the effect that, when E. R. Thomas offered the note to the bank, he stated to the committee that he had received it in part consideration for the sale of his interest in the Provident Savings Life Assurance Society, and that its makers were men of large wealth; that Sullivan, Reisenberg, and Martin then considered the offer, the two Thomases taking no part in the conference and not being present at it; that, at the close of the conference, the Thomases were called to the attention of the members of the committee, and informed that the bank would purchase the note provided the Thomases would guarantee it.

payment; that the Thomases agreed to guarantee its payment; that the other three members then voted to accept the note; that the Thomases did not vote on the question, or take any part in deciding whether the bank should accept the note; that Mr. Ives prepared the guaranty, which was signed by the Thomases, and that the note was thereupon purchased by the bank for the sum of \$48,861.11, and that sum placed to the credit of E. R. Thomas on the books of the bank. Mr. E. R. Thomas, who testified for the defendants, also repeatedly declared that he took no part in deciding whether the bank should purchase the note. The minute of the proceedings of the discount committee is as follows: "Mr. E. R. Thomas offered a note for \$50,000 made by a number of wealthy men in Philadelphia, which he and his associates had received in the matter of the sale of the Provident Savings Life Insurance Company, and, after some discussion, it was voted to accept the note, provided Messrs. E. R. and O. F. Thomas guarantee same."

The authority of the discount committee to accept paper for the bank was conferred by the following by-law of the bank: "That two local directors be added to the discount committee, and that all loans of \$5,000 and over, not passed on by the board of directors, be referred to this committee, and receive the unanimous consent of all members present at the meeting before being entered."

The argument of the defendants is that the Thomases perpetrated a fraud on the defendants by the sale of the note to the bank, that they must be considered as having joined in the unanimity required by the by-law for the acceptance of the note, and that, being so considered, their knowledge of the alleged fraud is imputable to the bank.

In submitting the question of fraud to the jury, the trial court charged, in substance, that, if they should find that the Thomases disposed of the note to the bank in fraud of the rights of the defendants, the law would not impute to the bank knowledge of that fraud merely because one of the Thomases was the president, and both of them were directors and members of the discount committee, of the bank.

It is a general rule of the law of agency that a principal is bound by the knowledge of his agent. In the case of *Distilled Spirits (Harrington v. United States)* 11 Wall. 367, 20 L. ed. 167, Mr. Justice Bradley said that the rule "is based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he

will perform that duty." That the rule has certain exceptions was conceded by Justice Bradley. He said, for example, that when it would be unlawful for an agent to communicate his knowledge to his principal, as when it has been acquired confidentially as attorney for a former client in a prior transaction, the reason of the rule ceases, and his principal ought not to be bound by the agent's secret and confidential information. That case did not call for any expression of opinion as to whether there is not also another exception when the agent is engaged in committing an independent fraudulent act for his own benefit. On principle it seems it should be so. If the reason of the general rule is that the law presumes the agent has discharged his duty of communicating his knowledge to his principal, there seems to be no just ground for denying the second exception above suggested, for it cannot be fairly presumed that an agent will communicate to his principal a fraud intended for his own, and not his principal's, benefit. Another reason for the exception has been stated, however, and that is that where one, in transacting the business of his principal, is committing a fraud for his own benefit, he is not acting within the scope of his authority as his principal's agent, and therefore that his knowledge of the fraud is not imputable to his principal. Speaking of the general rule that the principal is held to know all that his agent knows in any transaction in which the agent acts for him, the circuit court of appeals for the sixth circuit, in *Thomson-Houston Electric Co. v. Capitol Electric Co.* 12 C. C. A. 645, 22 U. S. App. 669, 65 Fed. 343, said: "This rule is said to be 'based on the principle of law that it is the agent's duty to communicate to his principal the knowledge which he has respecting the subject-matter of negotiation, and the presumption that he will perform that duty.' Such a presumption cannot be indulged, however, where the facts to be communicated by the agent to the principal would convict the agent of an attempt to deceive and defraud the principal. The truth is that where an agent, though ostensibly acting in the business of the principal, is really committing a fraud for his own benefit, he is acting outside of the scope of his agency, and it would therefore be most unjust to charge the principal with knowledge of it."

Such was also the view expressed by the circuit court of appeals for the eighth circuit in *Bank of Overton v. Thompson*, 56 C. C. A. 554, 118 Fed. 798. And in *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917, it was said: "The general rule is that notice

to an agent, while acting for his principal, of facts affecting the character of the transaction, is constructive notice to the principal. . . . There is an exception to this rule when the agent is engaged in committing an independent fraudulent act on his own account, and the facts to be imputed relate to this fraudulent act. It is sometimes said that it cannot be presumed that an agent will communicate to his principal acts of fraud which he has committed on his own account in transacting the business of his principal, and that the doctrine of imputed knowledge rests upon a presumption that an agent will communicate to his principal whatever he knows concerning the business he is engaged in transacting as agent. It may be doubted whether the rule and the exception rest on any such reasons. It has been suggested that the true reason for the exception is that an independent fraud committed by an agent on his own account is beyond the scope of his employment, and therefore knowledge of it, as matter of law, cannot be imputed to the principal, and the principal cannot be held responsible for it. On this view, such a fraud bears some analogy to a tort wilfully committed by a servant for his own purposes, and not as a means of performing the business intrusted to him by his master. Whatever the reason may be, the exception is well established."

In 2 Pomeroy's Eq. Jur. 3d ed. § 675, it is said: "It is now settled by a series of decisions possessing the highest authority that when an agent or attorney has, in the course of his employment, been guilty of an actual fraud contrived and carried out for his own benefit, by which he intended to defraud, and did defraud, his own principal or client, as well as perhaps the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney and thus fraudulently concealed."

This language of Professor Pomeroy was quoted by Mr. Justice Harlan in *American Surety Co. v. Pauly*, 170 U. S. 133, 42 L. ed. 977, 18 Sup. Ct. Rep. 552, which case also clearly sustains the doctrine that the law will not impute notice from an agent to his principal where such a notice would necessarily prevent the consummation of the agent's fraudulent scheme. To the same effect are *Gunster v. Scranton Illuminating, H. & P. Co.* 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550; *Graham v. Orange County Nat. Bank*, 59 N. J. L. 225, 35 Atl. 1053; *Manhattan L. Ins. Co. v. Forty-Second Street & G. Street Ferry R. Co.* 139 N. Y. 29 L.R.A.(N.S.)

140, 34 N. E. 776; *Bank of New York Nat. Bkg. Assn. v. American Dock & Trust Co.* 143 N. Y. 559, 38 N. E. 713; *Henry v. Allen*, 151 N. Y. 1, 36 L.R.A. 658, 45 N. E. 355; *Benedict v. Arnoux*, 154 N. Y. 715, 49 N. E. 326.

There are cases which hold that knowledge of the illegality of a note by a bank director acting with the board or committee of the bank at the time of the purchase or discount of the note by the bank is imputable to the bank, while such knowledge by a director who is not present and does not act with the board or committee when the note is purchased or discounted is not imputable to the bank. *National Bank v. Norton*, 1 Hill, 572; *Bank of United States v. Davis*, 2 Hill, 452; *North River Bank v. Aymar*, 3 Hill, 262; *Westfield Bank v. Cornen*, 87 N. Y. 320, 93 Am. Dec. 573; *Atlantic State Bank v. Savery*, 82 N. Y. 292. We think, however, that, if the distinction is sound at all, it has no application where the director is transacting business with his bank for himself, and in its transaction fraudulently conceals facts which, if made known to the bank, would defeat his purpose. In *Terrell v. Branch Bank*, 12 Ala. 502, it appears that Terrell executed a note in blank and delivered it to Scott, a director of a bank, to be filled up with the proper sum for the renewal of another of Terrell's notes held by the bank. The director filled up the note for a larger sum than the amount necessary for renewal, and, acting with the board of directors when the note was discounted, had it discounted for his own use. The supreme court of Alabama said: "It cannot be admitted that, in receiving the blank of the defendant to be used for his benefit, Scott acted as the agent of the bank, and certainly he did not thus act in abusing the authority conferred on him by the defendant. But in filling up the blank for a larger amount than his authority required, and then offering the note for discount, he was in reality the representative of his own interest. *Pro re nata*, his powers as a director were suspended; he was contracting with the bank through his associates in the directory; he was borrowing, not lending, its money. Though a member of the board, and present too, it cannot be supposed that he co-operated with them in purchasing paper of which he was the avowed proprietor; and whether he did or not, it cannot be presumed that he made any disclosure which would prejudice his application for a loan."

This case was also referred to with evident approval in *American Surety Company v. Pauly*.

If, therefore, the Thomases be considered as having acted with the other three members of the discount committee, because of their presence at its meeting, and the requirement of the by-law that the paper accepted by the committee should "receive the unanimous consent of all members present at the meeting before being entered," we nevertheless think that notice of the alleged fraud of the Thomases cannot be imputed to plaintiff.

There is another aspect of the case that should not be overlooked. The unanimous testimony of the four witnesses who were present at the meeting of the discount committee shows that the Thomases did not sit with the committee when its remaining three members considered their offer and decided what to do with it. They absented themselves from the conference, and took no part in the decision. They seem to have studiously refrained from acting to any extent whatever as agents of the bank. They were not regarded by the other three members as so acting. The transaction, from beginning to end, was one in which they were acting, and were understood by the other members of the committee as acting, for themselves only. They were negotiating with the bank at arms' length in a transaction in which they were vendors and the bank a vendee. A rule of law which would impute notice to the bank in such a case would make it unsafe for any bank at any time to discount paper for, or purchase it from, one of its directors.

It is further contended by the defendant that the court erred in certain of its rulings on the admission and rejection of evidence. When Mr. Moore, one of the defendants, was under cross-examination, he was asked if, after the note had been delivered to the Thomases and he had begun to suspect fraud, he made any effort to recover possession of the note, and the question was allowed to stand because the court thought its answer might show whether Mr. Moore's conduct was consistent with his declaration that he suspected fraud. The court refused to allow the defendants to prove that the Thomases did not have the stock which they agreed to deliver to Coyle in their "strong box" in the bank, as they had declared, but that they had hypothecated it and did not have possession or control of it. The defendants sought to prove the terms of a certain trust alleged to have been created by the Thomases for the benefit of their creditors, including the plaintiff in this case, and after a part of the testimony on this point had been taken, the court struck it out, and refused to allow more, on the ground that, even if such trust

were created, it did not relieve the defendants of their liability. The vice president of the bank was allowed to testify that certain checks drawn by E. R. Thomas against his account in the bank of the plaintiff, amounting to the sum of \$50,500, were paid by the bank; he testifying from his knowledge of the course of business in the bank, and from the signatures, indorsements, and stampings on the checks, and not from actual knowledge or recollection of such payments. Testimony was admitted explaining how the word "deliver" came to be inserted in the contract of October 5, 1907; the argument against its admission being to the effect that it was an attempt to vary a written agreement by parol testimony, while the exception taken at the trial was for a totally different reason, and the plaintiff was permitted to show that during the negotiations preceding the signing of the contract of October 5, 1907, by the Thomases and Coyle, Coyle admitted the interest of the other defendants in the contract. We find no error in any of these rulings.

Error is also assigned on the ground that the plaintiff alleges in the statement of its claim that it received the note in suit from Coyle, while the proofs show that it was received from one of the Thomases. This is not an objectionable variance. It is common practice for a plaintiff who holds a note indorsed in blank to declare on it as a note indorsed and delivered to the plaintiff by the indorser, regardless of the number of hands through which it may have passed after such indorsement, or of the person from whom it may have been actually received. Such pleading in no wise embarrasses the defense.

What has been said disposes of the most important of the thirty-four assignments of error. Each of the assignments has been carefully considered, but we find no reversible error in any of them. The judgment of the Circuit Court will therefore be affirmed, with costs.

NORTH DAKOTA SUPREME COURT.

EMERADO FARMERS' ELEVATOR COMPANY, Resp't.,

v.

FARMERS' BANK OF EMERADO, Appt.

(— N. D. —, 127 N. W. 522.)

Bank — defalcation — unauthorized corporate checks to conceal — liability.

1. In case the treasurer of an elevator company, also acting as cashier of a bank

Headnotes by ELLSWORTH, J.

in which the elevator company has money on deposit, and authorized to draw checks in the name of the elevator company upon its bank account for the purpose of paying debts and obligations of the elevator company, misappropriates funds of the bank, and, for the purpose of covering up a shortage in the bank's funds until such time as he expects to be able to replace the same, draws checks of the elevator company payable to the bank, and charges these checks against the elevator company on the books of the bank, without intention to transfer funds from one corporation to the other, but only for the purpose of temporarily concealing his defalcation, such checks create no liability in favor of the bank against the elevator company.

Same — personal indebtedness to bank — fraud — notice.

2. In case the cashier of the bank having misappropriated funds of the bank or become in some manner indebted thereto, as treasurer of the elevator company, draws checks upon it payable to the bank, and uses the same to pay his personal indebtedness to the bank, such checks, by their form, of themselves operate as notice to the bank of a misappropriation of the funds of the elevator company, and the bank, after accepting them with such notice, cannot predicate upon them a claim of liability against the elevator company.

Same — defalcation by cashier — corporate check to conceal — transfer of proceeds — liability of bank.

3. In case the cashier of a bank who has misappropriated its funds or otherwise become indebted to it, in order to conceal his defalcation or pay his indebtedness, transfers funds of an elevator company of which he is treasurer, to the bank, and in order to account for such transfer draws checks upon the elevator company payable to the bank and charges the amount of the same against the elevator company upon the books of the bank, the bank having accepted such payment through its cashier cannot retain the benefits of his act without accepting the consequences of his knowledge. After receiving funds under such a state of fact, the bank can retain them only through ratification of the fraudulent act of its agent, the cashier; and in doing this it becomes *particeps criminis* with the cashier, and liable at the suit of the elevator company to the amount of the fund so fraudulently transferred.

Same — trust funds — payment to misappropriator — liability.

4. A banking institution is not authorized to pay out funds intrusted to it on de-

posit to a person known by it to stand in a trust relation to the depositor, when it has notice that such person intends to misappropriate and divert the fund received to his own uses when paid over; and, in case such payment is made, the amount so paid may be recovered at the suit of the depositor.

Same — misappropriation by cashier — fraud — notice.

5. In case the cashier of a banking institution who has the entire management, control, and conduct of its affairs, and stands as sole representative of the bank in all transactions relating to the receipt and disbursement of the funds of depositors, who, while so acting, draws checks of an elevator company of which he is treasurer, payable to the bank, presents such checks as treasurer to himself as cashier, takes the sum of money paid over thereon, and misappropriates it, the bank for which he is acting will be held to knowledge of his fraudulent purpose at the time of presenting the checks, and cannot base thereon a claim of liability in its favor against the elevator company.

(June 28, 1910.)

APPEAL by defendant from a judgment of the District Court for Grand Forks County in plaintiff's favor in an action brought to recover the alleged balance of a bank deposit. Affirmed.

The facts are stated in the opinion.

Messrs. Bangs, Cooley, & Hamilton, for appellant:

Where the agent, through whom notice is to be imputed to the principal, was himself the author of the fraud, knowledge thereof is not imputed to the principal.

United Security L. Ins. & T. Co. v. Central Nat. Bank, 185 Pa. 586, 40 Atl. 97; 2 Pom. Eq. Jur. § 675; Aetna Indemnity Co. v. Schroeder, 12 N. D. 110, 95 N. W. 436; Benedict v. Arnoux, 154 N. Y. 715, 49 N. E. 330; Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912; Thomson-Houston Electric Co. v. Capitol Electric Co. 12 C. C. A. 643, 22 U. S. App. 669, 65 Fed. 341; Produce Exch. Trust Co. v. Bieberbach, 176 Mass. 577, 58 N. E. 162; Knobloch v. Germania Sav. Bank, 50 S. C. 259, 27 S. E. 962; First Nat. Bank v. Foote, 12 Utah, 157, 42 Pac. 205; Bank of Overton v. Thompson, 56 C. C. A. 554, 118 Fed. 798.

The fraud had its inception and its consummation in acts done by Hempstead in his capacity as treasurer of the plaintiff company, and it should bear the loss.

Gunster v. Scranton Illuminating, Heat, & P. Co. 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550.

Mr. Scott Rex, for respondent:

Note.—As to imputing to bank knowledge of officers personally interested, see note to Lilly v. Hamilton Bank, ante, 558; and see also note to Brookhouse v. Union Pub. Co. 2 L.R.A.(N.S.) 993, as to the effect of the fact that the officer of the bank is the sole representative of the bank in the transaction.

29 L.R.A.(N.S.)

Actual knowledge on defendant's part that the money was, or was to be, misappropriated, would warrant recovery.

Baeschlin v. Chamberlain Bkg. House, 67 Neb. 196, 93 N. W. 412; Zane Banks & Bkg. §§ 136, 143; First Nat. Bank v. New Milford, 36 Conn. 93; Manhattan Bank v. Walker, 130 U. S. 267, 32 L. ed. 959, 9 Sup. Ct. Rep. 519; Lamson v. Beard, 45 L.R.A. 822, 36 C. C. A. 56, 94 Fed. 30.

Notice to, or the knowledge of, the cashier, was notice and knowledge of the bank.

Sykes v. First Nat. Bank, 2 S. D. 242, 49 N. W. 1062; Wyckoff v. Johnson, 2 S. D. 91, 48 N. W. 837; Stebbins v. Lardner, 2 S. D. 127, 48 N. W. 847; Union Nat. Bank v. Moline, M. & S. Co. 7 N. D. 211, 73 N. W. 527; Farmers' & T. Bank v. Kimball Mill. Co. 1 S. D. 388, 36 Am. St. Rep. 739, 47 N. W. 402; Black Hills Nat. Bank v. Kellogg, 4 S. D. 312, 56 N. W. 1071.

Where the corporation agent is the person who acts for the corporation in the matter in hand, it is charged with all the knowledge its agent has in such matter.

First Nat. Bank v. New Milford, supra; Morris v. Georgia Loan Sav. & Bkg. Co. 109 Ga. 12, 46 L.R.A. 506, 34 S. E. 378; Wiggins v. Stevens, 33 App. Div. 83, 53 N. Y. Supp. 90; Daniels v. Empire State Sav. Bank, 92 Hun, 450, 38 N. Y. Supp. 580; National Bank v. Munger, 36 C. C. A. 659, 95 Fed. 87.

Where a bank officer acting in a dual capacity is the head or sole managing officer of the bank, or participates in a transaction on behalf of the bank, the bank cannot escape liability for fraud in the transaction.

Holden v. New York & E. Bank, 72 N. Y. 286; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; First Nat. Bank v. Babidge, 160 Mass. 563, 36 N. E. 462; First Nat. Bank v. Dunbar, 118 Ill. 625, 9 N. E. 186; First Nat. Bank v. Blake, 60 Fed. 78; Niblack v. Cosler, 74 Fed. 1000, affirmed in 26 C. C. A. 16, 47 U. S. App. 637, 80 Fed. 596; Zane, Banks & Bkg. §§ 106, 163; Bolles, Bkg. § 14, pp. 416-422; Hobbs v. Boabright, 195 Mo. 693, 5 L.R.A. (N.S.) 906, 113 Am. St. Rep. 709, 93 S. W. 940; Cook v. American Tubing & Webbing Co. 28 R. I. 41, 9 L.R.A. (N.S.) 193, 65 Atl. 653; Armstrong v. Chemical Nat. Bank, 27 C. C. A. 601, 54 U. S. App. 462, 83 Fed. 566; Smith v. Anderson, 57 Hun, 72, 10 N. Y. Supp. 278; Stebbins v. Lardner and Black Hills Nat. Bank v. Kellogg, supra; First Nat. Bank v. Sing Sing Gas Mfg. Co. 120 App. Div. 542, 104 N. Y. Supp. 1040; Fouché v. Merchants' Nat. Bank, 110 Ga. 827, 36 S. E. 256; Le Duc v. Moore, 111 N. C. 516, 15 29 L.R.A. (N.S.)

S. E. 888; Citizens' Sav. Bank v. Walden, 21 Ky. L. Rep. 739, 52 S. W. 953; Brookhouse v. Union Pub. Co. 2 L.R.A. (N.S.) 993 and note, 73 N. H. 368, 111 Am. St. Rep. 623, 62 Atl. 219, 6 A. & E. Ann. Cas. 675; Steam Stone Cutter Co. v. Myers, 64 Mo. App. 527; Anderson v. Kinley, 90 Iowa, 554, 58 N. W. 909; Wade, Notice, §§ 683a, 683b; Pom. Eq. Jur. § 666.

When a principal bases rights or claims upon the acts of his agent, he thereby ratifies such acts.

Atlantic Cotton Mills v. Indian Orchard Mills, supra.

Ellsworth, J., delivered the opinion of the court:

The complaint in the action in which this appeal is taken alleges that respondent, which is a corporation engaged in the grain elevator business at the village of Emerado, North Dakota, had carried, for two years and more prior to the beginning of the action an open account on deposit with appellant, which was during that period engaged in a general banking business at the same place; that during said period appellant had paid out for respondent on checks drawn on its said account portions of its moneys, and that at the beginning of the action there still remained to respondent's credit the sum of \$3,044.02, which balance was payable on demand; that demand had been duly made and payment refused. The answer of appellant admits the allegation of an open account on deposit by respondent, but denies that there remains a balance of such deposit to respondent's credit in any sum whatever; and further alleges, as a counterclaim, that during the continuance of the account between appellant and respondent as aforesaid, appellant honored checks of respondent duly issued by it to an aggregate amount of \$3,257.97 in excess of all sums received from respondent, by deposit or otherwise; and prays judgment for the recovery of the amount of such overdraft in the sum alleged.

By undisputed facts shown upon the trial, it appears that on June 19, 1907, there stood to respondent's credit on the books of appellant bank a balance of \$6,660.98; that between that date and October 3, 1908, there were further sums deposited by respondent, which, including such balance, aggregated the sum of \$146,682.49; and that during said period there was paid out for respondent upon checks duly drawn and presented to appellant sums aggregating \$143,638.47, leaving a balance of \$3,044.02, the sum for which suit is brought.

It further appeared that at all times from

the fall of the year 1905 until his death, by suicide, on or about the 1st day of October, 1908, one John Hempstead was secretary and treasurer of respondent corporation, and as such had authority, and it was a part of his official duties, to receive its moneys and deposit them with appellant to respondent's credit. It also was his duty, as treasurer of respondent, upon presentation to him of proper vouchers therefor, to pay its debts and obligations, and he was duly authorized to draw checks upon respondent's bank account with appellant for that purpose.

It also appeared that from December, 1902, until the time of his death, Hempstead was one of the directors and cashier of appellant bank. On August 15, 1907, Hempstead, as treasurer of respondent elevator company, drew two certain checks, one in the sum of \$2,000 and the other in the sum of \$1,768, on which checks appellant under the designation of "Farmers' Bank" was named as payee, and on August 17, 1907, charged the amount of said checks against respondent's account on the books of the bank. On May 8, 1908, Hempstead, as treasurer, drew another check for the sum of \$2,333.99, in which also appellant was the payee named, and on May 9th charged that sum against respondent upon the books of the bank. All three of these checks bear the bank's stamp, "Paid," upon their face as of the date of their issuance. On the quality of these three checks depends the entire issue between appellant and respondent in this case. If they were properly chargeable against respondent's account, then the claim of the elevator company against appellant is fully paid, and appellant is entitled to recover, as an overdraft, the amount prayed for in its counterclaim. On the other hand, if the checks are worthless, and their aggregate amount is not a legitimate charge against respondent, appellant concededly is indebted to it in the amount claimed in its complaint.

It was shown to have been the usual practice of Hempstead during the period that he was acting as treasurer for respondent to receive, over the counter of the bank, grain tickets issued by the operating agent of the elevator company at Emerado, and to pay them in cash with the moneys of the bank. During those seasons of the year when grain was being marketed in considerable quantity, a number of such tickets would be presented in the course of a day; and at the close of the day's business, in order to adjust accounts between the elevator company and the bank, Hempstead would draw a check for the aggregate amount of the tick-

ets issued during the day, payable to the bank, and sign the same as treasurer of the elevator company. A large number of checks drawn in this manner were shown upon the trial. It appears, however, that the three checks in question, although drawn in the same form as the others, were not placed by Hempstead with the checks of the elevator company, but were kept in a separate drawer, and were not noted by him in any manner upon respondent's books of account. The existence of these checks was therefore unknown to the elevator company until after Hempstead's death, and a consequent examination of the bank's books and papers.

It further appeared at the trial that at the time the three checks in question were drawn, marked paid, and charged against the elevator company upon the books of the bank, there was no indebtedness due from the elevator company to the bank in that sum or in any sum whatever. It also appeared that after the time of Hempstead's death, upon an examination of his account with the bank, there was a cash shortage of \$800 or more; that false certificates of deposit aggregating several hundred dollars had been issued by Hempstead to certain depositors. Shortages and irregularities also appeared in the accounts with other banks during the period in which Hempstead was cashier, and in his account with a school district of which he was treasurer. During his lifetime those shortages were covered by false entries, or by some means not clearly shown, which prevented their disclosure upon the books of the bank. It seems apparent from the facts shown that, for a period of at least two years before his death, Hempstead had dealt fraudulently with several of the different funds intrusted to him, and manipulated his accounts in such manner as to present a fair showing, while he misappropriated and used for his own benefit very considerable sums.

Upon the trial appellant introduced the testimony of Hempstead's successor as cashier, to the effect that, so far as shown by the books and papers of the bank, it had received no benefit from the three checks issued by Hempstead and charged against respondent's account upon its books; that the books of the bank, at the dates on which these entries were made, balanced exactly, a status that would not have existed if the cash account of the bank was intact at those dates and had been increased by the receipt of the amount of money shown by the checks, or of any sum whatever. It also appeared that at all times prior to October 1, 1908, the books of the bank, at such times as a balance was taken, gave no indication

of any irregularity or shortage in the bank's funds. An expert accountant who examined the books of the elevator company in October, 1908, testified that the elevator company had received no consideration or value whatever for the three checks in question. There was also some testimony that, according to a business custom prevalent in business circles in Emerado, checks drawn in the name of the bank were paid to those presenting them, in cash, and charged upon the books in the same manner as checks drawn by depositors to the order of cash. The trial court found the facts generally as hereinbefore narrated, and deduced therefrom a conclusion of law that appellant was indebted to respondent in the sum of \$3,044.02, for which sum judgment was entered accordingly. Appellant's principal assignments of error are directed against the findings of the trial court holding that a balance upon deposit was still due respondent. Therefore, aside from certain objections made upon the trial to the introduction of evidence, which will be referred to hereafter, the point upon which the entire controversy hinges is whether or not the three checks, aggregating \$6,101.99, were properly chargeable against respondent. If it be held that these checks are a valid charge against respondent, then it is quite apparent, not only that respondent's entire deposit had been paid out to it, or on its order, but that it is liable to appellant for the sum paid in excess of such deposit, as shown by the counterclaim.

The dual relation of Hempstead to this transaction in its various incidents is, of course, the only factor which complicates and renders at all uncertain or doubtful the determination of the controlling points of this appeal. If respondent and appellant in their dealings had been represented by different agents, the solution of the question of liability, by the application of well-recognized principles, would be direct and simple. The meager showing of the evidence throws little light upon the ultimate actual disposition, by Hempstead, of the sum of money represented by the aggregate amount of the three checks, or the fund from which it was drawn; so these facts are left almost entirely to speculation and surmise. It would seem that neither appellant nor respondent received any benefit whatever from whatever transfer of funds is represented by the passage of these checks. The most probable view is that the money was misappropriated and used by Hempstead for his personal benefit. It is suggested by appellant's counsel that the capacity in which Hempstead was acting at the time of the misappropriation is the determining factor

of the question presented. It is doubtless true that this is a point deserving consideration. However, it rests almost wholly in inference from the facts shown. The inferences that may legitimately be drawn from these facts are somewhat various, but, as we view it, any state of fact that may reasonably be said to exist under the proofs produced comes necessarily within the limits of one or the other of the following hypotheses: (1) Hempstead, having applied to his own use funds of the bank in his hands as cashier in the aggregate amount shown by the three checks, drew the checks and charged them against the elevator company on the bank's books, for the purpose of covering up the shortage in the bank's funds until such time as he expected to be able to replace the funds so used by him; (2) Hempstead, being indebted to the bank in the aggregate sum shown by the amount of the checks, gave to it, in payment of his personal debts, checks signed by him as treasurer upon funds belonging to the elevator company; (3) Hempstead, as cashier of the bank, having misappropriated at different times its funds to the aggregate amount of these checks, actually transferred to the funds of the bank those of the elevator company in his charge as treasurer, and, in order to account for such transfer, drew and charged the three checks, as shown by the evidence; and (4) Hempstead, at a time when the elevator company owed no indebtedness to the bank, as treasurer of the elevator company, drew checks payable to the bank, presented these checks to the bank through himself as cashier, received the money in cash, and misappropriated it.

From the fact that all moneys belonging to the elevator company, under the control of Hempstead, were at all times involved in this transaction on deposit with appellant, it follows that only under the last hypothesis could he be said to have actually misapplied these funds while acting as treasurer of the elevator company. His opportunities for fraudulent manipulation of these funds as cashier of the bank were, therefore, more numerous than when acting in the other capacity, and the consequent temptation to misappropriation much stronger. While under the conditions of the hypothesis 4 it is possible that, when handling the funds as treasurer of the elevator company, he may have made the actual misappropriation, still it seems to us that the occurrence of such condition is less probable than any of the three others.

If, under the conditions of hypothesis 1, the checks were issued and used by Hempstead merely as a temporary fraudulent cover for the misappropriation of bank funds,

it seems quite clear that the bank can make no claim to any benefit from a contract based upon the checks. In preparing the checks with such purpose in view, it cannot reasonably be claimed that Hempstead had any intention that they should in fact operate as a transfer of the funds of the elevator company to the bank. As he acted only as treasurer of the elevator company in preparing and handling the checks, there was no meeting of minds between it and the bank in a contract operating to transfer the funds. In such state of fact, there is no support to a claim of liability in favor of the bank against the elevator company for any of the sums of money designated in the checks. *First Nat. Bank v. New Milford*, 36 Conn. 93.

Under hypothesis 2, it is readily apparent that a transfer by means of such checks, and the application of the funds of the elevator company to the payment of the private debt of Hempstead, would, of itself, operate as notice to the bank of a misappropriation. The bank, taking the checks under such conditions and with such notice, on principles so elementary that demonstration is superfluous, could not predicate upon them a claim of liability against the elevator company.

The facts of hypothesis 3 are analogous in every way to those presented in cases where one person takes the property of another and uses it as a means of liquidating his debt to a third person. In such case, the third party taking the benefit with notice of the fraud out of which it proceeds cannot retain it without becoming *particeps criminis* with the person committing the fraud. Whether the transfer of funds from the elevator company to the bank was made simply upon the books of account or by manual transfer of bills, notes, or coin, the benefit conferred thereby must necessarily have been accepted for the bank by Hempstead its cashier. "It must be deemed to have known what he knew, and it cannot retain the benefit of his act without accepting the consequences of his knowledge. The plaintiff cannot obtain greater rights from his act, than if it did the thing itself, knowing what he knew." *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496. Therefore, the bank, in receiving the funds under a state of fact such as this, acquired no title to them, and can retain them only by ratifying the fraudulent act of its agent. In doing this it would, of course, become liable at the suit of the elevator company, to which the fund fraudulently transferred belonged.

Hypothesis 4, the last in order and the 29 L.R.A. (N.S.)

one which, as we have noticed, is most improbable of occurrence, is also the most difficult of determination. The controlling principle is that a banking institution is not authorized to pay out funds intrusted to it by deposit to a person standing in a trust relation to the depositor, when it knows such person intends to misappropriate and devote the fund to his own uses when paid over. It is argued by respondent that, if Hempstead as treasurer of the elevator company, presented these checks to Hempstead as cashier of the bank, and he, acting in the latter capacity, paid over the money to Hempstead as treasurer, who thereupon misappropriated it, the party paying the money, being the same person who received it, must necessarily have knowledge of what he intended to do with it in his other capacity; and therefore that the cashier of the bank knew at the time he paid out the elevator company's money that the agent to whom he paid it meant to turn it to his personal uses. The general principle underlying this proposition of law is formulated by our Code as follows: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of, and ought, in good faith and the exercise of ordinary care and diligence, to communicate to the other." Rev. Codes 1905, § 5782. But, appellant contends that Hempstead, being merely the agent of the bank and engaged in a fraudulent transaction which rendered it against his interest to disclose his knowledge, as treasurer of the elevator company, to the executive officers of the bank, could not be presumed to have made known these facts. Cases are cited in which the principle is so applied to facts that are very closely analogous to those of the case at bar. *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Gunster v. Scranton Illuminating, Heat, & P. Co.* 181 Pa. 327, 59 Am. St. Rep. 650, 37 Atl. 550. These cases, however, are distinguished from the case at bar in that the officers of the bank, having knowledge of an intended fraudulent diversion of the funds intrusted to it, did not control its action. Such control was exercised by other persons representing the corporation, with equal or greater authority, to whom the knowledge of the person who intended to make the misappropriation was not conveyed. In the case at bar the evidence shows quite satisfactorily that none of the stockholders of the bank except Hempstead was resident in the territory adjacent or tributary to the village in which the bank was located. The entire management, control, and conduct of the affairs of the bank was committed to

Hempstead. He had an assistant whom he himself employed, but who was unknown to the officers of the bank, and who had not the slightest control of the bank's affairs. There was not the slightest oversight or control over Hempstead exercised by any officer of the corporation. This, as we view it, places the bank under plenary responsibility for the acts of Hempstead, and binds it entirely to notice of any fact that he had in mind when he performed any of the acts committed to him in disbursing the funds of the bank. In any event, the rule above referred to, that the principal cannot take the benefit of the transaction conducted by its agent ostensibly on its behalf, without assuming full responsibility, not only for his acts, but his knowledge, applies with all its force. *Niblack v. Cosler* (C. C.) 74 Fed. 1000. Under the facts of hypothesis 4, therefore, Hempstead, as principal and sole agent of the bank, necessarily had knowledge at the time he paid the three checks drawn in the name of the elevator company, that the agent of the elevator company to whom it was paid meant to use the cash for his own benefit. In other words, the bank had full knowledge of the fraud which the agent of the elevator company intended to perpetrate, and in paying out the money it was *particeps criminis* in the fraud, and could not recover upon the checks received by it in such transaction. In any practicable view of the circumstances attending the misappropriation of funds by Hempstead in any capacity in which it was possible that he should have acted, there was no liability of the elevator company to the bank on any of the three checks in question, and the conclusions of the trial court are fully sustained.

The evidence received by the trial court under objection was all directed to the point that the elevator company had no knowledge of or notice of any irregularities on the part of Hempstead in his dealings with its funds, and, on the other hand, had every reason to believe that he was at all times conducting the business of the elevator company in a regular and methodical manner. While such evidence is not very material, we cannot say that its reception was in any manner prejudicial to appellant. It seems to have been offered in an attempt to forestall certain matters of defense that were not afterward presented, to the effect that certain questionable acts of Hempstead were ratified and approved by tacit acquiescence on the part of the elevator company. The objections to these items of evidence were, we think, properly overruled.

As our conclusions upon the legal principles governing the case agree in result 29 L.R.A. (N.S.)

with the findings of the trial court, the judgment is affirmed.

All concur, except Morgan, Ch. J., who did not participate.

OHIO SUPREME COURT.

HOCKING VALLEY RAILWAY COMPANY,
v.
Plff. in Err.,

GEORGE PHILLIPS.

(81 Ohio St. 453, 91 N. E. 118.)

Railroad — Injury to stock — Insufficient fences — Liability.

The liability of a railroad company, under § 3324, Revised Statutes, to respond in damages for injuries to stock in consequence of its neglect to construct and maintain a sufficient fence on each side of its road, is limited to loss or injuries occurring upon its own right of way.

(February 23, 1910.)

Headnote by the COURT.

Note. — Liability of railroad whose failure to maintain fences permits escape of live stock, which is killed or injured outside its right of way.

It was held in *Frisch v. Chicago G. W. R. Co.* 95 Minn. 398, 104 N. W. 228, that a statute providing that railroad companies should be liable for negligently killing or injuring domestic animals, and that a failure to fence should be an act of negligence, was applicable only to animals killed or injured on its right of way, it appearing from the facts in that case that, although the escape of the plaintiff's horse from pasture was due to defendant's failure to comply with the statute, the accident actually happened on the track of another railroad running parallel to the defendant's.

Construing the same statutory provision in practically the same kind of a case, the United States circuit court of appeals held in *Bear v. Chicago G. W. R. Co.* 72 C. C. A. 513, 141 Fed. 25, that there could be no recovery against a railroad for the death of an animal, where the same did not occur on its own right of way, although its presence at the place of the accident was due to a defect in the defendant's own fences.

In *Chicago, K. & N. R. Co. v. Hotz*, 47 Kan. 627, 28 Pac. 695, the railroad company had failed to fence off its right of way, and one of the plaintiff's cows escaped from pasture and became mired in a creek, and it was held that if the creek was the proximate cause of the loss of the cow, the company could not be held liable for its neglect to fence.

But in *Missouri P. R. Co. v. Eckel*, 49

ERROR to the Circuit Court for Wood County to review a judgment affirming a judgment of the Court of Common Pleas which affirmed as to defendant Hocking Valley Railway Company a judgment of a Justice's Court in plaintiff's favor in an action brought to recover the value of a steer, the killing of which was alleged to have been caused by defendants' negligence. Reversed.

Statement by Crew, J.:

Suit was brought by defendant in error, George Phillips, before a justice of the peace of Montgomery township, Wood county, Ohio, against the Hocking Valley Railway Company and the Toledo, Fostoria, & Findlay Railway Company as defendants, to recover the value of a steer which was killed by the latter company on its private right of way. In the justice's court judgment was rendered in favor of the plaintiff, George Phillips, against the defendants jointly, for the sum of \$45 and the costs of suit. The cause was then appealed to the court of common pleas, where, a jury being waived by the parties, the cause was submitted to the court upon the following agreed statement of facts:

"(1) The Hocking Valley Railway Company owns and operates a line of railway from Toledo to Columbus.

"(2) The defendant the Toledo, Fostoria, & Findlay Railway Company owns and operates a line of railway on its private right of way extending from Toledo to Fostoria, parallel to and adjoining the Hocking Valley Railway Company.

"(3) The Hocking Valley Railway, or the private right of way of the Hocking Valley Railway Company, was, at the date alleged in the petition, fenced on both sides; but the fences were so much out of repair as that they were insufficient to turn stock.

"(4) The Toledo, Fostoria, & Findlay Railway Company had not at that time, and never has had, any fence between its right of way and the right of way of the Hocking Valley Railway Company, where the same parallels the right of way of the Hocking Valley Railway Company, but has constructed a fence on the west side of its right of way.

"(5) On or about the date alleged in the petition, the plaintiff was the owner of a steer of the value of forty-five (\$45) dollars.

"(6) The steer was at and immediately before he went across the right of way of the Hocking Valley Railway Company's upon the right of way of the other defendant, where he was killed, on the land of John Phillips, adjoining the right of way of the Hocking Valley Railway Company, and the east.

"(7) Owing to the defective condition of the Hocking Valley Railway Company's fence, the steer passed through the inclosure in which he was, onto the track of the Hocking Valley Railway Company.

"(8) He went away from the right of way of that company, upon the right of way of the Toledo, Fostoria, & Findlay Railway Company, where he was struck by one of its cars and killed. The steer was struck shortly after midnight; that the night was dark;

Kan. 794, 31 Pac. 693, the company was held liable for the death of a horse which, while on its right of way through the company's failure to fence the same, became frightened, and was killed by running into a fence not on the right of way.

And in *Gould v. Bangor & P. R. Co.* 82 Me. 122, 19 Atl. 84, the defendant company was held liable for injuries to a calf received while in a pasture adjoining the right of way, by coming into contact with a barbed wire fence erected by the company and allowed to fall into such disrepair as to cause the injuries. The court said that the statute requiring railroads to fence their right of way must have a reasonable construction, and while the object of the fence was to protect and restrain domestic animals, it should not be made unnecessarily dangerous, or permitted to become so by neglect.

And so, in *Rehler v. Western New York & P. R. Co.* 28 N. Y. S. R. 311, 8 N. Y. Supp. 286, the company was held liable for injuries to cattle in a pasture adjoining the tracks, due to their coming in contact with an improper fence. In the course of the opinion in this case, the court said: 29 L.R.A. (N.S.)

"A railroad company cannot, by neglect to erect a suitable and sufficient fence, deprive the owner of adjoining land of reasonable use of his land for pasturage or other purposes. It cannot do so by neglecting to erect any fence at all, nor by suffering its fence to fall into disrepair; nor, by the same reasoning, by erecting a fence which is a menace of danger to cattle pastured on adjoining land. If the railroad company neglects or violates its duty in either of these respects, the adjoining proprietor may, nevertheless, make a reasonable use of his own land, and at the risk of the railroad company, and not at his own."

A verdict against a railroad company for the loss of some hogs was affirmed in *Boggs v. Missouri, K. & T. R. Co.* 156 Mo. 389, 57 S. W. 550, it appearing by the defendant's admission that the hogs escaped from inclosed fields along the defendant's right of way, because of the absence of sufficient fences, and were thereby lost; and this concession it was held established that the loss was the proximate consequence of the default, for which the railroad was liable.

W. A. S.

that when the motorman saw the steer, he was standing along west of the track of the Toledo, Fostoria, & Findlay Railway Company, and was within 300 feet of the car; that the motorman immediately applied both the ordinary and emergency brakes, but was unable to stop the car; and that the car was equipped with the usual appliances used on all such cars."

The court of common pleas, upon the foregoing agreed statement of facts, entered judgment in favor of the plaintiff, George Phillips, against the Hocking Valley Railway Company for the sum of \$48.60, and for costs, but found in favor of the Toledo, Fostoria, & Findlay Railway Company and dismissed it from the suit. The plaintiff, George Phillips, and the defendant the Hocking Valley Railway Company each filed a motion for new trial, which said motions were heard and overruled, and exceptions duly noted. Thereupon the Hocking Valley Railway Company filed its petition in error in the circuit court, asking a reversal of the judgment rendered against it; and George Phillips filed his cross petition in error therein, asking a reversal of the judgment of the court of common pleas dismissing from the suit and discharging from liability the Toledo, Fostoria, & Findlay Railway Company. The judgment of the court of common pleas was in all respects affirmed by the circuit court. The Hocking Valley Railway Company prosecutes the present proceeding in error, to obtain a reversal of the judgment of the circuit court, affirming the judgment rendered against it by the court of common pleas. No complaint is made by the defendant in error, George Phillips, in this court, of the action and judgment of the circuit court in affirming the judgment of said court of common pleas dismissing and releasing the Toledo, Fostoria, & Findlay Railway Company.

Messrs. James O. Troup, C. O. Hunter, and Richard Inglis for plaintiff in error.

Messrs. G. C. Sheffler and N. R. Harrington for defendant in error.

Crew, J., delivered the opinion of the court:

At common law a railroad company was not required to inclose or fence its right of way, and domestic animals straying or going upon such right of way were considered trespassers thereon, and if killed or injured the owner thereof was without remedy. The obligation to fence, if any exists, is statutory, and must rest upon legislative enactment, for no such duty is imposed by the common law. In this state, by § 3324, Rev. Stat., the duty is imposed upon every

railroad company to construct and maintain, on each side of its right of way, a fence sufficient to turn stock, and the company is made liable in damages for loss or injury to either persons or property resulting from its failure to perform that duty. The precise question here presented by the record now before us is whether in the present case, under this statute, upon the agreed facts, the failure of the Hocking Valley Railway Company to maintain along its right of way fences sufficient to turn stock renders it liable in damages to the defendant in error, George Phillips, because of the killing of his steer, which it is admitted was not killed by said Hocking Valley Company, nor on its right of way. A solution of this question depends upon the construction proper to be given above § 3324, Rev. Stat., the provisions of which, so far as they are here pertinent, read as follows: "A company or person having control or management of a railroad shall construct, or cause to be constructed and maintained in good repair on each side of such road, along the line of the lands of the company owning or operating the same, a fence sufficient to turn stock, . . . and such company or person shall be liable for all damages sustained in person or property in any manner by reason of the want or insufficiency of any such fence, . . . or any neglect or carelessness in the construction thereof, or in keeping the same in repair." This statute, which is in the nature of a police regulation, was enacted from considerations of public policy, and its obvious purpose is to prevent stock from getting upon the right of way and track of a railroad company, and thereby endangering not only their own safety, but the lives and safety of the traveling public. But it was neither the design, nor is it the effect, of this statute to make the railroad company liable for all injuries, regardless of where or how they may occur, which would not have occurred but for the failure of the company to construct and maintain sufficient fences. Under this statute, we think, the liability of a railroad company for injuries to stock going upon its right of way in consequence of the company's neglect to construct and maintain proper fences is a liability for such damages only as result from injuries received upon its right of way as the direct and natural consequence of the absence of sufficient and proper fences. In other words the duty of the railroad company under this statute has relation only to dangers upon its own right of way.

Section 2692 of the General Statutes of the state of Minnesota provides that "all railroad companies in this state shall, within six months from and after the passage

of this act, build, or cause to be built, good and sufficient cattle guards at all wagon crossings, and good and substantial fences on each side of such road." Section 2693 of said statutes provides that "all railroad companies shall be liable for domestic animals killed or injured by the negligence of such companies, and a failure to build and maintain cattle guards and fences as above provided shall be deemed an act of negligence on the part of such companies." The supreme court of Minnesota, in the case of *Frisch v. Chicago G. W. R. Co.* 95 Minn. 398, 104 N. W. 228, construing these sections, say: "It has been uniformly held by this court that the purpose of the statute we are here considering is to prevent domestic animals from getting upon railroad tracks, thereby endangering the safety of the traveling public, persons in charge of trains, and of the animals themselves, by requiring the roads to be inclosed by proper fences and cattle guards. *Blais v. Minneapolis & St. L. R. Co.* 34 Minn. 57, 57 Am. Rep. 36, 24 N. W. 558; *Smith v. Minneapolis & St. L. R. Co.* 37 Minn. 103, 33 N. W. 316. The language of § 2693, and the purpose of its enactment, clearly indicate that the liability upon a railroad company for loss of domestic animals by a failure to fence its road is limited to animals killed or injured on its right of way. We so construe the section." This statute was also considered by the circuit court of appeals, eighth circuit in *Bear v. Chicago G. W. R. Co.* 72 C. C. A. 513, 141 Fed. 25, and it was held that the statute entailed a liability upon a railroad company only for a damage done upon its own right of way. The facts of that case are in many respects quite similar to the facts in the case at bar. The plaintiff, Bear, was the owner of a valuable horse alleged to be worth more than \$2,000. The horse, being in the public highway, went upon the defendant company's right of way through an opening in the defendant's fence, crossed the defendant's right of way and track, and went upon the right of way and track of the Northwestern Railway Company, where it was killed by a passing train owned and operated by the latter company. In the opinion in that case, Hook, Circuit Judge, says: "As to the construction of § 2693: By its terms it relates alone to domestic animals killed or injured through the failure of a railroad company to inclose its right of way; such failure being termed an act of negligence. Does it include a case, such as this, where the animal was not killed on the right of way of the defendant? The enactment of the statute was in view of the obvious and special dangers incident to a railroad right of way, and the moral duty of the owner to adopt reasonable pre-

cautions to guard against them. This moral duty was made a statutory duty, and the means prescribed as being best suited to attain the object were the erection and maintenance of fences and cattle guards. The defendant's duty was in relation to the dangers upon its own possessions. The duty to exclude stock from an adjoining or a distant right of way was upon the company that owned it."

A like interpretation and effect must, we think, be given to § 3324 of our statutes. It therefore necessarily follows that, upon the admitted facts of the present case, the Hocking Valley Railway Company is not liable to the defendant in error, George Phillips, because of the loss he sustained, for in contemplation of law it has done him no wrong. In an action for neglect of duty, it is not enough for the plaintiff to show that the defendant neglected a duty imposed by statute, and that he would not have been injured if the duty had been performed, but, to entitle him to recover, he must further show that such duty was imposed for his benefit, or was one which the defendant owed to him for his protection and security from the particular loss or injury of which he complains. *Smith v. Tripp*, 13 R. I. 152; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211.

We have examined all the authorities cited by counsel for defendant in error, and such examination discloses that, in each of the cases cited and relied upon, the loss or injury for which a recovery was had occurred upon the right of way of the company against which judgment was permitted. Hence, these authorities are not controlling, neither are they in conflict with our holding in the present case.

Judgment reversed, and judgment for plaintiff in error.

Summers, Ch. J., and Spear, Davis, Shauck, and Price, JJ., concur.

OKLAHOMA SUPREME COURT.

W. R. SMITH et al., and W. N. TALL
FERRO, Appt.,
v.

FIRST NATIONAL BANK OF CADDO
OHIO.

(23 Okla. 411, 104 Pac. 1080.)

Secured note — negotiation — payment
to original payee — effect.

1. The assignment of a note before

Headnotes by KANE, Ch. J.

turity to a bona fide holder carried with it a chattel mortgage executed as security therefor, and the assignee alone could thereafter discharge the mortgage lien; payment of the indebtedness to the original mortgagee by a purchaser of the mortgaged property being insufficient, though the latter had no notice of the assignment.

Same — chattel mortgage — construction.

2. A clause in a mortgage which provides that, "if said cattle or any part thereof be consigned to or sold by any person except said Tambllyn & Tambllyn, then said mortgagees shall be paid the proceeds of said sale, and its commission of 50 cents per head on all the above-described cattle so sold," did not authorize the mortgagor to sell the cattle to others than the mortgagees, and pay the proceeds of the sale to Tambllyn

& Tambllyn, after the note secured by such mortgage had been assigned by them to someone else.

(Williams and Dunn, JJ., dissent.)

(March 9, 1909.)

APPEAL by defendant Taliaferro from a judgment of the District Court of the United States for the Southern District of the Indian Territory in plaintiff's favor in an action brought to foreclose a mortgage on certain cattle. Affirmed.

The facts are stated in the opinion.

Messrs. Cruce, Cruce, & Bleakmore, for appellant, Taliaferro:

The assignment of a negotiable promissory note, secured by mortgage, without

Note. — Effect upon lien of mortgage securing negotiable instruments assigned before maturity of payment to payee, without knowledge of assignment.

By the weight of authority, a mortgage executed as security for the payment of negotiable paper is a mere incident thereto and partakes of the negotiability of the paper it secures. As to payment, the rights of the parties thereto, as well as third persons, are governed by the rules relating to negotiable paper, in other words, payment before maturity to anyone other than the holder of the negotiable instrument is at the risk of the payer, and is binding upon the holder of the paper only where express or implied authority to receive such payment is established by the person making the same. Hence, payment of a negotiable note secured by mortgage by the mortgagor or his grantee, where made to the mortgagee, not in possession of the note and mortgage, is not binding upon an assignee thereof before maturity, who was in possession of the papers at the time of payment, unless he had expressly or impliedly authorized such payment. *Carpenter v. Longan*, 16 Wall. 271, 21 L. ed. 313; *Kenicott v. Wayne County*, 16 Wall. 452, 21 L. ed. 319; *Sawyer v. Prickett*, 19 Wall. 146, 22 L. ed. 105; *New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 24 L. ed. 346; *Windle v. Bonebrake*, 23 Fed. 165; *Swift v. Bank of Washington*, 52 C. C. A. 339, 114 Fed. 643 (chattel mortgage); *First Nat. Bank v. Baird*, 73 C. C. A. 96, 141 Fed. 862 (chattel mortgage); *Brayley v. Ellis*, 71 Iowa, 155, 32 N. W. 254; *Baumgartner v. Peterson*, 93 Iowa, 572, 62 N. W. 27; *Burhans v. Hutcheson*, 25 Kan. 625, 37 Am. Rep. 274; *Hoffacker v. Manufacturers' Nat. Bank (Md.)*, 23 Atl. 579; *Biggerstaff v. Marston*, 161 Mass. 101, 36 N. E. 785; *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29; *Williams v. Keyes*, 90 Mich. 290, 30 Am. St. Rep. 438, 51 N. W. 520; *Markey v. Corey*, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493; 29 L.R.A. (N.S.)

Brooke v. Struthers, 110 Mich. 563, 35 L.R.A. 536, 68 N. W. 272; *Borgess Invest. Co. v. Vette*, 142 Mo. 567, 64 Am. St. Rep. 567, 44 S. W. 754; *Morrison v. Roehl*, 215 Mo. 545, 114 S. W. 981; *Dodge v. Birkenfeld*, 20 Mont. 115, 49 Pac. 590; *City Nat. Bank v. Goodloe-McClelland Commission Co.*, 93 Mo. App. 123 (chattel mortgage); *Webb v. Hoselton*, 4 Neb. 308, 19 Am. Rep. 638; *Eggert v. Beyer*, 43 Neb. 711, 62 N. W. 57; *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Porter v. Ourada*, 51 Neb. 510, 71 N. W. 52; *Herbage v. Moodie*, 51 Neb. 837, 71 N. W. 778; *Snell v. Margritz*, 64 Neb. 6, 91 N. W. 274; *Bautz v. Adams*, 131 Wis. 152, 120 Am. St. Rep. 1030, 111 N. W. 69.

The reason for this doctrine was said in *Baumgartner v. Peterson*, supra, to be that a mortgagor executing a mortgage as security for a negotiable note payable to order is charged with knowledge that the note is negotiable, and he makes payments to the original mortgagee without the production of the note at his peril, as same are of no effect as against an indorsee thereof who had possession at the time the payments were made.

And in *Burhans v. Hutcheson*, the court reasoned that as a mortgage was a mere security, creating a lien upon property, but vesting no title, a negotiable instrument secured thereby was the principal thing, and the mortgage was a mere incident following the debt and deriving its character from the instrument, and hence the negotiable note being the principal evidence of the debt, and the mortgage merely ancillary thereto and following the note, the holder of the note being also the owner of the mortgage, payment thereon to the original holder by the mortgagor is of no effect as against one at the time owning and in possession of the note and mortgage.

So, in *Bautz v. Adams*, supra, the court said that a mortgagor in a mortgage securing a negotiable note, or his subsequent grantee, is not warranted in paying the mortgage indebtedness to the record owner thereof or his agent, relying solely on the record, where the securities

formal assignment of the mortgage, while it transfers to the assignees the equitable title to the property, and the consequent right to enforce the lien, leaves the legal title to the property undisturbed; and an innocent third party is not bound to know that the original mortgagee has no right to cancel or discharge the mortgage.

Cobbey, Chat. Mortg. §§ 650, 653, 654, 683; Jones, Chat. Mortg. 3d ed. § 503; Jones, Chat. Mortg. 4th ed. §§ 818, 820; 2 Am. & Eng. Enc. Law, 2d ed. p. 1087; Pom. Eq. Jur. 3d ed. §§ 658, 693, 740, 770; Bayley v. Greenleaf, 7 Wheat. 46, 5 L. ed. 393; Bank of Indiana v. Anderson, 14 Iowa, 544, 83 Am. Dec. 390; Perkins v. Hays, Cooke (Tenn.) 163, 5 Am. Dec. 680; Patrick v. Marshall, 2 Bibb, 41, 4 Am. Dec.

are not in possession of such owner or the person assuming to act as his agent.

And in *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801, the court remarked: "The importance of protecting the holders of commercial paper is so great that to warrant finding that a person who assumes to have authority to receive payment of the principal sum on any such paper has such authority, possession of the paper itself by such person, or proof *alimide* of express authority, is indispensable. . . . If money be due on a written security, it is the duty of the debtor to see that the person to whom he pays it is in possession of the security.' . . . The payer is negligent if he relies on anything less, and must abide the event of being able to establish, by clear and satisfactory evidence, an express agreement between the holder of the security and the supposed agent, authorizing the latter to represent the former in the transaction."

This is not the universal rule, however, as in a few jurisdictions, the doctrine that a mortgage executed as security for the payment of negotiable paper partakes of the negotiability of the paper, and is governed by the rules relative thereto, is denied on the theory that such a mortgage is a mere chose in action, although an incident to the debt secured and passing with it. Hence a subsequent holder thereof, to protect himself as against payments thereafter made in good faith to the original mortgagee, must give actual notice to the maker, of the change in the title; otherwise, payments to the mortgagee without notice will be binding upon the subsequent holder. *McAuliffe v. Reuter*, 166 Ill. 491, 46 N. E. 1087; *Schultz v. Sroelowitz*, 191 Ill. 249, 61 N. E. 92; *Napieralski v. Simon*, 198 Ill. 384, 64 N. E. 1042; *Bartholf v. Bensley*, 234 Ill. 336, 84 N. E. 928; *Sheldon v. McNall*, 89 Ill. App. 138; *Williams v. Pelley*, 96 Ill. App. 346; *Carey v. Kutten*, 98 Ill. App. 197; *Reed v. Coale*, 4 Ind. 283 (negotiability of note does not clearly appear); *Jennings v. Vickers*, 31 La. Ann. 679; *Hilliard v. Taylor*, 114 La. 833, 38 So. 594; *Johnson v. Carpenter*, 7 Minn. 29 L.R.A. (N.S.)

670; *Livermore v. Maxwell*, 87 Iowa, 705, 55 N. W. 37; *Day v. Brenton*, 102 Iowa, 482, 63 Am. St. Rep. 460, 71 N. W. 538; *Pickford v. Peebles*, 7 S. D. 166, 63 N. W. 779; *Ayers v. Hays*, 60 Ind. 452; *Evans Bros. v. Roanoke Sav. Bank*, 95 Va. 294, 28 S. E. 324; *Connecticut Mut. L. Ins. Co. v. Talbot*, 113 Ind. 373, 3 Am. St. Rep. 655, 14 N. E. 590; *Williams v. Jackson*, 107 U. S. 478, 27 L. ed. 529, 2 Sup. Ct. Rep. 814; *Abbott v. Goodwin*, 20 Me. 408.

Messrs. I. P. Ryland and W. A. Ledbetter for appellee.

Kane, Ch. J., delivered the opinion of the court:

This was a suit in equity commenced by the First National Bank of Cadiz, Ohio,

176, Gil. 120; *Olson v. Northwestern Guaranty Loan Co.* 65 Minn. 475, 68 N. W. 100.

In support of this doctrine in *McAuliffe v. Reuter*, the court reasoned that, in a suit to foreclose a mortgage, the mortgage is a mere chose in action not negotiable, and the mortgagor without notice of its assignment may interpose any defense arising out of the transaction with the mortgagee which he could set up against the mortgagee in case a bill were filed by him; and this being true, it is the duty of the purchaser of a mortgage to inquire of the mortgagor if there be any reason why it should not be paid.

And in *Buehler v. McCormick*, 169 Ill. 269, 48 N. E. 287, the court remarked: "The purchaser knows from the papers who the mortgagor is, and may, by notice and inquiry, protect himself in making the purchase much more readily than the mortgagor may, if for any reason he is unable to obtain at once the cancellation and return of his obligations. The assignee is charged with knowledge of the law that a mortgage is assignable only in equity, and subject to the equities between the original parties to it, and he cannot relieve himself from the consequences of his own negligence by simply showing that the mortgagor failed to take up the note and mortgage when he paid the debt to the then legal holder."

In *Johnson v. Carpenter*, it was said that "where a debt is secured by a mortgage on real estate, and also by negotiable promissory note, the mortgage is a chose in action, as between the mortgagor and any subsequent assignee, and is taken subject to the state of accounts between the mortgagor and mortgagee at the time of the assignment, and to all payments made by the mortgagor to the mortgagee at any time before actual notice of the assignment. The mortgage is an incident to the debt, and whoever owns the latter is entitled to the benefit of the former to enforce payment, but he cannot rely on the privileged character of the note to insure him the advantage of the mortgage. He must be vigilant in bringing home to the mortgagor the fact of the change of ownership in the mortgage."

the appellee, to foreclose a chattel mortgage upon 103 head of cattle, of the value of \$3,000. It seems that on the 18th day of June, 1901, W. R. Smith, H. P. Wiggs, and Ed Sacra executed their promissory note for \$4,430.40, due six months after date, to Tamblyn & Tamblyn, commission merchants, and of even date therewith made, executed, and delivered their chattel mortgage on 230 head of cattle to secure payment of same. On the 1st day of July, 1901, Tamblyn & Tamblyn indorsed and delivered the note to Annabel Abell, a broker of Kansas City, Missouri. On the 8th day of July, 1901, Annabel Abell, without indorsement, sold and delivered said note to the appellee herein. Subsequently, and before the maturity of the note, the

mortgagors sold 103 head of the cattle covered by the chattel mortgage to the appellant, W. N. Taliaferro, who took possession of the same, and sent the purchase price, which amounted to \$3,000, to Tamblyn & Tamblyn, the original mortgagees. Taliaferro, at the time he purchased and took possession of said cattle, had no actual knowledge that the note had been assigned, but was assured by the mortgagees that they still held the same. The appellee, plaintiff below, claimed that the assignment of the note operated to transfer the mortgage, and that Taliaferro, the appellant, took the cattle subject to this lien. Taliaferro filed his separate answer, admitting the execution and transfer of the note, but claiming that he was an innocent

If the mortgagor pays the mortgage to the mortgagee after it has been assigned, without notice of the assignment, the lien is extinguished, and the land cleared of the encumbrance, and the mortgagee becomes a trustee of the sum paid for the benefit of the owner of the debt."

The Illinois cases are not apparently in harmony with *Keohane v. Smith*, 97 Ill. 156, wherein the doctrine was asserted that a mortgage, when securing the payment of a negotiable instrument, partook of the negotiable character of such instrument, and it became the duty of the maker thereof, or a third person assuming its payment, to inform himself whether such outstanding note and mortgage had in fact been paid, and thereby render it less possible for the mortgagee to practise fraud on an assignee of the note. On this point, it was said: "The note . . . was a negotiable instrument.

. . . It was for a definite sum, was payable absolutely on a day named, and was not dependent upon any contingency, either in regard to the event or the fund out of which payment was to be made, or as to the party by or to whom payment was to be made. These are qualities of negotiable paper both at common law and under our statute. The assignment of the note by the mortgagee to complainant was an assignment in violation of the mortgage by which it was secured. Complainant became the bona fide assignee and holder of the note, for value, before maturity, and as to her Sullivan could make no defense, either at law or in equity. He knew his note was outstanding, and if he paid it to a party not the holder, it was as at his own risk as to whether such party would apply the money payment of his outstanding note. Smith had notice of the same facts before he effected the loan on the same property for his principal, the owner of the indebtedness secured. He had actual notice of the existence of the mortgage and that it was on record. It described the note, and, from the description contained in the mortgage, he ought to be held to have had notice that the note secured was not due. Being negotiable paper, he must have known it might have

been assigned in the usual course of business, and might then be in the hands of an innocent holder for value. Under the circumstances it was his duty to have informed himself whether the outstanding note the mortgage secured had in fact been paid. Not to do so made it possible for the mortgagee to practise a fraud on the assignee of the note. Knowing the note was not due, and would not be for years to come, he ought to have inquired whether Runyan was still the holder, and could rightfully receive payment, and not to do so was gross carelessness."

This case is distinguished in the later decisions of that court on the ground that it simply held that, under the circumstances of that case, it was gross negligence for the mortgagor in a mortgage secured by a negotiable instrument, or a third person assuming payment thereof, to pay the same to the mortgagee before the maturity of the debt, without making any inquiry of such mortgagee or anyone else as to the present ownership and whereabouts of the note and mortgage. These decisions, however, overrule this case to the extent, at least, of holding that a mortgage securing a negotiable instrument does not partake of the negotiable character of the instrument.

Where the mortgagors, in effect, constitute the mortgagee their agent to negotiate a mortgage and note given by them, the act of the mortgagee in transferring the same to a purchaser is in law the act of the mortgagors, and hence they cannot be heard to complain that the transfer was not recorded, and they do not stand in the position of a mortgagor who innocently pays money to his mortgagee after the mortgage had been transferred to another but before it had been recorded. *Bacon v. Wood*, 22 R. I. 255, 47 Atl. 388.

Payment to a grantee by the grantor of a deed absolute on its face, but intended as a mortgage, will not defeat the title of a third person claiming under a conveyance by the mortgagee, and without notice that such deed was a mortgage. *Sweetzer v. Atterbury*, 100 Pa. 18.

purchaser for value. His answer contained the following paragraphs:

"Second. Defendant states that under the terms of the mortgage described in plaintiff's complaint, codefendants Smith, Sacra, and Wiggs had permission from the mortgagees to ship said cattle to the said Tamblyn & Tamblyn, or to sell them to any other person, and pay the proceeds thereof to the said mortgagees.

"Third. Defendant states that the note sued on was never, by the said Tamblyn &

Tamblyn, assigned or transferred to the plaintiff, but that, on or about the 1st day of July, 1901, the said Tamblyn & Tamblyn sold the said note to one Annabel Abell, in Kansas City, Missouri, that at the time said note was sold to the said Annabel Abell she was cognizant of the fact that the mortgagees had been granted permission to sell and dispose of said property; that she had, for a number of years been engaged as a broker in Kansas City, Missouri, and was acquainted with the cus-

In some jurisdictions wherein the rule prevails that a mortgage securing a negotiable instrument is negotiable to the same extent as is such instrument, and hence payment thereof before maturity to anyone not owning the instrument is at the risk of the payer, unless the person to whom payment is made is in possession of the instrument or has authority to receive payment, the doctrine is asserted that an assignee of a negotiable note secured by a mortgage may, by his conduct, so permit the original mortgagee to deal with the mortgagor with reference to the same, as to mislead him into believing that he remains the owner of the note and mortgage, or that he has authority to collect the same, and thereby estop himself from denying such facts, and hence be bound by payments made by the mortgagor under such belief.

It is not the purpose of this note to consider the question as to what facts are sufficient to entitle a mortgagor to bind a holder before maturity of a negotiable note and mortgage by payments to the original mortgagee, after an assignment thereof, where the assignee retains the possession of the note and mortgage. In the following cases, however, the doctrine that such payments may be binding upon the assignee was asserted and applied: *Pennypacker v. Latimer*, 10 Idaho, 618, 81 Pac. 55; *Fox v. Cipra*, 5 Kan. App. 312, 48 Pac. 452; *Goodfellow v. Stillwell*, 73 Mo. 17 (trust deed containing express authority to collect); *Stark v. Olsen*, 44 Neb. 646, 63 N. W. 37; *Porter v. Ourada*, 51 Neb. 510, 71 N. W. 52; *Pine v. Mangus*, 76 Neb. 83, 107 N. W. 222; *Fitzgerald v. Beckwith*, 182 Mass. 177, 65 N. E. 36. The doctrine was recognized in *Logan v. Smith*, 62 Mo. 455, but not applied, as it was held that the facts were not sufficient to bring the case within the rule.

While the doctrine was recognized and applied in *Fitzgerald v. Beckwith*, to the extent of holding that where the assignee clothed the mortgagee with apparent authority to collect, he is bound by payments made, that is apparently as far as the Massachusetts court has gone in sustaining the rule, as in *Murphy v. Barnard*, 162 Mass. 72, 44 Am. St. Rep. 340, 38 N. E. 29, it was held that payments could not be protected on the theory that they were made by the mortgagor to the mortgagee as an agent of the assignee, without knowledge of any limitation upon his authority to receive 29 L.R.A. (N.S.)

same, since the payer was unacquainted with the fact that the mortgagee was an agent of the owner of the note, and hence was not thereby induced to make the payments, but he made them solely because he assumed, without inquiry and without requiring the production of the note, that the mortgagee continued to be its holder and owner, and he dealt with him as owner, and not as an agent.

See also *Biggerstaff v. Marston*, 181 Mass. 101, 36 N. E. 785, wherein it is said that payments on a negotiable note secured by a mortgage, where made to the mortgagee before maturity, and where he was neither the owner nor the holder of the note, nor the agent of the owner to receive the principal, and where the note was not produced by the person receiving the payments, were paid at the peril of the payer, and, not having paid to the owner or the owner's agent, he must be held to have acted in his own wrong. It was further added: "Nor can he have credit for his payments of principal, on the ground that the defendant had, by her conduct, held out Hutchinson as having authority to receive them, or by her acts or silence given the plaintiff reasonable cause to believe that Hutchinson had such authority. There was no duty upon the defendant to notify the plaintiff that she had become the owner of the note and mortgage; while, having given a negotiable promissory note not yet matured, there was a duty upon the plaintiff himself, if he proposed to pay before maturity, to require the actual production of the note."

By the mortgage the plaintiff had contracted to pay to the mortgagee or his assignee, and, by the note to the mortgagor "in order," and by the law of negotiable paper it was not the duty of the purchaser of the note to notify the plaintiff of the purchase, and it was so much the duty of the plaintiff to see that it had not been transferred that when, without its actual production, he paid to the original payee, he acted in his own wrong. The defendant, by allowing the original mortgagee, as her undischarged agent, to receive payments of interest accruing before the maturity of the note, did not, as matter of law, justify the plaintiff in believing that Hutchinson had authority to receive the principal before it became due." And see remarks of the court in *Bartel v. Brown*, 104 Wis. 493, 80 N. W. 801.

tom prevailing in the said Kansas City among such commission men, concerning the right of cattle men, or the owners of cattle, to dispose of said cattle upon which mortgages existed, in favor of such commission firms; that under and by virtue of such custom, which was known to the said Abell and the plaintiff herein, cattle men, who had executed notes to the commission firms in Kansas City, and had executed mortgages on cattle to secure said loans, had permission of the mortgagees either to ship such cattle to such mortgagees to be by them sold, and the proceeds applied to such indebtedness, or themselves to sell such cattle to whom such mortgagors so desired, and discharge such indebtedness by paying such commission firms, in addition to such indebtedness, equal to 50 cents per head on all cattle included in such mortgage or mortgages.

"Fourth. Defendant states that at the time said Tamblyn & Tamblyn sold said note to Annabel C. Abell it was expressly understood and agreed and contracted for, between the parties thereto, that the said Tamblyn & Tamblyn should carry out the agreement they had originally made with the said mortgagors, and that the said Tamblyn & Tamblyn would act as the agents of the said Annabel C. Abell, or of any purchaser to whom she might sell such note, in and about the collection of the same, and would themselves sell said cattle, or permit the mortgagors to sell the same, and pay the proceeds to the said Tamblyn & Tamblyn, who should themselves pay the money to the said Annabel C. Abell, or any subsequent purchaser of said note.

"Fifth. Defendant says that the said Annabel C. Abell sold said note to the plaintiff on or about the 8th day of July, 1901, and at the time she sold said note she advised the plaintiff that the mortgagors had permission to sell such cattle, and that the said cattle would be sold by the said mortgagors at or before the maturity of said note.

"Sixth. Defendant states that said Annabel C. Abell did not indorse said note to the plaintiff, but that the plaintiff was advised, at the time of said purchase, that the mortgagee authorized the mortgagors to sell and convey the title to said cattle, and was advised that the mortgagors would exercise such right, and would themselves sell and dispose of said property, and that the plaintiff consented that the mortgagors might sell such property, and assumed the risk that said mortgagors and the said Tamblyn & Tamblyn would pay the proceeds of such cattle to the plaintiff.

"Seventh. Defendant states that at the time he purchased the cattle of his code-

fendants, he had no knowledge that said note had ever been sold, but that the said Tamblyn & Tamblyn and his codefendants assured him that Tamblyn & Tamblyn still owned such note; that the said Tamblyn & Tamblyn, in express terms, authorized the mortgagors to sell said property to this defendant, and relying upon which authority, this defendant purchased said cattle for the sum of \$3,000, and paid the same to the said Tamblyn & Tamblyn."

The answer contained the further allegation that under the custom long prevailing among commission merchants in Kansas City, where the note was made payable, and where it was negotiated, such commission merchants, when they loaned money to cattle men in the South and West secured by mortgage, granted to the mortgagors the right either to ship the cattle to the mortgagees, to be sold and the money applied to the satisfaction of the loan, or else to sell the cattle themselves and apply the money to the discharge of the loan; that the appellee was cognizant of this custom when he purchased the cattle, and therefore bound thereby. The appellant, Taliaferro, further answering, alleges that the chattel mortgage described in the complaint contained the following provision: "All of said cattle, as herein mentioned, are to be held in said pasture, and fed by the mortgagor during the term of this mortgage, and at least three days before the maturity of the note herein mentioned they shall be shipped and consigned to Tamblyn & Tamblyn, at the stockyards at Kansas City, Missouri, and when sold by them, the proceeds thereof shall be applied, first, in the payment of the usual and customary commission to said Tamblyn & Tamblyn for selling the same, and the balance, or so much thereof as may be necessary, shall be applied to the indebtedness hereinafter mentioned. If said cattle or any part thereof be consigned to or sold by any person except the said Tamblyn & Tamblyn, then said mortgagee shall be paid the proceeds of such sale and a commission of 50 cents per head on all the above-described cattle so sold." Defendant further alleges "that Kansas City is the second largest live-stock market in the world, and that for more than fifteen years last past it had been, and at the time of the execution of the note and mortgage sued on it was, the general custom existing in the said Kansas City, among all the live-stock commission firms doing business therein, to insert in all mortgages upon live stock provisions exactly similar in substance to the provisions herein, just referred to; that the meaning of said provisions was that, dur-

ing all the times aforesaid, according to the general custom that had been established by, and prevailed among, such commission firms, the mortgagors of live stock to such commission firms had the option either to ship the cattle to the mortgagees, or themselves sell the cattle to whomsoever they so desired, and with the proceeds discharge such indebtedness; that the provision of the mortgage herein sued on just referred to, under the custom prevailing during the times herein mentioned, in said Kansas City, authorized the mortgagors to convey said cattle to whomsoever they so desired and transfer title thereto." A general demurrer to this answer was sustained by the court, and, the defendant Taliaferro declining to answer further, judgment was entered against him and his bondsmen for \$3,000. Judgment for a larger amount was entered against Smith, Sacra, and Wiggs, who filed separate answer in the court below, but have taken no appeal to this court.

Counsel for Taliaferro contend that the court below committed error, first, in sustaining the demurrer to his answer; and, second, in entering judgment against him. To our mind the demurrer to the answer was properly sustained. The case of *Swift v. Bank of Washington*, 52 C. C. A. 339, 114 Fed. 643, seems to be in point, and decisive of the first point raised by counsel for plaintiff in error. The facts in that case were that on the 31st day of July, 1899, F. M. Overlees executed and delivered to W. B. McAllister & Company his negotiable promissory note for \$2,264.58, payable at their office at Kansas City Stockyards, Kansas City, Kansas, ten months after date. For a valuable consideration McAllister & Company indorsed and delivered the note before its maturity to the Bank of Washington, the defendant in error and plaintiff below. Of even date with the note the maker thereof executed a chattel mortgage on certain cattle to secure its payment. In the month of November, 1899, C. W. Swift, Jr., the plaintiff in error and defendant below, without notice that the note the mortgage was given to secure had been assigned to the plaintiff, purchased the mortgaged cattle from Overlees, the mortgagor, and in December, 1899, paid, or caused to be paid, to McAllister & Company, the mortgagees, the full amount of the mortgage debt, and received from them a release and discharge of the mortgage. Afterwards the plaintiff, the Bank of Washington, brought this action in replevin against the defendant, Swift, to recover the cattle. The court sustained a demurrer to the defendant's answer, and, declining to plead further, judgment was rendered 20 L.R.A. (N.S.)

dered against it, whereupon it sued out a writ of error. Paragraph 1 of the syllabus reads as follows: "Assignment of a note before maturity to a bona fide holder carried with it a chattel mortgage executed as security therefor, and the assignee alone could thereafter discharge the mortgage lien; payment of the indebtedness to the original mortgagee by a purchaser of the mortgaged property being insufficient, though the latter had no notice of the assignment." Circuit Judge Caldwell, who delivered the opinion, says: "It thus appears from the defendant's answer that he knew when he purchased the cattle that the mortgage was of record, unsatisfied, and the mortgage debt unpaid. If the defendant desired to have the cattle released from the lien of the mortgage, he should have required the production and cancellation of the note the mortgage was given to secure. Instead of doing this, he remitted the money to pay the mortgage debt to McAllister & Company, in the confidence that they would apply it to that purpose. His confidence was misplaced. They had before that sold and transferred the note to the plaintiff. They did not apply the money to its payment, but instead applied it to their own use, and wrongfully executed a release of the mortgage that is of no value against the plaintiff."

In one of the cases cited by Judge Caldwell (*New Orleans Canal & Bkg. Co. v. Montgomery*, 95 U. S. 16, 24 L. ed. 346) the rule is stated by Mr. Justice Swayne as follows: "The deed of trust securing the payment of the notes was an incident and accessory to them. The transfer of the notes carried with it to the transferees the benefit of the security. The trustee in such cases, like a mortgagee, is a purchaser for a valuable consideration. Both occupy the same ground with respect to notice, actual and constructive. It is that of a bona fide purchaser until the contrary is made to appear." Another case in point on this question is *Hollinshead v. John Stuart & Co.* (*Hollinshead v. Globe Investment Co.*) 8 N. D. 35, 42 L.R.A. 659, 77 N. W. 89, where the rule is stated by Mr. Chief Justice Corliss as follows: "With respect to negotiable paper the rule is different. The maker must, at his peril, ascertain at the time of payment whether the payee is still owner thereof. Although the purchaser of such paper does not notify the debtor of the fact of such purchase, and although the latter is ignorant thereof, still he is in law chargeable with notice of the rights of the purchaser, and therefore pays the original creditor at his own risk. On rehearing, the supreme court of North Dakota reviewed the authorities with

great care, and, in denying the petition, Mr. Chief Justice Bartholomew said: "Respondent knew the note was negotiable, and that the quality of negotiability would adhere to it every minute until it reached maturity. He knew it was intended to pass from owner to owner by indorsement, and that it was liable thus to pass at any moment; and he knew that the last person thus receiving it could require at his hands the full amount of the note. That the note belonged, or he thought it belonged, to the Globe Investment Company, when one coupon matured, furnished him no warrant for believing that it would belong to the same party when the next coupon matured, or when the principal fell due. He had in his own hands the means of absolute protection. He had only to see to it that he received his note when he paid his money. If he neglected this simple requirement, demanded not more by the law than by common prudence, he paid at his peril; and, if loss occurs, he must bear it. One party or the other must suffer, and he, being the party in fault, must bear the burden."

On the other proposition presented by the record, counsel for appellee say in their brief: "At pages 31, 32, and 33 counsel attempted to distinguish *Swift v. Bank of Washington*, supra, from this case, and for that purpose quotes the provision of the *Swift* mortgage, that 'when marketed, the consent of the second parties having been obtained, said property shall be consigned to the second parties at the Kansas City Stockyards,' etc., insisting that the clause, 'consent of the second parties having been obtained,' not being in the mortgage in this case, a third person purchasing the mortgaged property would acquire rights different from those acquired if he had purchased under the *Swift* mortgage. Counsel based this contention, however, upon the assumption that the mortgage in this case authorized the mortgagors to sell to other parties and apply the proceeds to the satisfaction of the debt, and in doing so they would effectually destroy the mortgage and the security. 'If the mortgagors had permission to sell the cattle to whom they pleased, and apply the proceeds to a debt, the mortgage, as security, would be worthless. The provision in the mortgage, that three days before the maturity of the note the cattle should be shipped to *Tamblyn & Tamblyn* at the stockyards in Kansas City, Missouri, and when sold by them the proceeds applied to the payment of the commission, and the balance, or so much thereof as may be necessary, shall be applied to the indebtedness secured by the mortgage, must be construed in connection with the other provisions of the mortgage, and the nego-

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tiatile character of the note secured. This recital in the mortgage would not authorize *Tamblyn & Tamblyn* to sell the cattle after they had transferred the note. It becomes inoperative after the note is assigned; nor does the provision in the mortgage that, if the cattle are consigned to, or sold by, any other person except *Tamblyn & Tamblyn*, then mortgagees shall be paid the proceeds of the sale and a commission of 50 cents per head on the cattle covered by the mortgage, authorize the sale of the cattle without the consent of the holder of the note."

On the other hand, counsel for appellant insists that the mortgagors had a right, under the express terms of the mortgage, to consign or sell to any other persons, and pay the proceeds to *Tamblyn & Tamblyn*; that this authority is expressly conferred by the provision of the mortgage which reads: "If said cattle or any part thereof be consigned to or sold by any person except said *Tamblyn & Tamblyn*, then said mortgagees shall be paid the proceeds of said sale, and its commission of 50 cents per head on all the above-described cattle so sold." We do not believe the clause of the mortgage above set out will bear the construction sought to be placed upon it by counsel for appellant. Such a construction would entirely destroy the mortgage as a security, and, by making the original mortgagee agent of the holder of the note for the purpose of collection, no matter how many transfers there may have been, greatly impair the value of the note, and practically deprive it of the advantages incident to negotiable instruments. We are therefore constrained to hold that the clause in this chattel mortgage which provides that, "if said cattle or any part thereof be consigned to or sold by any person except said *Tamblyn & Tamblyn* [the mortgagees], the said mortgagees shall be paid the proceeds of said sale, and its commission of 50 cents per head on all the above-described property so sold,"—did not authorize the mortgagors to sell the cattle to others than the mortgagees and pay the proceeds of the sale to *Tamblyn & Tamblyn* after the note secured by such mortgage had been assigned by them to someone else. This covenant in the mortgage bound the mortgagors, when the cattle were ready for market, to consign them either to *Tamblyn & Tamblyn* or any other dealers or persons wishing to purchase, but in either event the proceeds of the sale were to be paid to the mortgagees, who, under the circumstances of this case, must be deemed to be the holders of the promissory note. The transfer of the note carried with it to the transferee the benefit of the security, and thereafter he, and

not the original mortgagees, was the person to whom the purchase price of the cattle should have been paid.

The judgment of the court below is affirmed.

Turner and Hayes, JJ., concur. Williams and Dunn, JJ., dissent.

Petition for rehearing denied July 13, 1909.

OREGON SUPREME COURT.

MARTHA J. JENNINGS et al., Resp'ts.,
v.

WILLIAM LENTZ, Appt.

(50 Or. 483, 93 Pac. 327.)

Attachment — record information — rights.

Information by one having the record title to real estate, that he has conveyed it to another, together with a record of a mortgage on the property from the latter to him, is not such evidence that the latter is the owner of the property that one relying upon it in purchasing the property from him would be regarded as a bona fide purchaser; and therefore an attaching creditor of the reputed grantee, who, by statute, has the status of such purchaser, acting upon such information, acquires no right to the property superior to that conferred by a prior unrecorded deed, which such grantee had executed and delivered to a stranger.

(Eakin, J., and Slater, C., dissent.)

(January 21, 1908.)

A PPEAL by defendant from a decree of the Circuit Court for Baker County

Note.—The statement in JENNINGS v. LENTZ, that "the precise question, as here presented, is before this court for the first time, and we are referred to no case in which the point, under a similar state of facts as here disclosed, has been distinctly passed upon, nor have we found one," appears to be justified, as search has revealed no other case involving rights as between two successive bona fide purchasers from a common vendor holding under an unrecorded deed, where the conveyance to the earlier purchaser was also unrecorded. Cases are innumerable involving the right of an innocent purchaser from one holding record title, as against a purchaser from one holding under a prior unrecorded deed. But cases where neither contestant claims through one having record title appear to be lacking.

But Davis v. Lutkiewicz, 72 Iowa, 254, 33 N. W. 670, mentioned in the opinion, is 29 L.R.A. (N.S.)

quieting title to certain real estate. Affirmed.

The facts are stated in the opinion.

Mr. Charles A. Johns, for appellant:

From the date of the attachment a creditor is in all respects on an equal footing with a bona fide purchaser for value without notice.

Boehreinger v. Creighton, 10 Or. 42; Gill v. Frank, 12 Or. 507, 53 Am. Rep. 378, 8 Pac. 764; Dickey v. Henarie, 15 Or. 356, 15 Pac. 464; Riddle v. Miller, 19 Or. 468, 23 Pac. 807; Dimmick v. Rosenfeld, 34 Or. 105, 55 Pac. 100.

An attaching creditor is entitled, by reason of his attachment, to the same rights as a purchaser from the debtor, and is chargeable with only such notice as the record imports.

Security Trust Co. v. Loewenberg, 38 Or. 171, 62 Pac. 647.

The defendant was not put upon notice by reason of the fact that the deed from Lentz to the defendant in the attachment case was not recorded.

Davis v. Lutkiewicz, 72 Iowa, 254, 33 N. W. 670; Johnson v. Erlandson, 14 N. D. 518, 105 N. W. 722; Birdsall v. Russell, 29 N. Y. 250; 21 Am. & Eng. Enc. Law, p. 585.

Mr. Woodson L. Patterson also for appellant.

Messrs. C. E. Norton and C. P. Murphy for respondents.

King, C., filed the following opinion:

This is a suit to remove a cloud upon the title to 160 acres of land in Baker county, and is brought here on an appeal from a decree of the circuit court in favor of plaintiffs. On and prior to April 23, 1902, the land was owned and in the actual possession of Frank Lentz. On the date named, in consideration of \$500, one half of which

instructive in this connection. There the owner of land, and holder of the record title, sold to another who did not put his deed on record, and as part of the same transaction took back a purchase-money mortgage and recorded it, but, by mistake, the mortgage described the wrong land. Thereafter, the vendee mortgaged to a third person who was ignorant of the prior mortgage, and who recorded his mortgage. Later the vendee corrected the error in his vendor's mortgage by giving him a new one. It was held that the registry of the first purchase-money mortgage was void on account of the wrong description; that the second mortgage given by the vendee was protected as against the subsequent second purchase-money mortgage, notwithstanding the fact that the record title was not in the mortgagor, as the latter had a deed which would give the mortgagee all the information that a record of it could have done.

was paid in cash and the balance by a note due one year after date, secured by a mortgage on the property he executed a warranty deed to the premises to Robert Duvall, who, within an hour after receipt of the conveyance, and without entering into possession, executed a like deed therefor to Mary E. Gardner, who had furnished the money for the purchase, and for whom, without the grantor's knowledge, Duvall was acting as agent in the purchase from Lentz. On the same day that the deed to Duvall was executed, Lentz recorded his mortgage in the proper records of that county and soon thereafter removed from the land, leaving no one in possession, and, so far as manifested by the evidence, no one was in actual possession of the land when this suit was filed. The deed to Gardner was given subject to the Lentz mortgage, which, with the deed from Lentz to Duvall, was left by Mrs. Gardner with M. S. Hughes, who was to take them to the clerk's office for record; but for some explained reason they were not recorded until thirty days later. On October 3, 1903, Mrs. Gardner, by warranty deed and for a valuable consideration, transferred the property to plaintiffs' grantors who, by like deed, conveyed it to plaintiffs. Shortly after Frank Lentz had deeded the property to Duvall, he informed the defendant of the transfer, to whom it appears Duvall was indebted in the sum of \$145, which indebtedness was incurred some time prior to the transfer of the property by Lentz. Defendant then had his attorneys examine the records of the county for the purpose of ascertaining if the debtor still owned the property which resulted in their finding a record of mortgage on the property from him to Frank Lentz, but the record title to the land in the mortgagee. Without further investigation than the statement by Frank Lentz to the effect that on April 23d he had conveyed the land to Duvall, and the record of mortgage named, the defendant, on July 7, 1902 caused the land to be attached in an action filed against Duvall on the claim, in which proceeding judgment was obtained, execution issued thereon and property sold to satisfy the judgment. The property was purchased by defendant, receiving a sheriff's deed therefor, although which he here claims title. There is no controversy as to the facts, and for adjudication the question as to who has the better title under the facts stated. 1. Our statute provides that any property of the debtor not exempt from attachment shall be liable to attachment, and shall be attached by the sheriff making a certificate containing the title of the case, names of the parties, and description of the realty, with a statement showing the property to have been attached, and filing the same with the clerk of the county in which the property is situated; that from the date thereof until discharged, or writ executed, the plaintiff, as against third persons, shall be deemed a purchaser in good faith for a valuable consideration; that his rights as such shall attach immediately upon the filing of such certificate; and that every conveyance of real property within this state which shall not be recorded within five days after the execution thereof shall be void as against any subsequent purchaser in good faith for a valuable consideration, whose conveyance thereof shall be first duly recorded. Bellinger & C. Anno. Codes & Statutes, §§ 300-303, 5359.

2. In order, therefore, to determine whether defendant's title is superior to that of plaintiffs, it is necessary to ascertain only whether, in lieu of the course pursued, he would have been a purchaser in good faith if, with the limited knowledge of the status of Duvall's title at the time of the levy, defendant had purchased the property from him and paid a valuable consideration therefor. If answered in the affirmative, he has the better title and must prevail; otherwise plaintiffs have the superior title, and are entitled to the relief demanded. Under the law as it existed prior to the adoption of the statute mentioned, to the effect that after the filing of the attachment proceedings the creditor shall be deemed a purchaser in good faith, the creditor, by virtue of his attachment, acquired a lien only on the actual interest which the debtor had in the property. *Riddle v. Miller*, 19 Or. 468, 23 Pac. 807. It is obvious that the statute on this point was intended to modify this rule, and to give the attaching creditor regardless of the actual condition of the debtor's title, additional protection by placing him in the same position as a bona fide purchaser for value, in case of failure on the part of the real owner to observe the requirements of the recording acts. But, in construing these acts, it has been repeatedly held, and has become a settled rule in this state, that an attaching creditor, although placed on an equality with a purchaser by this statute, cannot insist on any greater protection than would be granted to such purchaser; and, in suits in equity the claim of a bona fide purchaser for value is an affirmative defense, which must be pleaded, thereby placing the burden of proof in such cases upon the party relying thereon. *Webster v. Rothchild*, 15 Or. 385, 3 Am. St. Rep. 162, 15 Pac. 650; *Wood v. Rayburn*, 18 Or. 3, 22 Pac. 521; *Rhodes v. McGarry*, 19 Or. 222, 23 Pac. 971; *Marks v. Miller*, 21 Or. 317, 14 L.R.A. 190, 28 Pac. 14; *Simpkins v. Windsor*, 21 Or. 382, 28 Pac. 72; *Dimmick v. Rosenfeld*, 34 Or. 101, 55 Pac. 100; *Flegel*

v. Koss, 47 Or. 366, 83 Pac. 847; Haines v. Connell, 48 Or. 469, 120 Am. St. Rep. 835, 87 Pac. 265, 88 Pac. 872. In discussing this feature, Mr. Chief Justice Thayer, in *Rhodes v. McGarry*, supra observes: "It seems to me that, notwithstanding the language of the Code above set out, an attaching creditor, in order to be deemed a purchaser in good faith of the property, as against one having an outstanding equity, must allege and prove all the facts necessary to establish that character of ownership in favor of a purchaser of such property as against such an equity. It can hardly be supposed that the legislature intended, by the provision of the Code referred to, to place an attaching creditor upon any more favorable grounds, with reference to his rights in the property attached, than those occupied by a purchaser of the property; nor to deem the former a purchaser in good faith, except under the same circumstances in which the latter would be deemed such a purchaser. Any other view would lead to absurd consequences, and occasion injustice. It would enable a party to cut off an outstanding equity by resorting to an attachment, when he would not be able to accomplish it by a direct purchase of the property. Such a result was obviously not contemplated by the adoption of the said provision of the Code." As the answer is sufficient to bring the defendant's position within the rule announced, it becomes necessary to determine whether this plea is sufficiently supported by the evidence to entitle defendant to be deemed a purchaser in good faith. Words & Phrases, vol. 4, p. 3117 defines "good faith" as being "an honest intention to abstain from taking any unconscientious advantage of another even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious." And the rule is that "a want of that caution and diligence which an honest man of ordinary prudence is accustomed to exercise in making purchases is, in judgment of law, a want of good faith" (Id., vol. 4, p. 3117).

3. Whatever is sufficient to put a subsequent purchaser on inquiry must be considered legal notice to him of those rights, and when the purchaser omits to observe that ordinary precaution, he must be charged with a knowledge of all facts he might have learned by the exercise of reasonable diligence in making inquiry as to matters to which his attention had been directed. *Dembitz Land Titles*, §§ 132, 133; *Bent v. Coleman*, 89 Ill. 364; *Citizens' Nat. Bank v. Dayton*, 116 Ill. 257, 4 N. E. 492; *Pringle v. Phillips*, 5 Sandf. 165.

The precise question, as here presented,
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is before this court for the first time, and we are referred to no case in which the point, under a similar state of facts as here disclosed, has been distinctly passed upon, nor have we found one, but an application of the principles stated are decisive of the issues presented. The result hinges upon the sufficiency of the inquiry made in reference to the debtor's rights in the premises. In this connection it is urged that the mortgage from the debtor to his grantor, being of record, when considered with the grantor's statement to the creditor to the effect that he had conveyed the property to the debtor on a prior date, without further inquiry, constituted sufficient evidence of the debtor's ownership therein to justify the attachment. It will be remembered, however, that the record at the same time disclosed the title to the property to be in Frank Lentz. When, therefore, it is made to appear from the record that the title is in a person other than the debtor, the record of a mortgage on the land, given by such debtor, is not notice or satisfactory evidence, that he is the owner of the premises mortgaged. A public record does not give notice of any facts not stated in it, or of facts that a person would not expect in the ordinary course of business to be found there. A person in the ordinary course of business affairs would not have expected to find a mortgage of record given by Duvall, unless he also appeared by the records to be the owner of the property mortgaged. From this it follows that, when the record disclosed the title to be in Lentz, the record of a mortgage given to him by Duvall did not constitute notice or evidence that the latter was the owner of the mortgaged premises. *Webb, Record of Title*, §§ 158, 160; *Security Trust Co. v. Lowenberg*, 38 Or. 159, 62 Pac. 647; *Roberts v. Bourne*, 23 Me. 165, 39 Am. Dec. 614; *Pierce v. Odlin*, 27 Me. 341; *Losey v. Simpson*, 11 N. J. Eq. 246; *Bingham v. Kirkland*, 34 N. J. Eq. 229; *Calder v. Chapman*, 52 Pa. 359, 91 Am. Dec. 163; *Doswell v. Buchanan*, 3 Leigh, 365, 23 Am. Dec. 280.

4. The statement by Frank Lentz that he had conveyed the land to Duvall was rebutted by the record itself, showing the title still to be in the person making the statement. The record of the mortgage was not only inadequate for the purpose claimed, but even if considered in connection with defendant's inquiry from Duvall's grantor, it cannot be held sufficient, in the absence of further investigation, to impart such notice as "an honest man of ordinary prudence is accustomed to act upon" when making a purchase of real property; and if not such as would be deemed sufficient for an actual purchaser, it must be conceded, under the adjudications of this state, that it is insuffi-

cient to protect the defendant as an attaching creditor. As stated in *Bent v. Coleman*, 89 Ill. 364, 368: "A person about to purchase this tract of land would naturally inquire into the title of the vendor. He would ascertain his source of title. This is the ordinary, and usually the first, inquiry." It appears that Duvall was known to be in the vicinity of the land when the attachment was made, and had defendant intended to purchase the land outright it would have been his duty to ascertain, and he would probably have endeavored to learn, whether he had any title to convey. Had this been done, it is presumed he would have been told the truth, resulting in no purchase having been made; and, if made, defendant, under such circumstances, would have taken nothing under his deed as against Duvall's successors in interest. He could not, under such circumstances, have been a purchaser in good faith; and, as stated, he can be in no better position as an attaching creditor. When defendant was informed of the sale to Duvall, and that he became the owner, it had reference only to his ownership on April 23d, which was prior to the attachment, and it did not necessarily follow that the title was in him at the time of the levy; nor does it appear that defendant was in any manner informed that his debtor either was, or claimed to be, the owner at that time, and, finding the record evidence of title in the debtor's supposed grantor, this was sufficient to put him on inquiry, and made it imperative that he should make further investigation before acting, or else assumed the risk of Duvall having no title. "It was not incumbent on him to exhaust every possible source of information" (*Johnson v. Erlandson*, 14 N. D. 518, 105 N. W. 722), but it was his duty to use at least reasonable diligence in that respect, or, in the event of his failure to do so, to abide the consequences. When he examined the records, and, in place of finding the title in the debtor, found it in a third party, he was in a far different position than that of a person attaching property on a claim against one who, under the records, holds the apparent title; for Duvall, when the levy was made had neither the apparent nor the actual title. In the case of *Davis v. Lutkiewicz*, 72 Iowa, 254, 33 N. W. 670, to which our attention is directed, the grantor had the deed in his possession, which the court held was better evidence of title than a record thereof, as the record would have imparted no notice not disclosed by the original deed, and when the person holding and exhibiting such instrument represented himself to be the owner of the property, the purchaser had such evidence of title as to justify him in acting accordingly. In this respect the

case mentioned is very different from the one under consideration, in which the debtor had neither the actual title nor any evidence thereof; nor does it appear that he claimed to be the owner of the land, nor that, after discovering the status of the title of record, any effort was made to ascertain from anyone likely to be in possession of the desired information, whether at the time of the levy the debtor either was in fact, or claimed to be, such owner.

After a careful consideration of the facts disclosed by the record, and of what we deem the principles of law applicable thereto, as announced and recognized by previous decisions of this court, we are impelled to hold that plaintiffs have the better title, on the ground that, when the records of the clerk's office of the county in which the land may be situated fail to show any title in the debtor, but disclose it to be in another, and the title in fact is not in such debtor, and the extrinsic evidence at hand is insufficient to warrant the creditor in acting on the theory of the debtor being the owner thereof, such attaching creditor must abide the risk incurred by his levy, and take only "what accident throws into his net as he finds it, and that he cannot claim the benefit of a fiction to get more than his debtor really owned." *Cowley v. McLaughlin*, 141 Mass. 181, 182, 4 N. E. 821. See also *Haynes v. Jones*, 5 Met. 292; *Hamilton-Brown Shoe Co. v. Lewis*, 7 Tex. Civ. App. 509, 28 S. W. 101.

The decree of the court below should accordingly be affirmed.

Eakin, J., dissenting:

I am unable to concur in the foregoing opinion. The real point upon which the decision turns is that the purchaser from a grantee whose deed is not recorded is, by reason of that fact alone, put upon inquiry, and consequently charged with notice of the prior unrecorded conveyance from such grantee; and I refer to the rights of the attaching creditor as those of a bona fide purchaser for value without notice, as that is what the statute says he shall be deemed. It is conceded that if the grantee's deed is on record, a purchaser from him is not put upon inquiry or notice of a prior unrecorded deed. He takes a good title, if in fact ignorant of it. There are many cases where there can be no record of one's title, such as title by descent or by adverse possession, but that fact cannot prejudice one's right to purchase or attach. I dare say that it is an everyday occurrence that purchasers are made from grantees who have not yet had their deeds recorded. In such a case the purchaser is bound to search the record for a conveyance from the apparent owner, as

disclosed by the record, as well as from his own vendor, but the fact that his vendor's deed is not recorded cannot put him upon any other inquiry, or charge him with notice of any other facts. *Bellinger & C. Anno. Codes & Statutes*, § 5359, provides that "every conveyance of real property within this state hereafter made, which shall not be recorded as provided in this title, within five days thereafter, shall be void against any subsequent purchaser in good faith and for a valuable consideration of the same real property, or any portion thereof, whose conveyance shall be first duly recorded." From this it seems clear that the recording statute has no reference to the title acquired by the purchaser from one whose deed is not recorded, but affects the title only of him who fails to record his deed until a prior deed from his grantor, of which he had no notice is recorded. The statute contains no suggestion or imputation that one can purchase only from him who appears, from the record to be the owner, or if he does so, it is at his peril. The effect of the opinion in the case is that, if one purchases from a person who is not disclosed by the record to be the owner, he gets only such title as his grantor actually has at the time of the purchase, regardless of the provisions of the recording statute. This is the holding in *Flynt v. Arnold*, 2 Met. 619. The effect of our statute (*Bellinger & C. Anno. Codes & Statutes*, §§ 302, 5359) is that the attachment can reach the actual interest had in the property by the debtor at the time of the attachment, and as to this remedy the registration laws have no application whatever, and the attachment can reach only such interest, except that in case of a prior conveyance by the debtor, such conveyance will be deemed void if it is unrecorded and the creditor is without notice of its existence, and in that case the attachment will be effectual as though said deed had not been made, and the recording statute, by its terms or intent, applies only to such unrecorded instrument. In the case of *Davis v. Lutkiewicz*, 72 Iowa, 254, 33 N. W. 670, it is said: "An unrecorded deed is valid as to the whole world, except a subsequent purchaser for a valuable consideration without notice. Surely the deed itself is better evidence of title in the grantee than the record of the deed. This deed the mortgagor had and held when *Davis & Sons* took their mortgage. A record of it would have imparted no notice not imparted by the original instrument." The court, further speaking of the case of *Flynt v. Arnold*, supra, which holds that "one who purchases land from a person holding an unrecorded deed purchases at his peril," says: "But this proposition cannot be sus-

tained, because, under our registry laws the holder of an unrecorded deed has a complete title except as against a subsequent good-faith purchaser without notice." *Johnson v. Erlandson*, 14 N. D. 518, 105 N. W. 722, was a case where *Hogenson*, the original owner, conveyed to *Erlandson*, which conveyance was never recorded. *Erlandson* executed a deed to *Baker*, but it was never delivered, and was fraudulently put on record by *Baker*, and plaintiff claims through *Baker*. The question was whether the fact that the deed to *Erlandson* was unrecorded put plaintiff on inquiry or charged her with notice of *Erlandson's* rights. The court say, in substance, it is urged that the failure to record the deed from *Hogenson* to *Erlandson* was sufficient to put plaintiff upon inquiry, and charge her with notice of the facts which inquiry of *Erlandson* would have disclosed. The court further say: "We cannot agree with this argument. The fact that the record failed to show that *Hogenson* had ever parted with his title was constructive notice of *Hogenson's* rights, and nothing more. The only subject of inquiry suggested by that fact was the question as to whether or not *Erlandson* had unconditionally acquired *Hogenson's* title. It is admitted that such is the fact." The Massachusetts cases hold that the attaching creditor is not protected in his levy unless the attachment debtor had at the time of the levy a record title, on the theory that that is his means of information (*Cowley v. McLaughlin*, 141 Mass. 181, 4 N. E. 821; *Haynes v. Jones*, 5 Met. 292) but in the former case the court suggest that if he knew at the time of the attachment that the title had passed to the attaching debtor, it might be sufficient. In *Davis v. Lutkiewicz*, supra, it may be inferred that the mortgagees had knowledge of the conveyance to their mortgagor; and in *Johnson v. Erlandson*, supra the plaintiff, taking here title under an unrecorded deed had the same character of information of its execution as the attaching creditor had in this case, viz., the statement of the grantee in the unrecorded deed. In this case the attaching creditor had information from *Lentz*, *Duvall's* grantor, that a conveyance had been made to *Duvall*; and I am convinced that in such a case a purchaser of value without notice is not, by reason of the absence of the vendor's title from the record put upon inquiry or charged with notice that the grantee in the unrecorded deed had previously conveyed the property.

Slater, C., concurs in this dissent.

Petition for rehearing denied.

SOUTH DAKOTA SUPREME COURT.

BYRNE HAMMER DRY GOODS COMPANY, Appts.,

v.

WILLIS-DUNN COMPANY et al.,
Respts.

(23 S. D. 221, 121 N. W. 620.)

Pleading — fraudulent corporation — disposition of stock.

1. In a suit to hold a corporation liable for debts of a partnership to the business of which it succeeds, on the theory that its organization was fraudulent in fact, or that, under the facts surrounding the organization, it was liable for the debts of the partnership, what the stockholders did with their stock since the organization is im-

Note. — Liability of corporation formed by firm, partnership, or association for debts of old concern, in the absence of express assumption or fraud.

Where, as in *BYRNE HAMMER DRY GOODS CO. v. WILLIS-DUNN CO.* the stockholders of a corporation formed by members of a pre-existing partnership, association, or firm include also third persons, the decisions seem agreed in holding that the corporation, in the absence of fraud or express agreement, cannot be held liable for the partnership debts.

Thus, in *Paxton v. Bacon Mill & Min.* 2 Nev. 257, it was held that a corporation whose property was composed partly of that of a pre-existing association and partly of property of third persons unconnected with such association was not liable for the debts of the association. The court said: "Had the mill owners all been members of the firm of Fairfax, Doake, & Co. at the time the debt sued on was contracted, and had they formed a corporation for the purpose of carrying out the objects of the partnership or association, without taking in strangers, in such case the corporation would, perhaps, be primarily liable in equity for the debts of the association which it succeeded. Under such circumstances the property of no one but one who contracted the debt and were originally liable would be taken or subjected to the payment of it. The same reasons continue the same business, with the same property, with no substantial change except in name. In such a case there is no reason why in equity the corporation should not be primarily liable for the debts, as it has succeeded to the property of the association. But if the debt is contended for by counsel for appellant under the law, the property of a stranger to the contract of indebtedness, who may have no knowledge of its existence, or even no means of ascertaining it, would be subjected to the payment of the liabilities of individuals with whom he may have associated himself in a common enterprise or L.R.A.(N.S.)

material as matter of pleading, although such matters might be material as evidence tending to support a charge of fraud.

Fraud — corporate organization — absorption of assets.

2. The fact that members of an insolvent partnership contribute the insurance money received for a destruction of its assets by fire, to the organization of a corporation, to continue its business, taking stock in such corporation in return, does not necessarily imply a fraudulent intent on their part to hinder and delay the creditors of the partnership.

Corporation — succeeding partnership — liability for debts.

3. A corporation which continues the business of an insolvent partnership is not, in the absence of fraud, liable for its debts, where it is organized by the former partners,

business. The injustice of such a rule is so apparent that no subtlety of reason can well disguise it."

So, in *Church v. Church Cement Co.* 75 Minn. 85, 77 N. W. 548, where a corporation had been formed by the owner of a concern, his wife, and an employee, it was held that the corporation was not liable for a debt due from the former concern to the employee, where the only assumption was a verbal agreement between the former proprietor and the employee, of which the wife, who owned the greater part of the stock, knew nothing.

So, a corporation formed by the members of an insolvent partnership and a third person, who, in good faith, put a large amount of money into the new concern, believing that the partnership debts had been paid, is not liable, even in equity, to a partnership creditor, but the partners' interest in the corporation may be reached. *Hall v. Baker Furniture Co.* 86 Neb. 389, 125 N. W. 628.

And in *McLellan v. Detroit File Works*, 56 Mich. 579, 23 N. W. 321, where a partnership consisting of two members was reorganized into a corporation, in which two others were given one share of stock each, and the partnership property was transferred to the corporation, only one note of the partnership being assumed, in an action on other notes of the partnership, it was held that the corporation was not liable although one of the former partners, without authority, had attempted to give renewal notes of the corporation. The court said: "The fact that nearly all the shares in the corporation were issued to Rowe & Hayes is mentioned in the argument as tending to the proof of an understanding that the corporation would assume partnership debts. But it was an immaterial fact. The corporation when formed was not identical with the partnership of Rowe & Hayes, and could not be sued for their debts even if there were no other stockholders. But in this case there were others; and though their interests were insignificant, they were entitled to no less protection on that account. And

who pay for their stock by insurance money collected for the destruction of the partnership assets by fire, and a stranger who, with knowledge of the facts, contributed cash equal to that of each partner, each contributor taking a *pro rata* share of stock for his contribution.

Same — subscription — consideration — issuance of stock.

4. The issuance, by a corporation organized to continue the business of an insolvent partnership, of its stock to the members of the partnership, who contributed cash received from insurance on the partnership property, is a sufficient consideration for the money so contributed, so that it is not liable to account for such money to the creditors of the partnership.

(Corson, J., dissents.)

(May 21, 1909.)

APPEAL by plaintiff from an order of the Circuit Court for Custer County sustaining a demurrer to the complaint in a suit to hold a corporation liable for the

when this suit was instituted, changes had been made which brought in new parties in no way chargeable with any equities which might have existed against the original members. This is mentioned not as a fact having any importance in this case, but to bring out in stronger light the errors which led to the judgment complained of."

And a corporation formed by one who is embarrassed in business, and who transfers all of his property to the corporation for stock of about the value of such property, is not liable for his old debts, although he was given control of the corporation; there being no express assumption of such debts, although there was an "understanding" that they should be assumed. *Durlacher v. Frazer*, 8 Wyo. 58, 80 Am. St. Rep. 918, 55 Pac. 306.

So, in *Austin v. Tecumseh Nat. Bank*, 49 Neb. 413, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628, it was held that, in the absence of fraud or a special agreement, a newly organized corporation for banking purposes which had succeeded to the business and property of a pre-existing partnership was not liable for the debts of the latter concern, where it was not shown that the stockholders of the corporation were the former partners, or that the corporation was a mere continuance of the former firm.

And in *Bradley Fertilizer Co. v. South Pub. Co.* 44 N. Y. S. R. 119, 17 N. Y. Supp. 587, where goods were sold to an unincorporated company, it was held that a corporation formed by the owner of the old company and his employees could not be held liable for a debt of that company as a *de facto* corporation.

In *Reed Bros. Co. v. First Nat. Bank*, 46 Neb. 168, 64 N. W. 701, where a failing partnership was formed into a corporation 29 L.R.A. (N.S.)

debts of a partnership to the business of which it had succeeded. Affirmed.

The facts are stated in the opinion.

Messrs. Eben W. Martin and Norman T. Mason for appellant.

Mr. E. L. Grantham, for respondents:

In the absence of a special agreement, a newly organized corporation is not answerable for the debts of an old corporation or firm to whose business and property it has succeeded, unless it affirmatively appears from the pleadings and proofs that the transfer of the property and franchises amounts to a fraud, or the circumstances attending are such as to warrant a finding that it is a mere continuation of the old corporation under a different name.

Austin v. Tecumseh Nat. Bank, 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628.

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having as stockholders the members of the partnership and third persons, who knew that there were outstanding partnership debts, and the assets and business of the partnership were transferred to the corporation, which continued the partnership business, it was held that these facts warranted the assumption that the corporation assumed the liabilities of the partnership.

And the fact that the members of the two concerns are the same is not conclusive.

Thus it was held in *Campbell v. Farmers' & M. Bank*, 49 Neb. 143, 68 N. W. 344, that the purchase of part of the assets of a partnership which had conducted a bank, by a corporation organized by the members of the former partnership for banking purposes, did not raise a conclusive presumption that the corporation became liable for the partnership debts, and it was also held that the two companies were not identical.

And in *Schufeldt v. Smith*, 139 Mo. 377, 40 S. W. 887, where the evidence was held to show an assumption by a corporation which was formed by the members of a partnership, of the partnership debts, it was held that the fact that the members of the partnership and stockholders of the corporation were the same persons did not imply an assumption of the partnership debts, and that the corporation and the pre-existing partnership were not identical although composed of the same members.

So, a corporation which was formed a partnership, and which has acquired part of the partnership property, is not liable for services rendered to the partnership. *Culbertson v. Alabama Constr. Co.* 127 G. 509, 9 L.R.A. (N.S.) 411, 56 S. E. 765, 4 A. & E. Ann. Cas. 507. The court said: "There was nothing to show that there was

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So, a corporation which was formed out of a partnership, and which has acquired the partnership property, is not liable for services rendered to the partnership. Culbertson v. Alabama Constr. Co. 127 Ala. 599, 9 L.R.A. (N.S.) 411, 56 S. E. 765, 8 A. & E. Ann. Cas. 507. The court said: "There was nothing to show that there

to the complaint. The complaint is quite lengthy, and may be briefly summarized as follows: It is alleged that the plaintiff is a corporation; that the defendant Willis-Dunn Company is, and has been since the month of October, 1901, a corporation, said corporation having been incorporated in October, 1901, as the Fitch-Willis Company, and having, on January, 1903, by amendment of its articles of incorporation, changed its name to the Willis-Dunn Company; that during the year 1901, and prior thereto, the plaintiff sold and delivered to the defendants Fitch & Willis, then doing business as copartners, certain goods, wares, and merchandise, to the value exceeding \$865; that on or about April 10, 1902, the said defendants Fitch & Willis executed to the plaintiff their promissory note for the balance, due one day after this date, and drawing interest at 6 per cent per annum from date until paid; that thereafter, on about April 3, 1905, the plaintiff recovered judgment against the said Fitch & Willis upon said note; that thereafter, and before

the commencement of this action, an execution was duly issued against the said defendants, and duly returned unsatisfied; that during the latter part of September, 1901, the said copartnership of Fitch & Willis, and the individual members thereof, became, and ever since have been, insolvent; that while so insolvent, in October, 1901, the said defendant Fitch & Willis caused to be organized a corporation known as the Fitch-Willis Company, of which corporation the said Fitch was chosen as president, and said Willis as treasurer, and one Frank L. Dunn, the brother-in-law of said Willis, as secretary, and to which corporation the defendants Fitch & Willis transferred the proceeds of certain policies of insurance against fire, written upon the property of said firm of Fitch & Willis, and upon which losses had accrued, and which said insurance so received was the amount of \$2,000; that said Fitch-Willis Company received the proceeds of said insurance fire policy, to wit, \$2,000, and mingled the same with its assets, and used the same in its

been any assumption by the corporation of debts of the partnership, or that it had acquired the partnership's property in fraud of creditors of the firm. A corporation which lawfully acquires the property of a partnership does not thereby become liable for the partnership's debts. Partners own the firm property just as individuals own their property; and, 'as the ordinary creditors of an individual have no lien on his property, and cannot prevent him from disposing of it as he pleases, so the ordinary creditors of a firm have no lien on the property of the firm so as to be able to prevent it from parting with that property to whomsoever it chooses.'

And a corporation formed by a surviving partner, to which the former partnership assets were transferred to pay for such partner's stock, is not liable on a note indorsed by such partner in the firm name without authority, where there was no intent to defraud creditors. *National Bank v. Hollingsworth*, 135 N. C. 556, 47 S. E. 618.

So, where a partnership was dissolved and the partners entered into an agreement whereby one was to cause a corporation to be formed in which he was to hold most of the stock, and the corporation was to assume the liabilities of the partnership, providing the partnership assets transferred exceeded such liabilities, it was held that the corporation was not liable to the former partners who had been obliged to pay a judgment against the partnership, where it was not shown that the corporation actually assumed the partnership liabilities or that the liabilities were less than the assets transferred. *Adams v. Empire Laundry Machinery Co.* 52 Hun, 610, 22 N. Y. S. R. 271, 4 N. Y. Supp. 738.

In *Georgia Co. v. Castleberry*, 43 Ga. 29 L.R.A. (N.S.)

187, it was held that a corporation of the same name as a partnership existing before the granting of the charter, and having the same agent, and engaged in the same business, was not liable for a claim for damage done to fences and crops by such partnership; and it was held that, in order to render the corporation liable, the same formalities would be required as were necessary to make an individual liable for the debts of another. The court said: "For all essential purposes, the 'Georgia Company,' doing business at the time this contract was made, and the corporation subsequently chartered and now sued, are separate and distinct. The former was a mere partnership, the members of which were each bound for the debt; the latter is a person,—a nonentity,—which gets its existence and responsibilities from the charter. Though the members of the partnership and the members of the corporation be the same, yet the rights of the one and the other are different. To make the company liable for the debt of the partnership, the same formalities are required as to make any individual liable for the debt of another. Such a contract must be in writing, signed by the party to be charged. There is no pretense of such a written undertaking, even if it were in the power of the president to so do. The assumption of a debt due by the old partnership, with no new consideration, is outside of the scope of the charter, and therefore outside of the scope of the president's duties, as they are derived from the nature of his office, and even a written contract promising to pay this debt would be of doubtful validity, unless there was special authority from the company. We are aware that there are instances in which a corporation has been held liable for debts contracted before the

business; that said corporation did not pay to the said Fitch & Willis any consideration for the transfer to it of such insurance, but in October, 1901, issued in exchange therefor, to said Fitch & Willis, one third each, being 167 shares to each, of the capital stock of said corporation,—said capital stock being fixed at \$5,000, consisting of 500 shares of the par value of \$10 each share,—that the only remaining stockholder of said corporation was said Dunn, as secretary, who contributed to the capital of the said corporation the sum of \$1,000, and received in exchange therefor the remaining capital stock of said corporation, 167 shares; that the only assets of said firm of Fitch & Willis existing at the time of the organization of said Fitch-Willis Company, aside from the said proceeds of in-

surance, was certain book accounts, of which about \$500 had been collected by the defendant Fitch, and applied to his individual use, and about \$200 collected by the defendant Willis, and applied to his individual use; that there still remains of said accounts uncollected about \$140; that shortly after the incorporation of said Fitch-Willis Company, the defendant Fitch pledged his stock therein, to wit, 167 shares, to his wife as security for the repayment of an alleged indebtedness due to her from the said firm of Fitch & Willis in the amount of \$750, and she subsequently paid to said corporation upon said stock the further sum of about \$450; that some time after the incorporation of said Fitch-Willis Company, the defendant Willis transferred his stock therein, 167 shares, to his wife

date of the charter, but it will, we think, be found that these are all cases where the debt was contracted in the course of the organization, as debts forming part of the expenses or for the payment of the costs arising in procuring the charter, or where the company has in fact received the consideration. There is nothing here except the single fact that the partnership was of the same name as the afterwards chartered company, and had the same agent, and was engaged in the same business. It does not even appear that the one is the successor of the other, except in name."

So, a corporation formed by members of a pre-existing partnership, to which the partnership property was transferred, is not liable to one employed by the partnership to build a sewer for a city with which the partnership had a contract for its construction, there being no agreement to pay therefor, and no novation. *Dingeldein v. Third Ave. R. Co.* 9 Bosw. 79.

Where, however, the partnership or association property is transferred to a corporation formed by the partners, and it appears that the corporation is merely a continuance of the old concern, the corporation has been held liable for the partnership or association debts.

Thus a corporation formed by the incorporation of the members of a partnership, which took all of the partnership property, and to which the partners transferred their interest for a like interest in the stock of the corporation, is liable for the debts of the partnership, since the members of the partnership may be said to have simply put on a new coat. *Andres v. Morgan*, 62 Ohio St. 236, 78 Am. St. Rep. 712, 56 N. E. 875.

And in *Baker Furniture Co. v. Hall*, 76 Neb. 88, 107 N. W. 117, 111 N. W. 129, 113 N. W. 267, it was held that a corporation which succeeded to the business of a partnership, and was organized for the purpose of continuing such business, and which took over the assets of the partnership, assumed the debts of the partnership to the extent of the property received.

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So, where a new corporation accepts an assignment of all of the property of an association for the purpose of carrying out the object of the association, it is liable for the association's debts. *Haslett v. Wotherspoon*, 1 Strobb. Eq. 209.

And it was held in *Hall v. Herter Bros.* 90 Hun, 280, 35 N. Y. Supp. 769, affirmed in 157 N. Y. 694, 51 N. E. 1091, that the jury might infer that a corporation of which the proprietors of a former partnership were the principal stockholders, and which took over the partnership business and assets, assumed the obligation of the partnership toward an employee who was supervising work for the partnership under an agreement for a commission to be paid when the work was completed, the completion occurring after the forming of the corporation.

In *Texas Loan Agency v. Hunter*, 13 Tex. Civ. App. 402, 35 S. W. 399, where a partnership had negotiated a usurious loan, a corporation of which members of the pre-existing partnership were the principal stockholders was held liable for the penalties prescribed for usury.

So, where a person carried on business in his own name and also under the name of Branch Crookes "and" Co., and borrowed money on the credit of both names, and afterwards the assets of that part of the business carried on under the name of Branch Crookes "and" Co. were transferred to a corporation called Branch Crookes "Saw" Co., the inference was held to be that the latter company assumed the debt. *Bremen Sav. Bank v. Branch-Crookes Saw Co.* 104 Mo. 425, 16 S. W. 209.

And members of a partnership who form a corporation and transfer the partnership property to it cannot, by a secret understanding, exclude one of the partnership creditors from the general assumption of such debts, and thereby withdraw the partnership assets from such creditor. *Williams v. Colby*, 24 N. Y. S. R. 793, 6 N. Y. Supp. 459.

J. T. W.

in payment of an alleged indebtedness due her from the firm of Fitch & Willis in the amount of \$750, and for an alleged additional indebtedness of \$100 due her individually from him, and she subsequently paid to the said corporation upon said stock the further sum of \$450; that said alleged indebtedness from the firm of Fitch & Willis to their wives was fraudulent and void; that thereafter, on or about the month of May, 1902, said Helen Fitch, the wife, sold and assigned to the said Adelia Willis, wife of said Willis, and to said Fred L. Dunn, her said stock in the Fitch-Willis Company for the sum of \$2,000 in cash received by her therefor; that said Fitch-Willis Company (now known as the Willis-Dunn Company) took the assets of the said firm of Fitch & Willis, including the proceeds of said fire insurance policy belonging to the firm of Fitch & Willis, with full notice and knowledge of the insolvency of said partnership, and of the unpaid indebtedness due the plaintiff and other creditors of said partnership, all of which was received by said corporation without a valuable consideration, except the issuance of the stock, as aforesaid; and that the said defendant Willis-Dunn Company has converted to its own use the proceeds of said insurance policies belonging to the partnership of Fitch & Willis. Wherefore the plaintiff prays that the defendant Willis-Dunn Company be adjudged to apply to the payment of the amount of the judgment rendered in favor of the plaintiff and against the defendant Fitch & Willis, together with the costs of this action, the property, assets, choses in action, and equitable interests belonging to said firm of Fitch & Willis and assigned to said defendant, or held in trust by it for said firm, or in which said firm is in any manner benefited, and for judgment against the defendant Willis-Dunn Company for the sum of \$1,033. To this complaint the defendant interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action in favor of the plaintiff and against the defendant Willis-Dunn Company, which demurrer was sustained by the court, and from which order sustaining such demurrer this appeal has been taken.

This complaint must be sustained, if at all, on one of two grounds: First, upon the theory that the original organization was fraudulent in fact; or, second, upon the theory that under the facts surrounding such organization the corporation was liable for the debts of the copartnership, entirely regardless of the question of fraudulent intent, even if all the parties acted in the best of good faith. On either theory any allegation of what was done by the

stockholders with the corporate stock, subsequent to the organization of the corporation, is absolutely immaterial as a matter of pleading. It is true that, if plaintiff should rely on the theory that the organization was with a fraudulent intent, and such fraudulent intent had been pleaded, undoubtedly upon trial plaintiff would be allowed to prove fraudulent dealings between these corporators and their wives, as tending to support the claim of fraudulent intent in the original transfer of the \$2,000 to the corporation; but it is clear that, if the original incorporation was in every respect bona fide, nothing done thereafter in the way of transfer of stock, by stockholders, could be referred to the separate entity, to wit, the corporation, and render it liable to the creditors of the firm. Therefore any allegation of what took place after the corporation was organized was a mere pleading of evidence, so far as the issues of this case are concerned; while such allegations might be very material and essential in an action brought for the purpose of charging the shares of stock with the claims of creditors. Upon the theory that the situation at the time of organizing the corporation was such that, regardless of the intent of the parties, were they ever so honest and upright, the creditors had an equitable right to hold the corporation for this \$2,000, it seems perfectly clear that what was done by the stockholders after the organization of the corporation is not only immaterial and incompetent as a matter of pleading, but under no circumstances could become material or competent as a matter of evidence upon trial, unless what happened after such organization should become material as matter of defense, as tending to show such laches on the part of plaintiff, or such changed conditions in relation to the corporation on the part of defendants, or some of them, as would deprive plaintiff of remedies to which it would otherwise be entitled.

The appellant in its brief contends for four propositions of law, the first one being that the transfer of the \$2,000 insurance money to said corporation for shares of stock was fraudulent: First, because such transfer was accomplished with an actual intent to hinder and delay the creditors of the copartnership of Fitch & Willis Company; second, because made without consideration. The other three propositions contended for are all based upon the assumption that the first proposition can be established, so that, if it is wrong in the first proposition, the others need no consideration. It will be noted from a reading of the complaint that there is no allegation of fraudulent intent on the part

of any of the incorporators of the Fitch & Willis Company in incorporating said company. There is no doubt but that, as a general proposition, it is absolutely necessary to allege the fraud when the same is relied upon, but there is a line of authorities holding that an express allegation of fraud is unnecessary where the allegations of fact are such that only one inference can be drawn therefrom, namely, that the parties are inspired with an actual fraudulent intent in doing the acts complained of. If, then, the proposition above stated, which is contended for by the appellant, is to be sustained on the first grounds stated, it must be because the facts alleged show conclusively the fraudulent intent of the organizers of the corporation. We think the following from the case of *Kingman v. Mowry*, 182 Ill. 256, 74 Am. St. Rep. 169, 55 N. E. 330, expresses the correct view: "The contention of appellant is the transfer by a debtor of his property to a corporation necessarily hinders and delays the creditor in the collection of his debts, and is in all instances a fraud in legal contemplation. Adjudged cases are cited as in support of this position. We have examined these cases; and, while such transactions were condemned in the instances then under consideration, we do not understand it to be deduced from them that it is a fixed rule of law that the formation of a corporation by the debtor, and the conveyance of all his property to the corporation, though made in actual good faith, is conclusively presumed to be fraudulent as a matter of law." In the case of *Albertoli v. Branham*, 80 Cal. 631, 13 Am. St. Rep. 200, 22 Pac. 404, is the following statement, which seems to us directly applicable to the pleading under consideration: "The only allegation of fact tending to show knowledge on the part of the plaintiff [Fitch & Willis] that the conveyance was for the purpose of defrauding creditors was that he knew at the time that his grantor was insolvent. This was not sufficient, as there is no reason why an insolvent debtor may not convey his property for full value." We think, therefore, that the mere allegation that Fitch & Willis, while insolvent, each received \$1,000 of the insurance money, and paid the same in with a like amount contributed by Dunn, and organized a corporation, each taking a one third of the stock of such corporation, in no manner carries with it a necessary implication of a fraudulent intent upon their part to hinder and delay the creditors of Fitch & Willis; and we cannot see wherein such organization of the corporation need, as a matter of fact, necessarily in the least hinder or delay creditors, except to the extent that

an execution might not be as speedily satisfied through a levy on corporate stock as through a levy on cash; but there certainly is no rule of law forbidding a person to change his property from one kind to another, if done honestly, merely because it may be a little more inconvenient for purposes of levy and sale.

The appellant relies upon the cases of *First Nat. Bank v. F. C. Trebein Co.* 59 Ohio St. 316, 52 N. E. 834, *Benton v. Minneapolis Tailoring & Mfg. Co.* 73 Minn. 498, 76 N. W. 266, and *Metcalf v. Arnold*, 110 Ala. 180, 55 Am. St. Rep. 24, 20 So. 301. It will be found, however, that in all of these cases there was an express allegation of fraudulent intent, and what the courts say therein simply pertains to the weight of the facts given as going to establish a fraudulent intent alleged; and we think an examination of these cases will show that they really hinge upon another proposition, or at least largely so, namely, that the new corporation organized was in fact but a mere successor of the former corporation or firm. A long line of decisions will be found wherein it is held that, when a person, firm, or corporation shall have reorganized and continued its or their business under the form of a corporation, under such circumstances as show such corporation to be nothing more nor less than a continuation of the former business, either because there is absolutely no change in the *personnel* of the ownership, nor in the kind of business carried on, or, if there is any change in the *personnel*, it appears that the additional parties were such in name only, really deriving their interests from the prior concern, then the new corporation is but a successor of the former concern, and liable, as such, for its debts. It will be found, however, in this class of cases, that assets of the corporation were practically identical with those of the concern it succeeded; but we have been unable to find a case at all parallel to this, where it has been held that a creditor could hold a corporation upon the theory that it was the successor of some prior concern. Cases analogous in some respects are to be found, but it must be remembered that, if we treat this complaint as an attempt to plead a cause of action upon this theory, the most that it alleges is that the members of a partnership, holding cash derived from the burning of their partnership property, and being in fact insolvent without any bad faith or fraud on their part, put this money into an entirely new and different enterprise, by investing it in the organization of a corporation in which a third party, knowing the above facts, puts in a like amount of cash; each party

taking his *pro rata* share therefor. As was well said in the case of *Austin v. Tecumseh Nat. Bank*, 49 Neb. 412, 35 L.R.A. 444, 59 Am. St. Rep. 543, 68 N. W. 628, "in the absence of a special agreement a newly organized corporation is not answerable for the debts of an old corporation or firm to whose business and property it has succeeded, unless it affirmatively appears from the pleadings and proofs that the transfer of the property and franchise amounts to a fraud upon the creditors of the old corporation, or the circumstances . . . are such as to warrant a finding that it is a mere continuation of the old corporation under a different name." We are therefore satisfied that there is nothing in the complaint herein which shows either the incorporation of a company with an actual intent to hinder and delay the creditors of the old copartnership, or the organization of a corporation which became the successor of such copartnership.

The appellant contends that the transfer of this money for the stock was void because made without consideration. In support thereof they cite several authorities, among them being 2 Cook on Corporations, § 673, p. 1587, wherein it is held: "It is also a principle of law that a corporation buying all the property of another corporation, and paying therefor in stock of the former corporation issued to the stockholders of the latter corporation, must either pay the obligations of the latter corporation, or have the property sold to pay such obligations." This is the proposition decided also in the cases cited by appellant, they all being cases where a new corporation had taken the property of an old one; and where the new corporation had either assumed the indebtedness of the old corporation, or, knowing of the debts of the old corporation, yet, regardless of the rights of the creditors of such old corporation, the new corporation, instead of issuing its stock to the old corporation, issued the same directly to the stockholders of the old corporation, thus placing the stock beyond the reach of the creditors of the old corporation. It will readily be seen that in these cases there was a lack of consideration going to the old corporation, but that in the case at bar there is nothing analogous. There is no claim in the pleadings but that the stock of the Fitch & Willis Company was worth all that was given for it, and such stock was issued directly to the persons paying the consideration therefor, so that there certainly is nothing in the contention that such stock was not a good consideration for the money paid into the corporation.

We are therefore clearly of the opinion
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that the learned trial court did not err in sustaining the demurrer to the said complaint, and the order sustaining such demurrer is affirmed.

Corson, J., dissents.

MASSACHUSETTS SUPREME JUDICIAL COURT.

WILLIAM R. CLARK

v.

RAYMOND P. DELANO, Appt.

(205 Mass. 224, 91 N. E. 299.)

Broker — paying mortgage — purchase at sale.

1. That a broker is employed to secure a loan to pay a mortgage does not prevent his becoming purchaser at the foreclosure sale in case he fails to secure the loan.

Same — securing money for self.

2. The right of a broker employed to procure money to pay a mortgage on real estate, to purchase the property at the foreclosure sale, and hold it for his own benefit, in case he fails to secure the loan, is not affected by the fact that he secures a loan on his own account with which to pay the purchase money.

(February 24, 1910.)

APPEAL by defendant from a decree of the Superior Court for Suffolk County in complainant's favor in a suit to restrain defendant from conveying or encumbering certain real estate and to procure a conveyance of the equity therein to plaintiff. Reversed.

The facts are stated in the opinion.

Messrs. John E. Eaton, Edwin T. McKnight, and Stanley W. C. Downey for appellant.

Mr. John D. Graham for appellee.

Knowlton, Ch. J., delivered the opinion of the court:

On June 3, 1909, the plaintiff was the owner of certain real estate in Boston, sub-

Note. — Although there are many cases on the general question whether an agent may purchase property of his principal at a judicial sale which he was employed to prevent, the above case is peculiar in its facts, and so far, at least, as an extended search has revealed, is without any exact precedent.

In *Collins v. Sullivan*, 135 Mass. 461, cited in *CLARK v. DELANO*, it was held that neither on the ground of agency nor fraud would a trust be declared where an agent, after having been employed for the collateral purpose of assisting his principal in finding a person who would advance money

ject to a mortgage of \$5,500 and interest, held by one Roberts, and to a lien for unpaid taxes. The mortgagee had previously requested payment of the mortgage debt, and on that day he began proceedings for a foreclosure of the mortgage by giving notice of a sale under a power in the mortgage, to take place on June 26, 1909. The plaintiff sought to raise money to pay the debt, either by giving a new mortgage, or by procuring an assignment of the old mortgage as collateral security. With this in view he applied to several brokers, advertised in a newspaper, and personally solicited several individuals for a loan. Previously, before the end of the month of May, he had employed the defendant, who was a real-estate broker, to act for him in endeavoring to procure the desired loan, subject to a right reserved to the plaintiff to employ other brokers, and to use other means to procure the loan.

Between the date of this employment and June 18th, the plaintiff and the defendant saw each other several times. On each occasion the defendant reported that he had not been able to procure a loan, but spoke hopefully of the probability of ultimate success. The plaintiff did not at any time tell the defendant that the property was advertised for sale under the mortgage, and the defendant first learned of it by seeing a notice of the sale, just before June 18th. On June 18th and 19th, the parties met for the last time before the sale. The defendant then said he had not been able to secure a loan, and, referring to the foreclosure, advised the plaintiff to apply to his own bank if he wished to save the property. The plaintiff replied that he had done so without success, and asked the defendant to continue his efforts to procure the loan. To this request the defendant made no definite answer. The master found that the plaintiff believed, and was warranted in believing, that the defendant would continue his efforts. Nothing more was done

by either party about the business. During the first part of the week before the sale, the plaintiff and the mortgagee met, and the plaintiff, in view of a recent payment by him of a part of the taxes on the property, asked the mortgagee to stop the proceedings for foreclosure. This the mortgagee declined to do, and he said that he supposed there would be no one at the sale, and that he (the mortgagee) would have to bid off the property in his own interest and that of the plaintiff. Relying upon this statement, the plaintiff did not attend the sale. On June 26th the sale was held according to the notice, the only persons present, besides the auctioneer, being the mortgagee, the defendant, and a stranger. The defendant bid off the property for \$6,500, the next highest bid of \$6,000 having been made by the stranger. Subsequently, the defendant obtained a mortgage loan of \$6,500 from the Dorchester Trust Company, in which he was a stockholder and a member of the examining committee. On May 22, 1909, one Paul, another broker employed by the plaintiff, had applied to this company on behalf of the plaintiff for a loan of \$6,000, to be secured by a mortgage on the land, and had been refused.

The defendant testified before the master that he conceived the idea of purchasing this property at the sale on the day before the sale, and definitely made up his mind to bid for it on the day of the sale. The master found that there was no evidence to warrant a conclusion that he entertained this purpose earlier than the time that he stated. At the time of the sale the defendant had made no arrangement for obtaining the money necessary to purchase the property. He first made an application for a loan to the Dorchester Trust Company two days later. He had some property besides his stock in the trust company, and thought that he could obtain the money there. According to the master's report, there was no evidence before him that the

to enable the principal to buy land which he had formerly owned, bought the land on his own behalf, with his own money, and took a conveyance of it to himself, although it appeared that to some extent he had been successful in dissuading his principal from seeking other assistance.

A case closely related to the CLARK CASE is *Smeltzer v. Lombard*, 57 Iowa, 294, 10 N. W. 669. In this case an agent for the negotiating of a loan on land procured a mortgage from the owner a short time before the expiration of the time allowed for the redemption of a prior mortgage, and placed the same on record; the loan was intended to be used to clear off prior liens on the land, but was never affected; without releasing the mortgage or canceling the note 29 L.R.A. (N.S.)

for which it was given, the agent caused the sheriff's deed under the foreclosure of the prior mortgage to be executed to one with whom he was closely associated. It was held that good faith required that, before taking the title, the agent should have procured the cancellation of the mortgage and placed his principal *in statu quo*, and that therefore the deed should be set aside.

For cases on question whether the assignee of a mortgage as collateral security, who forecloses the same and purchases the property, holds the title subject to a trust in favor of the assignor, see note in 7 L.R.A. (N.S.) 1094.

Right of broker to purchase real estate listed with him for sale, see note to *Rodman v. Manning*, 20 L.R.A. (N.S.) 1158.

defendant did not act in good faith in purchasing and mortgaging the property, under the circumstances stated, or that he did not believe that he had a right to do so. Solely as a conclusion from the facts stated in the report, the master found that, by undertaking to act as a broker to procure a loan for the plaintiff, the defendant entered into such a fiduciary relation to the plaintiff that he could not buy the property at the foreclosure sale for his own benefit, and give a mortgage to secure a loan for the whole purchase price, on his own account. The question is whether this conclusion of the master is correct.

There is no evidence that the defendant did not act in good faith in the interest of the plaintiff, in attempting to procure a loan. Up to the time appointed for the sale, there is no ground on which the defendant can be held for any wrongful act or omission. When the property was offered for sale by the auctioneer, and it was no longer possible to do anything for the benefit of the plaintiff under his employment as a broker, was the defendant, by reason of that employment, in such a relation to the plaintiff as precluded him from bidding at the auction as any other person might do? This question must be answered in the negative. His employment was terminated by conditions beyond his control. When the auctioneer began the sale, there was nothing more that he could do for the plaintiff as a broker. In reference to the sale which was going on, he stood as if he had never been employed by the plaintiff. If a sale must be made, there was nothing in his buying which was inconsistent with his former relations to the plaintiff. He had never been employed to represent the plaintiff in any way in connection with the sale. His only employment was to procure a loan if he could, and if he succeeded the plaintiff doubtless would have prevented the sale; but when it was too late to prevent the sale, he was as free as anybody to become a bidder. In his purchase there was no constructive trust for the plaintiff. *Collins v. Sullivan*, 135 Mass. 461; *O'Reiley v. Bevington*, 155 Mass. 72, 29 N. E. 54.

It makes no difference that he subsequently procured a loan upon the property on his own account. When he had become the purchaser, he stood in a new and independent relation. He might pay in cash if he found it convenient, or he might raise the money by a mortgage, or in any other legitimate way. His procuring a loan for himself after his purchase had no connection with his original employment.

Decree reversed.

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NEW JERSEY COURT OF ERRORS AND APPEALS.

ELMER COMER

v.

AARON MEYER et al., Pliffs. in Err.

(— N. J. —, 74 Atl. 497.)

Evidence — pleading — promise to repair — variance.

1. When the declaration in an action by a servant against his master, for personal injuries by reason of the negligence of the master, avers that the master set the servant to work with an instrumentality that the master had carelessly, negligently, and improperly permitted and allowed to become defective and unsafe, and to so remain, without proper repair and inspection, testimony that the master had promised the servant to repair or remedy the defect is admissible in evidence for the servant, although no averment of such promise is contained in the declaration.

Master — promise to repair — assumption of risk — jury.

2. A master is not liable under his promise to repair, if the danger of injury to the servant from the defective appliance is so great or so imminent that a reasonably prudent person would not assume the risk; but whether the danger is of such character is for the jury when, from the evidence, opposite conclusions may be reasonably drawn.

Same — injury to servant — proximate cause — jury.

3. Where the evidence tended to show that the kingbolt of a wagon broke, letting the whiffletrees drop on the horse's heels, causing the horse to jump and run away, throwing out and injuring the plaintiff, the question whether the breaking of the bolt was the

Headnotes by TRENCHARD, J.

Note. — Effect of promise to repair where danger is great and imminent.

The general question of the rights of a servant who continues work on the faith of his master's promise to remove a specific cause of danger is treated in an exhaustive note to *Illinois Steel Co. v. Mann*, 40 L.R.A. 781, and the effect of the servant's contributory negligence after such promise is treated at pages 786 et seq. This note is supplementary thereto.

Upon the question of the servant's right of action for injuries received in obeying a direct command, see notes to *Dallemand v. Saalfeldt*, 48 L.R.A. 753, and to *Lowe Mfg. Co. v. Payne*, post, —.

In many cases, of course, particularly where the master is a corporation, the promise cannot be made by the master himself, but by one acting as the representative of the master. In the following cases, for the sake of brevity, the one making the promise has been called the master, although in many cases it was some

proximate cause of the injury was for the jury.

Same — rule of, as to defective appliance — waiver by.

4. A master who personally receives a complaint from his servant as to a defect in the instrumentality furnished him by the master with which to work, and who personally investigates and promises to repair, is deemed to have waived a rule established by the master that reports of defects should be made to a designated agent.

(Vroom, J., dissents.)

(November 15, 1909.)

ERROR to the Circuit Court for Passaic County to review a judgment in plaintiff's favor in an action brought to recover

representative of the master, such as a superintendent or other vice principal, who did in fact give the promise. In these cases, however, it was held, or at least assumed, that the person giving the promise had power to bind the master in that respect.

Of course, the servant cannot rely upon the master's promise to repair where the defect complained of was not the proximate cause of the injury, and also, of course, the promise to repair may be revoked so as to shift the burden of proof back upon the servant, where it was placed by reason of his knowledge of the defect. No attempt has been made to gather cases involving these questions.

General principles.

The rule is well recognized that where the servant complains of dangerous conditions under which he has to work, which are due to the master's negligence, and the master has promised to remedy the same, the servant may, in reliance upon the promise, remain for a reasonable time in the employment without depriving himself of the right of recovery for injuries received because of those conditions.

This is a very reasonable and salutary rule, and operates to save the servant from the necessity of quitting the employment the very instant he discovers a danger, under the penalty of being denied a recovery for any injury incurred in consequence thereof, and it also has a tendency to make the servant prompt in reporting any defects which he may discover. Although the courts are not wholly agreed as to the exact ground of a servant's exemption under the so-called promise to repair rule, it would seem that the most reasonable explanation is that, by the master's promise, a new contract is created which operates to shift the risk which the servant, by reason of his knowledge of the danger, would be held to have assumed, back on to the master for such a length of time as may be reasonable for him to fulfil his promise. When, however, such a time has 29 L.R.A. (N.S.)

damages for personal injuries for which defendants were alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Mr. Marshall Van Winkle for plaintiffs in error.

Messrs. Ward & McGinnis, for defendant in error:

The promise to repair was merely a matter of evidence, bearing upon the question of the master's care, and was provable under the declaration, notwithstanding that it was not set out therein.

Belleville Stone Co. v. Mooney, 60 N. J. L. 323, 38 Atl. 835; Lanning v. New York C. R. Co. 49 N. Y. 521, 10 Am. Rep. 417.

The action rests upon the negligent act of the defendant in failing to furnish a safe

passed that the servant can no longer expect the master to carry out his promise, the risk is again shifted to the servant.

Under such a statement of the rule and the reason therefor and effect thereof, it is very clear that it cannot have the effect to shield the servant from the consequences of his own negligence. The promise to repair rule merely deprives the master for a time of the defense of assumption of risk; the defense of contributory negligence is still open to him, unaffected in any way by his promise to repair.

While the promise to repair rule precludes the master from setting up the defense of assumed risk under the circumstances mentioned, it does not foreclose the defense of contributory negligence. That is still open to him, for the employer does not assume the risks of the negligence of his employees during the time when his promise to make repairs should be fulfilled, nor, indeed, at any time. *St. Louis, I. M. & S. R. Co. v. Holman*, 90 Ark. 555, 120 S. W. 146.

The promise to repair rule does not make the master an insurer of the servant of the safety of the premises for a reasonable length of time thereafter. The servant must still exercise due care for his own safety. *Shemwell v. Owensboro & N. R. Co.* 117 Ky. 556, 78 S. W. 448.

The promise of the master to repair or replace a defective machine will not excuse the employee from the exercise of ordinary care in its use before the defect is remedied. *Freeman v. Savannah Electric Co.* 130 Ga. 449, 60 S. E. 1042.

Even a boy fourteen years of age, and so "necessarily below the age of mature discretion," may be guilty of contributory negligence so as to bar a recovery, notwithstanding a promise on the part of the master to remedy the defect causing the injury. *Western Coal & Min. Co. v. Burns*, 84 Ark. 74, 104 S. W. 535.

Whether the servant has the right to rely upon such promise of the master in any given case depends upon the question whether to do so would be so imminently dangerous that no man of ordinary pru-

appliance with which the plaintiff was to work, and not upon the nonperformance of the promise.

Belleville Stone Co. v. Mooney, supra; *Dowd v. Erie R. Co.* 70 N. J. L. 451, 57 Atl. 248; *Dunkerley v. Webendorfer Mach. Co.* 71 N. J. L. 60, 58 Atl. 94; *Andreisik v. New Jersey Tube Co.* 73 N. J. L. 664, 4 L.R.A. (N.S.) 913, 63 Atl. 719, 9 A. & E. Ann. Cas. 1006.

When the plaintiff protested to his master, and the master promised that the defects would be remedied, and ordered him to go on with his work, the plaintiff thenceforth refused to assume the risk.

Dowd v. Erie R. Co.; *Dunkerley v. Webendorfer Mach. Co.*; and *Belleville Stone Co. v. Mooney*,—supra.

dence would longer use it,—that is, upon the question of contributory negligence. *Brown v. Musser-Sauntry Land, Logging & Mfg. Co.* 104 Minn. 156, 116 N. W. 218.

So, in *Roccia v. Black Diamond Coal Min. Co.* 57 C. C. A. 567, 121 Fed. 451, the court said: "If the workman expose himself to dangers that are so threatening or obvious as likely to cause injury at any moment, he is, notwithstanding any promise of his employer, guilty of contributory negligence if he remain at the work. In other words, he assumes the risk of the danger which he knows and appreciates, and, if the danger be so obvious or threatening as likely to cause injury at any moment, he has no right to continue at such work, in the expectation that promised assistance will be sent."

In the case of a promise to repair, and perhaps in some other cases, the question is one of contributory negligence on the part of the servant, depending upon whether the danger was so great that an ordinarily prudent man would not have encountered it. *Chicago & E. I. R. Co. v. Heerey*, 203 Ill. 493, 68 N. E. 74.

Where it was contended that the servant was guilty of contributory negligence because the defects were entirely obvious to him, the court in *McFarlan Carriage Co. v. Potter*, 153 Ind. 107, 53 N. E. 465, said: "A promise to repair is confession to a breach of duty, and when a master, to right himself, requests and induces a postponement, either for convenience or profit, no principle of justice will lay the burden of delay upon the unoffending servant. The whole question is bottomed upon the wrong of the master, and it is sophistry to argue that the servant, by confiding in the master's promise for a reasonable time in which to cure the defects, clearly obvious though they be, should be chargeable with having waived the master's duty to him, and assumed the additional risk himself."

The rule is nowhere construed to deprive the master of this defense, and if the servant has been negligent, that fact will in all cases preclude a recovery, and the fact that there may have been a promise

Trenchard, J., delivered the opinion of the court:

Elmer Comer, the plaintiff below, was employed by Meyer Brothers, the defendants below, as a driver. Meyer Brothers conduct as partners a department store in Paterson. The plaintiff was furnished with a horse and wagon by the person in charge of the defendants' stable. He drove to the store and loaded the wagon, and proceeded to deliver the defendants' goods. While driving along a slight rise on the Saddle River road, the kingbolt broke and the whiffletree dropped upon the horse's heels, causing it to jump forward and run away. The wagon was upset and plaintiff injured. This suit was brought in the Passaic circuit court to recover damages for the inju-

on the master's part to remove the dangerous condition is wholly immaterial.

The rule, however, is almost universally so stated as to include the qualification that it does not apply where the risk incurred in remaining in the employment is so great and imminent that a reasonably prudent man would not incur it. This, of course, is merely the test of contributory negligence, and if the rule is stated in a form to indicate that the servant does not "assume the risk" after the promise to repair, this qualification is unnecessary, and it certainly tends to the confusion of the two defenses to say in effect that the servant does not assume the risk unless he is guilty of contributory negligence.

When, however, the rule is stated in language which goes no further than to state that a servant is not precluded from recovery merely because of his remaining in the employment with knowledge of the defect, if the master has promised to remedy it, then the qualification is necessary, for otherwise the rule would have the effect of relieving the servant from the consequences even of his own negligence, and this, as has been stated, the rule is nowhere construed to do.

It should be borne in mind that there are two distinct phases of contributory negligence: First, the servant may be guilty of some act of negligence which was the immediate cause of his injury; second, he may be guilty of negligence in remaining in the employment which exposed him to the risk in question. Of course, there can be no contention that the promise to repair has the effect of relieving the servant from the consequences of an act of negligence which results immediately in an injury to him. But where the only negligence chargeable to the servant is his remaining in the employment after the danger has become great and imminent, then, perhaps, it might with some plausibility be argued that he would be protected by the promise; but the test of contributory negligence in either phase is the same, *viz.*, the failure to act as a reasonably prudent man would under the same circumstances. The

ries thus sustained. The trial resulted in a verdict for the plaintiff, and this writ of error brings up for review the judgment entered upon such verdict.

The first proposition argued by the defendants is that "the negligence testified to at the trial was not alleged in the declaration, and that the declaration did not apprise the defendants of the case made against them at the trial." The question presented is raised by assignments of error founded upon exceptions taken to the admission of evidence, and to the refusal of the trial judge to nonsuit the plaintiff and to direct a verdict for the defendants. We do not perceive that the declaration failed to charge the negligence proven at the trial. It, in substance, charged that the defendants

set the plaintiff to work as a driver upon "a wagon drawn by a horse attached thereto by a harness and shafts, on which shafts was a whiffletree fastened thereto by a bolt, which bolt the defendants had carelessly, negligently, and improperly permitted and allowed to become worn, bent, and defective and unsafe, and to so remain without the proper repair and inspection." That thereafter, while the plaintiff was driving the horse and wagon, the defective bolt "bent, broke, slipped, or gave way, and caused the whiffletree to fall, and the horse to run away, and the plaintiff to be thrown to the ground," etc. The substance, therefore, of the negligence charged, was the furnishing of a wagon with a defective bolt. The testimony at the trial tended to show that the

duty to so act is always incumbent upon the servant, and neither the promise to repair nor any other action on the part of the master justifies the failure of the servant to act with reasonable care for his own safety, or, as it is commonly expressed, as a reasonably prudent man would have acted under the same circumstances.

The purpose of this note is to show that the defense of contributory negligence is still open to the master, notwithstanding the promise upon his part to remedy the condition causing the injury, rather than to show under what circumstances the servant may be deemed to have been guilty of contributory negligence. It is to be borne in mind, as has been stated above, that the question of contributory negligence is unaffected by the master's promise, and that conduct upon his part which would be deemed contributory negligence in the absence of a promise is also contributory negligence where a promise has been made.

As has been pointed out, there are two distinct phases of contributory negligence, but it is frequently impossible to tell just which phase the court is discussing in the cases; but this is really unimportant, as contributory negligence in either phase is universally considered a defense to an action by the servant, notwithstanding the master's promise.

Frequently the courts seem to combine the effect of an assurance of safety on the part of the master, and the effect of his promise to repair a defect, but the effect of these two actions on the master's part is entirely distinct. In the case of a promise to repair, the servant is aware of the danger, and the promise merely relieves him from assuming a risk of which he is aware. In the case of an assurance of safety, although the danger may be just as great and the servant's knowledge of it the same, yet, if the master assures him of safety, the question immediately arises whether or not the servant would not be justified in relying wholly upon the master's assurance, and in a way be relieved from the charge of contribu-

tory negligence, which otherwise might be incurred by him. In the one case, there is a danger well known to the servant and confessed by the master, while in the other case, the danger is denied by the master, who presumably knows more about it than does the servant. This note does not purport to cover the question of the effect of the master's assurance of safety, and the subject is mentioned solely for the reason that in some cases the two questions seem to be somewhat confused.

The promise to repair is evidence to rebut any presumption of contributory negligence on the part of the workman, raised by reason of continuing in the employment in the presence of obvious dangers. *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835, affirmed in 61 N. J. L. 253, 39 L.R.A. 834, 39 Atl. 764, 19 Mor. Min. Rep. 264.

The mere fact that one suing for injuries caused by the negligence of a fellow servant who was retained ten days after a promise to remove him for incompetency, does not plead an excuse for the delay does not necessarily negative its existence, so as to deprive the plaintiff of the right to rely on the promise. *Williams v. Kimberly & C. Co.* 131 Wis. 303, 10 L.R.A.(N.S.) 1043, 120 Am. St. Rep. 1049, 111 N. W. 481, 11 A. & E. Ann. Cas. 622.

Where it appears that the employee reasonably believed that the repairs had been made, there is no question of his contributory negligence to be submitted to the jury. *Missouri, K. & T. R. Co. v. Nordell*, 20 Tex. Civ. App. 362, 50 S. W. 601.

The servant is not protected by the promise to repair, if the work to be done is rendered imminently and immediately dangerous by the defect. *Cross Lake Logging Co. v. Joyce*, 28 C. C. A. 250, 55 U. S. App. 221, 83 Fed. 989.

When the master notifies the servant not to continue if there is danger, and the servant does continue, then the servant assumes the risk, notwithstanding that the master has promised to remove the danger. *Kimundry v. Anderson*, 103 Ill. App. 457.

bolt which held the whiffletree to the shaft was worn thin and defective, and that as a direct result of its condition the accident happened.

The defendants' real contention is that the evidence of the promise of the master to remedy the defect in the bolt should have been excluded because the plaintiff did not set forth such promise in his declaration. The plaintiff's proof tended to show that, while the plaintiff was loading the wagon, he noticed that the brace running from the top of the shaft and kingbolt, down under the whiffletree to the lower end of the kingbolt, was cracked. Upon examining the cracked brace, he also discovered that the kingbolt running through the shaft and the whiffletree was badly worn and defective.

It was this brace and the kingbolt which fastened the whiffletree to the shaft and held it in place. One of the defendants, Leopold Meyer, was at the time in charge of the loading of the wagon, in the absence of the shipping clerk. Comer reported the broken brace and the defective bolt to Meyer, and called his attention to them. Meyer examined them and saw their condition, but told Comer to go ahead, as the wagon was now loaded, and to use the wagon with the broken brace and defective bolt to deliver the goods and that he, Meyer, would have them fixed the next day. Comer, relying upon Meyer's promise, drove the wagon as directed. The accident happened on the day the promise to repair was made. It was such promise to repair that

Illustrative cases—contributory negligence as a matter of law.

A servant may be guilty of contributory negligence in continuing to use a machine which he knows to be defective and dangerous, notwithstanding he has protested against such use and received the master's promise to repair. *St. Louis Southwestern R. Co. v. Kern* (Tex. Civ. App.) 100 S. W. 971.

The promise of the master to repair is not effectual to permit a recovery, where the plaintiff testified that he stepped into the hole complained of in a moment of forgetfulness, and not in the belief that the hole had been repaired. *Miller v. White Bronze Monument Co.* 141 Iowa, 701, 118 N. W. 518.

Where, in operating an electric car, a motorman was compelled to exert all of his strength and to throw his weight upon the brake in order to stop the car, and, as a result of his over-exertion, was afflicted with a hernia, it was held in *Freeman v. Savannah Electric Co.* 130 Ga. 449, 60 S. E. 1042, that, in so over-straining himself, he was not acting with due care, and could not recover for his injuries, although he had complained of the defective brake and the foreman had promised to furnish him with another car.

A servant is wanting in due care in using an old and rotten harness with a vicious and ugly horse, and consequently is precluded from recovery, although the master had promised to fix the harness or get a new one. *Levesque v. Janson*, 165 Mass. 16, 42 N. E. 335.

A servant engaged in unloading logs from sleds, who uses a short handled ax to knock the hook out of the chain binding the logs together on the sled, is guilty of contributory negligence in using the ax in unloading an extra large load of logs, where he knows that some of the logs are likely to roll over toward him, and he depends on his agility in jumping to one side or in running from the sled at great speed, to avoid the danger of being crushed under the log; and the master's promise to provide

him with a longer handled ax, with which he could unload the sleds more safely, does not exempt him from the charge of culpable negligence. *Musser-Sauntry Land, Logging & Mfg. Co. v. Brown*, 66 C. C. A. 207, 126 Fed. 141. But in a subsequent trial in the state court, it was held that the question of the plaintiff's contributory negligence was for the jury (104 Minn. 156, 116 N. W. 218).

A locomotive fireman who, after complaining of the absence of a shield on the glass indicating the oil supply for the cylinder, the presence of which is necessary for his safety, and receiving the engineer's promise to fix it, leaves the terminal station, where the shield can be procured, and proceeds on a trip knowing that the promise has not been and cannot be fulfilled until the return, assumes the risk of injury from its absence. *Albrecht v. Chicago & N. W. R. Co.* 108 Wis. 530, 53 L.R.A. 653, 84 N. W. 882.

Although the shafting upon a wagon, used for the purpose of dumping the load, was defective, so that the wrench used for turning it could not be readily removed, and the master had promised to repair the same, nevertheless the servant cannot recover for injuries received by reason of the fact that the shafting began to turn rapidly and threw off the wrench, which struck him and injured him, where there appears to be no reason why the wrench should not have been removed before the load began to dump, nor why the servant could not have placed himself in a safe position, where he would not have been injured. *Trudeau v. American Mill Co.* 41 Wash. 465, 83 Pac. 725.

—mines and sand pits.

A miner who returns to work in a "pot" in the roof of a mine, which he knows is likely to fall at any time, is not relieved of contributory negligence by the fact that he had complained of the pot to his superior, who had promised to have it propped. *Alteriac v. West Pratt Coal Co.* 161 Ala. 438, 49 So. 867.

In *Roccia v. Black Diamond Coal Min. Co.*

the defendants insist should have been set forth in the declaration. We think not. It is the accepted law of this state that, under the contract of employment, it becomes the master's duty to take reasonable care to furnish the servant suitable tools and implements with which he may work, and that the neglect of the master to perform this duty renders him liable to the servant for any injury sustained by reason of such neglect. *McDonald v. Standard Oil Co.* 69 N. J. L. 445, 55 Atl. 289.

We have already pointed out that the negligence charged was the failure of the master to furnish a safe and suitable wagon for the use of the servant. That was the cause of action proved. The fact which appeared by the proof, that the defect in the

bolt was known to the servant, and the risk therefore obvious, did not change the character of the master's omission, and render it non-negligent. It is true that where it is shown that the servant either knew, or ought to have known, the dangerous character of the agency which he was called upon to use, and still voluntarily continued to use it, his action may be defeated; but that it is upon the ground that what he assented to he cannot afterwards complain of as a wrong. The fact that the plaintiff knew of the defect relieved the master from liability for his negligence only in case the servant assumed the risk arising out of the situation. But the servant does not always do this, even when the risks are obvious. He does not assume

57 C. C. A. 587, 121 Fed. 451, it was held that there could be no recovery where the injuries were caused by the caving in of the walls of a mine, which the plaintiff "knew and believed to be imminent," although, upon the plaintiff's complaint, the master had promised to furnish men and material to secure them.

An experienced workman is guilty of contributory negligence in continuing to work in a sand pit where the gravel and sod at the summit were permitted to overhang the base, and thus render the upper part of the bank liable to fall upon the men working below, notwithstanding the promise of the foreman, "I will secure the bank in a day or two, and I will warrant you that nothing will happen to you." *McCarthy v. Washburn*, 42 App. Div. 252, 58 N. Y. Supp. 1125.

—saws and planing mills.

An employee in a sawmill, who took a position between a saw and the log carriage, which to his knowledge was defective and liable to creep toward the saw, and paid no attention to the carriage, and was killed by being forced against the saw by the carriage, which had crept down its track, was held in *Crookston Lumber Co. v. Boutin*, 79 C. C. A. 368, 149 Fed. 680, to be guilty of contributory negligence precluding a recovery for his death, although he had complained of the carriage, and the master had promised to repair the same.

An employee in a sawmill, who attempts to pass through a space of 30 inches between a bench and a saw, and is injured by being thrown in contact with a saw, due to his stepping into a hole negligently permitted to be in a dangerous condition, is guilty of contributory negligence, where, by traveling 8 feet further, he could have gone around the bench in comparative safety. *H. D. Williams Cooperage Co. v. Headrick*, 86 C. C. A. 548, 159 Fed. 680.

Where the plaintiff had been promised an iron rod to clear away refuse from a saw, instead of the wooden stick which he was using, it was held in *Shea v. Seattle Lumber Co.* 47 Wash. 70, 91 Pac. 623, that negli- 29 L.R.A. (N.S.)

gence in not procuring and using a larger wooden stick would not be presumed in the absence of positive testimony that a larger stick could have been used.

A man with fourteen years of experience about machinery, whose duties were to assist in sawing and shearing heated bars and plates of iron by the use of a large circular saw, must be deemed guilty of negligence in continuing to work with the saw after noticing a crack in it from the rim 2 or 3 inches in length, where the saw was running at the speed of 1,700 revolutions a minute, and the work which he was doing required him to let the saw down upon large bars of iron with force sufficient to cut them in two. *Erdman v. Illinois Steel Co.* 95 Wis. 6, 60 Am. St. Rep. 66, 69 N. W. 993.

Even though the master has promised to repair a planing machine, the plaintiff cannot recover for injuries received while operating it without the exercise of due care. *Reiser v. Southern Planing Mill & Lumber Co.* 114 Ky. 1, 69 S. W. 1085.

A person operating a jointer who is obliged, in the absence of a guard, to keep his left hand on the face of the board being jointed within an inch of the exposed knives, revolving at the rate of 3,500 revolutions per minute, and to exert considerable pressure on the board to keep it in an upright position against the guide, cannot rely upon the master's promise to remedy the defect or an express direction to operate the jointer. *Sattley Mfg. Co. v. Wendt*, 116 Ill. App. 375.

—protection from falling objects.

A hod carrier injured by the falling of a piece of brick between unprotected floor beams of a building in which he is at work is guilty of contributory negligence in continuing to work where he knows the bricks are continually falling, notwithstanding the promise of a foreman that he would have the beams planked over in a short time so as to protect the workmen from falling objects. *Hannigan v. Smith*, 28 App. Div. 176, 50 N. Y. Supp. 845.

A servant injured while picking up pieces

the risk from a defect of which he has complained, and which the master has promised to repair, during the interval fixed by the master. *Andreicsik v. New Jersey Tube Co.* 73 N. J. L. 664, 4 L.R.A.(N.S.) 913, 63 Atl. 719, 9 A. & E. Ann. Cas. 1006. Assumption of risk, like contributory negligence, is a defense, and need not be confessed and avoided in the declaration. *Belleville Stone Co. v. Mooney*, 60 N. J. L. 323, 38 Atl. 835; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 97 Am. Dec. 722; *Purcell v. Paterson & P. Gas & Electric Co.* (N. J. L.) 53 Atl. 235; *Warshawsky v. Raritan Traction Co.* 68 N. J. L. 241, 52 Atl. 298. If, by promise to repair, the assumption of risk was in fact negated, the right of action still remained unimpaired on the original

liability of the master for negligence in failing to use due care to have the instrumentality reasonably safe. *Belleville Stone Co. v. Mooney*, supra. The right of recovery rests not upon the promise to repair, but upon the master's negligence and the fact that the application of the principle expressed in the maxim, *volenti non fit injuria*, is negated by the servant's reliance upon the promise. *Dunkerley v. Webendorfer Mach. Co.* 71 N. J. L. 60, 58 Atl. 94. As was said by Mr. Justice Swayze in the case last cited: "The difficulty with which the defendant contends is that there is negligence on its part, in the first instance, in failing to exercise reasonable care about the machine. For this negligence the defendant is liable unless it exculpates itself. It

of wood and other refuse, by being struck by refuse thrown from above, is not relieved from the effects of his negligence in continuing to work in the dangerous position, by the master's promise to build a chute for the refuse to be thrown into, thus removing the danger. *Crum v. North Vernon Pump & Lumber Co.* 34 Ind. App. 253, 72 N. E. 193, appeal dismissed in 163 Ind. 596, 72 N. E. 587.

—work in the dark.

A workman is not acting with due care in attempting in the dark to clear out a chute used to carry away refuse from a jointer without stopping the machinery, although the master had promised him to improve the conditions of the place of work, where it appears that the place was dangerous for such work even in the daytime. *Johnson v. Anderson & M. Lumber Co.* 31 Wash. 554, 72 Pac. 107.

In *Kentucky & I. Bridge & R. Co. v. Melvin*, 31 Ky. L. Rep. 959, 104 S. W. 334, it was said that where there is no defect in the premises or appliances, and the master was only delinquent in failing to furnish a lantern to enable the servant to see the work he had to do, it would be extending the promise to repair rule an unreasonable length to hold that the servant, although fully acquainted with the premises and the necessity for a light, could nevertheless undertake to perform his duty of walking near the edge of a deep coal chute, and hold the master responsible for injury sustained while so engaged.

The promise of a superintendent to have lights repaired will not excuse the negligence of the servant in working near revolving machinery in the dark. *Attleton v. Bibb Mfg. Co.* 5 Ga. App. 777, 63 S. E. 918.

Illustrative cases—contributory negligence as a question of fact.

It is not negligence *per se* to remain in the employment after complaint and promise to repair. *Swift & Co. v. Madden*, 165 Ill. 41, 45 N. E. 979; *Donley v. Dougherty*, 20 L.R.A.(N.S.)

174 Ill. 582, 51 N. E. 714; *Maryland Steel Co. v. Engleman*, 101 Md. 661, 61 Atl. 314.

A stationary engineer cannot be charged with contributory negligence merely because he remains in the service of the master a reasonable time after the latter's promise to remove an incompetent fireman. *Maitland v. Gilbert Paper Co.* 97 Wis. 486, 65 Am. St. Rep. 137, 72 N. W. 1124.

The degree of risk to which the employee may subject himself without becoming responsible for the consequences, after the master has promised to repair the defect or remove the danger, is not easy to determine, and unless the danger is very obvious and imminent, it should be left for the jury to say whether the act was that of a person of ordinary prudence. *Antletz v. Smith*, 97 Minn. 217, 106 N. W. 517.

Where the evidence is conflicting, the question whether a locomotive engineer injured through derailment of his engine operated the train in a dangerous manner and contrary to orders, and, if so, whether or not his act contributed to his injury, is for the jury. *Morgan v. Rainier Beach Lumber Co.* 51 Wash. 335, 22 L.R.A.(N.S.) 472, 98 Pac. 1120.

Where there was testimony to the effect that it would have been impracticable to work a defective machine which the master had promised to repair, in a safe manner, the question of the plaintiff's assumption of risk in working it in a dangerous manner was for the jury. *Shalgren v. Red Cliff Lumber Co.* 95 Minn. 450, 104 N. W. 531.

Where, immediately after the promise to repair was made, work in that part of the defendant's shop stopped for several days, it was held in *Keegan v. Walker*, 172 Mass. 58, 51 N. E. 449, that the question of plaintiff's contributory negligence in working upon the defective machine upon the resumption of work, without making a particular examination of it, was for the jury.

The question of contributory negligence of an engineer was held to be for the jury in *Nicolas v. Albert Lea Light & P. Co.* 107 Minn. 101, 119 N. W. 503, where he was injured by the explosion of a glass water gauge which was of standard make and of

only exculpates itself when it shows that the plaintiff assumed the risk. . . . The master is not exculpated, however, unless the willingness of the servant to incur the risk is shown, or reasonably inferred, from the circumstances of the case. Such willingness is not shown, nor is it reasonably inferred, from knowledge of the danger by the servant, where the other circumstances negative such inference. The circumstances that the servant complains, receives a promise of repair, and continues to work in reliance upon the promise, negative the inference of willingness on his part to exempt the master from liability. By making the promise the master relieves the servant from the assumption of risk, and remains liable for his negligence, notwithstanding the servant's knowledge."

With respect to the argument of the defendants which rests upon the assumption that the declaration avers that the plaintiff "did not know" of the defective bolt, it is sufficient to say that there is no such alle-

gation in the declaration. The fair inference from the language to which the defendants point is that the plaintiff was not warned that he was to take the risk of hurt arising from the defective bolt. We conclude that the evidence as to the promise was properly admitted, and that the motion to nonsuit and direct a verdict upon the ground stated was properly denied.

The next contention of the defendants is that, granting that a promise to repair was made, the plaintiff was guilty of contributory negligence. The argument is that the plaintiff should have been nonsuited because of the rule that the master is not liable under his promise to repair, if the danger of injury from the defective appliance is so great or so imminent that a reasonably prudent person would not assume the risk. 26 Cyc. Law & Proc. p. 1211; Dowd v. Erie R. Co. 70 N. J. L. 451, 57 Atl. 248; Dunkerley v. Webendorfer Mach. Co. 71 N. J. L. 60, 58 Atl. 94. But the trial judge recognized that rule, and correctly stated it to

the size in common use, and where a number of such gauges had exploded within a short time prior to the accident, and upon his complaint the superintendent had agreed to furnish him a smaller gauge.

And in *Illinois C. R. Co. v. Weiland*, 67 Ill. App. 332, where the servant, a switchman, was obliged to turn a switch, jump upon the car which was sent over the switch by the momentum received from a push engine, set a brake upon the car, get off the car and couple it to another car when it had reached the proper place, and was injured by being crushed between the two cars, where he did not have time properly to arrange the couplings before the approaching car reached him, it was held that the question of the plaintiff's negligence was for the jury, where he had complained to the master of the fact that the work was too much for one man, and the master had promised to give him another position.

So, an engineer is not guilty of contributory negligence as a matter of law, in taking out an engine with the guard to the lubricator glass broken, although the rules required the engineers to provide themselves with guards and replace the broken ones, where he had complained to the foreman, whose duty it was to repair the engines, and who had agreed to furnish him with a new guard. *Great Northern R. Co. v. McDermid*, 100 C. C. A. 525, 177 Fed. 105.

An inexperienced miner cannot, as a matter of law, be said to have been guilty of contributory negligence in working under the roof of a mine which he knew might fall, where the master had promised upon his complaint to furnish props therefor, and he himself had placed a tie under the roof, which proved insufficient to support it. *Kansas & T. Coal Co. v. Chandler*, 71 Ark. 518, 77 S. W. 912.

So, the court cannot say as a matter of 29 L.R.A. (N.S.)

law that a miner is guilty of contributory negligence in working two or three days after the superintendent had promised to remove the dangerous conditions, with eight or ten men more experienced than he, in a shaft in which some rock looked as though it could fall at any time, but not as if it would fall. *Monarch Min. & Development Co. v. De Voe*, 36 Colo. 270, 85 Pac. 633.

And if a person engaged as a miner for a coal company, who has knowledge of defects in appliances necessary to force pure air into the mines, and to dilute and render harmless and expel therefrom noxious and poisonous gases, gives notice thereof to the proper officer, and is promised that such defect shall be remedied, his continuance in such employment, in the well-grounded belief that such appliances will be put in proper condition within a reasonable time, does not necessarily or as matter of law make him guilty of contributory negligence. It is a question for the jury whether, in relying on such promises, and continuing in the employment after he knew of such defects, he was in the exercise of due care. *Sans Bois Coal Co. v. Janeway*, 22 Okla. 425, 99 Pac. 153.

So, whether a miner was guilty of contributory negligence in continuing to work 4 or 5 feet from a loose place in the roof of the mine, which upon his complaint the master had promised to repair, and which if it fell he had no reason to believe would engulf him, was held to be for the jury, in *Taylor v. Star Coal Co.* 110 Iowa, 40, 81 N. W. 249.

A servant whose duty it is to check the speed of cars on a track leading from a coal mine, by means of wedge-shaped blocks, is not, as a matter of law, guilty of contributory negligence in continuing to use old blocks after he had called his superior's attention to their defective condition, and had

the jury in his charge, leaving the jury to determine the character of the danger. Although the defect in the wagon was obvious, it was a fair question for the jury whether the risk of an accident was so great or imminent that no reasonably prudent person would have continued to work. *Dowd v. Erie R. Co. and Dunkerley v. Webendorfer Mach. Co. supra*. The evidence tended to show that both the defendants and the plaintiff thought the danger was not so great nor so imminent that the use of the wagon should be discontinued. The ground stated, therefore, did not justify a nonsuit.

The next contention of the defendants is that the breaking of the bolt was not the proximate cause of the plaintiff's injury. We see no merit in the contention. The proximate cause of an injury is the efficient cause, the one that necessarily sets the other causes in operation. *Batton v. Public Service Corp.* 75 N. J. L. 857, 18 L.R.A. (N.S.) 640, 127 Am. St. Rep. 855, 69 Atl. 54. If the plaintiff's evidence was believed,

the bolt broke letting the whiffletree drop on the horse's heels, and the horse then jumped and ran away, injuring the plaintiff. Certainly there was thus presented a question for the jury whether the breaking of the bolt was the proximate cause of the injury.

Lastly, it is insisted that the plaintiff is precluded from recovery because it is said he violated a rule of the defendants' establishment that "anything out of order should be reported to the man in charge of the stables or to Mr. Gee." But the plaintiff reported the defect in question to the defendant personally. When the master acted upon the report, examined the instrumentality concerning which complaint was made, and promised repair, he waived the rule. 26 Cyc. Law & Proc. p. 1161.

Finding no error, the judgment of the court below will be affirmed.

Vroom, J., dissents.

When promised new ones; especially where the blocks were covered with oil and dirt, and the selection of the block for use must be hurriedly done. *Lehigh Valley Coal Co. v. Warrek*, 28 C. C. A. 540, 55 U. S. App. 17, 84 Fed. 866.

If the master's superintendent had told the servant that he would look out for him while engaged in picking up paper in an elevator well, so that he would not be injured by the elevator's being sent down upon him, the servant was entitled to go to the jury on the question of due care upon his own merit. *Scullane v. Kellogg*, 169 Mass. 544, N. E. 622.

And the question of the plaintiff's contributory negligence is for the jury where he was injured by being struck in the head by a falling rivet, after he had complained of the danger of such an accident, and was told that he would be taken care of. *McNnon v. Riter-Conley Mfg. Co.* 186 Mass. 5, 71 N. E. 296.

Where knowledge that a roof is unsafe, and that risk was to be incurred in working under it, is not, as a matter of law, sufficient to defeat the servant's cause of action, if the danger was not such as to threaten immediate danger, or if it was reasonable to suppose that the room "might be safely entered by the exercise of care." *Hamman v. Central Coal & Coke Co.* 156 Mo. 232, 56 S. 1091.

Whether the plaintiff was not guilty of contributory negligence in driving down the hill while sitting on a load of tan bark with the soles of his boots even with the front of the load, with nothing for his feet to brace against, was a question of fact for the jury, where he was injured by driving into a hole in the roadway which the master promised to repair. *Nelson v. Shaw*, Wis. 274, 78 N. W. 417.

Whether a servant was guilty of contributory negligence in attempting to unscrew a bolthead near unguarded machinery which, upon his complaint, the master had promised to repair, was held in *Medlin Mill Co. v. Schmidt* (Tex. Civ. App.) 126 S. W. 689, to be a question for the jury.

In many cases the promise to repair rule is stated with the qualification that there can be no recovery, notwithstanding the promise, if the danger is so great and imminent that a reasonably prudent man would not have incurred it; but in many of these cases it does not appear that there was any question of negligence on the part of the servant, and in other cases it appears that the trial court erred in failing to state the rule with the qualification. Among such cases are the following, but, as was stated above, it should be remembered that the rule is seldom or never stated without the qualification, and that the qualification is coextensive with the rule. And it should also be noted that, in practically every case in which a recovery has been had where the master has promised to repair, the court has held that the matter of the servant's contributory negligence or failure to use due care was a question for the jury.

Cross Lake Logging Co. v. Joyce, 28 C. C. A. 250, 55 U. S. App. 221, 83 Fed. 989; *Cudahy Packing Co. v. Skoumal*, 60 C. C. A. 306, 125 Fed. 470; *Cincinnati, N. O. & T. P. R. Co. v. Robertson*, 71 C. C. A. 335, 139 Fed. 519; *Burch v. Southern P. Co.* 140 Fed. 270; *Utah Consol. Min. Co. v. Paxton*, 80 C. C. A. 68, 150 Fed. 114; *Crosby v. Cuba R. Co.* 158 Fed. 144; *King-Ryder Lumber Co. v. Cochran*, 71 Ark. 55, 70 S. W. 606; *Western Coal & Min. Co. v. Burns*, 84 Ark. 74, 104 S. W. 535; *St. Louis, I. M. & S. R. Co. v. Mangan*, 86 Ark. 507, 112 S. W. 168; *Marcum v. Three States Lumber Co.* 88 Ark. 28, 113 S. W. 357; *Anderson v. Seropian*, 147 Cal. 201, 81 Pac. 521; *Elie v. C. Cowles*

& Co. 82 Conn. 236, 73 Atl. 258; Swift & Co. v. Madden, 165 Ill. 41, 45 N. E. 979; Donley v. Dougherty, 174 Ill. 582, 51 N. E. 714; North Chicago Street R. Co. v. Aufmann, 221 Ill. 614, 112 Am. St. Rep. 207, 77 N. E. 1120; Scott v. Parlin & O. Co. 245 Ill. 460, 92 N. E. 318; Illinois C. R. Co. v. Weiland, 67 Ill. App. 332; Illinois C. R. Co. v. North, 97 Ill. App. 124; Atchison, T. & S. F. R. Co. v. Sledge, 68 Kan. 321, 74 Pac. 1111; Flynn v. Connecticut Valley Street R. Co. 196 Mass. 587, 82 N. E. 1085; Gray v. Red Lake Falls Lumber Co. 85 Minn. 24, 88 N. W. 24; Anderson v. Fielding, 92 Minn. 42, 104 Am. St. Rep. 665, 99 N. W. 357; Buckner v. Stock Yards Horse & Mule Co. 221 Mo. 700, 120 S. W. 766; Robertson v. Hammond Packing Co. 115 Mo. App. 520, 91 S. W. 161; Sapp v. Christie Bros. 79 Neb. 701, 113 N. W. 189, 115 N. W. 319; Benak v. Paxton & V. Iron Works, 85 Neb. 836, 124 N. W. 461; Taylor v. Nevada-California-Oregon R. Co. 26 Nev. 415, 69 Pac. 858; Burch v. Southern P. Co. (Nev.) 104 Pac. 225; Dowd v. Erie R. Co. 70 N. J. L. 451, 57 Atl. 248; Leaux v. New York, 87 App. Div. 405, 84 N. Y. Supp. 511; Quigg v. Post, 131 App. Div. 155, 115 N. Y. Supp. 147; Neeley v. Southwestern Cotton Seed Oil Co. 13 Okla. 356, 64 L.R.A. 145, 75 Pac. 537; Webster v. Monongahela River Consol. Coal & Coke Co. 201 Pa. 278, 50 Atl. 964; Meade v. Pittsburg R. Co. 223 Pa. 145, 72 Atl. 263; Hartman v. Reading Wood Pulley Co. 38 Pa. Super. Ct. 587; Powers v. Standard Oil Co. 53 S. C. 358, 31 S. E. 276; Mangum v. Bullion, B. & C. Min. Co. 15 Utah, 534, 50 Pac. 834; Miller v. Bullion-Beck & C. Min. Co. 18 Utah, 358, 55 Pac. 58; Virginia & N. C. Wheel Co. v. Chalkley, 93 Va. 62, 34 S. E. 976; Leeson v. Saw Mill Phenix, 41 Wash. 423, 83 Pac. 891; Jensen v. Hudson Sawmill Co. 98 Wis. 73, 73 N. W. 434; Curran v. A. H. Stange Co. 98 Wis. 598, 74 N. W. 377; Yerkes v. Northern P. R. Co. 112 Wis. 184, 88 Am. St. Rep. 961, 88 N. W. 53.

Care to be exercised by the servant after the promise.

In a few cases the courts hold that after a servant has complained to the master of the defect, and received the latter's promise to repair the same, the servant is bound to exercise a greater degree of care for his own safety. But the courts probably do not intend to hold that the servant is bound to exercise any extraordinary care, but only such reasonable care as a reasonably prudent man would exercise under like circumstances and a like knowledge of the danger.

Thus, in *Jones v. New American File Co.* 21 R. I. 125, 42 Atl. 509, the court said that the question of fact whether a servant could be regarded as excused from taking the risk of the employment after a promise to repair depended, among other things, upon whether, after knowing the danger, his own care and precautions were proportionately increased.

So, a servant is required to exercise such care as is commensurate with the danger of 29 L.R.A. (N.S.)

operating a defective machine, notwithstanding the promise of the master to repair it. *Brown Oil Can Co. v. Green*, 22 Ohio C. C. 518.

Where the evidence as to the care exercised by the servant after the promise was made is conflicting, the question of contributory negligence is for the jury. *Barney Dumping Boat Co. v. Clark*, 50 C. C. A. 616, 112 Fed. 922.

Notwithstanding the promise to repair, a servant must handle the defective machine with reasonable care in view of the defect. *Crooker v. Pacific Lounge & Mattress Co.* 34 Wash. 191, 75 Pac. 632; *Trudeau v. American Mill Co.* 41 Wash. 465, 83 Pac. 725.

After a promise to repair, the servant must still exercise such reasonable care and caution as a prudent man would exercise under the same circumstances. *Virginia & N. C. Wheel Co. v. Harris*, 103 Va. 708, 49 S. E. 991.

If a servant is engaged in a dangerous service in which the machinery is defective, and has knowledge thereof, makes objection thereto, and is induced to remain in the master's employment by promise or assurance of its repair, and, not having waived the objection, is injured by reason of such defect, without contributory negligence on his part, he is entitled to recover; but greater care is required of him than if he had not known of the defect. *Harris v. Bottum*, 81 Vt. 346, 70 Atl. 560.

But in *Missouri, K. & T. R. Co. v. Puckett*, 62 Kan. 770, 64 Pac. 631, it was held that, in the use of obviously defective tools, the servant is not bound to use extra care, but only that reasonable care to protect himself which ordinary men would use when employed in a service of like kind.

W. M. G.

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT.

REPUBLIC IRON & STEEL COMPANY,
Plf. in Err.,

v.

LEON THOMASINO, Admr., etc., of Tony Thomasino, Deceased.

(99 C. C. A. 523, 176 Fed. 49.)

Servant — miner — unpropped room — assumption of risk.

An experienced miner has no right to rely upon the master's assurance of safety of an unpropped room and promise to furnish the props soon if he will continue work, where he knows that every moment of work increases the danger of the fall of the roof.

(Shelby, Circuit Judge, dissents.)

(February 8, 1910.)

Note. — See note to *Comer v. Meyer*, ante, 597.

ERROR to the Circuit Court of the United States for the Northern District of Alabama to review a judgment in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

Statement by Pardee, Circuit Judge:

This action was brought by Leon Thomasino, hereinafter styled plaintiff, as administrator of the estate of Tony Thomasino, against the Republic Iron & Steel Company, hereinafter styled defendant, claiming \$20,000 damages for the killing of plaintiff's intestate.

The complaint charges that the defendant was operating a coal mine at or near Sayretton, Jefferson county, Alabama, and that on August 16, 1905, the said Tony Thomasino was in the employment of the defendant as a coal miner, and, while so engaged in and about the said service of the business of the defendant in said mine, a part of the roof or top of the said mine fell upon said Tony Thomasino, and as a proximate consequence thereof he was so injured that he died.

In the first count of the complaint it is charged that the death was caused by reason of a defect in the condition of the ways, works, and machinery or plant used in connection with the said business, to wit, the roof or top of said mine was not sufficiently propped to prevent its falling, which defect arose from, or had not been discovered or remedied owing to, the negligence of the defendant, or of some person in the service or employment of the defendant intrusted with the duty of seeing that the ways, works, and machinery or plant were in proper condition.

In the second count it is charged that the death was the proximate consequence of the negligence of a person in the service or employment and intrusted by the defendant with superintendence, while in the exercise of such superintendence, to wit, one W. M. Mason.

And in the third count the death is charged as occurring through the proximate cause of the negligence of a person in the employment of the defendant with superintendence, whilst in the exercise of such superintendence, to wit, some person unknown.

The fourth count is very similar to the second, but charges that said Mason negligently failed to sufficiently prop or secure from falling the said roof or part thereof which fell upon and killed the said intestate.

The fifth count is similar to the third, but more specific in charging that some unknown

person intrusted with superintendence negligently failed to sufficiently prop or secure from falling said roof or part thereof.

The sixth count charges that the death was the proximate consequence of the negligence of said Mason, intrusted by the defendant with and exercising superintendence, in failing to furnish plaintiff's intestate with sufficient props to secure said roof.

And the seventh is similar to the sixth, except it varies in charging that the negligence of an unknown person in the service or employment of the defendant, charged with superintendence, negligently failed to furnish plaintiff's intestate at his place of work a sufficient number of props to secure said roof or part thereof, etc.

The defendant answered with a plea of not guilty; that it was the duty of plaintiff's intestate to keep his room properly timbered or propped; that he negligently failed to timber or prop said room, in that he placed the timbers or props of said room at too great a distance apart, thereby rendering said roof likely to fall; that his negligence in this regard contributed to and was the proximate cause of his death; that the fall of said roof was caused by the fact that the timbers by which the same was propped were placed at a distance of 16 feet from the face of said mine, rendering the roof thereby likely to fall; that the timbering of the said room in this manner was unsafe and dangerous, and such danger was obvious and apparent to plaintiff's intestate, and, notwithstanding such obvious and apparent danger, plaintiff's intestate undertook to mine in said room with the roof thereof timbered in such manner, and thereby assumed the risk of the roof falling upon him; that plaintiff's intestate was killed by the roof falling upon him because it had been improperly propped or supported by timbers; that plaintiff's intestate had been cautioned by the defendant as to the necessity of having any such props; that, notwithstanding such caution and warning, he continued to work in said mine while such props or timbers were in there at such distance, and thereby he assumed the risk of said roof falling; and, finally, that plaintiff's intestate was aware that the roof was not propped or supported by props, and was rendered unsafe thereby, and, notwithstanding said knowledge, plaintiff's intestate continued to mine under said roof, whereby, and as a proximate consequence of which, plaintiff's intestate was killed.

There was considerable skirmishing with demurrers to the complaint, to the pleas,

and to the replications, not necessary to recite, and the parties went to trial on the issues as presented by the plaintiff as above mentioned, and the pleas of the defendant.

On the trial there was evidence showing that Tony Thomasino was killed while in the employment of the defendant as a coal miner. He had been in the employment of the defendant some six months. On seeking the employment, he represented himself as a practical coal miner and was given the job as such and assigned to a room with another miner, his cousin, Joe, as an assistant or "buddy." From the time he entered the service of the defendant, he worked in the same room driving it 150 feet from the heading, until August 16, 1905, when he was killed by the roof of his room falling upon him. The roof fell because it was not sufficiently propped or supported by timbers.

On the trial it was conceded that it was the duty of plaintiff in error to furnish the timbers for propping, and the duty of said Tony Thomasino to look after his room and set the necessary props. Both said Tony Thomasino and his assistant knew for what purpose props were used, how to set them, and that there was danger when not used; in fact, there was undisputed evidence showing that Tony Thomasino had been actually warned as to the danger if he did not prop, and, on one occasion, he had been suspended by the mine foreman because he failed to obey instructions by not setting the mine props close enough together.

There was also undisputed evidence showing that two or three days before Tony Thomasino was killed he was warned by his boss that he was not propping close enough to the face, and that it was dangerous rock, and he was told to set props closer, and promised to do so. It appears further, and on undisputed evidence, that each day a miner and his assistant in mining average from 5 to 6 feet into the face of the room, so that a new roof from 5 to 6 feet in length is over the mine as the miner does his work.

It was admitted by the plaintiff that Tony Thomasino's room was not properly propped, and that his death was due to that fact; but it was contended by the plaintiff that said Tony Thomasino had requested the defendant to furnish the necessary props, and it had failed to do so, and that upon such request the superintendent had told him, in effect, to go ahead and do the work; he would send him timbers to-day,—“The top is all right. Just as soon as I can, I will send you props.”

The strongest and most favorable evidence in favor of the plaintiff is the evidence of Joe Thomasino, given in full as follows:

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Joe Thomasino, a witness for the plaintiff, testified, in substance, as follows:

My cousin, Tony Thomasino, and myself, were working for defendant company at Sayreton, on August 16, 1905, and were working together under the same roof. Tony had been working at that time about six months. I don't know what he worked at before this. I was present when Tony was killed, was about 14 or 15 feet from him. Some rock fell from the top of the room on him and killed him. The rock was 4 or 5 inches thick. Tony was killed between half after 11 and half after 1 o'clock in the morning. When we went to work that morning, Tony and I examined the roof, and it seemed all right. I had worked one month as a miner with Tony Thomasino. Tony knew better about mining than I did.

Here the witness was asked the following question: “Whose duty was it to furnish props to the miners working in the mines?” And the court stated: “Isn't that without dispute?” And it was thereupon stated by defendant's counsel that there were two things not in dispute. One was that it was the duty of the company to furnish props, and the other was that it was the duty of the miner to set the props and prop his own room, and to this statement counsel for plaintiff made no objection.

I heard the conversation on top between Tony and Mr. Mason when Tony asked him for props, and Mr. Mason said: “The top is all right. You go ahead and go to work. If you don't go to work, you can quit.” Mr. Mason said: “Never mind, you go ahead. The top is all right, and after a while, as soon as I can, I will send you props.” We then went to work, and the driver came into the room, and we asked him for props, and he said he didn't have any, and said: “You will have to tell that to the boss.” No props were sent to the room after we asked for them. If props had been under our roof, it would not have fallen. If it had been propped, it would have made a motion when it started to fall and we could have heard it and got out the way. The nearest prop from the face of the mine at the time the roof fell was from 20 to 30 feet. It was about two, maybe three, days after he heard Tony ask Mr. Mason for props before Tony was killed.

On cross-examination this witness testified as follows: “I had worked in the same room ever since I had commenced mining. Tony was working in that room when I commenced working there. We have been setting props under the roof, and set them under the roof for the purpose of keeping the roof from falling on us. I knew, and Tony knew, that the roof had been propped, and if it had been propped

props would have held the roof, and if the roof had started to fall they would have held it until we got out of the way. Tony and I had been putting in these props together all the time we worked there. Tony was boss over me. I was his buddy, and he was a miner. Tony would direct me where to put the props, but pretty soon I learned myself how to put the props. We worked in this room about four or five days before Tony was killed, without putting any props up at all."

Thereupon the witness was asked the following question: "Didn't you know that there was danger of that roof falling without you put a prop?" To this question the plaintiff objected, the court sustained the objection, and the defendant excepted.

This was, in substance, the testimony of this witness, and all the tendencies thereof.

Joe Immodino, a witness for the plaintiff, testified as follows: "I was working for the Republic Iron & Steel Company, at Sayreton, on the 16th day of August, 1905. I knew Tony Thomasino before his death, and had known him for six or seven months. He had been working there several months before he was killed, and I had been working there about twelve months. Mr. Mason was the bank boss for the defendant company. His duties were to look after the place, and send props to prop the place. I heard Tony Thomasino ask Mr. Mason for timbers, and Mr. Mason said: 'Go on to work. I will send you timbers to-day. That the top was all right.' Tony Thomasino asked Mason for the timbers and Mason told him to go on to work, he would send timber to-day, two or three days before Thomasino was killed. Thomasino went to work after that. It was the duty of the company to furnish the props. The conversation between Mason and Thomasino about the props occurred outside of the mine and some time inside of the mine. At the time the conversation about the props took place, Salvador Lavito and Joe Thomasino were present."

On cross-examination, this witness testified, in substance, as follows: I have been a miner for about seven years, and have worked at Sayreton for two or three years. Every miner has a buddy who helps in the mine. It is the miner's duty to prop the roof in his room, and Tony Thomasino was a miner. The company furnished the props, but it was the miner's duty to set them up. It was customary to set the props to within 10 feet of the face of the room. I went into the room where Tony Thomasino was killed, right after he was killed, and the

nearest timber to the face of the room was from 20 to 30 feet. Tony had been working in that mine six or seven months before he was killed. When the miners want timbers, they ask the driver for them, and the driver would bring them; but if the driver didn't bring them, then you would tell the bank boss, and the bank boss would tell the driver. The bank boss never brought the timber himself, but the driver brought them. The driver for Tony was a white man named Reid. I worked at the time Tony was killed in room 40, and Tony worked in room 45. I put up my own props. I put the props in my room, and it was Tony's duty to prop his room. The conversation I heard between Tony and Mr. Mason about the props occurred two or three days before Tony was killed. It had been three or four days before this that Tony had not had any timbers. When Tony asked for props from Mason at the top of the mine, he told Mason that he had no timbers or props. In the mine at that time they averaged from 4, 5, or 6 feet a day into the face of the mine. I never saw any timbers at that time along the heading. At this time I cannot remember whether there were any timbers at the top of the mine or not. Tony had been working in the same room he was killed in, and had been the miner who has had that room, ever since he had been working for the company, and he had been working for the company about six or seven months.

This was, in substance, all the testimony of this witness, and all the tendencies thereof.

There was other evidence on the part of plaintiff and considerable on the part of defendant, all found in the transcript and bearing upon the issues in the case, but not necessary to recapitulate.

The bill of exceptions shows that, after the evidence was closed, the defendant made numerous requests for charges on specific propositions arising and supposed to arise in the case, which were refused by the court and exceptions duly reserved. Among them were the following: "The court charges the jury that if you believe the evidence in this case you cannot find for the plaintiff.

"The court charges the jury that if you believe the evidence in this case you cannot find for the plaintiff under the sixth count of the complaint.

"The court charges the jury that if you believe from the evidence that, on the day the plaintiff's intestate was killed, he tapped or sounded the room and concluded that it was safe, and that he continued to mine, depending on his own judgment as to the

safety of said roof, then the plaintiff cannot recover.

"The court charges the jury that if you believe from the evidence that plaintiff's intestate knew that props were necessary and were used to support the roof and prevent the same from falling in, and that without the same being used there was danger of the roof falling upon him, and that with such knowledge he continued to mine under the roof without said props, and that the roof fell upon him because it was not propped, then your verdict must be for the defendant, and this must be your verdict under such circumstances, even though you may believe from the evidence that the defendant had no props on hand, or that it negligently failed to provide them to plaintiff's intestate after it had been requested by him to do so."

The jury found for the plaintiff in the sum of \$2,500, on which verdict judgment was rendered, and defendant, after vainly seeking a new trial, sued out this writ of error.

The errors assigned are numerous, but they cover the refusals to charge as set out above.

Argued before Pardee and Shelby, Circuit Judges, and Foster, District Judge.

Messrs. Percy, Benners, & Burr and Walker Percy, for plaintiff in error:

One who represents that he has experience, and thereby secures employment, cannot claim inexperience in a suit brought to recover for his injuries.

20 Cyc. Law & Proc. p. 1244, (2); Stanley v. Chicago & W. M. R. Co. 101 Mich. 102, 59 N. W. 393.

It is the miner's duty as a matter of law to prop his room.

Sloss-Sheffield Steel & I. Co. v. Green, 159 Ala. 178, 49 So. 302.

Defendant's failure to furnish props cannot be considered the proximate cause of the roof falling, since there would have had to intervene the performance of intestate's duty to set the props, and the performance of this intervening duty cannot be presumed.

Alteriac v. West Pratt Coal Co. 161 Ala. 435, 49 So. 867.

Plaintiff's intestate was guilty of contributory negligence in failing to prop his room and in mining with it unpropped.

American Bridge Co. v. Seeds, 11 L.R.A. (N.S.) 1041, 75 C. C. A. 414, 144 Fed. 605; Westinghouse, C. K. & Co. v. Callaghan, 19 L.R.A. (N.S.) 361, 83 C. C. A. 672, 155 Fed. 397; Frazer v. Red River Lumber Co. 45 Minn. 237, 47 N. W. 785; Coal & Min. Co. v. Clay (Consolidated Coal & Min. Co. v. Floyd) 51 Ohio St. 542, 25 L.R.A. 848, 38 29 L.R.A. (N.S.)

N. E. 610; Petaja v. Aurora Iron Min. Co. 106 Mich. 463, 32 L.R.A. 435, 58 Am. St. Rep. 505, 64 N. W. 335, 66 N. W. 951; 24 Cyc. Law & Proc. p. 1252; Labatt, Mart. & S. p. 1272; Boyd v. Indian Head Mills, 131 Ala. 358, 31 So. 80; Roccia v. Black Diamond Coal Min. Co. 57 C. C. A. 569, 121 Fed. 451.

The fact that a promise to repair has been made and the assurance of safety given will not justify a servant in remaining at work where the danger is obvious and understood by him.

Sloss Iron & Steel Co. v. Knowles, 129 Ala. 410, 30 So. 584; Alteriac v. West Pratt Coal Co. supra; Coosa Mfg. Co. v. Williams, 133 Ala. 608, 32 So. 232; Linton Coal & Min. Co. v. Persons, 15 Ind. App. 69, 43 N. E. 652; Glenmont Lumber Co. v. Roy, 61 C. C. A. 506, 126 Fed. 524; Musser-Sauntry Land, Logging & Mfg. Co. v. Brown, 61 C. C. A. 207, 126 Fed. 141; Gowen v. Harley, 6 C. C. A. 198, 12 U. S. App. 54, 56 Fed. 973; Kansas City Southern R. Co. v. Billingslea, 54 C. C. A. 109, 116 Fed. 335; McPeck v. Central Vermont R. Co. 25 C. C. A. 110, 50 U. S. App. 27, 79 Fed. 590; District of Columbia v. McElligott, 117 U. S. 633, 29 L. ed. 949, 6 Sup. Ct. Rep. 884; Bunt v. Sierra Butte Gold Min. Co. 138 U. S. 483, 34 L. ed. 1031, 11 Sup. Ct. Rep. 464; Lindsay v. Hollenback & M. Contract Co. 29 Ky. L. Rep. 68, 4 L.R.A. (N.S.) 830, 92 S. W. 294; Chicago G. W. R. Co. v. Crotty, 4 L.R.A. (N.S.) 832, 73 C. C. A. 147, 141 Fed. 913; Showalter v. Fairbanks, M. & Co. 88 Wis. 376, 60 N. W. 257.

If the servant's opportunities for learning defects and appreciating the danger are equal to or superior to the master's, he cannot rely on the master's assurance of safety and promise to repair.

Alteriac v. West Pratt Coal Co.; Gowen v. Harley; and Sloss Iron & Steel Co. v. Knowles, supra; 26 Cyc. Law & Proc. p. 1202, 1241; Detroit Crude-Oil v. Grable, 3 C. C. A. 94, 94 Fed. 73; Gulf, C. & S. R. Co. v. Jackson, 12 C. C. A. 507, 27 U. S. App. 519, 65 Fed. 48.

Where the promise to repair is indefinite in its terms as to the time of its performance, it is a question for the jury as to whether or not the servant reassumed the risk by working an unreasonable time after the master defaulted in his promise; but the master sets a definite time for the repair, and defaults in his promise, and the servant continues to work after the expiration of the time set, he reassumes the risk and is negligent as a matter of law.

Eureka Co. v. Bass, 81 Ala. 214, 60 Rep. 152, 8 So. 216; Bridges v. Tennessee Coal, Iron & R. Co. 109 Ala. 293, 19

495; 26 Cyc. Law & Proc. p. 1213; Labatt, Mast. & S. p. 1204; Andreessik v. New Jersey Tube Co. 73 N. J. L. 664, 4 L.R.A. (N.S.) 913, 9 A. & E. Ann. Cas. 1006, 63 Atl. 719; Trotter v. Chattanooga Furniture Co. 101 Tenn. 257, 47 S. W. 425.

Messrs. Frank S. White & Sons and Thomas T. Huey, for defendant in error:

The intestate had a right to rely upon the promise and remain in the employment a reasonable time without assuming the risk, and what was a reasonable time was a question of fact for the jury.

7 Thomp. Neg. §§ 4664, 4668; Dresser, Employers' Liability, § 115, p. 590; Labatt, Mast. & S. § 429, p. 1213; Union Mfg. Co. v. Morrissey, 40 Ohio St. 148, 48 Am. Rep. 669.

The servant is entitled to remain for any period which will not preclude the reasonable expectation that the promise will be kept.

Eureka Co. v. Bass, 81 Ala. 214, 60 Am. Rep. 152, 8 So. 216; Louisville & N. R. Co. v. Stutts, 105 Ala. 376, 53 Am. St. Rep. 127, 17 So. 29; Buehner v. Creamery Package Mfg. Co. 124 Iowa, 445, 104 Am. St. Rep. 354, 100 N. W. 345; Washington & G. R. Co. v. McDade, 135 U. S. 554, 34 L. ed. 235, 10 Sup. Ct. Rep. 1044; Hough v. Texas & P. R. Co. 100 U. S. 213, 225, 25 L. ed. 612, 617, Republic Iron & Steel Works v. Gregg, 24 Ky. L. Rep. 1627, 71 S. W. 900; Parody v. Chicago, M. & St. P. R. Co. 5 McCrary, 38, 15 Fed. 205; Bailey, Mast. & S. p. 209; 26 Cyc. Law & Proc. pp. 1414, 1506; Rothenberger v. Northwestern Consol. Mill. Co. 57 Minn. 461, 59 N. W. 531; Patterson v. Pittsburgh & C. R. Co. 76 Pa. 389, 18 Am. Rep. 412; Chicago Anderson Pressed Brick Co. v. Sobkowiak, 148 Ill. 573, 36 N. E. 572; Benedict v. Guardian Trust Co. 91 App. Div. 103, 86 N. Y. Supp. 370; 1 Labatt, Mast. & S. § 427, p. 1207; Swift & Co. v. Madden, 165 Ill. 41, 45 N. E. 979; Missouri Furnace Co. v. Abend, 107 Ill. 44, 47 Am. Rep. 425; Cincinnati, N. O. & T. P. R. Co. v. Robertson, 71 C. C. A. 335, 139 Fed. 519; Huggard v. Glucose Sugar Ref. Co. 132 Iowa, 721, 109 N. W. 475; Gunning System v. Lapointe, 212 Ill. 274, 72 N. E. 393; Tannhauser v. Uptegrove, 114 App. Div. 764, 100 N. Y. Supp. 245; Collins v. Harrison, 25 R. I. 489, 64 L.R.A. 156, 56 Atl. 678; Monarch Min. & Development Co. v. DeVoe, 36 Colo. 270, 85 Pac. 633; Conroy v. Vulcan Iron-Works, 6 Mo. App. 102; Graham v. Newburg Orrel Coal & Coke Co. 38 W. Va. 273, 18 S. E. 584; Bailey, Mast. & S. p. 117; Roccia v. Black Diamond Coal Min. Co. 57 C. C. A. 567, 121 Fed. 451; New Jersey & N. Y. R. Co. v. Young, 1 C. C. A. 428, 1 U. S. App. 96, 29 L.R.A. (N.S.)

49 Fed. 723; Ross v. Chicago, M. & St. P. R. Co. 2 McCrary, 235, 8 Fed. 544; Breckenridge Co. v. Hicks, 94 Ky. 362, 42 Am. St. Rep. 361, 22 S. W. 554.

Where a servant continues to work after the promise by the master to repair a defect, there is no presumption that he assumes the risk incident to the defect, unless the time for the performance of the promise is gone by, and he knows that the repairs will not be made.

Chicago & G. W. R. Co. v. Travis, 44 Ill. App. 466; Counsel v. Hall, 145 Mass. 468, 14 N. E. 530; Birmingham Min. & Constr. Co. v. Skelton, 149 Ala. 473, 43 So. 110; Weber Wagon Co. v. Kehl, 40 Ill. App. 585; Conroy v. Vulcan Iron Works, 62 Mo. 35; Atchison, T. & S. F. R. Co. v. Lannigan, 56 Kan. 109, 42 Pac. 343; Lyberg v. Northern P. R. Co. 39 Minn. 15, 38 N. W. 632; 2 Dresser, Employers' Liability, § 115; McClusky v. Garfield & P. Coal Co. 180 Mass. 115, 61 N. E. 804; Anderson v. Seropian, 147 Cal. 201, 81 Pac. 521; Dempsey v. Sawyer, 95 Me. 295, 49 Atl. 1035.

As it was not shown that the intestate was aware of any danger, even if the place was dangerous he could rely on his superior's judgment of the safety of the working place, and continue to work under the promise that he would be supplied with the props in a reasonable time.

Pawnee Coal Co. v. Royce, 79 Ill. App. 469; Jensen v. Hudson Sawmill Co. 98 Wis. 73, 73 N. W. 434; Cudahy Packing Co. v. Skoumal, 60 C. C. A. 306, 125 Fed. 470.

The defense of assumption of risk is not available in an action by a miner for injuries sustained because of the failure of the company to furnish props, as required by a statute on the subject.

Wolf v. Smith, 149 Ala. 462, 9 L.R.A. (N.S.) 338, 42 So. 824; Johnson v. Mammoth Vein Coal Co. 88 Ark. 243, 19 L.R.A. (N.S.) 646, 114 S. W. 722; Labatt, Mast. & S. §§ 422-425, 427.

Mr. James A. Mitchell, also for defendant in error:

There can be no assumption of the risk against the violation of a statutory duty to prop mines, where the statute is for the protection or the safety of the employee.

Johnson v. Mammoth Vein Coal Co. 88 Ark. 243, 19 L.R.A. (N.S.) 646, 114 S. W. 722; Diamond Block Coal Co. v. Cuthbertson, 166 Ind. 290, 76 N. E. 1060; Western Anthracite Coal & Coke Co. v. Beaver, 192 Ill. 333, 61 N. E. 335.

Pardee, Circuit Judge, delivered the opinion of the court:

It is undisputed that it was the duty of the defendant to have furnished the plain

tiff's intestate with sufficient props to support the roof of the room where he was mining, and that it was the duty of the plaintiff's intestate to properly set the props. See *Sloss-Sheffield Steel & I. Co. v. Green*, 159 Ala. 178, 49 So. 302.

The evidence is conflicting as to whether the defendant did its duty in furnishing the props,—it is undisputed that the plaintiff's intestate did not set any props in the last four to five days of his work nor in the last 20 to 30 feet of his room.

The plaintiff's evidence shows that plaintiff's intestate worked in his room three or four (Joe Immodino), two or three (Joe Thomasino) days without putting up props, and then called on the mine foreman for props, and the bank boss said: "Go to work. I will send you timbers to-day. That the top was all right." Joe Immodino. "Go to work. To-morrow I will send you the props." Lavito. "The top is all right. You go ahead and go to work. If you don't go to work, you can quit." Or, "Never mind, you go ahead. The top is all right, and after a while, as soon as I can, I will send you props." Joe Thomasino. And after the application for props the plaintiff's intestate worked on two or three days extending his room and the unsupported roof thereof, when the roof fell and killed him.

The undisputed evidence shows that the plaintiff's intestate was an experienced miner, that he knew of the necessity of propping his roof as he advanced further in his work, and of the danger of its falling if not properly supported, and that, when he went to work the morning of his death, he, with his assistant, examined the roof and it seemed all right. From this it is clear that, in continuing his mining and extending his room without propping, the plaintiff's intestate well knew and appreciated the danger, and he assumed the risk, and plaintiff cannot recover, although the defendant neglected to furnish the necessary props (see *Sloss Iron & Steel Co. v. Knowles*, 129 Ala. 414, 30 So. 584), unless the plaintiff's intestate had a right to rely upon the mine foreman's promise to furnish props and his assurance as to safety. This is not a case of a master's furnishing a defective appliance or place which he promises to have repaired or made safe, but is rather a case where assurance of safety was given to the servant who was making his own place to work, which he knew as well as anyone could know would be and was dangerous without using the appliances the master promised to furnish (and he knew that the master had not furnished them), and he well knew that, in continuing to

work therein, he was in danger, and was increasing the danger with every stroke of his pick, for he was an experienced miner and well knew of the necessity of propping his roof as he advanced. Surely, under these circumstances, the plaintiff's intestate had no right to rely on the promise to furnish props, whether the furnishing was to be "to-day," "to-morrow," or "after a while, as soon as I can."

And we think it equally clear, under the plaintiff's evidence most favorably considered, that the plaintiff's intestate had no right to rely upon the foreman's assurance that "the top is all right;" "never mind, you go ahead. The top is all right,"—because he was not only an experienced miner but, as to the actual situation at the time the alleged assurance was given, he knew more about the situation than the foreman did, for he knew, and there is no suggestion in the evidence that the foreman knew, that he had already mined two or three days, extending his roof (10 to 12 feet according to the average) without setting props, thus increasing the ordinary danger.

We conclude, on principles well supported in reason and well recognized in adjudged cases, that under the evidence, and as a matter of law, the plaintiff's intestate, in continuing to work in the mine in the absence of sufficient propping to support the roof in his room, assumed the risk of injury from the falling roof, and defendant was entitled to the peremptory charge in its favor. See *Sloss Iron & Steel Co. v. Knowles*, supra; *Alteriac v. West Pratt Co.* 161 Ala. 435, 49 So. 867; *Coosa Mfg. Co. v. Williams*, 133 Ala. 606, 32 So. 232; *Musser-Sauntry Land, Logging & Mfg. Co. v. Brown*, 61 C. C. A. 207, 126 Fed. 141; *Glenmont Lumber Co. v. Roy*, 61 C. C. A. 506, 126 Fed. 524; *Kansas City Southern R. Co. v. Billingslea*, 54 C. C. A. 109, 107 Fed. 335; *Bunt v. Sierra Butte Gold Mf. Co.* 138 U. S. 484, 34 L. ed. 1032, 11 Sup. Ct. Rep. 464; *Eureka Co. v. Bass*, 81 Ala. 214, 60 Am. Rep. 152, 8 So. 216; *Bridgeport Tennessee Coal, Iron & R. Co.* 109 Ala. 293, 19 So. 495.

The judgment of the Circuit Court is reversed, and the cause is remanded, with instructions to award a new trial.

Shelby, Circuit Judge, dissenting:

The question of the deceased's contributory negligence was one for the jury, and in my opinion, it was correctly submitted to the jury by the trial judge.

The court gave the last charge copied in the statement of the case in the opinion of the majority, but added the following explanation: "Now I give you that in

nection with the general charge, provided always if he (the deceased) stayed there in pursuance of a request, under the advice that it was safe, and didn't know, and that a person of ordinary prudence would not know, it was dangerous, then, in that event, if he knew it was dangerous, he could not recover; otherwise he might."

In explanation of another charge requested by the defendant company, the trial court further said: "If you should find that Mason was negligent in not furnishing these things, and told him the roof was safe, and that he stayed there, relying on it, and the danger of mining under those circumstances was not obvious and apparent to a reasonable man, then that might excuse him from contributory negligence; but otherwise it would not, because it is the duty of a man who has sufficient experience to know that mining in the way he was was dangerous without the props; . . . if it was an apparent and known danger, he would not be justified in risking his safety on it. . . . But, as I explained to you several times, that depends upon whether the danger was obvious and apparent."

These instructions, in my opinion, correctly state the rule applicable to the case.

The reasons given by the trial court for overruling the motion for a new trial also shed light on the case as it was presented to the court and jury, and show that the question involved, to some extent, the credibility of the evidence, and was, therefore, one for the jury. Here is the order:

The court has carefully considered the briefs of counsel, and the evidence in connection with the general charge, and the refused charges, and is of the opinion that the case was fairly submitted to the jury, and that a new trial ought not to be granted. It is true Salvatore Lavito testified that Mr. Mason said, "Go to work, and tomorrow I will send you the timber," etc., and that Immodino testified that Mason said, "Go on to work, and I will send you the timber today." Joe Thomasino, when asked what the deceased said to Mr. Mason about furnishing him the props, testified, in substance, "after awhile, or as soon as I can, I will send you the props," and then the deceased went back to work, and he asked the driver for the props, and he did not have them. The testimony of Mr. Mason did not impress the jury, and the jury might well have found, under the circumstances, that the deceased had a right to rely upon the promise to furnish the props as soon as the defendant could, and to wait a reasonable time therefor, which reason-

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able time the jury, under all the circumstances, found included the period in which the accident occurred. The several versions of the promises were before the jury, and it was for the jury to say which version was true. It is therefore considered that the motion for a new trial be denied and overruled, and that the defendant have ninety days from this date in which to prepare and present a bill of exceptions.

This 26th day of May, 1909.

Thos. G. Jones, United States Judge.

The view of the trial judge that the deceased had the right to rely on the promise of the master to furnish the props, and to continue to work, waiting a reasonable time therefor, is fully sustained by the authorities, as is, also, his conclusion that the question of reasonable time was one for the jury. 1 Labatt, Mast. & S. § 429, p. 1213, and cases cited in note 5; Dresser, Employers' Liability, § 115, p. 591, and cases cited; Cincinnati, N. O. & T. P. R. Co. v. Robertson, 71 C. C. A. 335, 139 Fed. 519 (opinion by Lurton, Circuit Judge).

I cannot concur in the conclusion that the deceased servant, as matter of law, assumed the risk of injury from the falling roof of the mine, the master having negligently failed to furnish the props. A risk which the master negligently created by omitting some precaution which, in the exercise of ordinary care, ought to have been taken, cannot be regarded as one of the ordinary risks of the employment, which the servant, as matter of law, is presumed to have assumed. This principle "has been formulated and applied so frequently as to have become axiomatic." 1 Labatt, Mast. & S. § 270; Ford v. Fitchburg R. Co. 110 Mass. 240, 14 Am. Rep. 598. This view has the approval of the Supreme Court. In Hough v. Texas & P. R. Co. 100 U. S. 213, 25 L. ed. 612, that court held that it is implied in the contract of service "that the master shall supply the physical means and agencies for the conduct of his business. It is also implied, and public policy requires, that in selecting such means he shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business. Nor is it one which the servant, in legal contemplation, is presumed to risk."

The conclusion of the court in the opinion just read can only be sustained on the theory that the danger was so obvious that a person of ordinary prudence would not have continued the work. I find nothing in the record showing that it was apparent and obvious that the roof of the mine was about to fall. It is to be presumed that the jury,

as instructed by the trial judge, would have found for the defendant if such had been the fact. On the contrary, there is much to show that the danger did not appear to be imminent. It is not reasonable that Mason would have pronounced it safe and instructed the deceased to continue work if the danger had been obvious; and, besides, the instinct of self-preservation is to be considered and weighed against the supposition that the deceased incurred obvious and plain peril. The question was clearly one for the jury. *Kreigh v. Westinghouse*, C. K. & Co. 214 U. S. 249, 53 L. ed. 984, 29 Sup. Ct. Rep. 619.

I dissent from the opinion and the judgment of reversal.

Petition for rehearing denied.

FLORIDA SUPREME COURT.

MOSES D. HUDSON, Appt.,
v.

FRANCES E. HUDSON.

(— Fla. —, 51 So. 857.)

Divorce — desertion — husband driven from home.

1. In a suit for divorce upon the ground of wilful, obstinate, and continued desertion, for the statutory period, it is immaterial which of the married parties leaves the marital home, the one who intends bringing the cohabitation to an end commits the desertion. The party who drives the other away is the "deserter," and a wife may drive her husband away. Same — "wilful" — "obstinate."

2. The meaning of the statutory ground for divorce, "wilful," "obstinate," and continued desertion for more than one year, considered and discussed.

(February 2, 1910.)

APPPEAL by complainant from a decree of the Circuit Court for Santa Rosa County dismissing a bill filed for divorce, Reversed.

The facts are stated in the opinion.

Mr. J. P. Stokes for appellant.

Parkhill, J., delivered the opinion of the court:

The appellant filed his bill of complaint praying for a decree dissolving the bonds of matrimony then existing between him and his wife, the appellee, upon two grounds: Wilful, obstinate, and continued desertion

for more than one year; and for extreme cruelty.

A decree *pro confesso* was duly entered against the defendant for her failure to plead, answer, or demur to the bill of complaint on the rule day succeeding that to which process of subpoena was returnable. The cause was referred to Hon. C. H. Laney, as special master, who made a report of the testimony, with recommendation that the relief prayed be granted. Upon consideration of same, the chancellor dismissed the bill, and complainant appealed.

There is no conflict in the testimony. The facts are not denied or disputed. It appears that ever since these parties were married the complaining husband was without fault, but, during the last few years of their married life, the defendant was very quarrelsome, and would fuss and curse the complainant almost every day. Upon one occasion the defendant tried to induce one Jane Thompson, daughter by a former hus-

Note. — Desertion by forcing spouse to leave marital home.

The note, as indicated in the title, is confined to the question of whether the spouse who forces the other to leave home thereby deserts the latter.

It does not include cases in which the divorce was granted on a ground other than desertion, as, for example, extreme cruelty, although the spouse was forced to leave the home because thereof. Nor does it cover the question of what conduct will justify a spouse in leaving the marital home without imputation of desertion of the other spouse.

Where a spouse by force or misconduct causes the other party to leave the marital home, the former generally is held to be guilty of desertion.

In New Jersey, it is held that the cruelty causing the spouse to leave the marital home must, in order to constitute a constructive cause for divorce *a vinculo* on the ground of desertion, have been such as would of itself constitute a ground for divorce *a mensa et thoro*. *Laing v. Laing*, 21 N. J. Eq. 248; *Thomas v. Thomas* (N. J. Eq.) 74 Atl. 125; *Sarfaty v. Sarfaty*, 53 N. J. Eq. 193, 45 Atl. 261, and in *Lynch v. Lynch*, 33 Md. 328, where a husband had left the marital home because of the wife's persecution by temper and jealousy, a divorce on the ground of abandonment was refused, the court saying that cruel treatment which is only a ground for a qualified divorce must not be allowed to be made the ground for a final divorce.

The courts in some states have gone further than this, and have held that the conduct causing the spouse to leave, in order to constitute a constructive desertion, must have been such as would have itself been ground for an absolute divorce. *Barnes*

band, to put poison in the bread intended for the complainant to eat. Jane refused to do so, and told Moses Hudson about it. Upon another occasion the defendant tried to hire a man to kill the complainant; and again about three months before the final separation of the parties, the defendant tried to get one C. C. Thompson to go hunting with complainant and shot him, pretending that the gun was discharged accidentally. Finally, one morning in May, 1905, the defendant "flew into a violent rage" at the complainant about a matter for which he was not to blame, publicly cursing and abusing him, much to his embarrassment, continuing this conduct all the morning until he left home to avoid her. Hoping that she would be friendly, Hud-

son returned to his home in the afternoon of that day, but Mrs. Hudson was just as bad as when he left her in the morning, cursing and abusing him shamefully. The complainant testified: "She ordered me out of the house, and told me to leave and never come back; that she never intended to live with me again; and that she did not want to have anything to do with me. I argued the question with her, and tried to show her where she was mistaken, but she would not hear me. She ordered me out again, and again told me never to come back, and that she would never live with me again. There being nothing else for me to do, I left. I went down to my boat and lived there the best I could." He was asked, "What was the last thing she said to you?" "Moses

v. Barnett, 27 Ind. App. 466, 61 N. E. 737; Dwyer v. Dwyer, 16 Mo. App. 422,—none of the other cases cited in the note expressly imposes that condition. In many of the cases, however, where decrees were allowed on the ground of desertion, the conduct of the spouse forcing the other party to leave home was such as would have itself constituted an independent ground for divorce under the local law.

Ordering or driving spouse away.

In the following cases the facts were held to show a desertion by the spouse who ordered the other party to leave the marital home: *Brown v. Brown*, 79 L. T. Rep. N. S. 102 (telling wife she must find another home, and removing her furniture); *Jones v. Jones*, 95 Ala. 443, 18 L.R.A. 95, 11 So. 11 (requiring wife to leave house, and failing to provide for her); *Hall v. Hall*, 25 Ky. L. Rep. 1304, 77 S. W. 668 (sending wife away from husband's home, and vowing that he would not live with her); *Gloster v. Gloster*, 23 App. Div. 336, 48 N. Y. Supp. 160 (driving wife from house, and denying her right to live there, because she refused to promise not to go near her people); *Reid v. Reid*, 21 N. J. Eq. 331 (leaving home with intent not to return, and subsequently selling it, resulting in wife's being ejected, and sale of furniture); *Rigsby v. Rigsby*, 82 Ark. 278, 101 S. W. 727 (causing wife's departure by unreasonable conduct toward her children by former marriage, and attack on one of them).

And in *Albee v. Albee*, 141 Ill. 550, 31 N. E. 153, where the husband was suing for a divorce on the ground of desertion, the wife having left his home because of mistreatment by his mother, the court said that, under the circumstances, the one who was away from home could truly be said to be the deserted one, and the one who remained the deserter.

Leaving the marital home in consequence of mere warnings to leave, quarrels, or family unpleasantness is not, however, generally held sufficient to constitute deser-

tion on the part of the spouse who remains. Thus, desertion by the spouse remaining in the marital home, where the other spouse left on account of the former's alleged misconduct, has been denied under the following circumstances. *Smith v. Smith*, 4 Pa. Dist. R. 397 (where wife who owned house told husband that unless he went she would find some way to compel his withdrawal); *State v. Luper* (Or.) 95 Pac. 811 (where, upon husband's return from hospital, wife told him he need not come home for her to wait on, that he might as well go back to the hospital and stay there); *Barnett v. Barnett*, 27 Ind. App. 466, 61 N. E. 737 (where husband, because of objections to wife's long visits to her relatives, told her she had better go home, and that if she did not, he would throw her things into the road); *Rodenbaugh v. Rodenbaugh*, 17 Pa. Co. Ct. 477 (where wife left because of trouble with husband's mother); *Dwyer v. Dwyer*, supra (where wife left because of family unpleasantness, and because husband displaced her as mistress of house, and installed daughter).

A husband leaving home because his wife told him he could not come home, and that she would not live with him if he continued to carry on a saloon, cannot charge her with desertion under a statute providing that "departure or absence of one party from the family dwelling place, caused by cruelty or by threats of bodily harm from which danger would be reasonably apprehended from the other, is not desertion by the absent party, but it is desertion by the other party." *Barrett v. Barrett*, 20 S. D. 210, 105 N. W. 463.

In Pennsylvania, turning a wife out of doors is a special ground for divorce, and to justify such act the husband must show such treatment on her part as would entitle him to a divorce. *Gordon v. Gordon*, 48 Pa. 226; *Sowers's Appeal*, 89 Pa. 173; *Grove's Appeal*, 37 Pa. 443.

Cruelty and abuse forcing spouse to leave.

The facts in the following cases were held to show a desertion by the spouse

Hudson, you God damn son of a bitch, you can't call me 'wife' any more, and I will never live with you another day," was her answer. According to the testimony of one of the witnesses, "She quit him. She called him a God damn son of a bitch. She told him he could never call her 'wife' again. She told him he had to go. He went off in the morning and came back in the evening. She cursed him out again, and told him that she didn't want him around the place. He went down to the boat and lived there." The parties have not lived together since that time,—a period much longer than the one year prescribed by the statute. We think the testimony sustains the ground of a wilful, obstinate, and continued desertion for more than one year.

First, as to desertion. Mr. Bishop, in the second volume of his work on Marriage and Divorce, p. 597, says: "It is immaterial which of the married parties leave the marital home, the one who intends bringing

the cohabitation to an end commits the desertion. Thus, to drive away the wife from the house is to desert her." The party who drives the other away is the deserter, and a wife may drive her husband away. 5 Am. & Eng. Enc. Law, p. 803. See *Gray v. Gray*, 15 Ala. 779, 784; *Skean v. Skean*, 33 N. J. Eq. 148.

The testimony shows that the defendant was the one who intended to bring the cohabitation to an end. After years of cursing and abusing her husband, endeavoring to take even his life, and with violent language and epithet most opprobrious she drove this patient, nonoffending man from the marital home. There is no doubt about the meaning of her declaration: "Mess Hudson, you God damn son of a bitch, you can't call me 'wife' any more, and I will never live with you another day." The wife was the deserter.

Was the desertion wilful? Wilful means on purpose—intentional. As we have seen,

forcing the other party to leave the marital home by cruelty and abuse: *Daeters v. Daeters* (N. J. Eq.) 38 Atl. 950 (wife compelled to leave husband because of mistreatment received after she denied him marital rights upon learning that she had contracted venereal disease from him, and his failure for two years to solicit her return); *Harding v. Harding*, 22 Md. 337 (husband's violent conduct toward wife, accusing her of unfaithfulness, whereby wife was compelled, from fear of personal injury, to leave home before recovery from confinement); *Starkey v. Starkey*, 21 N. J. Eq. 135 (beating wife, threatening to kill her, and telling her to leave the house right away, abandonment by husband if proven, which it was not in this case); *Davenport v. Davenport*, 106 Va. 736, 56 S. E. 562 (wife compelled to leave home by husband's abusive language, violence to her person, and threats of greater violence); *Lister v. Lister*, 65 N. J. Eq. 109, 55 Atl. 1093; *Wood v. Wood*, 27 N. C. (5 Ired. Eq.) 674 (abuse of wife amounting to extreme cruelty, causing her to leave, constructive desertion); *Weigand v. Weigand*, 41 N. J. Eq. 202, 3 Atl. 699, affirmed in 42 N. J. Eq. 699, 11 Atl. 113 (forcing wife to leave home by cruel treatment, and by husband's insistence that his paramour live in the family); *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249 (treatment by husband, addicted to habitual intoxication, amounting to extreme cruelty); *Howe v. Howe*, 16 Pa. Super. Ct. 193 (cruelty and barbarous treatment by husband, endangering wife's life); *Setzer v. Setzer*, 128 N. C. 170, 83 Am. St. Rep. 666, 38 S. E. 731 (compelling husband to leave because of wife's cruelty, abandonment by wife); *Burnett v. State*, 72 Ark. 398, 81 S. W. 382 (unmerited reproach, rudeness, contempt, and neglect, 29 L.R.A. (N.S.)

rendering wife's condition intolerable, causing her to consent to separation); *Edwards v. Edwards*, 62 L. J. Prob. N. S. 37 (acts of husband in driving his wife away by threats, accompanied by the display of a knife, and afterward living in adultery).

But in the following cases there was held to be no desertion shown: *Sarfaty v. Sarfaty*, 59 N. J. Eq. 193, 45 Atl. 261 (unkind treatment, a single instance of physical violence a long time previous, an order during a quarrel by the husband that wife leave his house, where she did not leave for two weeks, and the order was not repeated); *Renk v. Renk* (N. J. Eq.) 38 Atl. 427 (evidence that the husband was not inclined to quarrel, that the wife was very nervous, that in one quarrel the husband got a pistol and proceeded to load it, saying he would shoot himself, but did not point it at his wife, and further evidence of a quarrel in which the wife struck the husband with a stove-lid lifter, after which she left home).

The Massachusetts statute provides that a divorce may be decreed in favor of either party "whom the other shall have wilfully and utterly deserted;" and it is held under this statute that extreme cruelty on the husband's part, and a failure to provide for the wife, in consequence of which she left his home, do not amount to desertion on his part. *Pidge v. Pidge*, 3 Met. 257; *Fera v. Fera*, 98 Mass. 155; *Padelford v. Padelford*, 159 Mass. 281, 34 N. E. 338.

But in *Lea v. Lea*, 99 Mass. 493, 96 Am. Dec. 772, where the question was as to the conclusiveness of a decree in a former suit by the husband, who had forced his wife to leave by his cruelty, to show that there had not been such a desertion by the husband as would enable the wife to maintain a bill, the court said that the

the defendant intentionally and on purpose and wilfully brought the cohabitation to an end. *Crawford v. Crawford*, 17 Fla. 180.

Was the desertion obstinate? Obstinate means determined—fixed—persistent. During all the years of the separation, the deserting wife was determined, fixed, and persistent in putting an end to the cohabitation, in her desertion, although her husband lived near by in his boat, "the best he could." All that time she made no effort to bring about a reconciliation or a restoration of the marital relations, which she had terminated.

In New Jersey, where the desertion must be, like here, "wilful, continued, and obstinate," in *Jerolaman v. Jerolaman* (N. J. Eq.) 54 Atl. 166, where the husband, being in fault, was the deserter, the court said: "The question in the case is whether the separation was continued and obstinate on his part for two years after that time. The separation in this case was, as I have stated, legally chargeable to the husband; and un-

der the rule applied in cases of this character, it was the duty of the husband to reform his habits, and after such reformation, and within the two years, seek out his wife, and apply to return, giving her reasonable assurances of the sincerity of his reformation, and of her probable safety in resuming marital relations." In *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249, the court said: "If, however, the husband's cruelty was not of such intensity as to amount to desertion, still it was such as to justify the wife in temporarily separating herself from him, and it was his duty to seek a return. This he did not do, but for many years remained entirely passive, manifesting no interest in her welfare, or desire to resume marital relations. This, under the circumstances, constituted desertion, and entitles the wife to a decree."

We are not unmindful that the marital relation is recognized, both legally and mor-

statute expressly authorized the party withdrawing on account of cruelty or neglect to obtain a divorce after five years.

There are *dicta* in *Warner v. Warner*, 54 Mich. 492, 20 N. W. 557, that where a wife is forced to leave home because of the husband's cruelty, it constitutes a desertion on his part.

The court in *Camp v. Camp*, 18 Tex. 528, said that if a wife were compelled to leave her husband for good cause, he would be regarded as guilty of desertion. In that case, however, the husband, who was guilty of misconduct, left the wife.

In *Frush v. Frush* (N. J. Eq.) 20 Atl. 261, the court said that a husband might, by a course of cruel treatment, drive his wife from home, and that, under certain circumstances, this would be considered a desertion by him. In that case a divorce was refused on the wife's unsupported testimony, where there was no showing that his alleged cruel conduct was unprovoked.

It was held in *Houliston v. Smyth*, 3 Bing. 127, that if a wife left her husband while under such apprehension of personal violence as a jury might find to have been reasonable, the husband was liable for her support thereafter.

In *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781, it was held that a court of chancery had power to grant alimony without a contract of separation, where the husband's conduct rendered it unsafe for the wife to live with him, or he turned her out of the home without providing for her.

And in *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891, which was an action for separate maintenance, it was held that if the husband voluntarily does that which compels the wife to leave him, it would be presumed that he intended that result, and 20 L.R.A. (N.S.),

such acts will be held a desertion on his part.

But it was held in *G— v. G—*, 67 N. J. Eq. 30, 56 Atl. 736, that where a wife separates from her husband on the ground of his cruelty, there is no desertion on his part which will warrant a divorce *a vinculo* if he furnishes her competent support during the statutory period necessary to constitute desertion.

Forcing wife to leave by adultery.

Where the husband permits his mistress to remain at his home, and thereby causes his wife to leave, it is generally held to furnish the wife a ground of divorce on the ground of his desertion.

This result was reached in the following cases: *Marker v. Marker*, 11 N. J. Eq. 256 (forcing wife to leave home by keeping lewd women there with whom he cohabited); *Koch v. Koch* [1899] P. 221 (husband carrying on adulterous intercourse with a servant in the home, and refusal to discharge her); *Dickinson v. Dickinson*, 62 L. T. Rep. N. S. 330 (act of husband in bringing woman with whom he sustained immoral relations home, and in response to wife's stating that either she or the woman must go, replying that the wife could do as she pleased).

The husband's adultery at a place other than his home, because of which the wife leaves him, is generally held not to constitute desertion by him. *Stiles v. Stiles*, 52 N. J. Eq. 446, 29 Atl. 162; *Lake v. Lake*, 65 N. J. Eq. 544, 56 Atl. 296; *Graves v. Graves*, 3 Swabey & T. 350.

In *Sickert v. Sickert*, 81 L. T. Rep. N. S. 495, it was held that the husband's admissions that he had been guilty of adultery, and a further statement that he could

ally, as imposing obligations pre-eminently on the husband. As the husband generally does the courting before marriage, he may well continue it afterwards. As pointed out in *Sargent v. Sargent*, 36 N. J. Eq. 644, society, so far, at least, has regarded his duty in maintaining and preserving those relations as of the superior order. "Not that the tie is more sacred or less binding on the part of the wife, but where the act of desertion occurs without reason on his part and without fault on her side, the same efforts to restore harmonious relations are not expected from her as would be from him, if the case were reversed." The principle that the integrity of the matrimonial tie requires this of the husband is stated by the

chancellor in *Schanck v. Schanck*, 33 N. J. Eq. 363. That was a case where a wife in anger told her husband that he "might go his way, and she would go hers," and gave other evidence of her desire that they should live separate, but immediately retracted and besought him not to go, and he, notwithstanding her entreaties, left her, in a passion, and, without any attempt at reconciliation, and without contributing anything towards her support, or even communicating with her in any way, remained away from her for three years, living all the time in the same county with her; and the court held that she was entitled to a divorce for desertion. "Under the circumstances of the case," said the court, "the husband owed a

not change his mode of life, which caused his wife to leave him, amounted to a desertion by him.

And in *Holston v. Holston*, 23 Ala. 777, a divorce was granted to the wife on the ground of abandonment, where she separated because she had reason to believe her husband had another wife living.

In *Morris v. Morris*, 20 Ala. 168, a bill alleging that the husband drove his wife out of his house, and that he lived in adultery with another woman, was held equivalent to an allegation that he had abandoned the wife.

Failure to support.

Mere failure to furnish the wife support, because of which she is forced to leave home, is generally held not to entitle her to a divorce on the ground of desertion.

Thus, in *Skean v. Skean*, 33 N. J. Eq. 148, a failure to furnish sufficient food and proper care to the wife, because of which she left him, was held not to constitute a desertion on the husband's part. The court said: "The husband may drive his wife away, or he may treat her so brutally as to compel her to flee for safety, or his conduct may be so cruel and malignant as to show that he means to force her away. If a wife, for either of these causes, separates herself from her husband, and he allows her to remain away for the statutory period, without professing sorrow for his violations of conjugal duty, and promising to amend his conduct, and asking her to return, he, in the eye of the law, is the deserter, and she has a right to ask for a dissolution of the marriage tie. But a mere failure by a husband to furnish his wife a sufficient support is not a ground of divorce; nor will he be considered a deserter if she leaves him for that cause."

To the same effect are *Palmer v. Palmer*, 22 N. J. Eq. 88; *DeWitt v. DeWitt* (N. J. Eq.) 36. Atl. 20; *McVickar v. McVickar*, 46 N. J. Eq. 490, 19 Am. St. Rep. 422, 19 Atl. 249; *Sandford v. Sandford*, 32 N. J. Eq. 420; *Farrier v. Farrier* (N. J. Eq.) 58 Atl. 1079; *Thomas v. Thomas* (N. J. Eq.) 74 Atl. 125; *Gumbert v. Gumbert*, 30 29 L.R.A. (N.S.)

Pittsb. L. J. N. S. 110; *Leshner v. Leshner*, 9 Pa. Dist. R. 69.

So, in *Bennett v. Bennett*, 43 Conn. 313, the husband's inability to support his wife, and a request that she return to her father's home, were held not to show a desertion by the husband.

So, in *Laing v. Laing*, 21 N. J. Eq. 245; *Plimley v. Plimley*, 35 N. J. Eq. 18, it was held that the husband's intemperance and improvidence, whereby the wife left the home, did not show a desertion on the part of the husband.

And in *Levering v. Levering*, 16 Md. 213, the intemperance of a husband, and a single act of personal violence, and failure to furnish necessaries and comforts, on account of which the wife left home, were held not to show an abandonment by the husband, it appearing that he furnished all within his reach, and was ready to receive the wife back.

But in *James v. James*, 58 N. H. 266, where it appeared that a husband had ability to provide, and the wife was compelled to separate from him because of his drunkenness and failure to support her, it was held that there was a desertion on his part. The court said: "There is no distinction in principle between the desertion by the husband, under such circumstances, and the compulsory separation caused by his ill-conduct. In the one case he abandons her to suffer and starve by his voluntary desertion of her; in the other, he leaves her to the same fate by his voluntary ill-treatment and neglect."

And in *Curlett v. Curlett*, 106 Ill. App. 81, where the husband had ability to support his wife, his failure to provide food and a home, which forced his wife to return to her mother's, was held to be a desertion on his part, although non-support constituted no ground for divorce.

And in *High v. Bailey*, 107 N. C. 70, 1 S. E. 45, where there was testimony tending to support it, a charge that if the husband made his wife leave, or so failed to provide for her support that she was compelled to leave in order to provide for herself and family, it would amount to desertion, was sustained.

J. T. W.

duty to his wife—a duty to society—to avoid, as he well might have done, the consequences which his punctilious resentment (so exacting that he would not even condescend to propose the terms on which it might be appeased) has inflicted upon his wife. . . . It is clear that she never intended to desert him. Her letters, offered in evidence by him, contain the very strongest expressions of affection, and were undoubtedly sincere. Were he before the court, asking a divorce from her on the ground of desertion, his application would be denied for the reason that he has been derelict in his duty towards her under the circumstances." And so would we say, in the instant case, upon similar facts. In view of the facts stated in *Wilson v. Wilson*, 66 N. J. Eq. 237, 57 Atl. 552, the court said: "An injured wife, under such circumstances, is not bound to invite her husband back,—to invite him to return and resume a career of brutality, drunkenness, or other misconduct which has made her life miserable. It is the duty of the husband to repent, and signify his repentance to his wife."

In *Trall v. Trall*, 32 N. J. Eq. 231, this rule is correctly stated: "Even if a wife deserts without cause, and afterwards realizes that she has acted hastily or foolishly, and would return if the way was opened for her, but the husband refrains from doing anything to induce her to return, for the purpose of making her absence a ground of divorce, her desertion is not obstinate, and not, therefore, a ground of divorce. . . . In such a case she remains away, not of her own will, but because she cannot get back without danger of being repulsed or subjected to the pain of humiliation that no husband has the right to inflict upon his wife." As peculiarly applicable to the instant case, the court went on to say: "But a careful study of the temper and disposition of this woman, as portrayed in the evidence, has satisfied me that any effort on the part of her husband to induce her to return would most probably have resulted in strengthening her determination to remain away." And the court held that a husband is not bound to attempt to induce his wife to return, when it is clear any effort in that direction would be unavailing. Continuing, the court said: "The case is a very sad one. The parties are both well advanced in years. Their married life covers a period of more than thirty years. The ties that once bound them together were strengthened by the birth of a child, who is now a man. I think most husbands and wives would regard death as a much more preferable termination of thirty years of married life than a divorce. But the ques-

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tion presented for judgment is one of blended law and fact, and not of sentiment or feeling, and must be decided by the law and the facts." The appellate court, in this case, sustained the decree of the court below, granting the husband a divorce. And so, as decided in *Lammertz v. Lammertz*, 59 N. J. Eq. 649, 45 Atl. 271: "Where the wife absented herself from her husband's home for more than two years, and such absence is not justified by her husband's conduct towards her, and the wife's conduct is such that little hope was left of a permanent reconciliation, it will be considered that the desertion is obstinate, and divorce will be decreed, though no proof was offered that the husband sought her and urged her return."

Recognizing the general rule that the husband, being the head of the household, is bound to do what he may, as a just man, to bring about his wife's return or a restoration of the marital relations, even where the original separation was wrongful on her part, yet we think, under the peculiar circumstances of the instant case, the wife's conduct was such as to make clear to anyone that any further effort by the complainant to induce his wife to return to him would have been unavailing; and that his right to a decree is not dependent upon his having done any more than was done by him in that direction. Indeed, as was said in *Trall v. Trall*, supra, "any effort on the part of her husband to induce her to return would most probably have resulted in strengthening her determination to remain away." And the evidence justifies us in adding that perhaps any further effort on his part to have continued the marriage relation would have caused her to end it by taking his life.

Was the desertion continued for one year? Yes, for nearly four years prior to the filing of this bill the wife's desertion continued, as we have seen. From the time the defendant put an end to the cohabitation, she did not live with her husband another day, as she declared would be the case when she drove him away.

We think the defendant's desertion was wilful, obstinate, and continued by the wife for more than one year, and that, under the facts of this case, as we gather them from the record, we are constrained to hold that the complainant is entitled to his decree, and that the chancellor erred in dismissing the bill.

The decree is reversed.

All concur, except Taylor, J., absent on account of illness.

UNITED STATES CIRCUIT COURT
OF APPEALS, THIRD CIRCUIT.TITLE GUARANTY & SURETY COMPA-
NY, Plff. in Err.,

v.

EMIL KLEIN, for Use of George Baglin.

(102 C. C. A. 189, 178 Fed. 689.)

Usury—loan of bonds.

The reservation of more than the legal rate of interest for the loan of bonds which are subject to fluctuation on the market is not within a statute making void any contract by which shall be reserved more than the legal rate for the loan or forbearance of money, goods, or other things in action.

(October, —, 1909.)

Note.—Applicability of usury law to loans other than of money.

This note is confined to cases of such transactions in property other than money as are, strictly speaking, loans,—that is, transactions in which the borrower was bound, or had the option, to return the loaned articles in kind. To go beyond this would necessitate a consideration of the vast numbers of cases involving transfers of property by way of sale, exchange, etc. For if the obligation is to return not property of the kind loaned, but a certain sum of money, the transaction may, with equal propriety, be called a sale of property, or a forbearance of money or a debt. It is fundamental that whether there is usury in a transaction depends primarily or ultimately upon the intention of the parties.

If the transaction has all the earmarks of bona fides, it is often called a sale, to which the usury laws do not prima facie apply; and if it is shown to be oppressive of a necessitous person, it can as readily be called a forbearance, or a cover for a usurious loan. So it has been determined to consider only cases of loans in the strict sense, and it has been found that the cases are almost unanimous in holding that the usury laws do not apply to loans other than of money, so long as they do not constitute a shift or cover for a loan of money.

Whether a contract to resell at an advance property purchased is usurious, is considered in the note to *Rogers v. Blouenstein*, 3 L.R.A. (N.S.) 213.

And a note on the question of increasing the price upon the sale of property on credit is appended to *Davidson v. Davis*, 28 L.R.A. (N.S.) 102.

The usury laws prohibit the taking of more than a specified rate of interest or compensation for the use of a certain amount in value; and whether it be money or goods so loaned, the contract, in order to be within the prohibition, must refer to a certain uncontingent repayment of the principal sum or value, and a certain uncontin-

ERROR to the Circuit Court of the United States for the Eastern District of Pennsylvania to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a surety's bond given as security for loan of United States bonds. Affirmed.

The facts are stated in the opinion.

Argued before Gray, Buffington, and Lanning, Circuit Judges.

Mr. Alexander Simpson, Jr., for plaintiff in error.

Messrs. R. Stuart Smith and Charles E. Morgan, with Mr. Dean Emery, for defendant in error:

The loan in the case at bar having been of securities, the defense of usury cannot be invoked in reference thereto, since the

gent rate in value for its use. *Morrison v. McKinnon*, 12 Fla. 552.

That the contract provides for the return of a greater quantity, though of the same kind of articles, is not sufficient. *Hamlin v. Fitch*, Kirby, 260.

So, when the subject-matter of the loan is of fluctuating value, the amount of profit derived depends upon contingencies that render the usury statutes inapplicable. *Hamlin v. Fitch* and *Morrison v. McKinnon*, supra.

The points made by the foregoing cases are dwelt on at length in *Dry Dock Bank v. American Life Ins. & T. Co.* 3 N. Y. 355, where the court says, after referring to the New York statute which is like that considered in *TITLE GUARANTY & S. Co. v. KLEIN*: "The statute would have been as comprehensive without the specifications of 'goods and things in action' as it now is. The terms 'interest' and 'forbearance' cannot be predicated of any other than a loan of money, actual or presumed. Interest is defined to be a certain profit for the use of the loan; and forbearance, the giving a further day, when the time originally limited for the return of the loan has passed. . . . Both imply that the thing loaned has an established value, so that the lender, on its return, with the compensation fixed by law for the use and risk, may receive a 'certain profit.' Now this is true only of money, which is legally supposed to have a fixed, unchangeable value in itself, and to be consequently the true measure of the value of all other property. A fixed rate per cent of money, therefore, in contemplation of law, is supposed to give to the lender a 'certain profit,' because the thing loaned is of the same value at the end of the term as at its commencement. This is not true, in fact, even of money. And the law does not affirm it to be true of anything else. Accordingly, a loan of goods is not within the statute, whatever may be reserved for their use. . . . Nor of stock or grain to be returned in kind. . . . Nor of stock converted into money, by arrangement to be replaced by other stock. . . . Nor of choses in action. . . . It is unnecessary

application of the law of usury can only be founded on a loan or forbearance of money.

Dry Dock Bank v. American Life Ins. & T. Co. 3 N. Y. 344; *Meaker v. Fiero*, 145 N. Y. 165, 39 N. E. 714; *Orvis v. Curtiss*, 157 N. Y. 657, 68 Am. St. Rep. 810, 52 N. E. 690; *Bull v. Rice*, 5 N. Y. 315; *Siewert v. Hamel*, 91 N. Y. 201; 29 Am. & Eng. Enc. Law, 2d ed. pp. 468, 469.

A loan of securities is not a loan of money.

Webb, Usury, § 54; *Stevenson v. Unkefer*, 14 Ill. 103; *Hamlin v. Fitch, Kirby*, 260; *Steptoe v. Harvey*, 7 Leigh, 501; *Hoag v. Greenwich*, 133 N. Y. 152, 30 N. E. 842; *Cowenhoven v. Pfluger*, 22 App. Div. 464,

47 N. Y. Supp. 1122; 29 Am. & Eng. Enc. Law, 2d ed. pp. 433, 434.

While it is true that a loan or sale of a promissory obligation by the promisor or obligor himself may be invalidated for usury, yet once such an obligation has had a legal inception, it may be disposed of at any valuation without constituting usury.

Eastman v. Shaw, 65 N. Y. 522; *Sweny v. Peaslee*, 42 N. Y. S. R. 485, 17 N. Y. Supp. 225; *Dry Dock Bank v. American Life Ins. & T. Co.* *supra*.

Gray, Circuit Judge, delivered the opinion of the court:

This case arose out of the same state of facts as those that have been recited in

to multiply cases. They all proceed upon the doctrine that the value of everything which can be the subject of a loan, except money, is subject to fluctuation; and consequently that an individual who loans 5 bushels of wheat, to receive 10 after harvest, or who, to sustain the credit of a friend, loans him a bond and mortgage for a month, may at the end of the term, from the depreciation of the commodity or security, receive in value less than he parted with, interest included." At another point in the opinion the court says: "It is sometimes asked why should a man be permitted to receive 10 per cent on an exchange of notes, when, if he advanced money on the same security, he would get but 7. The answer is, for the same reason that he is permitted to receive \$20 for six months' use of furniture valued at \$100. The one is prohibited, the other not. No man can exchange his promise to pay \$110 at the end of the year, for \$100 in cash. First, because he would thereby agree to refund in kind precisely what he had received, and this is the definition of a loan; and the \$10 must therefore be a compensation to the lender for the use of the money, whatever name may be given to the transaction. This the statute forbids. The legislature have fixed the interest of money at 7 per cent. This includes a compensation for the use, and the risk of its repayment. Nothing more can be received by or secured to the lender. The consequence is, that a promise to pay \$107 in a year is in law, an equivalent for \$100 in money presently received, no matter whether the promise is made by a Rothschild or a pauper. This is legally true because the legislature have so enacted. But they have not declared that a promise to pay money is money, or its precise equivalent, in any case except that of a loan. Hence upon an exchange of promises, as in an exchange of property, parties are left to their own judgment as to their relative value. They are sales, subject to the same rules, and their validity tested in the same manner as other sales. Upon the sale of property on time, the purchase money becomes a debt which is forborne for the period limited by the credit."

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Tate v. Wellings, 3 T. R. 531, is frequently cited as a leading case. It was held in that case that a transfer of stock under an agreement that the borrower should replace it on a certain day, or repay in money on a subsequent day, with such interest in the meantime as the stock would have produced, was not usurious, although the interest exceeded the lawful rate, it not appearing that the transaction was a mere device to obtain more than legal interest. Whether the transaction became usurious after the failure to return the stock at the stipulated time, the court said, was another question.

Under a usury statute defining interest as compensation for the use of money, usury can obtain only in transactions for money, and the statute therefore has no application to a bona fide loan of government bonds that are to be returned, although the borrower undertakes to pay to the lender full legal interest on the amount loaned, and also the interest paid on the bonds by the government. *Marshall v. Rice*, 85 Tenn. 502, 3 S. W. 177.

It was held in *Doak v. Snapp*, 1 Coldw. 180, that a so-called sale at par of depreciated state bonds to be paid in kind or their equivalent in money, together with full legal interest, was not necessarily usurious.

And a loan of depreciating United States final settlement certificates, providing for the repayment of a like sum, and in the same kind of certificates, with lawful interest on the loan, was held not to be usurious merely because the borrower also undertook to pay an additional sum in money to the borrower. *Hamlin v. Fitch*, *supra*.

So, a contract is not usurious by which one procuring a loan of depreciated securities undertook to pay more than their then market value plus legal interest, where he was given the option to redeliver the same securities in satisfaction of the loan. *Wads worth v. Champion*, 1 Root, 393.

And a contract of a borrower of 142 shares of bank stock, to return such shares at the end of a year, together with 30 additional shares, does not, when not intended as a cover for money, violate a statute forbidding the taking of value greater than \$6 per

the case of this plaintiff in error against George Baglin (No. 55, October term) 178 Fed. 682, and it has been agreed between counsel that the facts set forth in the record of that case, so far as they are relevant, will be considered as part of the record in this case.

Linderman and the plaintiff in error, the surety company, occupied positions in this transaction similar to those that they occupied in the Baglin Case, and in each instance the plaintiff below was acting on behalf of F. A. Heinze, and in both cases the transaction had to do with the loan of government bonds. But, as pointed out in the brief of defendant in error, the transaction between Klein and Linderman was a straight loan of United States 3's, due in 1908, and the loan itself was the first step in any transaction between Klein and Baglin. It had nothing whatsoever to do with the proceeds of any note discounted by the Metropolitan Trust Company, or otherwise. In short, Linderman desired financial assistance, and, on application to Heinze, the latter arranged to have Klein, his representative, loan Linderman United States 3 per cent bonds, upon condition that Linderman should give a surety company undertaking for their return, and there was no question of any extension of Linderman's time to perform his contract to return the bonds. The whole transaction, and the only transaction, between plaintiff and defendant is, as set forth in the bond in suit, signed and sealed the 1st day of August, 1907, in which Linderman, as principal, and the defendant company, as surety, were bound in the usual

form in the sum of \$30,000, to be paid to Klein, the plaintiff. The recital and condition of said bond is as follows:

"Whereas, the said Emil Klein has loaned, or is about to loan, to Garrett B. Linderman, United States government 3's coupon bonds due 1908, of the par value of thirty thousand dollars, a true and correct list whereof is hereto attached marked 'Exhibit A' and made part hereof; and "Whereas, the said Garrett B. Linderman has promised and agreed to return to the said Emil Klein the aforementioned securities, on or before the fourth day of November, 1907.

"Now the condition of this obligation is such that if the said Garrett B. Linderman, his heirs, executors, administrators, successors or assigns, shall and do return to the said Emil Klein, his executors, administrators and assigns, the above-mentioned securities on or before the 4th day of November, 1907, then this obligation shall be void; otherwise to remain in full force and virtue."

As in the Baglin Case, the surety company was paid a fee or commission for this undertaking, and received a deposit of stock from Linderman, as collateral indemnity thereto. The same questions were raised in the argument of this writ of error as were raised in the Baglin Case, and need not be again discussed.

An additional question, however, is presented by the plaintiff in error's contention, that the New York law on the subject of usury makes the claim void. This contention is founded upon the following finding of fact by the trial judge: "A question peculiar to this suit remains to be considered.

hundred for the loan of money, wares, merchandise, or other commodities. *Steptoe v. Harvey*, 7 Leigh, 501.

And a loan of suspended bank notes returnable, by tacit understanding, in like notes, was held in *Curtis v. Leavitt*, 17 Barb. 309, not to be usurious although the borrower immediately discounted the notes for specie.

A statute regulating the loan of "money, wares, or merchandise, bonds, notes, or other commodities" does not apply to a loan of corn. *Morrison v. McKinnon*, 12 Fla. 552.

A fortiori, a loan of corn is not within the meaning of a statute prescribing the maximum percentage to be taken for the use of "money." *Easterlin v. Rylander*, 59 Ga. 292.

So, a contract is not usurious by which one obtaining live stock from another undertakes to return the number obtained and an additional number that bears to the original number a ratio that exceeds the rate of lawful interest, where there is nothing to show that the transaction was intended merely as a cover for a loan of money. *Spencer v. Tilden*, 5 Cow. 144; *Holmes v. Wetmore*, 5 Cow. 149, note (a); *Cummings v. 29 L.R.A. (N.S.)*

Williams, 4 Wend. 679; *Whipple v. Powers*, 7 Vt. 457.

And a loan of eleven cows for \$50.75 per year, the transferee undertaking to return the cows with as many calves, worth \$203, or pay that amount in cash, and the lender agreeing to stand all losses that appear to be providential, is not usurious. *Bull v. Rice*, 5 N. Y. 315.

So, a contract to pay for sheep a certain sum in future, in addition to a certain weight of wool per year for each sheep purchased, is not necessarily usurious although the value of the wool reserved may exceed the legal rate of interest. *First Nat. Bank v. Owen*, 23 Iowa, 185; and *Gilmore v. Ferguson*, 28 Iowa, 220.

And there is no usury in a contract of one obtaining sheep, given another to return upon one year's notice the same number of sheep of equal quality and age, and in the meantime to pay annually for the use of each sheep a sum which was greater than the amount of interest computed at the highest lawful rate upon the basis of the value of the sheep. *Hall v. Haggart*, 17 Wend. 280.

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When the United States 3's were delivered, Linderman paid the sum of \$900 to Klein, and this money was afterwards paid to Heinze. It included $1\frac{1}{2}$ per cent interest for three months upon the par value of the government bonds, and $1\frac{1}{2}$ per cent commission, and the defense is set up that the payment of the commission was usurious and made the whole transaction invalid. The New York statute upon the subject of usury is as follows:

"Sec. 5. 'All bonds, bills, notes, assurances, conveyances, all other contracts or securities whatsoever except bottomry and respondentia bonds and contracts, and all deposits of goods or other things whatsoever, whereupon or whereby there shall be reserved or taken, . . . any greater sum or greater value, for the loan or forbearance of any money, goods, or other things in action, than is above prescribed [that is, 6 per cent interest] shall be void.'" Consol. Laws, chap. 20, § 373.

As pointed out by the learned trial judge, it is argued in support of this point that, if the loan of United States bonds, the return of which is guaranteed by the defendant, was usurious, and Linderman's contract for the return of the same therefore void, the collateral contract of the surety company was also void, though it had been paid \$300 for its undertaking, which was further secured by the personal liability of Linderman, and the deposit by him of stock securities whose face value was greater than the amount of the bond.

Passing any question that might be raised as to the effect of the New York usury law on the secondary obligation of the defendant, we note the fact commented on by the trial judge, that, by the bond in suit, the defendant guaranteed that Linderman would return certain named securities, called United States 3's, on a specified day, and that the contract by which Linderman was bound imposed no other obligation upon him. It has long been well settled by the decisions of the court of last resort in the state of New York, as well as elsewhere, that such usury laws are applicable only to a loan of money, and that the terms "interest" and "forbearance" cannot be predicated of anything other than a loan of money. It has never been doubted that such securities as those with which we are here concerned, and all other forms of obligation for the payment of money, can be bought and sold at any discount greater than the prescribed rate of interest, without contravening the usury laws, provided always that the transaction is in good faith, and not a mere cloak or device for covering a usurious contract; and when it is asserted that the transaction was intended as such

cloak or device, such intent must be satisfactorily proved by the party asserting it. Not only is there no evidence of such intent disclosed by the record in this case, but the contrary clearly appears, both from the testimony in the present case and from that in the Baglin Case, which has been stipulated into this record. The United States bonds that were the subject of this loan were bought and sold on the market, and, though in market parlance "gilt edged," they were undeniably subject to fluctuation, and for that reason, among others, were not be regarded as a loan of money, or within the purview of the usury laws.

Klein, himself cashier of a national bank, testified that the fluctuation on these bonds amounted to two or three points in 1907, the year in which they were loaned. There can be no question that the plaintiff would have been obliged to accept these or similar bonds, even if their market value had depreciated.

We have no difficulty in agreeing with the learned trial judge in his conclusion that the loan of these bonds, under the circumstances disclosed by the evidence, did not constitute a usurious transaction, within the meaning of the New York statute in that behalf.

The judgment of the court below is therefore affirmed.

SOUTH CAROLINA SUPREME COURT.

SOUTHERN SEATING & CABINET COMPANY, Appt.,

v.

FIRST NATIONAL BANK, Respnt.

(— S. C. —, 68 S. E. 962.)

Bank — lost check — duplicate — payment.

Where presentation of a check makes the bank liable therefor to the holder, one who, after giving a check, signs an order directing the bank to pay to the holder the amount of such check if it is still unpaid, takes the risk of the subsequent presentation of such check, and the bank may be required to pay both checks if the deposit account has funds.

(September 26, 1910.)

Note. — Risk of giving second check, upon alleged loss of first.

The decision in *SOUTHERN SEATING & CABINET Co. v. FIRST NAT. BANK*, that the drawer by executing a duplicate check, in case of an alleged loss of the original, assumes all risk as to loss arising from the latter, is logical inasmuch as he is in a

APPEAL by plaintiff from a judgment of the Common Pleas Circuit Court for Charleston County in defendant's favor in an action brought to recover the amount alleged to be due on a certain check. Reversed.

The facts are stated in the opinion.

Mr. Nathaniel B. Barnwell, for appellant:

A depositor can issue a duplicate check upon a bank where he has funds sufficient to pay both the original check and the duplicate check, and have the duplicate check paid if presented before the original, and the bank cannot refuse to pay it.

Merchants' Nat. Bank v. Ritzinger, 118 Ill. 484, 8 N. E. 834; *Benton v. Martin*, 31 N. Y. 382; *Hazzard v. Shelton*, 15 Ala. 62, 48 Am. Dec. 129; *Downes v. Church*, 13 Pet. 205, 10 L. ed. 127; *Walsh v. Blatchley*, 6 Wis. 422, 70 Am. Dec. 469; *Angaletos v. Meridian Nat. Bank*, 4 Ind. App. 573, 31 N. E. 368.

A check on a bank operates as an assignment *pro tanto* of the drawer's deposit account in bank, so that, upon presentation, the holder may maintain an action against the bank for wrongfully refusing payment.

Loan & Sav. Bank v. Farmers' & M. Bank, 74 S. C. 210, 114 Am. St. Rep. 991, 54 S. E. 304; *Fogarties v. State Bank*, 12 Rich. L. 518, 78 Am. Dec. 468; *Simmons Hardware Co. v. Bank of Greenwood*, 41 S. C. 177, 44 Am. St. Rep. 700, 19 S. E. 502; *Leaphart v. Commercial Bank*, 45 S. C. 569,

33 L.R.A. 700, 55 Am. St. Rep. 800, 33 S. E. 939; *McGahan v. Lockett*, 54 S. C. 367, 71 Am. St. Rep. 796, 32 S. E. 429; *Merchants' & P. Bank v. Clifton Mfg. Co.* 56 S. C. 320, 33 S. E. 750, 34 S. E. 411; *Calaham v. Bank of Anderson*, 69 S. C. 374, 48 S. E. 293, 2 A. & E. Ann. Cas. 203; *Livingstain v. Columbian Bkg. & T. Co.* 77 S. C. 306, 22 L.R.A. (N.S.) 442, 122 Am. St. Rep. 568, 57 S. E. 182; *Smith v. Nelson*, 53 S. C. 294, 24 L.R.A. (N.S.) 644, 65 S. E. 261; *Bickford v. First Nat. Bank*, 42 Ill. 238, 89 Am. Dec. 436; *Gage Hotel Co. v. Union Nat. Bank*, 171 Ill. 531, 39 L.R.A. 479, 63 Am. St. Rep. 270, 49 N. E. 420; 2 Dan. Neg. Inst. 5th ed. § 1638; *Morse, Banks & Bkg.* 471.

Any language or act which makes an appropriation of a fund amounts to an equitable assignment of the fund.

2 Am. & Eng. Enc. Law, p. 1055; *McConaughy v. Bennett*, 50 W. Va. 172, 40 S. E. 546; *McGahan v. Lockett*, supra; *Ferner v. Smith*, 31 Neb. 107, 11 L.R.A. 528, 23 Am. St. Rep. 510, 47 N. W. 632.

Memoranda may affect the negotiability of commercial paper; but this is an action between the original parties, so that the question of negotiability does not arise, and in order to establish its validity, the negotiability of commercial paper does not enter into the question.

Livingstain v. Columbian Bkg. & T. Co. supra; 7 Cyc. Law & Proc. p. 521; Dan. Neg. Inst. (5th ed.) § 104.

position to require an indemnity bond, and this position is supported by what little authority has been disclosed bearing upon the question.

Thus in *Benton v. Martin*, 31 N. Y. 382, where the lower court had implied a special agreement from the use of the word "duplicate" on a draft given in place of one alleged to be lost, that it was to be effectual as an order for the money if the drawees would pay it, but to be considered a denial of the drawer's liability in case the drawees refused to pay it, in holding that the only intention of the parties in using the word was to prevent payment of both drafts, the court said: "It might happen that the first bill had been negotiated and had come into the hands of a bona fide holder, and been withheld from presentment under circumstances which would excuse the delay. In that case if it should be presented and protested after the one marked duplicate had been paid, the defendant might be made liable as drawer, after his funds had been used to pay the duplicate. The probability of this was very remote. The possibility of its occurrence might have justified the defendant in requiring an indemnity before drawing another bill; but instead of requiring such an indemnity he consented to draw the

present bill, embracing in its terms the usual obligations of a drawer, and taking only the precautions, by inserting the word 'duplicate,' to provide that both bills should not be paid by the drawees and be charged to his account. By doing this he impliedly waived other precautions, such as might be suggested by the apprehension of the subsequent presentment and protest of the first bill by a bona fide holder under circumstances which would charge him as a drawer."

The principle that indemnity may be required by the drawer in case of lost check is supported by *Gibony v. Com.* 28 Ky. Rep. 1280, 91 S. W. 732, where it was held that one who failed to receive a check mailed to him might, upon executing a bond of indemnity and making proof of the loss of the check, receive a duplicate check.

And a lost check was held in *Rhodes v. Morse*, 14 Jur. 800, to come within a statute providing for the giving of a duplicate bill by the drawer of an inland bill of exchange, in case of loss, before maturity, upon his receiving indemnity.

For a note on effect of loss of check upon right of holder to recover against the maker without presentment, see *First Nat. Bank v. McConnell*, 14 L.R.A. (N.S.) 671.

J. T. W.

The question as to whether the bank could "safely pay" this check does not enter into the case.

Hazzard v. Shelton, *supra*.

Messrs. Buist & Buist for respondent.

Woods, J., delivered the opinion of the court:

On March 9, 1907, Bishop H. P. Northrop sent to the plaintiffs a check for \$500 on the First National Bank of Charleston, South Carolina. This check has never been presented for payment. The plaintiff's having written Bishop Northrop asking payment of the balance of a debt which the check was intended to pay, Bishop Northrop sent another check written in these words:

Charleston, S. C.
8th April, 1907.

No. —. The First National Bank of Charleston, S. C.

Pay to the order of the Southern Seating and Cabinet Company, \$500, five hundred 00/100 dollars. If previous check for \$500, dated March 9th, is still unpaid.

H. P. Northrop.

This check having been duly presented and payment having been refused when Bishop Northrop had to his credit on his deposit account over \$5,000, the plaintiffs sued the bank thereon. The circuit court sustained the bank's defense that it could not be required to pay the second check when it had notice by the writing on the check that the original check covering the same debt was outstanding. The case does not call for a discussion of the rights of the bank and the depositor and the payee when ordinary original and duplicate checks are given; for the depositor, on the face of the check, gave explicit directions as to the application of his funds, which the bank was bound to follow. Having abundant funds to pay both checks, he directed the bank in language which could not be made plainer to pay the plaintiffs the sum of \$500 and charge it to his deposit account, unless the bank had already paid another check for a like amount dated March 9th in favor of the same payees. As the bank had not paid such other check, this check, under the law of South Carolina, became on presentation an assignment *pro tanto* of the deposit account, and the bank became liable to the payee for the amount of the check. *Loan & Sav. Bank v. Farmers' & M. Bank*, 74 S. C. 210, 114 Am. St. Rep. 991, 54 S. E. 364.

There is no risk to the bank in paying the check. The depositor Bishop Northrop, by the express direction to pay the second check if the first had not been paid, chose

to assume all risks as to the first check given by him, including the risk that it might be necessary for the bank's protection that it should hold \$500 of his funds to meet the first check in case it should be presented by a bona fide indorsee for value.

The judgment of the Circuit Court is reversed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

PETER TENNANT'S HEIRS

v.

A. E. FRETTS, Impleaded, etc., Appt.

(— W. Va. —, 68 S. E. 387.)

Cloud on title — removal — jurisdiction — equity.

1. Equity has jurisdiction, at the suit of an owner of land who is in possession thereof under a good legal title, to remove a cloud from his title by a decree canceling and expunging from the records of the county in which the land is situate a void deed or writing constituting a cloud upon, or menace to, his title.

Same — grounds.

2. The power of a court of equity to grant relief in such case is independent of any statute conferring jurisdiction, and rests on general equity principles and practice.

Same — venue.

3. A suit to remove cloud and quiet title is local in its nature, and the jurisdiction of the court is determined by the situs of the land.

Same — nature of remedy.

4. The decree for relief in such suit operates generally, if not always, *in rem*, and need not be *in personam*.

Process — substituted service — judgment *in rem*.

5. The statute (§§ 11, 12, 13, chap. 124, Code 1906) providing for service of process on a nonresident by publication or by personal service out of the state cannot

Headnotes by WILLIAMS, J.

Note. — May jurisdiction of suit to quiet title or remove cloud on title of land within the territorial jurisdiction rest upon constructive service of process against a nonresident.

The present question is closely analogous to that considered in the note to *Hollander v. Central Metal & Supply Co.* 23 L.R.A. (N.S.) 1135, whether jurisdiction of a suit to compel the specific performance of a contract for the sale of real property within the territorial jurisdiction may rest upon constructive service against a nonresident.

That a suit in equity to quiet title or to remove a cloud on title *may*, at least,

authorize the rendition of a personal judgment or decree against a nonresident so served; but it does authorize any court, whether of law or of equity, to pronounce a judgment or decree binding *in rem*, in any case in which such court would otherwise be competent to do so if the defendant were personally served within the state.

Cloud on title — removal — equity — published service.

6. Equity may, upon service of process on a nonresident by publication, remove cloud from title to land within its jurisdiction by a decree binding only *in rem*.

(June 11, 1910.)

A PPEAL by defendant Fretts from a decree of the Circuit Court for Monongalia County in complainants' favor in a

suit to cancel a certain instrument which was alleged to constitute a cloud on title. Affirmed.

The facts are stated in the opinion.

Messrs. W. G. Bennett and Goodwin & Reay for appellant.

Messrs. Terence D. Stewart and Charles E. Hogg, for appellee:

A court of equity will interfere in behalf of the holder of the legal title to real estate, to remove a cloud on the title, or impediment or difficulty in the way of an effectual assertion of his rights in a court of law.

Jones v. Neale, 2 Patton & H. (Va.) 339; Sulphur Mines Co. v. Boswell, 94 Va. 480, 27 S. E. 24; Carney v. Barnes, 56 W. Va. 581, 49 S. E. 423.

Equity, by service on a nonresident by

proceed as a suit *in personam*, cannot be doubted; hence, the right of a court of one state to assume jurisdiction of such an action in respect of land in another, if the defendants are personally within the jurisdiction, and adequate relief can be granted by a decree operating *in personam*, *e. g.*, a decree requiring the execution of a conveyance or the release of an encumbrance. (See note to Proctor v. Proctor, 69 L.R.A. 682, and supplementary note to Fall v. Eastin, 23 L.R.A. (N.S.) 924.) It does not follow, however, that such a suit may not proceed *in rem*, if adequate relief can be granted by a decree operating upon the land, without requiring any personal act on the part of defendant not personally within the jurisdiction.

While, as will subsequently appear, some courts, arguing from the postulate that, independently of statute, a court of equity proceeds *in personam* only, have denied, or at least doubted, whether a court of equity, by virtue of its inherent powers, and in the absence of any statute other than a general statute providing for constructive service of process upon nonresidents, not expressly applicable to such a suit, may legitimately assume jurisdiction of a suit to quiet title or to remove a cloud on title upon that mode of service against a nonresident,—it is now settled, practically without dissent, that a state may confer jurisdiction under such circumstances either by a statute which provides in effect that title to realty may be settled by a proceeding to quiet title or to remove a cloud on title, combined with a general statutory provision for constructive service against a nonresident; or by a statute which does not assume to define or declare the power of a court of equity in this form of suit, but does provide specifically for constructive service of process against nonresidents in such suit. Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Bennett v. Fenton, 10 L.R.A. 500, 41 Fed. 283; Morris v. Graham, 51 Fed. 53; United States v. Southern P. R. Co. 63 Fed. 485; Connor v. Tennessee C. R. Co. 54 L.R.A. 689, 48 C. C. A. 730, 109 Fed. 931; Evans v. Charles Scribner's Sons, 58 Fed. 29 L.R.A. (N.S.)

303; McLaughlin v. McCrory, 55 Ark. 443, 29 Am. St. Rep. 56, 18 S. W. 762; Emery v. Kipp, 154 Cal. 83, 19 L.R.A. (N.S.) 983, 129 Am. St. Rep. 141, 97 Pac. 17, 16 A. & E. Ann. Cas. 792 (impliedly); Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Dunlap v. Steere, 92 Cal. 356, 16 L.R.A. 361, 27 Am. St. Rep. 143, 28 Pac. 503; McDonald v. McCoy, 121 Cal. 55, 53 Pac. 421; Cloyd v. Trotter, 118 Ill. 391, 9 N. E. 507; Essig v. Lower, 120 Ind. 239, 21 N. E. 1090; Miller v. Davison, 31 Iowa, 435 (conceded); Knudson v. Litchfield, 87 Iowa, 111, 54 N. W. 199; Rupp v. McLachlan, 122 Iowa, 343, 98 N. W. 153; Dillon v. Heller, 39 Kan. 599, 18 Pac. 693; Oldham v. Stephens, 45 Kan. 369, 25 Pac. 863; Robbins v. Martin, 43 La. Ann. 488, 9 So. 108; Mason v. Benedict, 43 La. Ann. 397, 8 So. 930; Shepherd v. Ware, 46 Minn. 174, 24 Am. St. Rep. 212, 48 N. W. 773; Mitchner v. Holmes, 117 Mo. 185, 22 S. W. 1070; Scarborough v. Myrick, 47 Neb. 704, 66 N. W. 867; Bancroft v. Conant, 64 N. H. 151, 5 Atl. 836; Fenton v. Minnesota Title Ins. & T. Co. 15 N. D. 365, 125 Am. St. Rep. 599, 109 N. W. 363 (impliedly); Kieffer v. Victor Land Co. 53 Or. 174, 90 Pac. 582, 98 Pac. 877; Robinson v. Kind, 23 Nev. 330, 47 Pac. 1, 977; Hill v. Henry, 66 N. J. Eq. 150, 57 Atl. 554 (impliedly); Ray v. Haag, 1 Tenn. Ch. App. 249; Sloan v. Thompson, 4 Tex. Civ. App. 419, 23 S. W. 613; American Bldg. & L. Asso. v. Mathews, 13 Tex. Civ. App. 425, 35 S. W. 690.

In Bryan v. Kennett, 113 U. S. 179, 28 L. ed. 908, 5 Sup. Ct. Rep. 407, it was held that jurisdiction of a suit in effect to quiet title could rest upon service by publication against nonresident minors, under a statute providing generally for such service in actions of that kind, although not in terms providing for that mode of service upon minors.

The case of Hart v. Sansom, 110 U. S. 151, 28 L. ed. 101, 3 Sup. Ct. Rep. 696, has sometimes been cited as authority for the broad proposition that jurisdiction of a suit to quiet title or remove a cloud on title to real property within the territorial jurisdiction cannot rest upon constructive service

publication, acquires jurisdiction to remove a cloud on title.

Knudson v. Litchfield, 87 Iowa, 111, 64 N. W. 199; Oldham v. Stephens, 45 Kan. 360, 25 Pac. 863; Short v. Caldwell, 155 Mass. 57, 28 N. E. 1124; Scarborough v. Myrick, 47 Neb. 794, 60 N. W. 867; Robinson v. Kind, 23 Nev. 330, 47 Pac. 1, 977; American Bldg. & L. Asso. v. Mathews, 13 Tex. Civ. App. 425, 35 S. W. 690; Bryan v. Kennett, 113 U. S. 179, 192, 195, 28 L. ed. 908, 913, 914, 5 Sup. Ct. Rep. 407; Witten v. St. Clair, 27 W. Va. 762; Hardy v. Beaty, 84 Tex. 562, 31 Am. St. Rep. 80, 19 S. W. 778; Perkins v. Wakeham, 86 Cal. 580, 21 Am. St. Rep. 67, 25 Pac. 51; Cross v. Armstrong, 44 Ohio St. 613, 10 N. E. 164; Meyer v. Kuhn, 13 C. C. A. 298, 25

U. S. App. 174, 65 Fed. 712; Arndt v. Griggs, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; Dillon v. Heller, 39 Kan. 599, 18 Pac. 693; Mason v. Benedict, 43 La. Ann. 397, 8 So. 930; Morris v. Graham, Bartero v. Real Estate Sav. Bank, 10 Mo. App. 78, 51 Fed. 53; 4 Pom. Eq. Jur. §§ 1398, 1399; 5 Pom. Eq. Jur. §§ 12 et seq.; Story, Conf. §§ 551, 555, 591; Rafael v. Verist, 2 W. Bl. 1058.

A suit to quiet title to real estate is a proceeding *in rem*.

Hardy v. Beaty; Arndt v. Griggs; and Perkins v. Wakeham,—*supra*; United States v. Fox, 94 U. S. 315, 24 L. ed. 192; 5 Pom. Eq. Jur. § 13; 32 Cyc. Law & Proc. pp. 1377, 1378; Hogg, Eq. Principles, p. 456, § 330.

against a nonresident. The first headnote, by Mr. Justice Gray, in that case, is that a decree of a state court for a removal of a cloud upon the title of land within the state, rendered against a citizen of another state, who has been cited by publication only, as directed by the local statutes, is no bar to an action by him in the circuit courts of the United States, to recover the land against the plaintiff in the former suit. As a matter of fact what was said on this point seems to have been *obiter*, or at least unnecessary to a decision, since the court was of the opinion that, by its terms, the decree in the suit to quiet title did not affect the party against whom it was asserted. As indicated in the headnote, however, the Supreme Court was of the opinion that the court which rendered the decree was in any event without jurisdiction as to such party. In this connection, the court said: "Generally, if not universally, equity jurisdiction is exercised *in personam*, and not *in rem*, and depends upon the control of the court over the parties by reason of their presence or residence, and not upon the place where the land lies in regard to which relief is sought. Upon a bill for the removal of a cloud upon title, as upon a bill for the specific performance of an agreement to convey, the decree, unless otherwise expressly provided by statute, is clearly not a judgment *in rem*, establishing a title in land, but operates *in personam* only, by restraining the defendant from asserting his claim, and directing him to deliver up his deed to be canceled or to execute a release to the plaintiff." The court, however, conceded that it would be within the power of the state in which the land lies to provide by statute that, if the defendant is not found within the jurisdiction or refuses to make or to cancel a deed, this should be done in his behalf by a trustee appointed by the court for that purpose, but said that, in the judgment in question, no trustee to act in behalf of the defendant was appointed by the court, and that the utmost effect that could be attributed to the judgment as against the defendant was that of an ordinary decree for the removal by him, as well as by the other defendants, of a cloud upon the plaintiff's title. 29 L.R.A. (N.S.)

After the decision in Hart v. Sansom, and before the decision in Arndt v. Griggs, a decree quieting title, rendered upon service by publication against a nonresident of another state, was, upon the authority of the Hart Case, held in Clark v. Hammett, 27 Fed. 339, to have been without jurisdiction and void on collateral attack. A similar decision was rendered by Shiras, J., in Pitts v. Clay, 27 Fed. 635.

It will be observed that in Hart v. Sansom there was no statute purporting to confer jurisdiction upon a court to proceed *in rem* in a suit to quiet title or remove a cloud on title, and that the statute providing for service by publication was general in terms, and did not apply specifically to such suits. In this respect the case is distinguishable from Arndt v. Griggs, *supra*, upholding the jurisdiction of the court upon constructive service of process against a nonresident in this class of suits, since the statute involved in that case, in relation to service by publication, expressly provides for that mode of service "in actions which relate to, or the subject of which is, real or personal property in this state, where any defendant has or claims a lien or interest, actual or contingent therein, or the relief demanded consists wholly or partially in excluding him from any interest therein, and such defendant is a nonresident of the state or a foreign corporation." The court, while conceding the general propositions that "an action to quiet title is a suit in equity; that equity acts upon the person; and that the person is not brought into court by service by publication alone," said: "The question is not what a court of equity, by virtue of its general powers, and in the absence of a statute, might do, but it is what jurisdiction has a state over titles to real estate within its limits, and what jurisdiction may it give by statute to its own courts, to determine the validity and extent of the claims of nonresidents to such real estate." Further, the court said that it followed that, if, as is conceded in Hart v. Sansom, a state has power to bring in a nonresident by publication, for the purpose of appointing a trustee, it

Williams, J., delivered the opinion of the court:

This is an appeal by A. E. Frëtts from a decree of the circuit court of Monongalia county, made on the 19th of May, 1908, granting relief to plaintiffs upon a bill to remove cloud from title to land.

The following are the facts: On May 2, 1900, Peter Tennant executed to A. E. Frëtts a writing under seal, which plaintiffs call an option, but which defendants insist is a contract of sale, agreeing to sell to him the "Pittsburg or River vein of coal"

underlying 163 acres of land in Monongalia county, at \$25 per acre. This writing was signed by both Tennant and Frëtts, but was not acknowledged by Tennant. On the 4th of May, 1900, Frëtts acknowledged it before a notary public in Pennsylvania, and on the same day, by writing indorsed on the back of the instrument, assigned his interest therein to William Allison of Uniontown, Pennsylvania. He acknowledged this assignment also before a notary public in Pennsylvania. On the 22d of May, 1900, both the original contract and the assign-

can in like manner bring him in and subject him to a direct decree.

In most of the cases above cited in support of the proposition that the jurisdiction may rest on constructive service against a nonresident, the statutes providing for substituted service seem, like that involved in the Arndt Case, to have covered suits of this kind by specific description, if not *eo nomine*. That, however, is not true of the California cases, and they were decided under a statute in relation to service by publication, which was in terms applicable to all actions, and did not specifically provide for such service in actions to quiet title. In that state, however, it is expressly provided by statute that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim;" and this statute would perhaps be sufficient to characterize the suit as a suit *in rem*, or at least to permit the suit to proceed in that form, even if the original suit, dependent upon the inherent powers of a court of equity, must be regarded as proceeding solely *in personam*.

Since the cases above cited in support of the jurisdiction to proceed in suits of this kind, upon constructive service of process against nonresidents, involve, or at least do not negative, the existence of statutes which might be regarded as characterizing the suit as one *in rem*, either directly by a provision as to the character of the relief that may be granted in such suit, or indirectly by specifically providing for constructive service of process against nonresidents therein, they cannot be regarded as full authority for the position taken by the court in *TENNANT v. FRËTTS*, since in that case there was no statute characterizing the suit as one *in rem*, and the jurisdiction was dependent upon the inherent powers of courts of equity in suits of this character, aided only by a general statute for constructive service, not specifically applicable to suits of this character. In this situation it is obvious that, to sustain the jurisdiction upon constructive service of process against a nonresident, it is necessary to take the position that a court of equity, though dependent upon its own inherent powers, may render a decree *in rem*, or at least one closely assimilated to a decree *in rem*, since a general provision for service by publication in all suits against

nonresidents can only constitutionally apply to a suit *in rem*. (When the statute providing for service by publication is specifically applicable to suits of this kind, that seems in itself to be regarded as sufficient to characterize the suit as one *in rem*, at least for the purposes of the constitution's principle that only suits *in rem* can rest upon constructive service by publication against a nonresident.) The court in the *TENNANT CASE* does take this position, and, therefore, reaches the conclusion that constructive service against a nonresident, under the general statutory provision for such service, will sustain the jurisdiction of a suit to remove a cloud from title, even though such suit is dependent upon the inherent powers of a court of chancery, unaided by a statute impressing it with the character of a suit *in rem*.

Essentially, and apart from the postulate, —which by the way is disputed by an eminent writer on the subject (see *Pom. Eq. Jur.* § 135), —that a court of equity, in the absence of statute, proceeds only *in personam*, and never *in rem*, a suit to quiet title or remove a cloud on title seems to be a suit *in rem* or quasi *in rem*, if the requisition of a personal act on the part of the defendant is not essential to the relief. Some suits are from their very nature, and apart from any general doctrine with respect to the personal character of suits in equity, necessarily to be regarded as *in personam*, since they contemplate the compulsion of some personal act on the part of the defendant.

The case of *Macomber v. Jaffray*, 4 Gray, 82, furnishes an illustration. That was a petition under a statute by one in possession of land, praying that certain defendants alleged to be making some claim to the property "may be summoned to show cause why they should not bring action to try their alleged title." The court said that it was the settled practice not to compel a party residing out of the commonwealth to bring a suit in the state courts; that to issue such an order to a foreigner or citizen of another state, not being personally subject to the jurisdiction of the court, would be useless, as any judgment on the petition would not operate on the estate.

In *Short v. Caldwell*, 155 Mass. 57, 28 N. E. 1124, upholding the jurisdiction of a suit to free the record title of real estate from the encumbrance of an undischarged mort-

ment were recorded in Monongalia county, West Virginia. Nothing was ever paid to Tennant on the contract, except the \$1 consideration recited in it. Peter Tennant died in August, 1904. On the 3d of November, 1905, his heirs sold the same vein of coal, to Smith Hood, Jr., and Homer C. Price, for \$95 per acre to be paid, one third upon approval of title and acceptance of deed, and the balance in one and two years from acceptance of deed. Hood and Price discovered the Fretts contract on record, and refused to make pay-

ment until the rights of Fretts and Allison in the coal were determined. Thereupon the heirs of Peter Tennant brought this suit, praying to have the Fretts contract canceled as constituting a cloud upon their title. Fretts and Allison are both residents of Pennsylvania, and were both personally served with original process in that state. Allison did not appear; but Fretts appeared by counsel and demurred, answered, and filed a cross bill praying for specific execution of the contract.

The first question presented is one of

gage, without personal service within the state upon nonresident defendants, the court said that there was an important difference between such a suit and a suit like *Macomber v. Jaffray*, under the statute authorizing the court to compel the supposed claimant of land to bring an action to try title, in that the latter statute authorizes only a decree *in personam*, while the statute under which the suit at bar was brought authorizes a decree which simply operates on the estate, the respondents not being called upon to do anything under it.

Though the jurisdiction of a suit to quiet title upon constructive service against a nonresident was upheld in *Bennett v. Fenton*, 10 L.R.A. 500, 41 Fed. 283, the opinion of Shiras, J., in that case, seems to indicate that in his view the jurisdiction could not be upheld upon constructive service, under the conditions existing in the *TENNANT CASE*. The decree in question was rendered in Minnesota, and it is stated in the opinion that the Minnesota statute expressly authorizes service by publication in "given cases," when personal service cannot be had. Whether or not a suit to quiet title is one of the "given cases" does not appear. But however that may be, there was a state statute which authorized one in possession of land to sue any person claiming an interest therein, for the purpose of determining such adverse claim; and that statute was apparently regarded as taking the case out of the doctrine of *Hart v. Sansom*, supra. After stating that previously, perhaps, sufficient consideration and weight had not been given to the limiting clause in the opinion in *Hart v. Sansom*, wherein it is stated "that upon a bill for the removal of a cloud upon title, . . . the decree, unless otherwise expressly provided by statute, is not a judgment *in rem*, . . . but operates only by restraining the defendant from asserting his claim," Judge Shiras said: "In other words, if the enforcement of the decree touching the title is dependent solely upon the inherent powers of a court of chancery, it is of necessity a decree *in personam*, because generally equity jurisdiction is exercised *in personam*, and depends upon the control of the court over the parties. If, however, there is statutory power given to the court to effectuate its decree by controlling the property, then the proceeding becomes in its nature a proceeding *in rem*," 29 L.R.A. (N.S.)

and in such case service by publication in case of nonresidents will confer jurisdiction to deal with the property." Again: "In the absence of statutory authority for the bringing of an action to quiet title, if a claimant of realty invokes the aid of a court of equity to settle the adverse claims made by another, he puts in motion the ordinary equitable powers of the court, which are exercised *in personam*,—that is, through the control of the court over the person of the defendant,—in which case personal service upon the defendant within the territorial limits of the jurisdiction of the court is essential to confer jurisdiction upon the court."

The view here apparently taken, that, to enable a court to proceed upon constructive service by publication against nonresidents in this class of suits, the inherent powers of equity must be aided by a statute which in effect give the suit the character of one *in rem*, seems technical, and opposed to the trend of opinion, if not to the actual decisions. Conceding, as Judge Shiras does, the desirability that the courts of a state should have some means of quieting title as against parties not personally subject to the jurisdiction, it would seem that a court of equity, even when unaided by statute, should have the inherent power to mold its decree in a form *in rem*, so as to operate directly upon the land, rather than upon the person, if the nonresidence of the defendant renders it impossible to enter a decree *in personam*.

The analogous question, whether jurisdiction of a suit for specific performance of a contract for the conveyance of land may rest upon constructive service of process against a nonresident, is considered in the note to *Hollander v. Central Metal & Supply Co.* 23 L.R.A. (N.S.) 1135.

Whether jurisdiction of a suit to quiet title to land in another state may rest upon constructive service of process against a nonresident presents, of course, a different question, and one not within the scope of this note, although it may be observed, incidentally, that it is clear, as expressly held in *Dull v. Blackman*, 169 U. S. 243, 42 L. ed. 733, 18 Sup. Ct. Rep. 333, that such a suit is purely *in personam*, and cannot rest upon constructive service against a nonresident. (See notes in 69 L.R.A. 673, and 23 L.R.A. (N.S.) 924).

G. H. P.

jurisdiction. Counsel for Fretts insist that the court is without jurisdiction to grant relief upon personal service of process upon defendants in Pennsylvania, which has no more effect than an order of publication, published in a newspaper. This question has never before been presented to this court for adjudication. If relief in such case cannot be decreed, it might often happen that a party would be without remedy. It is not within the sovereign power of a state to give extraterritorial effect to the decrees and processes of its courts, nor is there any means by which a resident of one state can be compelled to submit himself to the civil jurisdiction of the courts of another. Consequently, it follows that, unless the circuit court of Monongalia county had jurisdiction to grant relief by means of an *in rem* decree, plaintiffs are practically remediless. The courts of Pennsylvania cannot give them relief, because a decree of the court of that state could not affect title to land in this state. *Wilson v. Braden*, 48 W. Va. 196, 36 S. E. 367; *Poindexter v. Burwell*, 82 Va. 507; *Gibson v. Burgess*, 82 Va. 650; *Vaught v. Meador*, 99 Va. 569, 86 Am. St. Rep. 908, 39 S. E. 225; *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298; *Fall v. Eastin*, 215 U. S. 1, 54 L. ed. 65, 23 L.R.A. (N.S.) 924, 30 Sup. Ct. Rep. 3. The relief in this case must come through the direct operation of the decree upon the subject-matter, or not at all. It is not a case where the relief depends upon an act which a court of equity may compel a defendant to perform, such, for instance, as the execution of a deed in completion of a contract, or the surrender of title to land acquired in violation of trust or by some species of *mala fides*. In cases of that character the court having jurisdiction of the person of defendant may grant relief by compelling the defendant to perform the act essential to accomplish it. The decree in such cases would be purely *in personam*, and while they could not directly affect real estate in another state, yet the relief could be obtained through the act of the party, even to the extent of conveying land in another state. In such case it is the act of the party that affects the land, not the court's decree. *Massie v. Watts*, 6 Cranch, 148, 3 L. ed. 181; *Guerrant v. Fowler*, 1 Hen. & M. 6; *Farley v. Shippen*, Wythe, 254; *Dickinson v. Hoomes*, 8 Gratt. 353; *Wilson v. Braden*, *supra*; *Western U. Teleg. Co. v. Western & A. R. Co.* 8 Baxt. 54; *Muller v. Dows*, 94 U. S. 444, 24 L. ed. 207; *Wood v. Warner*, 15 N. J. Eq. 81. But in the present case the suit is to cancel, and expunge from the records of Monongalia county, a writing which constitutes a cloud upon plaintiffs' title to land in this state, and unless the decree of the West Virginia

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court can operate directly upon the subject-matter, in other words, unless the court can pronounce an *in rem* decree, plaintiffs are without means of relief. They are in possession of the land and have the legal title; there is nothing that a Pennsylvania court can compel defendants to do that will afford them relief. But counsel for appellant insist that a court of equity cannot pronounce an *in rem* decree in the absence of a statute authorizing it to do so, and that we have no such statute. We must admit that there is no statute conferring jurisdiction on courts of equity to make an *in rem* decree in suits to quiet title, and the action of the lower court must be sustained, if sustained at all, upon principles of general equity practice.

But can it be possible that a court of equity is powerless to grant relief by way of canceling a recorded writing which affects title to land within its jurisdiction, without it can obtain jurisdiction of the defendant also? Is this the state of our law? Does equity never act except upon the person? Is a statute necessary to give equity jurisdiction to quiet title where it cannot get jurisdiction of the person of defendant? We do not think so. Equity has exercised jurisdiction to grant such relief, independent of statute, both in England and in this country, for more than a century. *Hayward v. Dimsdale*, 17 Ves. Jr. 111; *Grever v. Hugell*, 3 Russ. Ch. 428; *Ward v. Ward*, 3 N. C. (2 Hayw.) 226; *Pettit v. Shepherd*, 5 Paige, 493, 28 Am. Dec. 437; *Apthorp v. Comstock*, 2 Paige, 482; *Shattuck v. Carson*, 2 Cal. 588; *Norton v. Beaver*, 5 Ohio, 178; *Groves v. Webber*, 72 Ill. 606; *O'Hare v. Downing*, 130 Mass. 16; *Ambler v. Leach*, 15 W. Va. 677; *Waldron v. Harvey*, 54 W. Va. 608, 102 Am. St. Rep. 959, 46 S. E. 603; *Smith v. O'Keefe*, 43 W. Va. 172, 27 S. E. 353. This power is inherent in courts of equity. It needs no statute to confer jurisdiction on courts of equity to quiet title, any more than to set aside a fraudulent conveyance or specifically enforce a contract for sale of land. It was the rigid rules of the common law, and strict adherence to former decisions, simple as precedents, that made courts of equity necessary, and ever since their formation has been the boast of the chancellor that there is no right which has not a corresponding remedy. 1 Pom. Eq. Jur. § 1. One of the principal grounds of original equity jurisdiction rests on the fact that courts of law are not always adequate to afford the relief, and in any case where, according to the principles of natural justice there is a right to be protected or enforced and the law has not provided an adequate remedy, equity takes jurisdiction. Bow

v. Creigh, 3 Rand. (Va.) 25. We cannot say that equity is impotent in the present case to grant relief, simply because defendants are beyond the jurisdiction of the court, and cannot be compelled to obey its process. Equity can remove a cloud from title to land within the court's jurisdiction without having before it the person of defendant. It has power to make a decree which may operate upon the subject-matter of the suit, notwithstanding such a decree is, in its nature, *in rem*. It would indeed be a deplorable condition if our law afforded no relief to a landowner who is in possession of his land under good and sufficient title, but which happens to be encumbered by some adverse claim or lien of record, which had been discharged, but not released. Such claims might never disturb his possession, but they are a menace to his title, and may greatly affect the selling value of his land. No citizen whose lands are thus affected can enjoy his rights of property to the full extent, so long as the *jus disponendi* is thus interfered with. Every state owes to its citizens the duty to protect the rights of property, as well as the persons, of its citizens, and we think the laws of this state are ample to authorize the court to give relief in the present case.

The land is situate in Monongalia county, and this gave the court of that county jurisdiction. The subject-matter of the suit is local. *Cooley v. Scarlett*, 38 Ill. 316, 87 Am. Dec. 298. The suit could not have been brought in any other court. It is local in its nature, like the abating of a nuisance (*Mississippi & M. R. Co. v. Ward*, 2 Black, 485, 17 L. ed. 311), or the enjoining of an act which affects real estate (*Northern Indiana R. Co. v. Michigan C. R. Co.* 15 How. 233, 14 L. ed. 674).

The next question is, Is the court authorized to grant relief in this case upon an order of publication against a nonresident? We think it is. Of course, a court cannot pronounce a judgment or decree that will be binding on the person of the nonresident defendant, or that can have any force or effect whatever beyond the territorial jurisdiction of the court, upon other than personal service of process. The leading case of *Pennoyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, settles this principle. But where the proceeding is *in rem*, as upon attachment of property, or where the judgment or decree is to settle and determine the title to real estate within the court's jurisdiction, it is competent for the legislature to provide for service of process by publication against a nonresident defendant. *Cooper v. Reynolds*, 10 Wall. 308, 19 L. ed. 931; *Arndt v. Griggs*, 134 U. S. 316, 33 L. ed. 918, 10 Sup. Ct. Rep. 557; *Witten v. St.* 29 L.R.A.(N.S.)

Clair, 27 W. Va. 762. But counsel for defendant insists that the legislature of West Virginia has not made any provision for an order of publication to be had in a suit in equity to remove cloud from title. This depends upon the constitution, to be given to §§ 11 12 and 13 of chapter 124, Code 1906. This chapter deals with process of the court, and the manner of service thereof; its scope is not confined to processes to be issued by any particular courts, or in any special suits or actions. Section 2 of this chapter begins by saying, "Process from any court," etc. This applies to courts in chancery as well as courts of law. Sections 11, 12 and 13 provide for order of publication against nonresident defendants, and how the same shall be published. Section 13 provides that personal service on a defendant outside of the state shall have the same effect as an order or publication duly posted and published against him. These provisions must be considered as applying to a nonresident defendant in any action at law or suit in equity, where the court has jurisdiction of the subject-matter of the action or suit, and can render a judgment or decree *in rem*. Section 13 closes as follows: "Upon any trial or hearing under this section, such judgment, decree, or order shall be entered as may appear just." While these provisions are not intended to confer equity jurisdiction in cases not otherwise cognizable in equity, it clearly warrants the service of process by publication in any case where equity has jurisdiction of the subject-matter, and is not obliged to have the defendant personally in court in order to give the proper relief. If it be true that a statute is necessary to give equity jurisdiction to quiet title to land, or if it be true that equity can grant relief only by means of a personal decree, except when it is otherwise expressly authorized by statute, the above provisions for service of process by publication can have no application in the present suit. But we do not understand that equity jurisdiction to pronounce a decree *in rem* is dependent upon statute. *Pomeroy* in his work (Eq. Jur.) says: "The decrees in a court of equity may be made to operate *in rem* to the same extent and in the same manner as judgments at law." Vol. 1, § 135. It depends upon the character of the wrong, and the nature of the relief which the court is asked to grant, whether or not the decree must be *in rem*, or *in personam*. The most usual method of procedure in equity is by decrees which directly affect the person. But it seems to be an established rule, that if the subject-matter of the suit is local, and the relief sought

is such that it requires the performance of no act by the defendant to give effect to the court's decree, it can make a decree which will operate directly upon the subject-matter.

The case of *Arndt v. Griggs*, supra, bears on this subject, and is cited in the briefs of counsel for both plaintiffs and defendant, as authority for their respective contentions. That was an action in the circuit court for the district of Nebraska to recover possession of land and quiet title. The plaintiff obtained judgment, and the defendant carried the case to the Supreme Court of the United States. As we understand the decision in that case, it settles no other principle than that a state has authority to provide, by statute, for the settlement of title to real estate within the state, in which a nonresident defendant may claim title or interest, and that such nonresident may be served by publication. It does not decide that a nonresident may not also be brought in, by publication, to answer a suit brought to quiet title to land, where the court has jurisdiction of such suit on principles of general equity practice, independent of a statute conferring such jurisdiction. There had been a decree or judgment in favor of Charles L. Flint against Michael Hurley and another, in the state court of Nebraska, adjudicating title to land as against the defendants, who had been proceeded against by publication as nonresidents. The question was whether the judgment of the state court was *res judicata* upon privies to the original parties, in the ejectment suit subsequently brought to recover the same land in the United States court, and the Supreme Court held that the judgment of the state court was binding on the nonresident. It is true that there was a statute of Nebraska authorizing suits to try title to land upon publication, but that fact does not make that case decisive of the point in the present case. A number of cases are cited by Mr. Justice Brewer, who delivered the opinion of the court, both from the state courts and from the Supreme Court of the United States, all of which go no farther than to support the general doctrine that the states have power to provide for the settlement of title to lands within their territorial limits, and that the title or interest of a nonresident therein may be settled and determined against him upon publication. The most of the cases on this point are from states which have, by statute, greatly enlarged the jurisdiction of equity, which was originally exercised only for the purpose of quieting title in favor of the owner of the legal title who was in possession. In many states the statutes have so en-

larged the original equity jurisdiction as to enable the court to determine any question of title, whether legal or equitable, between conflicting claimants, and whether the plaintiff be in or out of possession. These statutes have been uniformly upheld by the Supreme Court of the United States. But we find no decision which denies the doctrine that equity has original jurisdiction to remove a cloud and quiet title to land, in a suit brought by the legal owner who is in possession. Equity, unless aided by statute, will not entertain such a suit under any other conditions, and when such conditions do exist, no statute is needed to confer jurisdiction.

It is true that in the case of *Hart v. Sansom*, 110 U. S. 151, 154, 28 L. ed. 101, 102, 3 Sup. Ct. Rep. 586, 588, it was held that a judgment of the state court of Texas, rendered upon a petition to recover land and quiet title, wherein Hart had been proceeded against by publication, was not binding on him. But the court did not so hold because the state court was not authorized to render a binding judgment in such case upon publication, but because the allegations of the petition did not sufficiently set forth and described the claim or interest of Hart in the land. The court in its opinion by Justice Gray, says: "The petition alleged that Wilkerson was in possession; and that the other defendants, except Hart, held record deeds which were fraudulent and void, and cast a cloud upon the plaintiffs' title. But as to Hart, it did not allege that he was in possession, or was in privity with the other defendants, or that he held any deed, but only that he set up some pretended claim and title. And the verdict finds that he claimed the land, but had no title of record or otherwise therein. The judgment is that the plaintiffs recover the land of the defendants, and that the deeds mentioned in the petition be and are annulled and canceled, and the cloud thereby removed, and for costs; and execution is awarded for costs only, and not for any writ or process in the nature of a writ of possession or *habere facias*. It is difficult to see how any part of that judgment (except for costs) is applicable to Hart; for that part which is for recovery of possession certainly cannot apply to Hart, who was not in possession; and that part which removes the cloud upon plaintiffs' title appears to be limited to the cloud created by the deeds mentioned in the petition, and the petition does not allege, and the verdict negatives, that Hart held any deed."

The court did not even intimate that Hart would not have been bound if the claim which he afterwards asserted in an-

other suit had been sufficiently pleaded in the first suit, involving the same land.

The case of *Roller v. Holly*, 176 U. S. 398, 44 L. ed. 520, 20 Sup. Ct. Rep. 410, is more directly in point than either of the other cases above cited. In that case two points arose: (1) Whether or not process from a court of Texas served upon a defendant residing in Virginia on December 30, 1890, to appear in Limestone county, (Tex.) on January 5, 1891, "was due process" of law under the 14th Amendment, such service being given the effect of publication; (2) whether or not the court of Texas had jurisdiction to proceed against a nonresident to enforce a lien on land for purchase money, there being no statute of that state authorizing such proceeding, and there having been no seizure *in rem* of the lands, nor any notice to the vendees in possession claiming under the nonresident. In regard to the first point, the court did not undertake to say what length of time would be reasonable notice, so as to constitute due process of law, but held that on account of the long distance between the place of service and the place of return, five days was not sufficient time, and that judgment on such short notice was not binding. Concerning the second point, after discussing the questions decided in the two cases of *Hart v. Sansom* and *Arndt v. Griggs*, supra, the court, in its opinion by Justice Brown, says: "It is true there is no statute of Texas specially authorizing a suit against a nonresident to enforce an equitable lien for purchase money, but article 1230 of the Code of Texas, hereinafter cited, contains a general provision for the institution of suits against absent and nonresident defendants, and lays down a method of procedure applicable to all such cases. Obviously this article has no application to suits *in personam*, as was held by the supreme court of Texas in *York v. State*, 73 Tex. 651, 11 S. W. 869; *Kimmarle v. Houston & T. C. R. Co.* 76 Tex. 686, 12 S. W. 698; *Maddox v. Craig*, 80 Tex. 600, 16 S. W. 328; and by this court in *Pennoyer v. Neff*, 95 U. S. 714, 723, 24 L. ed. 565, 569. The article must then be restricted to actions *in rem*; but to what class of actions, since none is mentioned specially in the article? We are bound to give it some effect. We cannot treat it as wholly nugatory, and, as it is impossible to say that it contemplates a procedure in one class of cases, and not in another, we think the only reasonable construction is to hold that it applies to all cases where, under recognized principles of law, suits may be instituted against nonresident defendants."

The statute in West Virginia authorizing 29 L.R.A. (N.S.)

service of process upon a nonresident by publication does not specify in what particular class of cases such service is authorized. In this respect the statutes of the two states are similar. There was no statute in Texas expressly authorizing a court to proceed by publication to enforce a vendor's lien against a nonresident, yet the United States court held that the right to proceed by publication applied to such a suit, because, under the recognized principles of law obtaining in that state, the court had jurisdiction of such a suit. There is no statute in this state expressly authorizing a suit to remove a cloud from title, but under the well-recognized principles of law which obtain in this state, a court of equity has jurisdiction of such a suit brought by one who has both the legal title and possession of the land. Therefore, the analogy between the two cases is perfect, and the same principle may be properly applied to both. We do not understand any decision, state or Federal, to hold that equity is dependent upon statute for jurisdiction to remove a cloud from title in a case where the plaintiff is in possession, claiming under a valid legal title. These are the requisites for original equity jurisdiction in suits to quiet title, and equity has always exercised it, for the reason that the law, in such a case, afforded no remedy. But many of the states have, by statutes, provided that suits in equity may be brought to settle and determine title to, and interest in, land, whether the title or claim be legal or equitable, and without regard to possession. And it is upon the construction of these statutes that nearly all of the cases involving the question of the right of a court to make a binding decree upon service by publication have been reviewed by the Supreme Court of the United States. We have no statutes in West Virginia enlarging the jurisdiction of equity in such matters, nor do we assert that equity has authority in this state to give relief in a proceeding to quiet title, otherwise than is derived from the general equity practice. But inasmuch as it has jurisdiction to grant relief in the present case, and could under the principles of original equity practice do so without the aid of statute, provided the defendant was before the court, by a decree operating directly upon the subject-matter, the statute above cited (§§ 11, 12, and 13 of chapter 124) steps in, and empowers it to pronounce such a decree upon process served by publication against a nonresident, which will be as conclusive of his right in the land as if he had been personally before the court. 4 Pom. Eq. Jur. §§ 1396-1399.

The next question relates to the merits of the case. Is the writing a contract of sale, or is it only an option? This depends upon its proper construction. The writing is under seal, and after describing the land under which the vein of coal lies, it proceeds as follows *viz.*: "The coal to be paid for as follows: at the rate of twenty-five (\$25) dollars per acre, \$1 on the signing of this agreement and the balance on payment as the party of the first part elects. The deed to be made for the above-described tract of coal by the parties of the first part, their heirs or assigns, on fifteen days' notice in writing by the party of the second part, his heirs or assigns. A good deed with general warranty to be made whenever the unpaid purchase money is secured by bond with mortgage on the premises. A failure of the party of the second part to make the first payment within thirty days from the above date shall render this agreement null and void. The full amount for the above-described coal is to be paid when deed is made as above stated. It is further agreed that the second party has the right to enter in and under the above-described tract of land, to mine and convey away the coal in this as well as other coal that he now owns or may hereafter secure, with the undisputed right of roadways, and not be responsible for any damage to the surface nor anything thereon by the removal of said coal. The first party has the right to drill, mine, or bore for oil, gas, and water. The second party agrees to pay for surveying and abstract of title when same is accepted. First party agrees to sell the Pittsburgh vein of coal in and under the Kings Run farm bounded on the north by H. & J. Brock, east by Devine, south by R. E. Stephens, west by lands of Ruth E. Stephens, containing 63 acres more or less, at the same rate, terms and conditions as set forth in this agreement for the purchase of coal."

It is impossible to construe the agreement so as to give effect to all of its provisions. Some of them irreconcilably conflict with others. It first says, after reciting that \$1 is to be paid at the signing of the agreement, that the balance is to be paid as Tennant may elect. Relying on this clause, counsel for appellant insist that Fretts was not bound to make any payment, or tender of payment, until Tennant should elect how much, and when it should be paid. But it also contains the further provision that Tennant was to make deed upon fifteen days' notice in writing by Fretts or his assignee, and that deed was to be made whenever the unpaid purchase money was secured by bond with mortgage on the premises. A mortgage, of

course, could not be executed until Fretts, who was to become the mortgagor, had obtained title, and title was not to be conveyed until after Fretts had given fifteen days' notice to Tennant. No notice was ever given, and nothing was ever paid, except the \$1. The foregoing provisions contradict each other, and both cannot be given effect. But the clause providing for a forfeiture of the contract in the event Fretts did not make the cash payment within thirty days from its date, we think, clearly indicates that the writing was considered by the parties as an option, and not as a sale, and that Fretts had thirty days in which to elect whether or not he would accept. It is true the writing does not specify the amount of the cash payment to be made in thirty days. The cash payment cannot refer to the \$1, because that was expressly provided to be paid at the signing of the agreement. It must, therefore, necessarily refer either to a certain portion of the purchase money, the amount of which was agreed on by the parties, but not expressed in writing; or it must refer to, and include, the whole purchase price. It is unnecessary, for the purposes of this case, for us to decide whether it referred to the whole or only to a part of the price. Because it follows that the failure of Fretts to make a tender of it, whether it was all or a part, within the thirty days, rendered the contract void. If no certain amount in fact was agreed on to be paid within thirty days, Fretts should have elected to pay the whole purchase price, if he would avoid the effect of this forfeiture clause; and not having done so, all his rights under the agreement ended. Courts of equity do not, as a rule, enforce a forfeiture, where there has been a vested right. But this rule does not apply to a case where the contract itself, under which the parties claim, contains an express provision forfeiting a right upon the happening of a certain contingency. *Carney v. Barnes*, 56 W. Va. 581, 49 S. E. 423.

After this suit was brought, Allison assigned back to Fretts a one-half interest in the aforesaid agreement. Fretts appeared to the suit by counsel, and demurred to the bill; Allison made no appearance. The demurrer was overruled and Fretts filed an answer in the nature of a cross bill praying for specific execution of the contract. Plaintiff demurred to the cross bill, and the court sustained it. This is right. It is evident that Fretts could not obtain relief without making Allison a party, even assuming that his cross bill was meritorious. The cross bill, on its face, showed that Fretts and Allison were jointly interested in whatever rights were conferred by the contract, and

Allison should have joined in the application to the court for specific execution, or, if he refused to join he should have been made party defendant. In a suit to enforce a contract, all persons interested in it should generally be made parties. *Waterman*, Spec. Perf. § 55; *Wilcox v. Pratt*, 125 N. Y. 688, 25 N. E. 1091; *Woodward v. Clark*, 15 Mich. 104. It was also proper to sustain the demurrer to the cross bill, because its averments did not entitle defendant to any relief.

The decree of the lower court holds the writing to be an option which expired at the end of thirty days from its date, and canceled it as constituting a cloud upon plaintiffs' title. This was a quasi *in rem* decree, and one which the court had jurisdiction to pronounce. *Fretts*, having appeared in the cause by council, the court could render a personal decree against him for costs. His appearance, not having been limited to the one special purpose of objecting to the process or to the manner of its service, was a general appearance. *Frank v. Zeigler*, 46 W. Va. 614, 33 S. E. 761; *State v. Thacker Coal & Coke Co.* 49 W. Va. 140, 38 S. E. 539.

Fretts, having voluntarily appeared by counsel, and demurred to and answered plaintiffs' bill, is estopped from denying the court's jurisdiction of his person. *Hunter v. Stewart*, 23 W. Va. 549; *State v. Rawson*, 25 W. Va. 23; *Giboney v. Cooper*, 57 W. Va. 74, 49 S. E. 939.

There is no error in the decree, and it will be affirmed.

ARKANSAS SUPREME COURT.

INDUSTRIAL MUTUAL INDEMNITY
COMPANY, Appt.,
v.

WILLIAM HAWKINS.

(— Ark. —, 127 S. W. 457.)

Indemnity insurance — physical incapacity — right to recover.

An injury which wholly incapacitates a manual laborer from performing any and every kind of business which he is able to do or capable of engaging in is within the terms of a policy providing an indemnity for an injury which shall wholly disable and prevent him from prosecution of any and every kind of business, although the injury would not prevent his doing mental work if he was fitted to do it.

(April 4, 1910.)

A PPEAL by defendant from a judgment of the Circuit Court for Pulaski County 29 L.R.A. (N.S.)

ty in plaintiff's favor in an action brought to recover the amount alleged to be due on an indemnity insurance policy. Affirmed.

The facts are stated in the opinion.

Messrs. Carmichael, Brooks, & Powers, for appellant:

The liability of the defendant was based upon the language of the contract, and not the versatility of the plaintiff.

Lyon v. Railway Pass. Assur. Co. 46 Iowa, 631.

Total disability is inability to carry on any and all kinds of business. Under such a clause the insured must be unable to perform not only the duties of his usual occupation, but the duties of any other occupation.

Ibid.; 4 *Cooley*, Briefs on Insurance, p. 3293; *Supreme Tent, K. M. v. King*, 79 Ill. App. 145; *Supreme Tent, K. M. v. Cox*, 25 Tex. Civ. App. 366, 60 S. W. 971; 4 *Joyce, Ins.* § 3032; *Bacon, Ben. Soc.* § 395A.

Note. — The question, what constitutes disability within the meaning of accident or health policies, is covered by the note to *Turner v. Fidelity & C. Co.* 38 L.R.A. 529, and the supplemental note accompanying *Keith v. Chicago, B. & Q. R. Co.* 23 L.R.A. (N.S.) 352. A search has disclosed no cases which have passed upon the point since the writing of the last note.

The court in *INDUSTRIAL MUT. INDEMNITY Co. v. HAWKINS*, in construing the provision of the policy in question, providing for a recovery where the insured was wholly disabled and prevented from "the prosecution of any and every kind of business," to entitle the insured, a day laborer, to recover a benefit notwithstanding the fact that he was not prevented by the injury from doing mental work, providing he had possessed the necessary education, is in accord with the great weight of authority, as will be seen by referring to the two notes above cited. The intention of the parties in making the contract is the question of importance to be considered. As stated in *INDUSTRIAL MUT. INDEMNITY Co. v. HAWKINS*, provisions of this kind are construed against the insurer, and in favor of the insured. This case illustrates clearly the unjust and unreasonable extent to which the courts would be required to go if a literal construction was given to the language used. It clearly never was within the contemplation of this ignorant day laborer when he entered into the contract, that he should not be entitled to receive benefits providing the injury received left him in such a condition that, upon acquiring an education, he might follow some vocation requiring only mental labor. Such a construction would be utterly absurd. And it is almost equally as clear that the insurer had no such understanding at the time that the policy was issued.

Messrs. Whipple & Whipple, for appellee:

The phrase "immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business" means any and every kind of business pertaining to his occupation or within the scope of insured's ability.

Wall v. Continental Casualty Co. 111 Mo. App. 504, 86 S. W. 491; Joyce, Ins. § 3031; Foglesong v. Modern Brotherhood, 121 Mo. App. 548, 97 S. W. 240; McMahon v. Supreme Council, O. C. F. 54 Mo. App. 468; Lodbill v. Laboring Men's Mut. Aid Asso. 69 Minn. 14, 38 L.R.A. 537, 65 Am. St. Rep. 542, 71 N. W. 696.

Frauenthal, J., delivered the opinion of the court:

This was an action instituted upon a policy of insurance to recover indemnity for the time that plaintiff was unable to prosecute any business by reason of an injury received by him. On March 4, 1907, the defendant issued its indemnity policy of insurance, whereby it agreed that if the plaintiff received an injury "which shall, independently of all other causes, immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business for a period of not less than one week," it would make certain weekly payments to him during the continuance of such disability. The plaintiff was a day laborer, and on September 3, 1908, when the policy was in full force, he was injured while engaged in tearing up old machinery at the shops of the St. Louis, Iron Mountain, & Southern Railway Company. The testimony on the part of the plaintiff tended to prove that the injury consisted of a contusion and abrasion of the right knee, and that he was wholly incapacitated and disabled by reason thereof from work of any and every kind from the date of the injury until October 5, 1908. The testimony also tended to prove that his disability did not render him so helpless that he could not have done some other kind of business if he had been possessed of the mental capacity. The evidence showed that plaintiff was uneducated, and was not capable of earning a livelihood in any other work or business except by manual labor. The sole question involved in the case for determination is whether or not, under the above provision of the policy, the plaintiff was injured to such an extent as to entitle him to a recovery. Upon that question the court instructed the jury that the plaintiff would be entitled to recover "if you believe from the evidence in the case that the plaintiff sustained an injury which of itself whol-

ly disabled and prevented him from doing any and every kind of work pertaining to his occupation, or within the scope of his ability, for a period of over one week. . . . If, on the other hand, you find from the evidence that the plaintiff's injury was not such as to wholly disable and prevent him from doing any and every kind of work pertaining to his occupation within the scope of his ability for a period of over one week, your verdict will be for the defendant." And the court refused to instruct the jury, at the request of defendant, as follows: "The jury is instructed that, unless they find from the evidence that the injury sustained by the plaintiff was such as to wholly disable and prevent the plaintiff from the prosecution of any and every kind of business, you will find for the defendant." A verdict was returned in favor of plaintiff, and defendant has appealed to this court.

The right of the plaintiff to recover in this case depends upon the interpretation of the language of the contract describing the extent of the disability under which he must suffer from the injury, and what would constitute a total disability within the meaning of the policy: In the construction of all contracts the true object is to arrive at the intention of the parties; and, in order to do that, it is necessary to take into consideration the object and purpose of the parties in making the agreement. In construing such a provision as is involved in this policy, that meaning should be given to the language as will be consistent with the fair import of the words used, having reference to the object and purpose of the parties in making the contract. The contract sued on is like any other insurance policy, and its provisions should therefore be construed most strongly against the insurer. As the language employed is that of the defendant, a construction will not be adopted which will defeat a recovery if it is susceptible of a meaning that will permit one. *American Bonding Co. v. Morrow*, 8 Ark. 49, 117 Am. St. Rep. 72, 96 S. W. 615. *Title Guaranty & S. Co. v. Bank of Fulton*, 89 Ark. 471, 117 S. W. 537. The general object of such a contract as is involved in this case is to furnish to the insured an indemnity for the loss of time by reason of the injury which prevents him from prosecuting business. Its evident purpose is to secure him means of living during the time that he is unable to earn a livelihood. The language employed in this provision of the policy is for the purpose of defining what will constitute a total disability to earn a livelihood. Mr. Kerr in his work on Insurance (pp. 385, 386) defines a total dis-

value of the land. There was also evidence from which it might be found that E. E. Hart, a broker and banker at Council Bluffs, Iowa, purchased the notes and mortgage so given by defendant at a discount of about 25 per cent from their face value; such purchase being effected through the agency or assistance of one Gaines, who had knowledge of the fraud which had been perpetrated on the defendant. After receiving the paper, Hart notified the defendant that he had it, and was informed by her that she had been defrauded in the deal and would not pay the debt unless she was compelled to do so. Later this action at law was brought on one of the notes in the name of Mrs. A. W. Way as plaintiff, who claimed to be an innocent purchaser thereof before maturity. Mrs. Way was an aunt of Hart, living in the state of New York, and the petition was verified by him as her agent. The defendant answered, denying the good faith of plaintiff's alleged purchase and ownership of the paper, and pleading fraud in its inception and consequent damage to her in more than the amount of the note. Evidence was offered and introduced on both sides; and, when the parties had rested, the court, upon plaintiff's motion, directed a verdict against the defendant for the full amount of the note, on the ground that there was no evidence in the record upon which a verdict in defendant's favor could be sustained. The correctness of that ruling is the main question presented for our review. It should also be said that, after his suit was commenced, and after her deposition had been taken, Mrs. Way died, and her administrator has been substituted as plaintiff.

As has already been stated, the case, as made, presents evidence tending to sustain the defendant's claim that the note had its inception in fraud. If defendant testifies truthfully (and her credibility was a matter for the jury to determine), she was the victim of a rank imposition devised and executed by Baxter & Recroft, with the aid of others, whereby she was induced to purchase a lot of very undesirable land at a grossly exorbitant price. Assuming the sufficiency of this showing, as we must for the purposes of this appeal, the burden was cast upon the plaintiff to prove that Mrs. Way, or some person under whom she claims, acquired title to the paper in due course. Code Supp. 1907, § 3060a59. To reverse this burden she was required to show competent evidence: (1) That she became the holder of the note before it was forged and without notice that it had been previously dishonored, if such was the fact; (2) that she took it in good faith for value;

and (3) that at the time it was negotiated she had no notice of any infirmity in the note or defect in the title of the person negotiating it. Code Supp. 1907, § 3060a52. And to justify the court in directing a verdict in her favor, the testimony of the bona fide character of her holding must not only be without substantial evidence tending to impeach it, but the showing in its support must be so clear and unequivocal as to leave no room for difference of opinion concerning it among fair-minded men. *McNight v. Parsons*, 136 Iowa, 397, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858.

Does the record make such a case for the appellee? The statute provides that to constitute notice of infirmity in a negotiable instrument, or of a defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge thereof, or knowledge of such facts that his action in taking the instrument amounts to bad faith. Code Supp. 1907, § 3060a56. This provision simply puts in statutory form a rule of the common law as previously interpreted by this and many other courts. *Keegan v. Rock*, 128 Iowa, 43, 102 N. W. 805. In some of the states it seems to have been held that one who takes a transfer of negotiable paper under circumstances to put a reasonable person on inquiry as to defenses against it is considered as having notice of the facts which such inquiry would develop; but the more general trend of the decisions from an early day has been to the effect that mere ground of suspicion as to possible defects in the title of the negotiator, or of the existence of defenses to the instrument negotiated, is not the equivalent of notice to the transferee, and, to be regarded as an innocent purchaser, he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though, if the negligence be of a marked or gross character, it may be competent to establish the mala fides of the purchase. That which will charge the paper in his hands with prior equities and defenses is actual or direct notice of the facts, or, in the absence of such notice or knowledge, the existence to his notice of such facts or circumstances that his action in taking the paper amounts to bad faith. Of this class of cases an illustrative example is *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934, which is a leading case upon the subject. The court there, speaking by Clifford, J., and laying down the rule as it has frequently been recognized in this jurisdiction, held that mere ground or suspicion known to the purchaser of negotiable paper before maturity, or even negligence on his part, is

think that this interpretation of the contract is not inconsistent with the above provision, defining the nature of the disability as contemplated by the policy. We conclude that this is the reasonable and proper construction of the provision of the contract involved in this case. The lower court therefore did not err in its rulings upon the instructions in this case.

The judgment is affirmed.

IOWA SUPREME COURT.

WILLIAM ARND, Admr., etc., of A. W. Way, Deceased,

CHARLOTTE AYLESWORTH, Appt.

(— Iowa, —, 123 N. W. 1000.)

Note — secured by fraud — purchase — good faith.

1. The purchaser of a note secured from the maker by fraud has the burden of showing his good faith in the transaction.

Same — directed verdict.

2. The court cannot direct a verdict in favor of the purchaser of a promissory note which was secured from the maker by fraud, unless the testimony in favor of his good faith is such that no fair-minded person can draw any other inference therefrom.

Same — testimony of bona fide.

3. Uncontroverted evidence in favor of the bona fides of the purchaser of a note procured from the maker by fraud is not sufficient to authorize a directed verdict for the holder, in an action upon the note, if the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men.

Same — bad faith — suspicious circumstances.

4. Knowledge of suspicious circumstances, or failure to inquire into the consideration on the part of a purchaser of a note which has been secured from the maker by fraud, may be sufficient evidence of bad faith to take that question to the jury in an action upon the note.

Evidence — original petition — amendment.

5. The original petition in an action upon a promissory note, which sets out the chain of title from the maker to plaintiff, is admissible in evidence after an amendment inserting a link in the chain immediately before plaintiff, where the admission contained in it is inconsistent with testimony at the trial as to the facts of plaintiff's purchase.

Same — bona fides — question for jury.

6. One suing on a note which had been

procured from the maker by fraud cannot be permitted to testify that he purchased the note in good faith and for value, since that is the question which the jury must decide.

Same — absence of knowledge.

7. One suing on a note which had been obtained from the maker by fraud cannot be permitted to testify that he bought it before it was due, when it is conceded that he never saw it and knew nothing of its terms except as he was informed by one who may have acted as his agent in the transaction.

(December 20, 1909.)

APPEAL by defendant from a judgment of the District Court for Pottawattamie County in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. A. T. Flickinger and I. N. Flickinger, for appellant:

Knowledge of fraud may be established by circumstantial evidence.

Haggard v. Petterson, 107 Iowa, 421, 78 N. W. 53; Commercial Bank v. Paddock, 90 Iowa, 63, 57 N. W. 687; Merrill v. Parker, 80 Iowa, 547, 45 N. W. 1076; Merrill v. Hole, 85 Iowa, 66, 52 N. W. 4; Bennett State Bank v. Schloesser, 101 Iowa, 576, 70 N. W. 705; United States Nat. Bank v. Cresley, 86 Iowa, 634, 53 N. W. 352.

Frauds and failure of consideration having been shown, the burden shifted to the plaintiff to show that she was a bona fide holder without notice for value.

United States Nat. Bank v. Cresley, supra; Freittenberg v. Rubel, 123 Iowa, 156, 98 N. W. 624; Bank of Monroe v. Anderson Bros. Min. & R. Co. 65 Iowa, 692, 22 N. W. 929; Woodward v. Rodgers, 31 Iowa, 342; Rock Island Nat. Bank v. Nelson, 41 Iowa, 563; State Bank v. Cook, 123 Iowa, 111, 100 N. W. 72.

The negotiable instrument law did not change the rule as to the burden of proof. Keegan v. Rock, 128 Iowa, 39, 102 N. W. 805.

Messrs. Mayne & Hazelton for appellee.

Weaver, J., delivered the opinion of the court:

The note in suit was given to Baxter Recroft for part of the purchase price of certain lands in Nebraska, and secured by mortgage upon the property. There was evidence from which the jury might properly find that defendant was induced to give the property and give the note by the false and fraudulent representations of Baxter Recroft as to the location, quality, and

Note. — See note to Mee v. Carlson, ante, 351.
29 L.R.A. (N.S.)

value of the land. There was also evidence from which it might be found that E. E. Hart, a broker and banker at Council Bluffs, Iowa, purchased the notes and mortgage so given by defendant at a discount of about 25 per cent from their face value; such purchase being effected through the agency or assistance of one Gaines, who had knowledge of the fraud which had been perpetrated on the defendant. After receiving the paper, Hart notified the defendant that he had it, and was informed by her that she had been defrauded in the deal and would not pay the debt unless she was compelled to do so. Later this action at law was brought on one of the notes in the name of Mrs. A. W. Way as plaintiff, who claimed to be an innocent purchaser thereof before maturity. Mrs. Way was an aunt of Hart, living in the state of New York, and the petition was verified by him as her agent. The defendant answered, denying the good faith of plaintiff's alleged purchase and ownership of the paper, and pleading fraud in its inception and consequent damage to her in more than the amount of the note. Evidence was offered and introduced on both sides; and, when the parties had rested, the court, upon plaintiff's motion, directed a verdict against the defendant for the full amount of the note, on the ground that there was no evidence in the record upon which a verdict in defendant's favor could be sustained. The correctness of that ruling is the main question presented for our review. It should also be said that, after this suit was commenced, and after her deposition had been taken, Mrs. Way died, and her administrator has been substituted as plaintiff.

As has already been stated, the case, as made, presents evidence tending to sustain the defendant's claim that the note had its inception in fraud. If defendant testifies truthfully (and her credibility was a matter for the jury to determine), she was the victim of a rank imposition devised and executed by Baxter & Recroft, with the aid of others, whereby she was induced to purchase a lot of very undesirable land at a grossly exorbitant price. Assuming the sufficiency of this showing, as we must for the purposes of this appeal, the burden was cast upon the plaintiff to prove that Mrs. Way, or some person under whom she claims, acquired title to the paper in due course. Code Supp. 1907, § 3060a59. To remove this burden she was required to show by competent evidence: (1) That she became the holder of the note before it was overdue and without notice that it had been previously dishonored, if such was the fact; (2) that she took it in good faith for value;

and (3) that at the time it was negotiated she had no notice of any infirmity in the note or defect in the title of the person negotiating it. Code Supp. 1907, § 3060a52. And to justify the court in directing a verdict in her favor, the testimony of the bona fide character of her holding must not only be without substantial evidence tending to impeach it, but the showing in its support must be so clear and unequivocal as to leave no room for difference of opinion concerning it among fair-minded men. *McNight v. Parsons*, 136 Iowa, 397, 22 L.R.A. (N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858.

Does the record make such a case for the appellee? The statute provides that to constitute notice of infirmity in a negotiable instrument, or of a defect in the title of the person negotiating it, the person to whom it is negotiated must have had actual knowledge thereof, or knowledge of such facts that his action in taking the instrument amounts to bad faith. Code Supp. 1907, § 3060a56. This provision simply puts in statutory form a rule of the common law as previously interpreted by this and many other courts. *Keegan v. Rock*, 128 Iowa, 43, 102 N. W. 805. In some of the states it seems to have been held that one who takes a transfer of negotiable paper under circumstances to put a reasonable person on inquiry as to defenses against it is considered as having notice of the facts which such inquiry would develop; but the more general trend of the decisions from an early day has been to the effect that mere ground of suspicion as to possible defects in the title of the negotiator, or of the existence of defenses to the instrument negotiated, is not the equivalent of notice to the transferee, and, to be regarded as an innocent purchaser, he need not as a matter of law be diligent to investigate the circumstances of the origin of the paper, though, if the negligence be of a marked or gross character, it may be competent to establish the mala fides of the purchase. That which will charge the paper in his hands with prior equities and defenses is actual or direct notice of the facts, or, in the absence of such notice or knowledge, the existence to his notice of such facts or circumstances that his action in taking the paper amounts to bad faith. Of this class of cases an illustrative example is *Goodman v. Simonds*, 20 How. 343, 15 L. ed. 934, which is a leading case upon the subject. The court there, speaking by Clifford, J., and laying down the rule as it has frequently been recognized in this jurisdiction, held that mere ground or suspicion known to the purchaser of negotiable paper before maturity, or even negligence on his part, is

not in itself sufficient to charge him with notice, and proceeds also to speak of the limitations to be observed in the application of such rule. It says: "Whether the party had such knowledge or not is a question of fact for the jury, and, like other disputed questions of *scienter*, must be submitted to their determination under the instructions of the court; and the proper inquiry is: Did the party seeking to enforce the payment have knowledge, at the time of the transfer, of the facts and circumstances which impeach the title as between the antecedent parties to the instrument? And if the jury find that he did not, then he is entitled to recover, unless the transaction was attended by bad faith, even though the instrument had been lost or stolen. Everyone must conduct himself honestly in respect to the antecedent parties when he takes negotiable paper, in order to acquire a title which will shield him against prior equities. While he is not obliged to make inquiries, he must not willfully shut his eyes to the means of knowledge which he knows are at hand, as was plainly intimated by Baron Parke in *May & Chapman*, 16 Mees. & W. 355, for the reason that such conduct, whether equivalent to notice or not, would be plenary evidence of bad faith."

The courts accepting the rule of the Goodman Case have not been uniform in their holdings as to where the burden of proof lies in an action by the purchaser of negotiable paper tainted with fraud in its inception; but it has long been the doctrine in this and many other states that, such fraud being shown, the burden is not upon the defendant to show the plaintiff's bad faith in the purchase, but is upon the plaintiff to affirmatively establish his good faith in that transaction. *Keegan v. Rock*, 128 Iowa, 39, 102 N. W. 805, and cases there cited. It is important that this distinction be borne in mind in the consideration of cases like the one at bar, for it is quite possible that the testimony as a whole may be insufficient to justify an affirmative finding of bad faith on the part of the plaintiff, and still not be so conclusive of his good faith as to require a withdrawal of the question from the jury. *Cox v. Cline*, 139 Iowa, 128, 117 N. W. 48; *Mace v. Kennedy*, 68 Mich. 389, 36 N. W. 187. It is ordinarily to be expected, in these cases, that the purchaser will testify to his good faith and want of notice, and that defendant is compelled to rely upon circumstantial evidence to rebut such showing. Whether plaintiff has sufficiently satisfied the burden resting upon him, and made good his claim to be an innocent purchaser, is there-

fore a question for the jury, save in those instances where the testimony is not only consistent with the good faith of such purchase, but is such that no fair-minded person can draw any other inference therefrom. A categorical denial of notice or knowledge is something which in many, if not in most, instances cannot be opposed by direct proof; and the credibility of the witnesses, their interest in the case, the reasonableness or unreasonableness of their statements, the time, place and manner of the transaction, its conformity to or its departure from the ordinary methods of business, and all the other facts and circumstances which, though of slight moment in themselves, yet, when taken together, give character and color to the purchase under inquiry, constitute a showing which the court cannot properly pass upon as a matter of law. Observing this principle it has frequently been held that a denial of notice by the purchaser, though he be uncontradicted by any other witness, is not sufficient to justify a directed verdict in his favor. *Canajoharie Nat. Bank v. Diefendorf*, 123 N. Y. 191, 10 L.R.A. 676, 25 N. E. 402; *Joy v. Diefendorf*, 130 N. Y. 6, 27 Am. St. Rep. 484, 28 N. E. 602; *McNight v. Parsons*, 136 Iowa, 390, 22 L.R.A.(N.S.) 718, 125 Am. St. Rep. 265, 113 N. W. 858. Uncontradicted evidence is not sufficient to command a directed verdict, where the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men. *Elwood v. Western U. Teleg. Co.* 45 N. Y. 549, 6 Am. Rep. 140; *Honegger v. Wettstein*, 94 N. Y. 252; *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 329, 1 So. 561; *West Branch Bank v. Donaldson*, 6 Pa. 179; *Rumsey v. Boutwell*, 61 Hun, 165, 15 N. Y. Supp. 765; *Shaffer v. Clark*, 90 Pa. 94; *Dibble v. Northern Assur. Co.* 70 Mich. 1, 14 Am. St. Rep. 470, 37 N. W. 704. Says the Massachusetts court: "It is not often, where a party has the burden of proving a fact by the testimony of witnesses, that the jury can be required by the court to say that the fact is proved. They may disbelieve the witnesses. If the conclusion is to be reached by drawing inferences of fact from other facts agreed, ordinarily the jury alone can draw these inferences. It is only when no inferences are possible except those which lead to one conclusion that the jury can be required to find a proposition affirmatively established." *Anthony v. Mercantile Mut. Acci. Asso.* 162 Mass. 354, 26 L.R.A. 406, 44 Am. St. Rep. 367, 38 N. E. 973. • See, also, *Skillern v. Baker*, 82 Ark. 86, 118 Am. St. Rep. 52, 100 S. W. 764, 12 A. & E. Ann.

Cas. 243, and *Oleson v. Hendrickson*, 12 Iowa, 222.

In the last-cited case the court said: "It is true, all the evidence for the defense had been ruled out as inadmissible under the state of the pleadings; still, before the plaintiff could recover, he was bound to prove the substance of his complaint against the defendant. Whether he had done so or not, it was the province alone of the jury to determine, and it was not competent for the court to take this matter out of the hands of the jury." In *Elwood v. Western U. Teleg. Co.* supra, the court pertinently observes: "It is undoubtedly the general rule that, where unimpeached witnesses testify distinctly and positively to a fact and are uncontradicted, their testimony should be credited and have the effect of overcoming a mere presumption; . . . but this rule is subject to many qualifications. There may be such a degree of improbability in the statements themselves as to deprive them of credit, however positively made. The witnesses, though unimpeached, may have such an interest in the question at issue as to affect their credibility. . . . And, furthermore, it is often a difficult question to decide when a witness is, in a legal sense, uncontradicted. He may be contradicted by circumstances as well as by statements of others contrary to his own. In such cases courts and juries are not bound to refrain from exercising their judgment, and to blindly adopt the statements of the witness, for the simple reason that no other witness has denied them, and that the character of the witness is not impeached." That the circumstances under which a note is negotiated may be sufficient to sustain a verdict against the holder's positive denial of notice has been frequently held. *Commercial Bank v. Pad-dick*, 90 Iowa, 63, 57 N. W. 687; *City Deposit Bank v. Green*, 138 Iowa, 156, 115 N. W. 893; *Bennett State Bank v. Schloesser*, 101 Iowa, 571, 70 N. W. 705; *McNight v. Parsons*, supra; *Keegan v. Rock*, 128 Iowa, 39, 102 N. W. 805; *Detroit Nat. Bank v. Union Trust Co.* 158 Mich. 557, 123 N. W. 28. Speaking of this proposition in *Hoffman v. Leibfarth*, 51 Iowa, 711, Appx., 2 N. W. 518, it is said: "It is not essential the knowledge of the plaintiff should have been established by direct testimony. It may be established by circumstances and inference therefrom." See also: *Custard v. Hodges*, 155 Mich. 361, 119 N. W. 583; *Detroit Nat. Bank v. Union Trust Co.* 145 Mich. 656, 116 Am. St. Rep. 319, 108 N. W. 1092; *Peirson v. McNeal*, 137 Mich. 158, 100 N. W. 463; *Goodrich v. McDonald*, 77 Mich. 486, 43 N. W. 1019; 29 L.R.A. (N.S.)

Shirk v. Neible, 156 Ind. 66, 83 Am. St. Rep. 150, 59 N. E. 281; *Auten v. Gruner*, 90 Ill. 300; *Johnson v. Way*, 27 Ohio St. 380; *Myers v. Bealer*, 30 Neb. 280, 46 N. W. 479; *Sullivan v. Langley*, 120 Mass. 437; *Jones v. Gordon*, L. R. 2 App. Cas. 627, 4 Eng. Ruf. Cas. 416.

These authorities, and many others which might be cited, uphold with much unanimity the rule, as we have stated it, that neither negligence, nor knowledge of suspicious circumstances, nor failure to inquire into the consideration, will in or of itself be bad faith in a holder of negotiable paper who purchases it in the ordinary course of business; but they are equally consistent in holding that the existence of such facts may be evidence of bad faith sufficient to take the question to the jury; and especially is this so where the burden is upon the holder to establish the innocent character of his purchase. Applying the law thus stated to the record in the instant case, we are of the opinion that the trial court erred in directing a verdict for the plaintiff.

In view of the necessity of ordering a new trial, we refrain from expressing any opinion upon the merits of the case, and enter upon no review in detail of the evidence offered. It is sufficient, at this point, to say that, observing the fundamental rule by which, upon an appeal from an order directing a verdict, this court is bound to give the evidence the most favorable construction for the appellant of which it is reasonably susceptible, we think there is testimony in the record from which the jury could properly find that the note in suit was purchased by Hart for and on account of Mrs. Way, or, in other words, that Hart's relation to the matter was that of agent for Mrs. Way, and that the circumstances attending the negotiation were such that, under the rules of law hereinbefore discussed, the question whether the plaintiff had established the good faith of that transaction should have been submitted to the jury. We may further say that, even if it be granted that Mrs. Way derived her title from Hart as an intermediate holder in his own right, the proof of the good-faith character of her holding is not so clearly and affirmatively established as to permit the court to pass upon it peremptorily as a matter of law. This phase of the case is involved in considerable obscurity, and the record discloses a failure in the production of the best evidence of which the case was apparently capable, which, to say the least, leaves room for unfavorable inferences. This reticence, we assume, did not arise from any desire to suppress or withhold the facts, but rather from a miscon-

ception of the position of the respective parties with respect to the burden of proof, to which we have frequently referred in this opinion. To illustrate, it appears that the transaction between Mrs. Way and Hart was affected entirely by correspondence. Hart also says that a record of this, with other business transactions with Mrs. Way, was kept or entered upon his books; but neither the correspondence nor the books, which ought to be the best possible evidence to show the nature and circumstances of this transaction, are put in evidence. Counsel for appellee say that defendant did not ask for the production of the books and letters, and, if she wanted them, she should have made the proper demand or request therefor. It is true the request made was rather vague and indefinite, and probably insufficient to compel the production as a matter of right; but it must be remembered that the appellant, having proved the fraud attaching to the inception of the notes, was not required to go farther and show the *mala fides* of the plaintiff's purchase; but it was incumbent on plaintiff, in order to recover, to show her hand, and open up the details of the transaction to the inspection of the court and jury. If, with this burden upon her, plaintiff could afford to take the chances of not producing this testimony, it could hardly be expected that defendant would take the chances of what an excursion into the books and correspondence of her adversary might develop.

Of the other errors argued, we need only allude to the following: The original petition filed in the suit alleged that the note in suit was indorsed and transferred by Baxter & Recroft to Thompson, and that Thompson sold and transferred it to plaintiff, and it was not until after the case had been pending about a year that the pleading was amended, alleging the sale of the paper by Thompson to Hart and by Hart to plaintiff. On the trial defendant offered the allegation of the original petition in evidence as tending to support the theory that Hart's position in the transaction was that of an agent instead of a purchaser in his own right, and upon the objection of plaintiff the testimony was excluded as incompetent, immaterial, and irrelevant. The objection should have been overruled. The allegation in the pleading was of the nature of an admission by the plaintiff inconsistent with her subsequent claim, and inconsistent with the testimony offered in her behalf on the trial, and defendant was entitled to put it in evidence for whatever the jury might find it worth in arriving at the truth of the controversy. This is especially true when the offered allegation has been withdrawn

or superseded by a subsequent pleading. *Marshall Field Co. v. Oren Ruffcorn Co.* 117 Iowa, 157, 90 N. W. 618; *Shipley v. Rea-soner*, 87 Iowa, 555, 54 N. W. 470; *Leach v. Hill*, 97 Iowa, 81, 66 N. W. 69; *Burns v. Chicago, Ft. M. & D. M. R. Co.* 110 Iowa, 385, 81 N. W. 794; *Ludwig v. Blackshere*, 102 Iowa, 370, 71 N. W. 356; *Raridan v. Central Iowa R. Co.* 69 Iowa, 531, 29 N. W. 599. It is easy to say that, upon the chief point in controversy, such an admission of record, though not conclusive and still open to explanation, might easily be of material weight in the minds of the jury, and its exclusion was therefore prejudicial error. This error was made more injurious in the present case by the fact that the court at first admitted the evidence and allowed it to be read to the jury, but later recalled the ruling and excluded it, thus emphasizing to the jury that the admission in the superseded pleading could not be considered by them.

Again, Mrs. Way, in her deposition, was permitted to answer in the affirmative, and over defendant's objection, the direct question whether she "purchased said note in good faith and for value." This was simply the witness's conclusion of mixed law and fact, and involved the ultimate question the jury were impaneled to decide. The objection should have been sustained. This witness was also permitted to say that she bought the notes before they were due, when it is conceded she never saw the notes and knew nothing of their terms except as she had been informed by Hart, and, while the answer was doubtless given in all candor, it was evident she was only repeating hearsay information; and defendant's motion to strike such answer should have been sustained. In view, however, of the record as a whole, we should not be inclined to reverse on this ground alone.

Others errors argued are either not well assigned, or are of a nature not likely to arise on a retrial.

For the reasons hereinbefore indicated, the judgment appealed from is reversed, and the cause remanded for a new trial.

LOUISIANA SUPREME COURT. CITY OF NEW ORLEANS

JOSEPH LENFANT et al., Appts.
(126 La. 455, 52 So. 575.)

Nuisance — what constitutes.

1. An unauthorized obstruction upon a public street is a nuisance *per se*, but no

Headnotes by MONROE, J.

lawful use which an individual makes of his own property is a nuisance *per se*, nor can it be made so by a municipal ordinance; and whether it is a nuisance in fact, or *per accidens*, depends upon the circumstances and surroundings.

Same — parking of cars — ordinance — validity.

2. An ordinance which absolutely prohibits the doing of things upon property which appears to be the subject of private ownership, which are harmless in themselves, and may or may not become nuisances, according to the manner in which they are done, is unconstitutional, because it seeks unduly to regulate and trammel the use of such property; and where it imposes arbitrary and unreasonable obligations it is illegal, for that reason.

(May 9, 1910.)

APPEAL by defendants from a judgment of the Second Recorder's Court of the City of New Orleans convicting them of violation of a municipal ordinance regulating the parking of railroad cars and then making up of trains. Reversed.

The facts are stated in the opinion.

Messrs. Denegre & Blair and Victor Leovy for appellants.

Messrs. John J. Reilley and I. D. Moore, for appellee:

Public policy requires that a municipal corporation should not be disturbed in the exercise of its powers unless it has clearly transcended its authority.

Monroe v. Gerspach, 53 La. Ann. 1011; Kennedy v. Phelps, 10 La. Ann. 227; State v. Cozzens, 42 La. Ann. 1070, 8 So. 268;

Note. — Parking cars or making up trains within city limits.

The use of the streets of a city for the purpose of making up or breaking up trains, or for parking and storing cars, is a nuisance, and a railroad has no right to use its tracks and sidings on the streets for such purposes. Glick v. Baltimore & O. R. Co. 8 Mackey, 412, subsequent appeal 21 D. C. 363; (See also Neitzey v. Baltimore & P. R. Co. 5 Mackey, 34); Hopkins v. Baltimore & P. R. Co. 6 Mackey, 311; Fitzgerald v. Baltimore & P. R. Co. 8 Mackey, 513; Owensboro & N. R. Co. v. Sutton, 12 Ky. L. Rep. 247, 13 S. W. 1086; Pennsylvania R. Co. v. Angel, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; Pennsylvania R. Co. v. Thompson, 45 N. J. Eq. 870, 19 Atl. 622; Mahady v. Bushwick R. Co. 91 N. Y. 148, 43 Am. Rep. 661.

The use of a street as a switching yard, in drawing freight cars constantly to and from the company's yards, has also been restrained as a nuisance. Kavanagh v. Mobile & G. R. Co. 78 Ga. 803, 4 S. E. 113.

The use of tracks in a city street for shifting cars should not be absolutely prevented, but limited as is reasonably necessary

for the purpose of carefully taking its cars into or out of the station, to place them in the various trains. Hopkins v. Baltimore & P. R. Co. supra; Glick v. Baltimore & O. R. Co. 21 D. C. 363.

A municipal ordinance prohibiting a railroad company from making up trains or distributing cars across a street is a proper exercise of municipal power when construed to mean that the company shall not stop its engines, cars, or trains across the street during the switching operations, but is invalid when construed to prevent altogether the company from crossing the street when switching its cars. Birmingham v. Alabama G. S. R. Co. 98 Ala. 134, 13 So. 141.

1 Dill. Mun. Corp. 4th ed. § 141.

If one sort of fuel will produce a smoke less obnoxious than another it is the duty of the one responsible to use the fuel less objectionable.

16 Am. & Eng. Enc. Law, p. 248.

A nuisance is public if it affects the surrounding community generally or the people of some local neighborhood, although it may be located on private property, and such a nuisance is one which the common council is authorized, as a government agency, to abate.

Wood, Nuisances, 2d ed. pp. 2, 75; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317, 27 L. ed. 739, 2 Sup. Ct. Rep. 719; People v. Detroit White Lead Works, 82 Mich. 471, 9 L.R.A. 722, 46 N. W. 735; Louisville & N. R. Co. v. Orr, 91 Ky. 109, 15 S. W. 8; Wylie v. Elwood, 134 Ill. 281, 9 L.R.A. 726, 23 Am. St. Rep. 673, 25 N. E. 570; Winslow v. Bloomington, 24 Ill. App. 647; McAndrews v. Colliard, 42 N. J. L. 189, 36 Am. Rep. 508; Cincinnati R. Co. v. Com. 80 Ky. 137; State v. Canal & C. R. Co. supra; Dill. Mun. Corp. 4th ed. § 141; Monroe v. Gerspach and State v. Cozzens, supra; McQuillin, Mun. Ord.

sary for the purpose of carefully taking its cars into or out of the station, to place them in the various trains. Hopkins v. Baltimore & P. R. Co. supra; Glick v. Baltimore & O. R. Co. 21 D. C. 363.

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The use of railroad tracks upon a city street for the purpose of distributing cars and making up trains causes such special injury to the abutting owners that they may maintain a private action for the abatement of the practice as a nuisance. Pennsylvania R. Co. v. Angel, supra.

In State v. Marshall, 50 La. Ann. 1176, 24 So. 186, it was held that the parking or collecting of two, three, or more cars was not necessarily a nuisance; and while it was conceded that a city has the power to

§ 491; Wharton, *Crim. Law*, 10th ed. § 1476; Sedgw. *Const. Law*, 2d ed. pp. 413, 414; Black, *Const. Law*, p. 64; Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659, 24 L. ed. 1036; Froelicher v. Oswald Iron-works, 111 La. 706, 64 L.R.A. 228, 35 So. 821; Vanderbilt v. Adams, 7 Cow. 349; McClanahan v. Vicksburg, S. & P. R. Co. 111 La. 786, 35 So. 902.

Monroe, J., delivered the opinion of the court:

The defendants in this case are prosecuted under an affidavit which charges "that on or about the 25th day of October, 1909, on Elysian Fields street, between Dauphine and Marais streets, . . . one Jos. Lenfant, Jos. Kinkaid, Jno. McGuire, and Charles Marshall, each employees and officers, did then and there wilfully viol. ord. 6,057 N. C. S., and particularly sects. 1, 2, 3, and 4, of said ord. 6,057 N. C. S. All against the peace and dignity of the city of New Orleans."

By which we understand is meant that the parties named, acting as officers and agents, violated ordinance No. 6,057 new council series, which ordinance reads and provides as follows:

"Whereas, numerous complaints have been made, and are being made, in regard to the parking of cars by the Louisville & Nashville Railroad Company and the Southern Pacific Railroad Company, on Elysian Fields street, to the great discomfort of persons living on that street, and with increase of danger to all persons crossing Elysian Fields street; and, whereas, these complaints tend to show that such use of the neutral ground in the middle of Elysian Fields street, by such railroad companies, is wholly unnecessary on the part of said companies, and has led to many serious accidents, and to the depreciation of property on that street; and, whereas, the operation of said companies, in parking their cars and making up their trains, can be, and ought to be, carried on off Elysian Fields street; now, therefore:

"Section 1. . . . That the Louisville & Nashville Railroad Company, the Pontchartrain Railroad Company, the Southern

Pacific Railroad Company, and all other railroad companies which have hitherto used the neutral ground of Elysian Fields street for parking their cars and for carrying on the work of making up trains, watering engines, and doing other similar yard work, be, and they are hereby, prohibited from using said neutral ground for such purposes.

"Sec. 2. . . . That said neutral ground shall not be made use of, at any point, for the purpose of cleaning cars or locomotives or blowing out or watering engines, or cleaning furnaces, or switching cars, or making up trains.

"Sec. 3. . . . That the said railroads shall, within thirty days after the passage of this ordinance, keep and operate gates on both sides of Elysian Fields street, at right angles; and it shall be the duty of the gatemen operating said gates to notify, by signals, all street cars and vehicles crossing said street of the approach of trains; and the fact that said gates are open shall be deemed and treated as notice justifying vehicles, in crossing said street, without further special notice from the gate keeper. Said gates shall be operated so as to interfere as little as possible with traffic and travel across Elysian Fields street.

"Sec. 4. . . . That all cars moving through said street shall, within thirty days after the passage of this ordinance, be provided with modern and efficient spark arresters and smoke consumers.

"Sec. 5. . . . That any officer, agent, or employee of any railroad company, violating any of the provisions of this ordinance, shall upon conviction . . . be condemned to pay a fine of not more than \$25, or imprisonment for not more than thirty days, or both, in the discretion of the recorder, each day that any of the provisions of this ordinance shall be violated, constituting a separate offense."

Defendants filed a plea, in which they allege that the ordinance relied on by the prosecution is unconstitutional, for the reasons that it contravenes various specified articles of the state and Federal Constitutions, in that, if enforced, it will impair the obligations of contracts, devest vested

regulate the parking of cars, the court declined to give its sanction to an ordinance which was wholly prohibitory.

This decision was followed in *State v. Owen*, 50 La. Ann. 1181, 24 So. 187, where the practice complained of was the exchanging between two railroads of cars which were to be hauled beyond their respective lines.

It was decided in *State v. Atlantic & N. C. R. Co.* 141 N. C. 736, 53 S. E. 290, that a city could punish a railroad company for shifting cars in making up a train on the streets in violation of an ordinance, 29 L.R.A. (N.S.)

notwithstanding provisions as to the handling of trains on the city streets, contained in a franchise or license granted to the railroad by the city.

But it was held in *Beideman v. Atlantic City R. Co.* (N. J. Eq.) 19 Atl. 731, that a railroad company should not be enjoined from using its main tracks for making up and unmaking its trains, because in so doing it causes disturbance, discomfort, or nervousness to individuals residing near its tracks.

W. A. S.

rights, take or damage private property, without compensation previously made, operate as a regulation of interstate commerce, deprive defendants and the corporations named of their liberty and property without due process of law, and deprive them of the equal protection of the law; and that it is illegal, because the things forbidden by it are legal and proper, and those commanded wholly unreasonable and *ultra vires* of the city of New Orleans. They further allege that the so-called "neutral ground" is a strip of land, say, 53 feet wide, separating the two roadways of Elysian Fields street, which is, and for many years has been, the private property of the Pontchartrain Railroad Company, having been purchased by it from Bernard Marigny in 1830, and the title to which, as so acquired, has been adjudicated upon and affirmed by the supreme court of this state in a litigation, to which the city of New Orleans was a party, and the record of which is annexed to the plea; that the railroad companies named in the ordinance, other than the Pontchartrain, are using the property, under the authority of the latter, and defendants are using it under the authority of, and contracts with, said three companies; that the city of New Orleans brought a civil suit alleging that the said strip of land had been dedicated to public use, but, upon the filing of exceptions by the Pontchartrain Company, resorted to the present proceeding, to drive it, and those holding under it, off therefrom. Defendants annex to their plea the petition in said suit, and various titles, ordinances, contracts, etc., as establishing the facts alleged; and they sum up their position by averring that the different sections of the ordinance in question are unconstitutional, illegal, and unreasonable: (Sec. 1) Because it prohibits the Pontchartrain Railroad Company and the companies and persons acting under its authority, including defendants, from using the alleged neutral ground for parking cars, making up trains, watering engines, and other "yard work," all of which is necessary for the purposes of the traffic, interstate and intrastate, in which said companies and persons are engaged, and none of which constitute nuisances; (sec. 2) because it prohibits said parties from using the alleged neutral ground, at any point for cleaning cars or locomotives, or blowing out or watering engines or furnaces, or switching cars, or making up trains, none of which are nuisances; (sec. 3) because it imposes upon said parties the burden of erecting gates and maintaining watchmen, day and night, along the whole length of Elysian Fields street, including sparsely settled localities, where there is little traffic

by day, and none by night, which is unnecessary and unreasonable; (sec. 4) because it fails to define modern and effective smoke consumers and spark arresters, and there are no smoke consumers for locomotives.

Counsel for the prosecutor objected to the plea in so far as it sets up the title of the Pontchartrain Railroad Company and objected to the documents annexed thereto, in support of said title, and the objections, as also an objection to the entire plea, having been sustained, defendants took their bills of exception. Bills were also taken to the exclusion of the documents referred to, when they were offered in evidence; to the exclusion of testimony offered to show the cost of erecting and maintaining gates between Claiborne street and the lake; and to the refusal of the recorder to inform defendants, after he had found them guilty, whether they were convicted under one, or another, or all, of the sections of the ordinance.

The appellate jurisdiction of this court, which is here invoked, "extends to all cases in which the constitutionality or legality of . . . any fine, forfeiture, or penalty imposed by a municipal corporation, shall be in contestation; . . . in such case," says the Constitution, "the appeal, on the law and the facts, shall be directly from the court in which the case originated to the supreme court." Const. art. 85. Under this grant, the inquiry into the facts of a case thus made appealable is confined to the facts necessary to the determination of that question. *State ex rel. Graffina v. Finnegan*, 52 La. Ann. 695, 27 So. 564; *Louisiana Soc. v. Moody*, 52 La. Ann. 1815, 28 So. 224; *State v. Pearson*, 110 La. 398, 34 So. 575.

From a reading of the preamble of the ordinance under consideration, it will be seen that its main purpose, as there declared, is to prohibit the "parking" of cars upon the neutral ground of Elysian Fields street, which practice is said to occasion great discomfort to the residents of that street, to be wholly unnecessary, and to have led to many serious accidents and to the depreciation of property. The preamble further declares that the making up of trains on said neutral grounds can, and ought to be, carried on elsewhere, and the text of the ordinance prohibits and penalizes not only the parking of cars, and the making up of trains, but the watering of engines and other similar "yard work," including the cleaning of cars, locomotives, or furnaces, the blowing out of engines, the switching of cars for the making up of trains, and it proceeds to command the railroad companies, using the said neutral ground, to

keep and operate gates on both sides of Elysian Fields street, and to provide its "cars" with modern and efficient spark arresters and smoke consumers.

The ordinance appears to have been enacted either upon the theory that the neutral ground is part of Elysian Fields street, or upon the theory that it is immaterial whether it is a public highway or the private property of those who are prohibited from using it for the purposes mentioned. The contention of the learned counsel representing the city of New Orleans is that "this is, primarily, a prosecution to abate a nuisance," and "that it is perfectly immaterial whether the nuisance is committed on private or public property;" and it was in accordance with the theory last mentioned that he objected to, and the recorder excluded, the evidence offered on behalf of defendants to show that the property belongs to the Pontchartrain Railroad Company, and that they (defendants) are using it under the authority of that company. We agree with the learned counsel that the purpose of the city is to abate what it, in effect, characterizes as a "nuisance," since the preamble of the ordinance declares that the things prohibited by it occasion discomfort to the residents, lead to accidents, and operate to depreciate property, and a "nuisance," in the broad sense, is anything which incommodes or annoys or produces inconvenience or damage. There are, however, "public nuisances" and "private nuisances," and a nuisance may be, at the same time, both public and private, if it, at the same time, affects the general public and also inflicts upon a private individual some special injury that is not inflicted upon the general public. There are, also, "nuisances *per se*," and "nuisances in fact," or *per accidens*; the former being those which are always nuisances, or always nuisances in certain localities, and the latter being those which become nuisances by reason of circumstances and surroundings. We do not, however, agree with the learned counsel that it makes no difference whether the act complained of as a nuisance is committed in a public street or upon private property. The city of New Orleans is vested with the power to regulate the use of its streets, in the interest of the public; but it could not, if it would, lawfully surrender a street to a railroad company as a park for the assembling of its rolling stock, or as a railroad yard for the watering and blowing out of its locomotives, the cleaning of its cars, the making up of its trains, etc., for that would be to give to a private concern that which belongs to the public and is inalienable, and such use of a street would constitute a nuisance *per se*. On the other hand, no lawful use made by an individual

of his own property is a nuisance *per se*, nor can it be made so by municipal ordinance; the most that the municipal authorities can do being to suppress those uses which are nuisances *per se*, or upon inquiry are found to be nuisances *per accidens*. Whilst, therefore, it is entirely competent for the city of New Orleans to prohibit the parking, cleaning, switching, etc., of cars, and the making up of trains on Elysian Fields street, simply because it is the judge of what constitutes an obstruction to its streets, and an obstruction is a nuisance *per se*, a very different question is presented when it undertakes to prohibit a railroad company from using its own property in that way; such uses not being nuisances *per se*, and the city having no power to make them so by ordinance. Considering the ordinance here in question, we have stated that the main reason for its enactment, as declared in the preamble, is to prevent the parking of cars on what is called the "neutral grounds of Elysian Fields street." But the defendants say that the so-called "neutral ground" is the property of the railroad company, under the authority of which they are using it, and though they were denied the privilege of introducing their proof on the subject, it has been brought up in the record, with the bills of exception, and appears to make out a *prima facie* case, at least as to a strip of land having a width of 50 feet (French measure). We do not consider this a proper occasion upon which to express any final opinion upon the title so exhibited, but will remark that, in the case of Pontchartrain R. Co. v. New Orleans, 27 La. Ann. 162 (the record of which was offered by defendants), the city was sued for damages for having destroyed the plaintiff's depot, which appears to have been built partly on the strip of land thus referred to, and partly on the roadways upon either side, and there was judgment in favor of plaintiff in the sum of \$30,000. The opinion of the court (Morgan, Judge) begins as follows: "Plaintiffs purchased from Bernard Marigny a strip of land 50 feet wide. The purchase was made on the 23d of February, 1830. The title of Bernard Marigny to the land in question cannot be denied. The land was bounded on either side by a public street."

The opinion then goes on to state that in March, 1830, the city council authorized the company to make use of the streets on either side of its own land, to a width of 12 feet, and that, acting under the authority so granted, the company built "a depot which covered their own land; the outside pillars thereof, side walls, side columns and other portions of the depot, rested upon

the two strips of 12 feet each, on either side of their property." That in 1870 the city revoked the permission to use said 12-foot strips and notified the company to vacate and that there followed a litigation, pending which the city had the entire depot destroyed. Wherefore it was condemned in damages, as stated.

In *State v. Marshall*, 50 La. Ann. 1176, 24 So. 186, one of the defendants now before the court was prosecuted under an ordinance which denounced, as a nuisance, the parking of cars on the neutral ground of Elysian Fields avenue (being the thoroughfare here in question), and made it unlawful for a "railroad company to permit its engines, cars, or trains of cars, to remain standing upon any portion of the ground known as 'Elysian Fields avenue,' or the 'neutral ground,' between the levee and Miro street, except so far as may be done by trains in motion." In that case, as here, the defendant sought to prove that the neutral ground (so called) belonged to the Pontchartrain Railroad Company, and the documents offered were excluded, and, as in this case, were brought up with the bills of exception. It appeared, too, that some parol testimony was taken down showing the company's possession of the property, and, upon the whole, Mr. Justice Breaux, as the organ of the court, said: "We feel justified in considering the ordinance as one applying to the owner of the property the 'neutral ground,' to which it (the ordinance) . . . refers. And, proceeding so to consider it, he said: "We are compelled to decline to give the sanction of this court to an ordinance so needlessly restraining in its character." On application for rehearing it was further said: "The court desires to have it well understood that it does not decide that, as between the city of New Orleans and anyone else who may claim an interest of any kind, that the city is not the owner of 'Elysian Fields avenue,' or that it is the owner. . . . The whole question related to the parking of cars on Elysian Fields. We decided that parking of cars was not, of itself, a nuisance."

In *State v. Owen*, 50 La. Ann. 1181, 24 So. 187, the defendant appears to have been prosecuted under the same ordinance for delivering and exchanging cars on the "neutral ground," and it was said by the court: "Different from the 'neutral grounds' on 'Canal street,' these grounds, we are informed, are private property. It sufficiently appears of record, for the purpose of this case, that the title is in the Pontchartrain Railroad Company, and that these grounds are partly in the possession and use of the Louisville and Nashville Railroad Company, with the written consent of the owner, the Pontchartrain Railroad Company. . . . 29 L.R.A. (N.S.)

We are not dealing with the possibilities of the ordinance, but with the ordinance as it is. Interpreting it as it reads, we do not think that it is legal. It treats as a nuisance *per se*, an exchange, which manifestly is not a nuisance *per se*. The offense charged here is the delivery of cars and an exchange of cars. There is no question here of the improper carrying on of the work of exchanging cars and the injury thereby occasioned. The ordinance seeks to stop the work. In our view, the collecting of cars, or stopping them, on 'Elysian Fields,' done in a fair and reasonable way, gives no ground of complaint."

In the instant case, as in those cited, we must assume, for the purposes of the question at issue, that the "neutral ground," referred to in the ordinance under which defendants are prosecuted, is the private property of the Pontchartrain Railroad Company, and that defendants are making use of it with the consent of the owner. "Parking" (literally speaking) is the assembling of things or animals within a park, as the parking of artillery, or the parking of deer, and we should take it rather to refer to things or animals, not at the moment in actual service, but so held, to be used, within a longer or shorter period, as required. As applied in the ordinance, it means the assembling of cars, few or many, upon what we must assume to be private property. We are unable to discover in what way such parking constitutes a nuisance in fact, and still less a nuisance *per se*, since cars are ordinarily inanimate and inoffensive, and, so far as we can see, there can be no more reason why a person should not store them on his property than why he should not store other vehicles, or lumber or bricks or anything else, inoffensive in itself, in which he deals or which he chooses to store. As to the obstruction of the view, if the Pontchartrain Railroad Company owns the land in question, it has the right to rebuild its depot, or to build a succession of depots, extending from one cross street to another, along Elysian Fields street, and the owners of the property on either side would have no better cause of complaint than would a property owner, upon one side of an ordinary (single-road) street, should the owner of the vacant square, on the other side, conclude to cover it with tall buildings. The same thing may be said of the other uses of the property which are prohibited by the ordinance. Though the things prohibited are harmless in themselves, they are prohibited, absolutely, as only acts constituting nuisances *per se* are prohibited, and a person prosecuted under the ordinance can as well be convicted for doing those things in a manner which could inflict

no legal injury and furnish no just cause of complaint, as for doing them in such a way as to create a nuisance. The defendants before the court are not charged with doing the prohibited things in any particular way. The charge is that "they did, then and there, viol. ord. 6,057, N. C. S.," and, as we have said, the ordinance prohibits, absolutely, uses of (what, so far as appears, is) private property, which, in themselves, are legitimate and void of legal offense.

With regard to the command contained in § 3 of the ordinance to maintain gates, it applies as well to that portion of Elysian Fields street which is almost uninhabited as to that portion which is built up and is crossed by street cars and vehicles engaged in the ordinary city traffic, and we are of opinion that the command is unreasonable, and hence illegal, in failing to distinguish between places where gates should be maintained and places where they would serve no useful purpose, but, according to the evidence, would constitute an element of danger. Section 4 of the ordinance requires that "all cars . . . shall . . . be provided with modern and efficient spark arresters and smoke consumers,"—thus failing to distinguish between an ordinary car and a locomotive, and also failing to distinguish between locomotives which burn oil and those which burn coal. It appears from the testimony, however, that the locomotives of one of the companies named in the ordinance use oil, and emit no sparks, and we can take notice of the fact that the vast majority of "cars" carry no fire. Our conclusion, then, is that the ordinance No. 6,057, N. C. S., is unconstitutional, in that it seeks, unduly, to regulate and trammel the use of property which appears to be the subject of private ownership, and that it is illegal, because arbitrary and unreasonable.

It is therefore ordered, adjudged, and decreed that the convictions and sentences appealed from be annulled and set aside, and that the defendants be discharged.

Provosty, J., takes no part, not having heard the argument.

Petition for rehearing denied June 6, 1910.

MICHIGAN SUPREME COURT.

WILLIAM H. GALE

v.

PERCY G. MAYHEW, Appt.

(161 Mich. 96, 125 N. W. 781.)

Note — assignment — right of assignee.

1. An indorsement by which one "assigns his interest" in a negotiable note does not permit the indorsee to sue thereon in his own name, where the statute per-

mitting such suits by assignees of choses in action does not apply to such notes.

Same — qualified indorsement — negotiable instruments law.

2. The provision of the negotiable instruments law that a qualified indorsement, which is defined as an indorsement without recourse, or words of similar import, does not impair the negotiable character of the instrument, does not apply to an indorsement by which one assigns his interest in the note.

(April 1, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Kent County in plaintiff's favor in an action brought to recover the amount alleged to be due on a promissory note. Reversed.

The facts are stated in the opinion.

Messrs. Kleinbans & Knappen, for appellant.

A legal indorsement is a prerequisite to the holder suing in his own name.

Matteson v. Morris, 40 Mich. 52.

The assignment did not amount to an indorsement.

Aniba v. Yeomans, 39 Mich. 171; Spencer v. Halpern, 62 Ark. 595, 36 L.R.A. 120, 37 S. W. 711; Lyons v. Divelbis, 22 Pa. 185.

Messrs. Smedley, Hall, & Freeland, for appellee.

An indorsement, "I transfer all my right and title to the within note, to be enjoyed in the same manner as may have been by me," is in effect an indorsement without recourse, and does not destroy the negotiability of the instrument.

1 Dan. Neg. Inst. § 700, p. 671; Hailey v. Falconer, 32 Ala. 536; Evans v. Freeman, 142 N. C. 61, 54 S. E. 847; Thorp v. Mineman, 123 Wis. 149, 68 L.R.A. 146, 107 Am. St. Rep. 1003, 101 N. W. 417; Markey v. Corey, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493.

Stone, J., delivered the opinion of the court:

From appellant's brief we compile the following statement of the facts in this case: The defendant had for some time prior to November or December, 1907, been employed by the Grand Rapids Felt & Paper Co.

Note. — As to whether the holder of an indorsed note is real party in interest within the meaning of statutes defining the parties by whom the action must be brought, see note to American Soda Fountain Co. v. Hogue, 17 L.R.A. (N.S.) 1105.

As to right of transferee without indorsement of bill or note payable or indorsed to order of transferor, to protection as a bona fide purchaser, see note to First Nat. Bank v. McCullough, 17 L.R.A. (N.S.) 1105.

Company, and while so employed became acquainted with one William R. Pelton. Pelton had been working there for about twenty years as millwright, and part of the time he had charge of the carding and picking rooms. The felt boot company had failed in May, and it was only a question of time before they would have to suspend operations. Mr. Pelton looked into the cotton felt business with a view to getting capital interested and starting up such business, and also bought some secondhand machines at Seneca Falls, New York. He and Mr. Mayhew had several conversations beginning with November, 1907, which finally culminated in a somewhat indefinite verbal agreement about January 1, 1908. There is some conflict as to the terms of this agreement; Pelton contending that a partnership was contemplated, in which he was to give his machines at a valuation of \$1,500, and that Mayhew was to put in \$1,500. Mayhew contends that he would not consider a partnership, and offered to buy the machines, but that Pelton refused to sell them. There was also talk of later forming a corporation, in which case Pelton was to receive \$1,500 worth of stock for his machines. Mayhew rented a building, and Pelton's machines, along with several others of different character, were there installed. Pelton began installing his machines about January 25, 1908, and they were ready to operate somewhere between the latter part of February and the middle of March. While the machines were being set up, Pelton drew wages amounting to \$15 a week, and after the machines began turning out stock, at the rate of \$3 a day. During the time the machines were being installed, Pelton and Mayhew were still negotiating about a partnership and about incorporation. Finally, upon February 22, 1908, the note and agreement herein involved were given. They are as follows, being dated back to February 1, 1908.

Grand Rapids, Mich., February 1, 1908.

Twelve months after date, for value received, we promise to pay to the order of William R. Pelton fifteen hundred and no 100 dollars, with interest at six per cent, semi-annually, covering machinery, as per agreement of February 1.

P. G. Mayhew Company,
P. G. Mayhew.

Grand Rapids, Mich

Agreement for the sum of \$1,500 in the form of a note for twelve months, with six per cent interest, payable semi-annually. I, William R. Pelton, have placed in the hands of Percy G. Mayhew three carding machines as delivered for use in the Michigan Felting Company, which shall entitle
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me, if desired, upon incorporation of this Michigan Felting Company, to \$1,500 worth of shares in said corporation. And I further agree to give my services for the time of six months from the date of this agreement with the Michigan Felting Company, at \$3 per day, guaranteed to me upon the commencement of the making of stock.

[Signed] William R. Pelton.

Percy G. Mayhew.

Dated February 1, 1908.

There is a conflict of testimony as to just what these papers meant. Pelton claims that they covered an outright purchase of the machines. Mayhew contends that he was simply leasing the machines for a period of one year, and that the note was simply evidence of title, in order to protect Pelton's machines from fire loss.

About two or three months after Pelton began work, and about May 1st, acting in accordance with his claimed understanding of the agreement, Mayhew asked for the return of the note in question, offering at the same time to turn over to Pelton a number of insurance policies, to secure Pelton for the loss of the machines in case of fire. This Pelton refused to do. Pelton continued working under the agreement until his period of six months, lacking one week, was up. He was, however, paid for the full six months. At the time they severed their business relations, July 25, 1908, they displayed considerable ill feeling toward each other. The latter part of the following January, Pelton sold the note to the plaintiff. The language by which this note was transferred is:

I hereby assign my interest in this note to William H. Gale.

[Signed] W. R. Pelton.

The consideration for this transfer was \$500 cash, and an agreement to give Pelton \$1,000 worth of stock of the Gale Chair Company. The testimony shows that Pelton did not inform the plaintiff that there was a misunderstanding between himself and Mayhew concerning the note.

The note was not paid and this suit was brought thereon in the Kent circuit court. At the close of the case, defendant made a motion that the court direct a verdict for the defendant, on the ground that the testimony showed that the note was simply assigned to the plaintiff, and that, being a negotiable note, the plaintiff, therefore, could not sue in his own name, under the statute. 3 Comp. Laws, § 10,054. The motion was overruled, defendant excepted, the case was submitted to the jury, and a verdict for the plaintiff was returned in the

sum of \$1,573.75, and judgment was entered thereon.

Counsel for the respective parties agree that the assignment of error raises the single question whether the writing found upon the back of the note was such an indorsement as would enable the plaintiff to bring suit thereon in his own name, or whether it was merely an assignment.

The circuit judge, and in fact counsel for both parties, treated the note as a negotiable note, under the negotiable instrument act. In this we think they were correct.

Appellant places reliance largely on the case of *Aniba v. Yeomans*, 39 Mich. 171, as authority that the plaintiff cannot sue in his own name. It is true that at common law an assignee of a chose in action could not sue in his own name. The statute above referred to give this right in certain cases, but it expressly excepts negotiable instruments. In the case of such instruments, something more than a mere assignment is necessary. There must be a legal indorsement. Was there such in this case?

Counsel for appellee well say that in *Aniba v. Yeomans* this court did not hold that a person who receives a negotiable note by virtue of an assignment written on the back of it cannot bring the suit in his own name. That question does not seem to have been raised in the case. What this court did hold was that *Yeomans*, having received the note by assignment from *Aniba*, was not an indorsee of the note, and therefore that he held the note subject to any defense which the makers might have to it in the hands of *Aniba*. But had the question been raised there, as it is raised here, what would this court have said? It will be unfortunate if we are compelled to reverse this case upon this question, for the merits of the whole controversy seem to have been tried and submitted to the jury, the same as though Mr. Pelton had been the plaintiff, instead of Mr. Gale. This statute, however, has been the law of this state since 1863.

As early as 1872, in the case of *Redmond v. Stansbury*, 24 Mich. 445, it was held that this statute, permitting an assignee of a chose in action "not negotiable under existing laws" to sue and recover in his own name, did not apply to a case where the plaintiff simply had possession of a negotiable note payable to another. In that case Mr. Justice Graves said: "The reasoning is this: That the act of 1863 allows choses in action to be transferred in the same way as chattels; that this note is a chose in action; and that its possession, like the possession of a horse, was evidence of ownership. The language of the act itself furnishes an explicit answer to this argument. The statute expressly excepted from

its operation all papers allowed to be negotiable under the laws as they were before the statute; and the note in suit was of this kind. The plaintiff below could, therefore, derive no aid from the law of 1863, and, as he failed to show himself invested with the legal title through any mode recognized by law, the judgment below should be reversed." This statute is again referred to in *Waldron v. Harrington*, 28 Mich. 493.

In *Robinson v. Wilkinson*, 38 Mich. 299, *Susannah Wilkinson* brought suit upon a note made by *Robinson*, and payable to the order of *James N. R. Wilkinson*. The note was not indorsed, and the plaintiff claimed a right to recover upon it by showing a verbal assignment of it by the payee to herself for value. Mr. Justice Cooley said: "It is not pretended that such a suit could have been maintained at the common law, but reliance is placed upon the statute . . . which provides that 'the assignee of any bond, note, or other chose in action, not negotiable under existing laws, which has been or may be hereafter assigned, may sue and recover the same in his own name,' etc. The view of this statute taken by the plaintiff is that it is intended to confer upon assignees of choses in action the right to maintain suits in their own name in all cases; that, while a note in the form of the one before the court is in a certain sense negotiable, yet that it is not fully and for all purposes such until after indorsement by the payee, and is therefore within the intent of this statute, and must be considered not negotiable until it is put in position to pass from hand to hand by mere delivery. And it is said with some force there could be no reason for leaving this particular class of paper subject to the common-law rule which required suit to be brought in the name of the payee, when on all other contracts the assignee is permitted to sue in his own name. The question, however, is one of statutory construction, and not of the sufficiency of the reasons for making the statute what it is. There is no doubt that such paper is negotiable according to the sense of that word as it is employed in mercantile law. Bills of exchange and notes payable to order or to bearer are equally considered negotiable, though the ceremony of indorsement is required in the one case and not in the other. It is true that paper payable to order, and not yet indorsed, is sometimes said not to be negotiable until the indorsement is made, but by this is meant only that the indorsement is a necessary ceremony of the process of negotiating it. The term 'negotiable' is one of classification, and does not of necessity imp-

anything more than that the paper possesses the negotiable quality. The statute referred to is an enabling statute, and we cannot enlarge it. Probably, in enacting it the legislature went as far as it was supposed there was any necessity for going, namely, to provide for cases in which, under common-law rules, the assignee could not, by the act of the parties, be empowered to sue in his own name. It was not supposable that any similar enactment was needed for the case of negotiable paper, as the mere act of indorsement, which it is customary to perform in assigning such paper, was all that would be needed. *Redmond v. Stansbury*, 24 Mich. 447. We think the court erred in giving judgment for the plaintiff, and that the judgment must be reversed, with costs, and a new trial ordered." See also the language of Chief Justice Campbell in *Matteson v. Morris*, 40 Mich. 55.

Spinning v. Sullivan, 48 Mich. 5, 11 N. W. 758, was a suit in equity to correct a note. The note was drawn in proper commercial form, and was made payable to the order of James Sullivan. But no indorsement had been made to the defendant. Whatever title he had obtained was through a separate instrument purporting "to assign, sell, transfer, and set over to said Timothy Sullivan, a certain note of Charles Spinning now held by me." Mr. Justice Graves said: "In case of the assignment of a chose in action not having the attribute of negotiability, the assignee takes it subject to antecedent equities, and the late provision to permit assignees to sue in their own names has not affected the principle. *Myers v. Davis*, 22 N. Y. 489. But commercial paper having the quality of negotiability is privileged, and such of it as belongs to the class of bills of exchange and promissory notes may be transferred in such manner as to give the transferee a better right than was possessed by the party making the transfer. In case the new title is innocent and regular, the law will protect it against prior equities, and leave the latter to independent adjustment. But to have this effect the title must accord with the rules which give the immunity. Because if it does not, and pursues simply the style and method allowed by the common law in the case of chattels, the right which follows is no greater than would ensue if the paper was devoid of the character of negotiability, and such ownership as there is will be subject to pre-existing equities. The title the defendant Timothy sets up is of this kind. The note was transferable by indorsement, and was not transferred in

that way, but by assignment. He obtained no title to enable him to sue except in the name of the payee,"—citing the cases above referred to, and, also, *Gibson v. Miller*, 20 Mich. 355, 18 Am. Rep. 98. See also *Brennan v. Merchants' & M. Nat. Bank*, 62 Mich. 347, 28 N. W. 881; *Minor v. Bewick*, 55 Mich. 491, 22 N. W. 12.

This question was before this court in *Stevens v. Hannan*, 86 Mich. 305, 24 Am. St. Rep. 125, 48 N. W. 951. There the payee of the note transferred it by these words: "For value received I hereby assign all interest in and to this note to Ralph E. Watson." Watson transferred it in turn to the plaintiff, for value, before maturity, by writing his name on the back and delivering it to him. The defendant there insisted that the plaintiff could not sue in his own name, but should have brought suit in the name of the payee. Upon that branch of the case, Mr. Justice McGrath said: "I do not think that the first point is well taken. If the effect of Batchelder's indorsement was to make the note thereafter non-negotiable, then the assignment from Watson to plaintiff entitled plaintiff to sue in his own name, under the statute, and, if Batchelder's indorsement did not affect its negotiability, then Watson's indorsement entitled plaintiff, as holder of the note, to sue in his own name." This case is easily distinguished from the case we are considering. Had Mr. Gale before maturity, and for value, transferred the note in question by writing his name on the back, and delivering it to an indorsee, we should have another question before us.

It is said that the circuit judge relied for his course upon the case of *Markey v. Corey*, 108 Mich. 184, 36 L.R.A. 117, 62 Am. St. Rep. 698, 66 N. W. 493. In that case the note sued upon was indorsed: "I hereby assign the within note to Matthew M. Markey and Catherine Sundars." The point was urged there by the defendant that, if the plaintiffs took title to the note, it was under the assignment, and that therefore they could not sue in their own names; but if they had a right of action, it must be brought in the name of the original party to the contract. It is well that we bear in mind the difference in the language of the assignment in the case we are considering, and that in the above case. In this case it was: "I hereby assign my interest in this note to William H. Gale." In the above case it was: "I hereby assign the within note." Mr. Justice Long, in the above case, after discussing the matter at some length, said: "The language used in the assignment to the note in suit does

not negative the implication of the legal liability of the assignor as indorser, and as the words are to be construed, as strongly as their sense will allow, against the assignor, he must be held as indorser." Then, after quoting the language of the assignment in *Aniba v. Yeomans* and the language of Mr. Justice Marston in that case, he continues: "In other words, the learned justice seemed to think that the words used limited the transfer to the right and title he then held. While this holding appears to be at variance with the cases elsewhere, we think it readily distinguishable from the present, as here the words are, 'I hereby assign the within note,' etc., and do not purport to limit the liability of Corey as an indorser." We think that the learned circuit judge was in error in relying upon the case of *Markey v. Corey*.

But it is urged by counsel for appellee that the old rule has been abrogated by § 40 of the negotiable instrument law (Laws 1905, No. 265), which was adopted in this state before the note in question was made. That provision reads as follows: "A qualified indorsement constitutes the indorser a mere assignor of the title to the instrument. It may be made by adding to the indorser's signature the words 'without recourse,' or any words of similar import. Such an indorsement does not impair the negotiable character of the instrument."

We have two answers to the above claim:

First, that it was held by this court as early as *Borden v. Clark*, 26 Mich. 410, that the fact that the vendor of a promissory note indorsed it "without recourse" has no tendency to show that his vendee is not a bona fide purchaser. Nor would the addition of the words of "similar import" make any difference. So it is clear that this statute has not changed the rule in this state in that respect. It cannot be said that the words used in the case we are considering were equivalent to an indorsement without recourse.

Second. The statute above quoted expressly provides that "a qualified indorsement constitutes the indorser a mere assignor of the title to the instrument." Here again we are confronted with § 10,054, 3 Comp. Laws, which holds that the assignee of a negotiable note cannot sue in his own name. So, whether the negotiable character of this instrument is impaired or not by the assignment, we cannot abrogate this statute, which has been the law of this state nearly fifty years, and has been repeatedly interpreted and cited by this court. That the legislature might wisely repeal it is another matter.

We feel compelled, therefore, to reverse the judgment below, without a new trial.
29 L.R.A. (N.S.)

MINNESOTA SUPREME COURT.

MICHAEL MANLEY, Respt.,

v.

HUGH R. SCOTT.

J. S. SHAFFER, Intervener, Appt.

(108 Minn. 142, 121 N. W. 628.)

County commissioners — nature of board.

1. The board of county commissioners of Hennepin county is a continuing body, and its existence is not affected by the election of new members, and the election of a chairman and vice chairman at the first session in each year.

Same — power to contract — termination.

2. Such board has power to employ a morgue keeper and to enter into a contract with him to perform the services required for a period of one year, during which time he may only be discharged for causes which will justify the county in refusing to carry out the contract.

Public contract — duration — validity.

3. The board may, on the last day of the year, employ a morgue keeper for a period of one year therefrom, regardless of the fact that two new members of the board, who were elected at the November election preceding, will qualify and enter upon their duties soon after the first of the year. Such contract, being reasonable, and not contrary to public policy, cannot legally be rescinded without cause, after such new members have qualified.

(June 4, 1909.)

Headnotes by ELLIOTT, J.

Note. — Power of board to appoint officer or to make a contract for term extending beyond its own term.

It is not intended to include in this note cases involving the validity of contracts by municipalities, counties, towns, or school districts, where the primary question considered was the validity as affected by the reasonableness of the term of the contract, rather than the question herein under consideration, as to the validity as affected by the fact that the contract extends beyond the term of the board entering into the same.

Power as affected by nature of contract.

The power of municipal boards to contract is statutory, and arises either from express statutory provisions or authority implied therefrom. That the legislature has the power to authorize municipal boards to enter into contracts which will extend beyond their own official term is well settled. *Detroit v. Detroit Citizens' Street R. Co.* 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410; *Taylor v. Northampton County*, 50 N.

APPEAL by intervener from a judgment of the District Court for Hennepin County in plaintiff's favor in an action brought to recover a salary alleged to be due him under a contract appointing him morgue keeper of Hennepin County. Reversed.

The facts are stated in the opinion.

Mr. Freeman P. Lane, for appellant:

Boards of county commissioners have a perpetual existence, continued by members who succeed each other, and the body remains the same, notwithstanding a change in the individuals who compose it.

Chapman v. York County, 79 Me. 267, 9 Atl. 728; Pegram v. Cleveland County, 65 N. C. 114.

Courts will not interfere with such boards

in the lawful exercise of the jurisdiction committed to them by law, on the sole ground that their actions are characterized by lack of wisdom or sound discretion.

Monroe County v. Strong, 78 Miss. 565, 20 So. 530; State v. Public Building Comrs. 12 Rich. L. 300; Platter v. Elkhart County, 103 Ind. 360, 2 N. E. 544; Grannis v. Blue Earth County, 81 Minn. 55, 83 N. W. 495.

Where the commissioners of a county do public business according to the discretion confided to them, new commissioners are bound by their acts.

Scioto v. Gherky, Wright (Ohio) 493; Richland County v. Miller, 16 S. C. 236.

The execution of the contract which will bind the board in the future, and after

C. (5 Jones, L.) 98; Kerlin Bros. Co. v. Toledo, 20 Ohio C. C. 803.

This being true, it follows that the validity of a contract extending beyond the term of the board making it is determined to a great extent by the language employed in the statute conferring the power, construed with reference to the subject-matter and nature of the contract and the purpose thereof. As an aid in construing such statutes the character and nature of the contract have an important bearing.

Thus, where the contract involved relates to governmental or legislative functions of the board making it, or involves a matter of discretion to be exercised by the board, unless the statute conferring power to contract clearly authorizes a board to make a contract extending beyond its own term, no power of the board so to do exists, since the power conferred upon boards to exercise legislative or governmental functions is conferred to be exercised as often as may be found needful or politic, and the board presently holding such powers is vested with no discretion to circumscribe or limit or diminish their efficiency, but must transmit them unimpaired to their successors. Omaha Water Co. v. Omaha, 12 L.R.A. (N.S.) 736, 77 C. C. A. 267, 147 Fed. 1; Omaha Water Co. v. Omaha, 85 C. C. A. 54, 156 Fed. 922, on subsequent appeal, 96 C. C. A. 419, 171 Fed. 647; Illinois Trust & Sav. Bank v. Arkansas City, 34 L.R.A. 518, 22 C. C. A. 171, 40 U. S. App. 257, 76 Fed. 271; Pikes Peak Power Co. v. Colorado Springs, 44 C. C. A. 333, 105 Fed. 1; Westminster Water Co. v. Westminster, 98 Md. 551, 64 L.R.A. 630, 103 Am. St. Rep. 424, 56 Atl. 990; Gale v. Kalamazoo, 23 Mich. 344, 9 Am. Rep. 80.

Where a board of councilmen of a town have duly determined to issue bonds and sell them to certain persons who have made the most advantageous bid therefor, it is merely a ministerial duty thereafter to issue the bonds, and a subsequent board of councilmen will by mandamus be required to perform the duty. Edward C. Jones Co. v. Guttenberg, 66 N. J. L. 659, 51 Atl. 274. 29 L.R.A. (N.S.),

—contracts for water supply, street lighting, etc.

Where a contract relates to the ordinary business affairs of the municipality which the board represents, they are controlled by no such rule, and they may lawfully exercise the power conferred in the same way, and in its exercise the municipality will be governed by the same rules which control a private individual or business corporation under like circumstances. Illinois Trust & Sav. Bank v. Arkansas City and Pikes Peak Power Co. v. Colorado Springs, *supra*; McBean v. Fresno, 112 Cal. 160, 31 L.R.A. 794, 53 Am. St. Rep. 191, 44 Pac. 358; Higgins v. San Diego, 118 Cal. 524, 45 Pac. 824, 50 Pac. 670; Biddeford v. Yates, 104 Me. 506, 72 Atl. 335, 15 A. & E. Ann. Cas. 1091; Gale v. Kalamazoo and Westminster Water Co. v. Westminster, *supra*; Blood v. Manchester Electric Light Co. 68 N. H. 340, 39 Atl. 335; Tanner v. Auburn, 37 Wash. 38, 79 Pac. 494; Edward C. Jones Co. v. Guttenberg, *supra*.

In amplification of this doctrine in Omaha Water Co. v. Omaha, *supra*, the court said: "A city has two classes of powers, the one legislative or governmental, by virtue of which it controls its people as their sovereign, the other proprietary or business, by means of which it acts and contracts for the private advantage of the inhabitants of the city and of the city itself. In the exercise of powers which are strictly governmental or legislative, the officers of a city are trustees for the public, and they may make no grant or contract which will bind the municipality beyond the terms of their offices, because they may not lawfully circumscribe the legislative powers of their successors. But in the exercise of the business powers of a city, the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the city will be governed by the same rules which control a private individual or a business corporation under like circumstances. In contract-

there has been a change in its membership, will not in itself constitute fraud.

McCormick v. Boston, 120 Mass. 499; *Bay State Brick Co. v. Foster*, 115 Mass. 431; *Benjamin v. Wheeler*, 8 Gray, 409; *Soon Hing v. Crowley*, 113 U. S. 703, 28 L. ed. 1145, 5 Sup. Ct. Rep. 730; *Oglesby v. Attrill*, 105 U. S. 605, 28 L. ed. 1186; *Wait v. Ray*, 67 N. Y. 36; *Blandon v. Moses*, 29 Hun, 607; *Reubelt v. Noblesville*, 106 Ind. 478, 7 N. E. 206; *Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385; *Webb v. Spokane County*, 9 Wash. 103, 37 Pac. 282.

Mr. F. H. Boardman for respondent.
Mr. Elmer W. Gray for defendant.

Elliot, J., delivered the opinion of the court:

In this proceeding it was sought to determine whether Michael Manley or J. S.

Shaffer is entitled to perform the services and receive compensation as morgue keeper of Hennepin county during the year of 1909. The controversy was submitted to the district court upon agreed facts, as authorized by § 4286 of the Revised Laws of 1905, and Shaffer appealed to this court from a judgment entered in favor of Manley.

The facts may be stated very briefly. At midnight on December 31, 1908, the terms of two of the five members of the board of county commissioners of Hennepin county expired. On that day, before the expiration of the term of office of these two members, J. S. Shaffer, who had previously been employed, was appointed and re-employed as morgue keeper of the county for the year 1909, and the contract with him was reduced to writing and duly executed by him and by the chairman of the board on behalf of the board. At the November election of

ing for the construction or purchase of waterworks to supply itself and its inhabitants with water, a city is not exercising its governmental or legislative, but is using its business or proprietary, powers. The purpose of such a contract is not to govern its inhabitants, but to obtain a private benefit for the city and for its denizens."

This case applied the doctrine as to the right of a city council to contract for a water supply for a period of years extending beyond their terms of office, where the statute relative thereto authorized the city to construct and maintain waterworks "on such terms and under such regulations as may be agreed on." In other words, a general power. To the same effect is *Illinois Trust & Sav. Bank v. Arkansas City*, supra.

On the same point in *Valparaiso v. Gardner*, 97 Ind. 1, 49 Am. Rep. 416, the court said: "There is a distinction between powers of a legislative character and powers of a business nature. The power to execute a contract for goods, for houses, for gas, for water, and the like, is neither a judicial nor a legislative power, but is a purely business power."

In Indiana the rule is settled that where there is no substantial limitation of the legislative power of the common council of the municipality to contract for such necessities as gas, water, etc., a city has the power to contract for a supply of gas or water for a stated period of time extending beyond the tenure of office of the individual members of the common council making the contract. *Indianapolis v. Indianapolis Gaslight & Coke Co.* 66 Ind. 396; *Valparaiso v. Gardner*, supra; *Vincennes v. Citizens' Gaslight Co.* 132 Ind. 114, 16 L.R.A. 485, 31 N. E. 573.

In *Westminster Water Co. v. Westminster*, supra, a contract by a city with a water company, which required the city to levy a specific tax annually forever to pay for water used by the city, was held invalid, because an attempt to bind succeeding common councils in the discharge of their legislative 29 L.R.A. (N.S.)

and governmental powers, the levying of a tax being a governmental power.

Carlyle Water, Light & P. Co. v. Carlyle, 31 Ill. App. 325, held a contract by a city for water supply, which extended beyond the term of the officers making it, not void, but voidable merely so far as it was executory.

In *Pikes Peak Power Co. v. Colorado Springs*, supra, the general rule as herein before stated was applied, and the power of a city was affirmed, to grant the rights and privileges of constructing power houses to generate electricity in suitable places on the public grounds of the city, and to lay conduits and erect poles on its streets, and furnish light to the city and its inhabitants for a period of years extending beyond the term of office of members of the council making the contract. The statute in this case, also, in general terms, empowered the city to regulate the use of its streets to provide for the lighting of the same, etc.

And where the authority of the city council is by statute coextensive with the powers of the city or its inhabitants, the limitations in their term of office is immaterial as affecting their right to make contracts such as lighting the public streets for any reasonable period of time, although beyond the term of office; the contract stands the same as if it had been made by a vote of the inhabitants acting in their town organization. *Blood v. Manchester Electric Light Co.* 68 N. H. 340, 39 Atl. 335.

So, also, a contract by the mayor and council of the city for lighting the streets and public places for a period of years is valid, although extending beyond their term of office. *Tanner v. Auburn*, 37 Wash. 28, 79 Pac. 494.

In the absence of any inhibition against making a contract by a municipal board which should extend beyond the term of office of the board which makes it, such a contract is not invalid upon this ground, if at the time of its execution it was fair, just and reasonable, and prompted by the neces-

1908, two new county commissioners had been elected, and when they took office, soon after the 1st of January, the board elected a new chairman and vice chairman, as required by the statute. Immediately thereafter the board attempted to rescind the contract with Shaffer, and to make a new contract with Manley, by which he was employed as morgue keeper for the year 1909. The question is whether the contract made with Shaffer on December 31st is valid and binding, so as to preclude the board, as constituted after January 4, 1909, from rescinding it and employing Manley; or, stating the question somewhat more abstractly, Has the board of county commissioners the power to make a contract with an employee which extends beyond the expiration of the terms of office of certain members of the board?

sities of the situation, or was advantageous to the municipality at the time it was entered into. To sustain such a contract, there must be a clear showing of a reasonable necessity for its execution. Coming within this doctrine is a contract extending over a period of years, to dispose of the sewage of a city for a certain consideration to be paid annually, and such a contract is valid, although extending beyond the term of office of the board making it. *McBean v. Fresno*, supra. Followed in *Higgins v. San Diego*, supra, as to a contract by a city for water supply, which extended beyond the term of the council making it.

—leases.

Applying the general doctrine stated, the power of a city council to lease municipal property to private parties was sustained, although it extended beyond the term of the council executing it, in *Biddeford v. Yates*, supra. In this case, in answering the contention that the city council had no power to enter into contracts which could not be completed before the expiration of the term of the council, even though the power to lease was delegated in general terms, the court said: "It appears to us that the logic of the plaintiff's contention tends to limit a city council to action with respect to such matters only as are to go into effect under its own administration. Such limitation would segregate a municipal government from all other corporations and business institutions, in the methods employed for the transaction of business, and might, it seems to us, prove highly detrimental. A municipal government, represented by its city council, should be regarded as a business institution with reference to those transactions or matters permitted by the terms of its charter. When not limited to a prescribed method, it should be permitted to act with the same business foresight that is accorded to other business institutions. A corporation or individual dealing in the letting of property might find it of the high-

While there is some apparent conflict in the authorities, it is reasonably clear that the weight of authority is to the effect that the board has such power. It was expressly so held in *Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385; *Webb v. Spokane County*, 9 Wash. 103, 37 Pac. 282; *Pickett Pub. Co. v. Carbon County*, 36 Mont. 188, 13 L.R.A. (N.S.) 1115, 122 Am. St. Rep. 352, 92 Pac. 524, 12 A. & E. Ann. Cas. 986; and *Liggett v. Kiowa County*, 6 Colo. App. 269, 40 Pac. 475. A somewhat different conclusion was reached in *First Nat. Bank v. Peck*, 43 Kan. 643, 23 Pac. 1077; *Shelden v. Butler County* (*Shelden v. Fox*) 48 Kan. 350, 16 L.R.A. 257, 29 Pac. 759; *Millikin v. Edgar County*, 142 Ill. 528, 18 L.R.A. 447, 32 N. E. 493; *Jay County v. Taylor*, 123 Ind. 148, 7 L.R.A. 160, 23 N. E. 752; *Layton v. State*, 28 N. J. L. 575; *State v.*

est importance to make a lease to-day to take effect months or even years hence. They might find it equally detrimental to be limited in their power to thus anticipate the future. This idea is so apparent as a business proposition as to become self-evident."

The doctrine has also been applied to the power of municipalities, through their common council, to enter into contracts to lease property to be used for a public market, and such a lease was sustained, although extended beyond the term of the council making it. *Gale v. Kalamazoo*, 23 Mich. 344, 9 Am. Rep. 80.

A board of school directors may, after their successors are elected, but before they have qualified, lease a building to be used for educational purposes. *Dubuque Female College v. Dubuque*, 13 Iowa, 555.

—contracts for public printing.

Where there is a specific grant of power to county commissioners, to contract for public printing for a term not exceeding two years, without other limitation or restriction as to time, the power may be exercised at any time during the term of the board, when a prior contract for such work has expired or is about to expire; the power under such circumstances is just as ample the last week of the board's official existence as at any time prior thereto, if there is no fraud in making the contract. *Pickett Pub. Co. v. Carbon County*, 36 Mont. 188, 13 L.R.A. (N.S.) 1115, 122 Am. St. Rep. 352, 92 Pac. 524, 12 A. & E. Ann. Cas. 986.

And where by statute county commissioners are clothed with full authority to make all contracts which are essential to the management of county affairs, a contract for county printing is valid, although it extends in part into another year and beyond the term of some members of the board making the contract. *Liggett v. Kiowa County*, 6 Colo. App. 269, 40 Pac. 475. In reaching this conclusion the court said: "In the absence of any proof showing fraud and col-

Platner, 43 Iowa, 140; and *Vacheron v. New York*, 34 Misc. 420, 69 N. Y. Supp. 608; but, when carefully examined, these cases will be found not to militate against the rule above stated. In *Millikin v. Edgar County*, supra, it was held that a contract for the employment of a keeper of a county poorhouse for a period of three years was not within the power of a board of supervisors, each of whom was elected for one year only. In *Jay County v. Taylor*, supra, it was held, two judges dissenting, that a contract by which a board of county commissioners attempted to employ a legal adviser for a time extending beyond a date when all the members of the board as constituted would retire, unless re-elected, was invalid. But the subsequent case of *Pulaski County v.*

Shields, supra, deprives this case of much of its value as an authority, except as applied to employees who stand in a confidential or personal relation to the board.

Shelden v. Butler County, supra, and *Coffey County v. Smith*, 50 Kan. 350, 32 Pac. 30, hold that county commissioners cannot designate an official newspaper, and contract for the county printing for more than one year. Under the statute in force, the board of county commissioners went out of existence at the end of the year, and it was very reasonable to infer that the legislature did not intend that the new board should be deprived of its right of control over such expenditures. The same rule was applied in *First Nat. Bank v. Peck*, supra, where the outgoing board attempted to designate the

lusion, or that the agreement must of necessity be so vitally injurious to the public's interests as to render the agreement void as against public policy, the contract cannot be adjudged invalid because it was to be completed after the term of the majority of the board as it then existed should have expired. The county is a continuous organization. Many contracts can be conceived and suggested which, of necessity, could not be performed during the term of office of an entire board of county commissioners. To hold contracts invalid because part or all of a board cease to exercise public functions would be to put these corporations at an enormous disadvantage in making the contracts which are essential to the safe, prudent, and economical management of the affairs of a county."

But where the legislature has provided that boards of county commissioners of the several counties of the state shall have exclusive control to designate a paper and control the county printing, each board has that power, and no board has the power to let a contract for county printing which will extend beyond its term, so as to prevent the exercise of the power by its successors. *Sheldon v. Butler County* (*Sheldon v. Fox*) 48 Kan. 356, 16 L.R.A. 257, 29 Pac. 759. Followed in *Coffey County v. Smith*, 50 Kan. 350, 32 Pac. 30, which held that the board of county commissioners about to be dissolved by operation of law had no authority to enter into a contract for the county printing for the ensuing year.

—appointments to office and contracts of employment.

Where the nature and character of an office or employment is such as to require a municipal board or officer to exercise a supervisory control over the appointee or employee, together with the power of removal, within the rule already considered such appointment or contract of employment by the board is the exercise of a governmental function, and hence, contracts relating thereto must not be extended beyond the life of the board. *State ex rel. Hudson* 29 L.R.A. (N.S.)

County v. Layton, 28 N. J. L. 244; *State v. Platner*, 43 Iowa, 140.

Thus, a board of freeholders of a county have no power to bind themselves to appoint a keeper of a workhouse for a term of years, and thereby deprive themselves or their successors in office of the right of removal and subsequent control of such officer, where such board is vested with the right to remove him at any time; neither have they the right to divest themselves and their successors for a term of years of all control over such a public institution and its inmates, committed by law to their guardianship. *State ex rel. Hudson County v. Layton*, supra.

So, where power is given a board of supervisors to remove an appointee at their pleasure, the board cannot contract with such appointee for such time and salary as they may see fit, so as to deprive subsequent boards, or even themselves, of all control over the matter. *State v. Platner*, supra.

And even though a statute does not in terms impose a limit as to the time for which a keeper of a poorhouse may be appointed by a county board, yet, where the members of the board are elected annually, each holding office for one year, and the board is clothed with authority to levy taxes to raise funds to support paupers, which power is required to be exercised by the board annually, no board is empowered to enter into a contract with the keeper of the poorhouse for his employment for a term extending beyond the life of the board. *Millikin v. Edgar County*, 142 Ill. 528, 15 L.R.A. 447, 32 N. E. 493.

A board of county commissioners has not the power to employ an attorney for a period of three years, the term to commence in the future, after the retirement of one member of the board, as such contract is unreasonable, imposing as it does upon the three subsequent members an attorney not of their hiring. *Jay County v. Taylor*, 123 Ind. 148, 7 L.R.A. 160, 23 N. E. 752.

Compare with *Pulaski County v. Shields*, 130 Ind. 6, 29 N. E. 385, which sustained the

depository of public funds. *State ex rel. Hudson County v. Layton*, 28 N. J. L. 244, merely held that the board of chosen freeholders had no power to make a contract which placed the workhouse and its inmates beyond their control and under the entire management and control of another party. The keeper of the workhouse was said to be the mere agent of the board in the management of the workhouse, and the power of removal should remain in the board to be exercised at its discretion. *Vacheron v. New York*, supra, held that a board of supervisors had no power to make a contract for the control of the highways extending beyond the date when, by the terms of its charter, the entire control of such highways passed from the board to the city of New York.

These cases all rest upon the ground either that the particular contract under consideration was beyond the power of any board to make, or that it extended beyond the time when the particular board would go out of existence, and was against public policy because it deprived the succeeding board of the power to perform the duties which were imposed upon it by law. That doctrine, even if sound, would not control the present case, because the board of county commissioners of Hennepin county is a continuing body, and the election of new commissioners has no other legal effect than to partially change the personnel of the body. In *Pulaski County v. Shields*, supra, the following pertinent language was used: "It is insisted, however, that this contract

authority of county commissioners to employ a superintendent of an insane asylum for a period of five years, a period extending beyond the term of the board; but in this case the statutory power conferred upon the board was very general, and gave to it a wide range of discretion in employing a superintendent of the asylum. The case is distinguished from the *Taylor Case*, supra, on the ground that in that case the relation between the board and its attorney was peculiar and in its nature confidential, while, as to the superintendent of an asylum, his duties were fixed by statute, and power given to the board to add to or take from them; and it was said that this contract of employment was not an unwarranted abridgment of any of the powers of the succeeding boards, for the reason that the superintendent was under their control and direction, and that the law carried with the contract an implied condition subjecting it to the express discretionary powers of that board or a succeeding board to discontinue the asylum altogether.

In the absence of some necessity or special circumstances showing that the public good required it, a contract by a board of county commissioners made just prior to the expiration of their term of office, employing a janitor for the courthouse for a period of time extending into the term of their successors in office, and which has the effect to forestall the action of such successors for a year, is calculated to be prejudicial to the public interests, and hence is against public policy and void. *Franklin County v. Ranck*, 9 Ohio C. C. 301.

But the mere fact that a physician was employed by county commissioners for a period of time extending a little beyond their term of office will not of itself render the contract of employment invalid. *Webb v. Spokane County*, 9 Wash. 103, 37 Pac. 282.

—employment of superintendents and teachers of public schools.

Where there is no limit placed on the exercise of the power conferred upon school

trustees or boards to contract with and employ teachers, a contract by such trustee or board employing a teacher for a term to commence or to continue after the expiration of the term of such trustee or board is valid, and binding upon their successors in office. *Caldwell v. School Dist. No. 1*, 55 Fed. 372; *Tappan v. School Dist. No. 1*, 44 Mich. 500, 7 N. W. 73; *Cleveland v. Amy*, 88 Mich. 3/4, 50 N. W. 293; *Farrell v. School Dist. No. 2*, 98 Mich. 43, 56 N. W. 1053; *Gillis v. Space*, 63 Barb. 177; *Wait v. Ray*, 67 N. Y. 36.

In the latter case it was said that school districts were quasi corporations, and that the trustees were officers of them, and when acting officially and within their jurisdiction, they bound the corporation they represented, and their legal contracts could be enforced against their successors in office.

Where there is nothing in the grant of power to a board of trustees to employ teachers and a superintendent of public schools, which in any way limits the authority of the board of trustees to make contracts which are to be terminated during the existence of any particular organization of the board, the mere fact that one member of the board retires each year, and that there is a reorganization provided for each year, does not impose a limit upon the general grant of power, and hence a contract by a board employing a superintendent for the ensuing year is valid, although such term extends beyond the time fixed for the organization of the board. *Reubelt v. Noblesville*, 106 Ind. 478, 7 N. E. 206.

This case was referred to in *Jay County v. Taylor*, supra, and it was said that had the employment been for a longer time than one year, as for instance for three years, a different result would have been reached.

But the doctrine of the *Reubelt Case* is amply supported by the decision of the Indiana court in *Pulaski County v. Shields*, supra.

It has been held in this state that a school board may contract to employ teachers for the period of a year, to commence in the future after the expiration of the term of the board, and the fact is immaterial that

is void upon other grounds,—that it is in contravention of public policy, for the reason that, to uphold it, would put it in the power of one board of commissioners to bind the hands of its successors, and that it acts as an unwarranted abridgement of the 'administrative, executive, and legislative' powers of the board. The first of the rea-

sons assigned rests upon an erroneous conception of the constitution of the board of county commissioners,—that that body consists of a series or succession of boards, one following the other. As we have heretofore said, the board of [county] commissioners is a corporation, representing the county. From a legal standpoint, it is the county.

the employment was for the purpose of forestalling the new board, where fraud on the part of the board making the contract is not alleged. *Milford v. Zeigler*, 1 Ind. App. 138, 27 N. E. 303.

In the absence of fraud, the board of directors may make a valid contract with a teacher for a term beginning the next school year, and after the term of one of the directors had expired, as a district school board is a corporation representing the district. It is a continuous body, and while the personnel of its members changes, the corporation continues unchanged, and it has the power to contract, and its contracts are contracts of the board, and not of its individual members. *Taylor v. School Dist. No. 7*, 16 Wash. 365, 47 Pac. 758; *Splaine v. School Dist. No. 122*, 20 Wash. 74, 64 Pac. 766.

Under a statute providing in general terms that the board of directors shall have the power to employ a superintendent of schools, a school board has the power to hire a superintendent, under a contract to be wholly executed after the next annual election, and after the new board of school directors should organize. *Gates v. School Dist. 53 Ark.* 468, 10 L.R.A. 186, 14 S. W. 656; *School Dist. No. 54 v. Garrison*, 90 Ark. 335, 119 S. W. 275.

A contract employing a school teacher is valid, although extending beyond the term of the officers making the contract on the part of the district. The contract, however, is subject to the right of the district, at the next annual meeting, to terminate it by action inconsistent therewith, as by shortening the term or providing for teaching by male or female teachers. *Webster v. School Dist. 16 Wis.* 317.

Such contracts are also subject to the right of the succeeding board to fix the term thereof. *Cleveland v. Amy and Farrell v. School Dist. No. 2*, supra.

The mere fact that a contract to employ a teacher is for a period which will not fully be performed before the expiration of the term of office of the board will not avoid it, where such contract is advantageous to the district, as where the winter term of school extends beyond the current school year; hence, beyond the term of office of the board. *School Dist. No. 6 v. Morse*, 8 Cush. 191.

The authority of a prudential committee to contract with teachers is to have a reasonable limitation measured by the obvious purpose and object of their election. To say that they shall make no contract which shall be operative beyond their official term is too narrow; to say that they can contract for services which shall be rendered 29 L.R.A. (N.S.)

during the official term of their successors is too wide a view of their authority. If in good faith it becomes necessary so to do, the committee may make a contract for the services of a teacher that will lap over a reasonable time upon the official term of their successors. Thus, where the committee was unable to hire a teacher for any term less than a year, and he was a desirable teacher to secure, and the committee acted for what they deemed the best interests of the school, and made a contract with him that would run into the succeeding year, the contract was sustained. *Chittenden v. School Dist. No. 1*, 56 Vt. 551.

Where the statute power is given to school directors to employ teachers only for the current year, the board of directors cannot, by contracts for teaching wholly to be carried out in the future, divest future boards of directors of the power to select the teachers they shall desire for terms to be fixed after their organization. There is, however, no objection to a contract by a board of directors with a teacher to teach a reasonable time beyond the school year, where entered into in good faith, and not for the purpose merely of imposing upon the district an unsatisfactory teacher. *Stevenson v. District No. 1*, 87 Ill. 255; *District No. 6 v. Hart*, 4 Ill. App. 224.

But the board of directors cannot, just before the school year ends, make a contract for teaching for the ensuing year. *Davis v. School Directors*, 92 Ill. 293. And the directors have no power, a few days before a current school year expires, to hire a teacher to teach a term of school extending three months or nearly so into the ensuing year. *Cross v. School Directors*, 24 Ill. App. 191.

In *Taylor v. Northampton County*, 50 N. C. (5 Jones, L.) 98, the statute relating thereto was held to constitute a limitation on the power of a school committee to employ teachers for a period of time extending beyond the term of the committee.

A board of trustees of a public school cannot employ a superintendent for a term to commence after the term of the board expires. *Fitch v. Smith*, 57 N. J. L. 526, 34 Atl. 1058.

In *Loomis v. Coleman*, 51 Mo. 21, it was said that school directors have no authority to employ a teacher for a period extending beyond the time when their office expires. The case itself, however, did not involve the point, as the contract in question was held invalid because made by the old board after their term of office had expired.

A. G. S.

. . . It is a continuous body. While the personnel of its membership changes, the corporation continues unchanged. It has power to contract. Its contracts are the contracts of the board, and not of its members. An essential characteristic of a valid contract is that it is mutually binding upon the parties to it. A contract by a board of commissioners, the duration of which extends beyond the term of service of its then members, is not, therefore, invalid for that reason."

A very similar question was presented in *Webb v. Spokane County*, supra, and it was held that where the county commissioners had employed a physician for the term of one year, to attend the poor of the county, and he had accepted the employment, and had entered upon the discharge of his duties, the contract would not be rescinded by the county, although it extended beyond the terms of office of the commissioners making it. *Liggett v. Kiowa County*, supra, held that where county commissioners were authorized to act with reference to any particular matter, they might make a contract with reference thereto, the performance of some part of which would not be possible until after the expiration of the terms of the officers who entered into the agreement,—citing *Wait v. Ray*, 67 N. Y. 36, and other cases. In *Pickett Pub. Co. v. Carbon County*, supra, it was held that, under a statute which authorized a board to contract for county printing for a term not exceeding two years, the board had power to enter into a two-year contract, although the time extended beyond the term of office of the contracting board and into the term of their successors. See a note to this case in 12 A. & E. Ann. Cas. 988. This principle was also applied in *Norton v. Wilkes*, 93 Minn. 411, 101 N. W. 619, where it was held that a board of trustees of a school district may, prior to the regular annual election in July, employ a school teacher for the ensuing year, and bind the district for the full period of five months.

The statute authorizes Hennepin county to provide and equip a public morgue which shall be under the control of the board of county commissioners. No express provision is made for a morgue keeper; but the power to employ a suitable person for that purpose is inferable from the general powers of the board and the limitation contained in the provision that no person shall be employed in or about the morgue who is in any manner connected with or interested in the undertaking business. Rev. Laws 1905, §§ 435, 436. The morgue keeper is an employee, and not a public officer. His selection and employment for a definite and reasonable term in no manner interferes with

the proper discharge of the duties of the board of county commissioners, nor does it deprive the board of full power and proper control over the things and matters submitted to its care by the statutes. It is conceded that the person employed by the board on December 31, 1908, was and is a suitable person to perform the duties required to be performed by him. Having the power at that time to employ a morgue keeper, there is no implied limitation upon that power which restricts the possible term of employment to the time when any member or members of the board shall go out of office. The contract made in this instance was fair and reasonable, and no question of fraud or collusion is even suggested. Such being the facts, we can conceive of no principle of public policy which is violated by the contract in question. The contract being thus valid, the board, after the new members qualified had no power to revoke or rescind it without cause being shown.

The judgment of the trial court is therefore reversed, and the case remanded to the District Court, with directions to proceed in accordance with the views expressed herein.

OHIO SUPREME COURT.

GEORGE W. LINDSAY, Trustee, etc., of
William H. Runkle, Bankrupt, Plff. in
Err.,

v.

DAVID A. RUNKLE et al.

(82 Ohio St. 325, 92 N. E. 489.)

Bankrupt — trustee — right to sue for partition.

A trustee of the estate of a bankrupt selected or appointed under the provisions of the national bankruptcy act is without legal capacity, under the statutes of Ohio, to bring and maintain a suit for the partition of real estate in which such bankrupt is a tenant in common with others.

(June 28, 1910.)

ERROR to the Circuit Court for Pickaway County to review a judgment affirming a judgment of the Court of Common Pleas dismissing a petition filed for the partition of certain real estate. Affirmed.

Headnote by the COURT.

Note. — The question of the right of a trustee in bankruptcy, or an assignee for creditors, to maintain partition, was considered in *Hobbs v. Frazier*, 20 L.R.A. (N.S.) 105, and the note thereto appended, and no later decision in addition to *LINDSAY V. RUNKLE* has been brought to light.

Statement by Price, J.:

On the 29th day of September, 1908, the plaintiff in error filed in the court of common pleas of Pickaway county his petition, in which he prayed for the partition of certain real estate in which the bankrupt, William H. Runkle, was a tenant in common with the defendants in error. Omitting description of the several tracts of land, that part of the petition important in the consideration of this case is as follows: "The plaintiff says that he is the duly appointed, qualified, and acting trustee in bankruptcy of the estate of William H. Runkle, a bankrupt; that it is to the best interest of the said estate that this proceeding be brought; and that he has a legal right to and is seised in fee simple and entitled to possession as such trustee of William H. Runkle, a bankrupt, of the undivided one-fourth part of the following described real estate situate in the county of Pickaway, in the state of Ohio, and in the townships of Madison and Walnut, and being," etc. Here follows a description of five different tracts of real estate, some of them containing but a few acres. The petition alleges that William H. Runkle, the bankrupt, is the son and heir at law of Henry M. Runkle, deceased, and that the personal property of the deceased "is sufficient to pay all the debts and claims against his estate." It is also alleged that Saloma Runkle is the widow of the deceased and entitled to dower in said premises, and that the other defendants, now defendants in error, are tenants in common in said premises with said bankrupt, each entitled to one-fourth part of the premises subject to said dower. The prayer of the petition is to have the interest of said bankrupt set off to him in severalty, and "that the dower of said Saloma Runkle be assigned to her, and that subject thereto partition be made, and his interest set off to him in severalty if the same can be done without manifest injury to the property; but, if his interest cannot be so set off without injury to the value of said property, that same may be appraised and sold, and for such other relief as may be provided for in law and equity." The defendants demurred to the petition on two grounds: (1) That the plaintiff has not a legal capacity to sue. (2) That the petition does not state facts sufficient to constitute a cause of action. The court sustained the demurrer, and, the plaintiff not desiring to amend the petition, the same was dismissed at costs of the plaintiff. The latter prosecuted error in the circuit court for the reversal of said judgment; but the same, on final hearing, was affirmed.

29 L.R.A. (N.S.)

Mr. George W. Lindsay, for plaintiff in error:

The trustee or assignee is clothed with the power and duty to sue whenever suit is necessary, and he is given the same right in any litigation he may institute which the bankrupt would have had if no decree in bankruptcy had been rendered.

Sanger v. Upton, 91 U. S. 56, 23 L. ed. 220; Sparhawk v. Yerkes, 142 U. S. 1, 35 L. ed. 915, 12 Sup. Ct. Rep. 104; Hiscock v. Varick Bank, 206 U. S. 28, 40, 51 L. ed. 945, 953, 27 Sup. Ct. Rep. 681; Holden v. Stratton, 198 U. S. 202, 212, 49 L. ed. 1018, 1021, 25 Sup. Ct. Rep. 656; Hewit v. Berlin Mach. Works, 194 U. S. 296, 302, 48 L. ed. 986, 988, 24 Sup. Ct. Rep. 690; Barden v. First Nat. Bank, 178 U. S. 524, 44 L. ed. 1175, 20 Sup. Ct. Rep. 1000.

As to everything except fraudulent conveyances and fraudulent preferences, under the bankrupt law the trustee takes by his assignment, as a purchaser from the bankrupt, with notice of all outstanding rights and equities. Whatever the bankrupt could do to make the assigned property available for the general creditors, he may do, but nothing more, except that he may sue for and recover that which was conveyed in fraud of the rights of creditors, and set aside all fraudulent preferences.

Dudley v. Easton, 104 U. S. 99, 103, 26 L. ed. 668, 669; 5 Cyc. Law & Proc. p. 339; Davis v. Crompton, 85 C. C. A. 633, 20 Am. Bankr. Rep. 58, 158 Fed. 735; Randolph v. Canby, Fed. Cas. No. 11,559; Bromley v. Smith, 2 Biss. 511, Fed. Cas. No. 1922; Leighton v. Harwood, 111 Mass. 67, 15 Am. Rep. 4.

An assignee for the benefit of creditors has the power to sue for and recover, in the name of such assignee, everything belonging or appertaining to the assigned estate, and, generally, to do whatever the debtor might have done in the premises.

Hubbard v. Tod, 171 U. S. 474, 498, 43 L. ed. 246, 257, 19 Sup. Ct. Rep. 14; Lenox v. Roberts, 2 Wheat. 373, 4 L. ed. 264; Mueller v. Nugent, 184 U. S. 1, 14, 46 L. ed. 405, 411, 22 Sup. Ct. Rep. 269; Brent v. Bank of Washington, 10 Pet. 596, 9 L. ed. 547; Page v. Edmunds, 187 U. S. 596, 605, 47 L. ed. 318, 322, 23 Sup. Ct. Rep. 200; Pearsall v. Smith, 149 U. S. 231, 37 L. ed. 713, 13 Sup. Ct. Rep. 833; Claflin v. Houseman, 93 U. S. 130, 23 L. ed. 833; Phelps v. McDonald, 99 U. S. 298, 25 L. ed. 473; Hammond v. Whittredge, 204 U. S. 538, 51 L. ed. 606, 27 Sup. Ct. Rep. 396.

It is the policy of the law of the state of Ohio to permit anyone having the legal title to property held in common with oth-

ers, to have partition of the same, and the plaintiff does not need to go farther and show that partition is required by the demands or the interests of a beneficial owner, or that the same is necessary to protect the rights of those beneficially interested.

Lindsay v. Zanoni, 6 Ohio C. C. 477; *Horstman v. Ritter*, 6 Ohio N. P. 470; Ohio Rev. Stat. § 5757; *Byers v. Wackman*, 16 Ohio St. 443; *Williams v. Van Tuyl*, 2 Ohio St. 338; *Tabler v. Wiseman*, 2 Ohio St. 211.

An assignee has more than a mere power of sale in his assignor's real estate, as he holds an absolute title.

Van Arsdale v. Drake, 2 Barb. 599; *Sandmeyer v. Dakota F. & M. Ins. Co.* 2 S. D. 346, 50 N. W. 353; *Walker v. Ross*, 150 Ill. 50, 36 N. E. 986; *Johnson's Appeal*, 103 Pa. 373; *Burnham v. Logan*, 88 Tex. 1, 29 S. W. 1067.

A trustee, having the power of sale, may maintain partition, and is entitled to exercise his own judgment and discretion upon the question as to whether or not it is to the best interest of his trust estate to partition the same.

Gallie v. Eagle, 65 Barb. 583; *Phelps v. Harris*, 101 U. S. 370, 25 L. ed. 855; *Horstman v. Ritter*, supra; *Jewett v. Perrette*, 127 Ind. 97, 26 N. E. 686; *Smith v. Scholtz*, 68 N. Y. 41.

The state court has jurisdiction.

Drew v. Myers, 81 Neb. 750, 17 L.R.A. (N.S.) 350, 116 N. W. 781.

The suit in partition is not a part of the proceedings in bankruptcy, but an independent suit brought by the trustee in bankruptcy to assert his rights to property of the bankrupt, and to collect and reduce that property to money, and is against strangers to the bankruptcy proceedings.

Bardes v. First Nat. Bank, supra; *Whitney v. Wenman*, 198 U. S. 539, 549, 550, 49 L. ed. 1157, 1159, 1160, 25 Sup. Ct. Rep. 778; *Pirie v. Chicago Title & T. Co.* 182 U. S. 438, 448, 45 L. ed. 1171, 1177, 21 Sup. Ct. Rep. 906.

A trustee holding a moiety of lands as such may sue for and compel partition, if he holds an estate in possession, and the partition will not be in contravention of the trust.

30 Cyc. Law & Proc. p. 194; *Phelps v. Townsley*, 10 Allen, 554; *Smith v. Gaines*, 38 N. J. Eq. 65; *Gallie v. Eagle*, supra; *Paine v. Sackett*, 27 R. I. 300, 61 Atl. 753.

Mr. Joseph W. Adkins also for plaintiff in error.

Mr. Clarence Curtin, for defendants in error David A. Runkle et al.:

A trustee in bankruptcy has no right to maintain an action in partition in a state court.

29 L.R.A. (N.S.)

Horstman v. Ritter, 6 Ohio N. P. 470; *Jewett v. Perrette*, 127 Ind. 97, 26 N. E. 686.

Price, J., delivered the opinion of the court:

The plaintiff in error, as trustee of William H. Runkle, a bankrupt, holds that position under certain provisions of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 544, U. S. Comp. Stat. 1901, p. 3418), whereby the creditors of the bankrupt may elect a trustee, or, on failure to so act, the court of bankruptcy may appoint the trustee. If the trustee elected by a majority of the creditors is an incompetent or unsuitable person, the bankruptcy court may disapprove of the selection, and another may be appointed by the court after such creditors have failed to select a suitable person, and, when the trustee so created has accepted and become duly qualified, as required by the statute, he is invested with the title of the bankrupt to his estate, real and personal, of whatever character, not exempt under the law. This is so by virtue of the statutes relating to the subject, and not by virtue of any direction or will of the bankrupt.

Without considering all the particular steps to be taken or observed by the trustee in discharge of his duties, it is sufficient there to notice some of the consequences of the procedure. By clause 2 of § 47 of the bankruptcy act, it is made the duty of the trustee to reduce to money the property of the estate, under the direction of the court, and by clause 6 he is required to keep regular accounts showing all amounts received and from what source. The provisions of § 70 which relate to sales of property are as follows: "All real and personal property . . . shall be appraised by three disinterested appraisers; they shall be appointed by and report to the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. The title to property of a bankrupt estate which has been sold as herein provided shall be conveyed to the purchaser by the trustee." In § 58 (bankruptcy act) it is provided that creditors shall have at least ten days' notice by mail of all proposed sales of property, etc. Another provision of the act requires that all sales shall be by public auction unless otherwise ordered by the court. There are provisions as to sale of property encumbered by lien, giving the court, on proper petition by the trustee, the power to order sale, subject to or free of liens as may be considered best by the court.

The trustee is carefully instructed by the bankruptcy act as to his powers and duties, and, in discharge of many of his duties, he is under the control of and answerable to the court of bankruptcy. We need not further occupy this field of investigation; but we have gone far enough to see that the jurisdiction and powers of the court of bankruptcy are peculiar to that court, made so by the law creating and regulating its jurisdiction; and we are now to determine the standing and rights of such trustee when he enters the state courts, claiming to be a tenant in common, asking partition of real estate.

He comes to the state court as a stranger to its jurisdiction, although he may resort to it to enforce his rights in certain cases. He says in his petition that he belongs to another jurisdiction, and gives the sign by which he may be known, *viz.*, he is trustee of a tenant in common who is a bankrupt. He does not disclose in his petition that the court of bankruptcy had ordered or authorized him to come into the state court, for any purpose; nor does he ask the state court to order a sale in either of the ways pointed out by the statute under which he was appointed and qualified.

Is he a tenant in common, or is he but the trustee of a tenant in common? He is invested with the title of the bankrupt, not as a purchaser, or under other form of contract, but solely by operation of law and for a special purpose, that he may convert the estate into money with which to pay the debts of the bankrupt.

He may, in the bankruptcy proceedings and according to the law on that subject, sell the undivided interest of the bankrupt in the lands, and convey such interest to the purchaser, who may thus become a tenant in common with the owners of the other interests, and that path appears to be free from doubt or obstruction.

But what confronts the trustee as he asks partition in the state court? The suit must be entertained and conducted under the laws of the state. What would the trustee do or say, in case one or more of the tenants in common should answer and charge that the bankrupt tenant in common had received and enjoyed the rents and profits of the estate for years, and ask an accounting for the same? Would he have to consult the bankruptcy court as to his duty in such case? If the dower of a widow is to be assigned, as is required in this case, it must be done under the state law. If the commissioners appointed to make partition "are of opinion that the estate cannot be divided without manifest injury to the value thereof, they shall return that fact to the court with a just valuation of the estate, whereupon if the court approve the return, and

one or more of the parties elect to take the estate at such appraised value, the same shall be adjudged to him or them, upon his or their paying to the other parties their proportion of the appraised value thereof according to their respective rights," etc.

This right of election is vested by law in each of the tenants in common; but it could not be exercised by the trustee, without using the estate otherwise in his hands to make the necessary payments to other co-tenants.

If no such election is made, "the court may, at the instance of a party, make an order for the sale thereof at public auction by the sheriff who executed the writ of partition, or his successor in office." Rev. Stat. § 5764. Section 5765 provides: "But the estate shall not be sold for less than two thirds of the appraised value thereof as returned by the commissioners." Here would be a conflict between the state and bankruptcy courts, for we have observed that it is provided in § 70b, c, of the bankruptcy act that "all real and personal property belonging to bankrupt estates shall be appraised by three disinterested appraisers; they shall be appointed by, and report to, the court. Real and personal property shall, when practicable, be sold subject to the approval of the court; it shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value." The court mentioned is the bankruptcy court.

The sale in the partition case is governed by prescribed rules which, as we see by comparison, are in plain conflict with the provisions for sale in the bankruptcy proceeding, and the trustee seems insistent in promoting and maintaining that conflict. We know of no method of blending these jurisdictions in order to have partition made that will be just and equitable to the widow and all the tenants in common as their rights may appear.

It is not our duty to entertain the suit of the trustee when it is inevitable that a conflict of jurisdiction will arise between the state and Federal courts. The trustee may sell the estate of the bankrupt without partition, as before observed, with results less harmful than a complication of questions and interests likely to follow such an action for partition.

We still think the trustee in bankruptcy is not a tenant in common as recognized in partition proceedings, but is but a trustee of a tenant in common.

The foregoing reasons are sufficient to sustain the judgment of the lower court, and its judgment is affirmed.

Summers, Ch. J., and Crew, Spear, Davis, and Shauck, JJ., concur.

OKLAHOMA SUPREME COURT.

CHICAGO, ROCK ISLAND, & PACIFIC
RAILROAD COMPANY, Plff. in Err.,
v.

LOGAN, SNOW, & COMPANY.

(23 Okla. 707, 105 Pac. 343.)

Appeal — nonprejudicial ruling — harmless error.

1. A motion to require the plaintiffs' petition to be made more definite and certain being overruled, it affirmatively appearing from the record that the defendant was not prejudiced thereby, the ruling of the lower court thereon will not be disturbed.

Carrier — lost freight — act of God — burden of proof.

2. Whenever a carrier seeks to excuse itself for loss occurring on account of an act of God or some irresistible superhuman cause, the burden of proof rests upon the carrier.

Same — verdict — evidence — sufficiency.

3. It appearing that the goods delivered

Headnotes by WILLIAMS, J.

(Dunn, J., dissents.)

(May 12, 1909.)

Note. — Burden of proof when the defense in an action to recover for loss or injury to goods during carriage is act of God or vis major.

The rule is well settled, as laid down in the above decision, that whenever a carrier seeks to excuse itself for loss occurring through an act of God or irresistible superhuman cause, inevitable accident or the public enemy, the burden of proof rests upon the carrier to establish such defense. The *Niagara v. Cordes*, 21 How. 7, 16 L. ed. 41; *The Majestic*, 166 U. S. 375, 41 L. ed. 1039, 17 Sup. Ct. Rep. 597; *Strouse v. Wabash, St. L. & P. R. Co.* 17 Fed. 209; *Louisville & N. R. Co. v. Cowherd*, 120 Ala. 51, 23 So. 793; *Jackson v. Sacramento Valley R. Co.* 23 Cal. 269; *Clyde S. S. Co. v. Burrows*, 36 Fla. 121, 18 So. 349; *Van Winkle v. South Carolina R. Co.* 38 Ga. 32; *Charlotte, C. & A. R. Co. v. Wooten*, 87 Ga. 203, 13 S. E. 509; *Burke v. United States Exp. Co.* 87 Ill. App. 505; *Wabash R. Co. v. Johnson*, 114 Ill. App. 547; *Mahaffey v. Wisconsin C. R. Co.* 147 Ill. App. 43; *Toledo, St. L. & K. C. R. Co. v. Tapp*, 6 Ind. App. 304, 33 N. E. 162; *J. H. Corniee Glove Co. v. Merchants' Dispatch Transp. Co.* 130 Iowa, 327, 4 L.R.A.(N.S.) 1060, 114 Am. St. Rep. 419, 66 N. W. 749; *Roberts v. Riley*, 15 La. Ann. 103, 77 Am. Dec. 183; *Lindsley v. Chicago, M. & St. P. R. Co.* 36 Minn. 539, 1 Am. St. Rep. 692, 33 N. W. 7; *Grier v. St. Louis Merchants' Bridge Terminal R. Co.* 68 Mo. App. 565, 84 S. W. 158; *Chicago, M. & Q. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462; *Duncan v. Great Northern R. Co.* 17 N. D. 610, 19 L.R.A.(N.S.) 952, 118 N. W. 826; *Wallingford v. Columbia & G. Co.* 26 S. C. 258, 2 S. E. 19; *Johnstone v. Richmond & D. R. Co.* 39 S. C. 55, 17 S. E. L.R.A.(N.S.)

to the plaintiff in error, as a common carrier, were placed in a sealed car and set upon a switch for transit, and an unprecedented flood came in such intensity, volume, and so sudden and extraordinary, as to constitute an irresistible superhuman cause, no evidence being offered by the carrier as to the condition of the car after the flood, the goods in question being not identified in the car after the flood, the flood waters rising 8 feet from the ground where said car was standing, the perishable goods contained in the cars caught in the flood being "dumped" in the Kaw or Kansas river, but the goods in controversy not being of that character, all of the goods identified being forwarded to their proper destination, those that could not be identified supposedly or probably being forwarded to the claim department in Chicago, the goods in controversy never reaching their proper destination, and no showing being made in regard to the same by the claim department at Chicago, held that the verdict of the jury against the carrier will not be disturbed.

512; *Craig v. Childress, Peck* (Tenn.) 270, 14 Am. Dec. 751; *Nashville, C. & St. L. R. Co. v. Stone*, 112 Tenn. 348, 105 Am. St. Rep. 955, 79 S. W. 1031; *Missouri P. R. Co. v. Barnes*, 2 Tex. App. Civ. Cas. (Willson) 507; *Gulf, C. C. & S. F. R. Co. v. Roberts* (Tex. Civ. App.) 85 S. W. 479; *Day v. Ridley*, 16 Vt. 48, 42 Am. Dec. 489; *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293; *Nugent v. Smith*, L. R. 1 C. P. Div. 19, reversed on other grounds in L. R. 1 C. P. Div. 423, 1 Eng. Rul. Cas. 216.

The only conflict of authority arises when the question is: Must the carrier relying upon such a defense as an act of God or vis major go further and affirmatively show that there was no negligence or want of due care on its part but for which the goods would not have been injured or destroyed? Upon this question the decisions are conflicting, though the weight of authority seems to support the rule that it is incumbent upon the carrier to show that it used due diligence to carry the goods safely, and that the act of God or the vis major was the sole cause of the loss. Thus, in *Slater v. South Carolina R. Co.* 29 S. C. 96, 6 S. E. 936, it was held that the burden was upon the carrier to show not only that the act of God was the cause of the injury to the goods, but that it was the entire cause, because it was only when the act of God was the entire cause that the carrier could be shielded. The court said that the carrier "insures against everything except the act of God and the public enemies, and unless he proves that the disaster was due wholly and entirely to one of these causes, then it must be presumed to be due, in part at least, to some other cause. And as against any other cause he is an insurer. The onus, then, is upon him to prove the absence of

ERROR to the District Court for Kingfisher County to review a judgment in plaintiffs' favor in an action brought to recover damages for the loss of certain goods while in defendant's possession for transportation. Affirmed.

Statement by Williams, J.:

On the 18th day of May, A. D. 1905, the defendants in error, as plaintiffs, commenced this action against the plaintiff in error, as defendant, in the district court of Kingfisher county, territory of Oklahoma, declaring in their petition on three alleged causes of action. In the first count it was alleged that on the 27th day of May, 1903, the plaintiffs were the owners of certain goods, wares, and merchandise of the value of \$323.03, and on said date delivered said goods, wares, and merchandise to the defendant as a public carrier, at Kansas City, Missouri, to transport and carry same from that point to Kingfisher, Oklahoma territory; that said defendant received and ac-

cepted said goods in good condition as a public carrier, and agreed and undertook for a valuable consideration to transport same to Kingfisher, and there deliver same to the plaintiffs; that said defendant, after receiving said goods, wares, and merchandise for shipment, wholly failed, neglected, and refused to carry, transport, and deliver same to the plaintiffs at Kingfisher, Oklahoma territory, although frequently demanded so to do; and still so neglects, fails, and refuses to do so, and refuses to account for said goods in any manner, to the damage of the plaintiffs in the sum of \$323.03. The second count is the same as the first, except that it alleges the date to be the 29th day of May, 1903, and the value of the goods or amount of damage to be \$27.63. The third count is also the same as the first, except the allegation as to the date is May 26, 1903, instead of May 27th, and the value of the goods or damages is alleged to be \$60.98.

On the 11th day of June, 1905, the de-

negligence, unless, as we have said, the proof is that the act of God is the entire cause, which, if so, would, of course, in itself show the absence of negligence."

So, in *Richmond & D. R. Co. v. White*, 88 Ga. 805, 15 S. E. 802, under a Code provision that a carrier was bound to use extraordinary diligence, and that in case of loss the presumption of law was against it, and that no excuse would prevail unless the loss was occasioned by the act of God or the public enemy of the state, it was held that this presumption was not met or removed by showing merely that the act of God was the ultimate cause of the loss, but that, "to silence the presumption altogether," it was necessary to show that the act of God was the sole cause, and that the loss happened in spite of the use of due diligence by the carrier to prevent it.

In *Hays v. Kennedy*, 41 Pa. 378, 80 Am. Dec. 627 (not strictly in point here because the goods were destroyed not by an act of God, but by a collision between steamboats on a river), in which it appeared that the bill of lading bound the carrier to deliver safely, "the unavoidable dangers of the river navigation and fire excepted," the court, after an extended discussion as to what was meant by unavoidable dangers or accidents and acts of God, went on to say: "The carrier is bound to carry safely, and if he fail to do so, the burden of proof of a valid excuse is cast upon him. If he show a cause which the law admits to be sufficiently serious to be called inevitable, he has merely prepared the way for showing that he used all possible care. At this stage of the case, the law does not presume any fault on his part; but simply demands that he shall complete his excuse by showing that, in the midst of the danger, he exerted all the skill and care he could to avoid it."

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And the rule as to burden of proof enunciated in the case last cited seems to find support in *Long v. Pennsylvania R. Co.* 147 Pa. 343, 14 L.R.A. 741, 30 Am. St. Rep. 732, 23 Atl. 459, judging from some of the language used therein, though the court apparently voices also the opposite rule. This was an action to recover for baggage lost with the train on which it was carried, in the Johnstown flood of 1889, in which the flood was held to be "an inevitable accident, properly described as *actus Dei*," and the rule declared to be that it was only necessary to show the character of the flood, and that the loss of the train on which the baggage was, was not due want of care on the carrier's part in the management of its business, in order to make a complete defense, which would seem beyond a doubt to place the burden upon the carrier. But the court also declared that in such a case negligence was not presumed, but should be proved as any other fact necessary to the plaintiff's recovery. These two statements left by themselves would seem to leave it in doubt as to where this court stands upon the question under discussion, but in view of the extraordinary character of the flood which caused the loss, its suddenness and power, as shown by the evidence, the conclusion could not be escaped that it was entirely the act of God. And again, the court itself goes on to say that the proof of the flood made a defense that met "the requirement of the rule as to the burden of proof resting on a carrier in every particular." It therefore seems safe to say that this decision supports the rule that the burden is on the carrier to show that there was no negligence on its part.

This rule that the burden of proof is upon the carrier to establish not only that the act of God ultimately occasioned the loss, but that the same was not due in any

defendant filed its motion to require plaintiffs to state in their several causes of action whether or not the alleged agreements between the plaintiffs and the defendant were in writing, and, if so, by what representative of the company they were executed, etc. On the 12th day of June, 1905, the defendant filed its demurrer to the petition of the plaintiffs, on the grounds: (1) Want of jurisdiction of the person of defendant or the subject-matter of the action; (2) want of capacity to sue; (3) another action pending between the same parties for the same cause; (4) defect of parties, plaintiff or defendant; (5) several causes of action improperly joined; (6) the petition did not state facts sufficient to constitute a cause of action. On the 2d day of December, 1905, the court separately overruled the motion of the defendant to require plaintiffs to make the petition more definite and certain, and the demurrer, to each of which exceptions were properly saved. On the 30th day of December, 1905,

manner to its negligence, finds support also in the following cases: *Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 394; *McCarthy v. Louisville & N. R. Co.* 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370; *Central R. Co. v. Hall*, 124 Ga. 322, 4 L.R.A. (N.S.) 898, 110 Am. St. Rep. 170, 52 S. E. 679, 4 A. & E. Ann. Cas. 128; *Pittsburg, C. C. & St. L. R. Co. v. Mitchell (Ind.)* 91 N. E. 735; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426, affirming 5 Bosw. 395; *Heyl v. Inman S. S. Co.* 14 Hun, 564; *Dunson v. New York C. R. Co.* 3 Lans. 265; *Graham v. Davis*, 4 Ohio St. 362, 62 Am. Dec. 285; *Fentiman v. Atchison, T. & S. F. R. Co.* 44 Tex. Civ. App. 455, 98 S. W. 939.

On the other hand, there is a line of authority which declares the rule to be that when a carrier has shown that the loss of the goods was occasioned by the act of God or by *vis major*, it will not be presumed that its negligence contributed to the loss, but that on the contrary it must be proved as any other fact necessary to the plaintiff's recovery. Thus, in *Memphis & C. R. Co. v. Reeves*, 10 Wall. 176, 19 L. ed. 909, Mr. Justice Miller, in approving a charge that when the damage was shown to have resulted from the immediate act of God, the carrier would be exempt from liability, unless the plaintiff proved that the defendant was guilty of some negligence in not providing for the safety of the goods, used the following language: "It is hard to see how the soundness of this proposition can be made clearer than by its bare statement. A common carrier assumes all risks except those caused by the act of God and the public enemy. One of the instances always mentioned by the elementary writers, of loss by the act of God, is the case of loss by flood and storm. Now when it is shown that the damage resulted from this cause

defendant filed its answer to the petition of the plaintiffs, denying each and every allegation therein except as admitted. Defendant admitted that it was a corporation as alleged, and a public carrier of freight between Kansas City, Missouri, and Kingfisher, Oklahoma territory, and that on the 27th day of May, 1903, the plaintiffs were the owners of certain goods; and states that said goods were by the plaintiffs shipped from Chicago, Illinois, to Kingfisher, Oklahoma territory, over the line of the Wabash Railway Company, under contract between the plaintiffs and said Wabash Railway Company, and that said goods were delivered by said Wabash Railway Company to the defendant at Kansas City, Missouri, on said date; that on and immediately after said 27th day of May, 1903, a great and unprecedented flood, caused by the overflow of the Kaw or Kansas and the Missouri rivers, occurred at said point, and by reason thereof the yards, tracks, and warehouses of said defendant

immediately, he is excused. What is to make him liable after this? No question of his negligence arises, unless it is made by the other party. It is not necessary for him to prove that the cause was such as releases him, and then to prove affirmatively that he did not contribute to it. If, after he has excused himself by showing the presence of the overpowering cause, it is charged that his negligence contributed to the loss, the proof of this must come from those who assert or rely on it."

And that the burden of proof is upon the shipper to show that the act of God was not the sole cause of the loss of the goods, but that the negligence of the carrier contributed thereto, finds support also in the following cases: *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Wolf v. American Exp. Co.* 43 Mo. 421, 97 Am. Dec. 406; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 206; *Davis v. Wabash, St. L. & P. R. Co.* 89 Mo. 340, 1 S. W. 327; *Lamar Mfg. Co. v. St. Louis & S. F. R. Co.* 117 Mo. App. 453, 93 S. W. 851; *Armstrong v. Illinois C. R. Co.* post, 671; *Hubbard v. Harnden Exp. Co.* 10 R. I. 244.

So, in *Kirk v. Folsom*, 23 La. Ann. 584, it was held that, to escape liability for goods lost during carriage, it devolved upon the carrier to show that the loss was occasioned, in the language of the Code, by "accidental and uncontrollable events," and that then the burden of proof to establish want of skill or diligence in the carrier or its servants was on the plaintiff.

As to the substantive question of the duty of the carrier where an act of God has occurred or is threatened, see note to *Armstrong v. Illinois C. R. Co.* post, 671.
J. A. C.

at said point where the goods were delivered were suddenly and unexpectedly overflowed, and that defendant's property, including its building, warerooms, and cars, was caught in the flood, and the goods so owned by the plaintiffs were in said way, without any fault on the part of the defendant, lost and destroyed by being washed away and covered with earth, water, and wreckage, caused by said freshets in said rivers; that the defendant in good faith endeavored to remove said goods beyond the reach of said waters, but the rise of the same was so sudden, unexpected, and unprecedented that it was unable to do so. On the 16th day of January, 1906, plaintiffs filed their reply to said answer, denying each and every allegation contained therein inconsistent with their petition. On the same day the plaintiffs and the defendant, through their attorneys, stipulated that the value of the goods involved in said cause as sued by the plaintiffs was that fixed in the petition of the plaintiffs, that said goods were of the actual market value of \$411.64 at the time same were alleged to have been received by the defendant, and in good condition. On the 8th day of July, 1907, the trial of said action was begun in the district court of Kingfisher county, Oklahoma territory, and the question upon whom the burden of proof rested was raised. The court ruled that, in view of the pleadings and admissions, the burden was on the defendant, to which action of the court no exception was taken.

The evidence on the part of the defendant to sustain the averments of its answer is substantially as follows: George Chaplin, chief clerk of its local freight office at Kansas City, Missouri, testified that the records of the company showed that they received the shipment on May 29th, and that it was loaded on the same day on one of the regular merchandise cars for the west, but that, on account of flood conditions west, no cars on that day ran west on defendant's line.

In answer to interrogatories, he testified:

Q. After the flood, you may state whether or not the goods in question were ever found or identified?

A. No, we were never able to identify them.

Q. Was the car in which these goods were loaded submerged with water?

A. It was to a depth of 8 feet (from the ground).

Q. Now, when you came to getting the actual goods of Logan, Snow, & Company, state whether or not you were able to identify them?

A. Our records show that they were loaded in that particular car.

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Q. Can you testify from your recollection?

A. Yes, sir; I can. We were unable to identify these goods; our records show it.

Q. What finally became of these goods, if you know?

A. I can't say. All the unidentified goods were sent to Chicago.

Q. Sent to Chicago?

A. But they were in such a shape that they were not worth the freight charges, all that I saw.

He further testified that on the night of the 29th day of May, the goods were put in the box car in question, and the car was sealed up.

Q. State whether or not, after going into the cars and taking out the freight, it was possible to identify all the freight in the cars?

A. It was not possible to identify all the freight in the cars.

Q. State whether or not it was possible to identify all, or even to find all, of the freight that your books showed should be in the cars?

A. It was not possible to identify the freight, and there was a great deal of the freight that we couldn't find at the time the cars were unloaded.

Mr. Peterson, the general warehouse foreman of the defendant at Kansas City, testified as follows:

Q. Do you remember this shipment of goods of Logan, Snow, & Company, of Kingfisher, Oklahoma,—these goods in question?

A. I know by the handling of all records and correspondence about it, and endeavoring to locate the shipment.

Q. Do you know whether or not you were ever able to identify this particular shipment after the flood subsided?

A. We were not.

Q. Did you find these goods that are in controversy here, when you got in there to checking up?

A. No, sir.

Q. What became of the goods generally that came out from that flood; what did you do with them?

A. A great many of the goods were worthless, such as crackers. Stuff of that kind were thrown away. Goods that were plainly marked we took up with the consignee and shippers. In most cases got disposition on them. The goods that were badly damaged and we were unable to identify were supposed to be sent to Chicago.

Q. You never got disposition on this shipment of plaintiffs' here?

A. We got disposition, but we never located the goods.

Q. You don't know what became of the goods?

A. No, sir; I do not.

Q. Do you know what day the goods of Logan, Snow, & Company were received by the Chicago, Rock Island, & Pacific Railway Company, and if so, what day?

A. On May 28th.

Q. Did you ever make any effort to identify these goods?

A. I did.

Q. Were you successful?

A. No.

Q. Now, what became of the goods that was in that car that was loaded on the 29th day of May, 1903 (referring to the car in which the goods in question were placed)?

A. A great many of them were sent to the destination; some of them damaged to such an extent that they were dumped; and those that we were unable to identify probably went to Chicago.

Q. That was the final disposition of all the goods that was in the cars at that time?

A. Yes, sir.

Q. Now, you speak about them being dumped. What do you mean by that?

A. Such goods as crackers, or goods that would not stand it to pass through the flood, were put in what we called a dump car, and sent over to the river and dumped in.

Q. O, I see, perishable goods?

A. Yes, sir.

Q. These goods that you mentioned, to Logan, Snow, & Company, were not goods of that character, were they?

A. No, sir.

Q. And you don't know anything about what condition these goods were in after the flood, personally?

A. This particular shipment, no.

Q. I believe you say there were some other goods in the car that was loaded on the 29th day of May, 1903, which contained two cases of dry goods and a case of corsets consigned to Logan, Snow, & Company, mentioned in this suit?

A. Yes sir.

Q. Mr. Peterson, have you any returns from the property that was shipped to Chicago for final distribution?

A. No, sir; that was handled by the claim department in Chicago.

Q. Handled by the claim department in Chicago?

A. Yes, sir.

On June 8, 1903, the following notice was sent to the defendants in error at Kingfisher, Oklahoma territory, by the agent of the plaintiff in error:

Please be advised that we have the following

goods on hand at our Kansas City depot, consigned to you, *viz.*: shipped from

_____. This freight has been badly damaged by the recent flood and must be removed at once. Otherwise it will be sold for whom it may concern.

(Signed) J. F. Gillett, Agent.

Attached to said notice was a description of the goods sued for in this cause, but there is no notation as to wherein the same were damaged.

On July 13, 1903, the following letter was sent to the defendants in error:

Messrs. Logan & Snow,

Kingfisher, Oklahoma territory.

Gentlemen:—

Referring to your letter of June 16 and 20, in reference to two cases of dry goods shipped by Marshall Field & Company to you, would say that we cannot forward these goods to you under the proposition outlined in your letter, as this company not assuming any responsibility on account of these goods being damaged by water, and we do not care to forward them down there and have them refused on our hands. Acting under instructions from our claim department, we shall return these goods to Chicago to be disposed of at that point.

Yours truly,

(Signed) J. F. Gillett.

This letter was written on a Chicago, Rock Island, & Pacific Railway Company letter head. No effort was made by the plaintiff in error to introduce the testimony of the agent, Gillett, relative to said notice of June 8 or said letter of July 13. By other witnesses, however, it was sought to be shown that such notices as the one of June 8 were sent to all persons shown by their records to have had freight in transit in their yards at the time of the flood, and that letters of the character of that of July 13 were written without making specific examination, but on the general character of the flood.

Mr. M. A. Low, with Messrs. C. O. Blake, H. B. Low, and Robberts & Curran, for plaintiff in error:

The burden of proof was, after the showing by defendant of the destruction of the goods by "an irresistible superhuman cause," shifted to the plaintiffs, and they had the burden of showing loss by the carrier's negligence.

Mitchell v. United States Exp. Co. 46 Iowa, 214; Davis v. Wabash, St. L. & P. R. Co. 89 Mo. 340, 1 S. W. 327; Memphis & C. R. Co. v. Reeves, 10 Wall. 176, 19 L. ed. 909; The New Orleans, 26 Fed. 44.

The railway company is not liable for loss by flood, even though negligent.

Empire State Cattle Co. v. Atchison, T. & S. F. R. Co. 135 Fed. 135, affirmed in 77 C. C. A. 601, 147 Fed. 457; 14 Am. & Eng. Enc. Law, p. 336; *Lamar Mfg. Co. v. St. Louis & S. F. R. Co.* 117 Mo. App. 453, 93 S. W. 851; *Moffatt Commission Co. v. Union P. R. Co.* 113 Mo. App. 544, 88 S. W. 117; *Pinkerton v. Missouri P. R. Co.* 117 Mo. App. 288, 93 S. W. 849; *Rogers v. Missouri P. R. Co.* 75 Kan. 222, 10 L.R.A. (N.S.) 658, 121 Am. St. Rep. 416, 88 Pac. 885, 12 A. & E. Ann. Cas. 441; *Hunt Bros. v. Missouri, K. & T. R. Co.* (Tex. Civ. App.) 74 S. W. 69; *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 256; 9 Rose's Notes (U. S.) 128; *Cole v. German Sav. & L. Soc.* 63 L.R.A. 416, 59 C. C. A. 593, 124 Fed. 115.

Messrs. W. W. Noffsinger and M. W. Hinch, for defendants in error:

If the carrier has been guilty of negligence and by such negligence brought the goods in the way of danger, or if the loss or injury might have been prevented by the exercise of care and diligence on his part, which he fails to exercise, and by reason of such negligence there is an opportunity for the act of God to operate, the loss is due to his negligence.

Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co. 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 A. & E. Ann. Cas. 450; *Jones v. Minneapolis & St. L. R. Co.* 91 Minn. 229, 103 Am. St. Rep. 507, 97 N. W. 893; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Read v. Spaulding*, 30 N. Y. 630, 86 Am. Dec. 426; *Elliott v. Rossell*, 10 Johns. 1, 6 Am. Dec. 306; *Bowman v. Teall*, 23 Wend. 306, 35 Am. Dec. 562; *Chicago, B. & Q. R. Co. v. Manning*, 23 Neb. 552, 37 N. W. 462; *Fish v. Chapman*, 2 Ga. 349, 46 Am. Dec. 393; *Savannah, F. & W. R. Co. v. Commercial Guano Co.* 103 Ga. 590, 30 S. E. 555; *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428; *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199.

If the goods are unaccounted for, and it is not shown that the flood caused the loss, or what their condition was when they disappeared, a recovery for their full value may be had.

Charlotte, C. & A. R. Co. v. Wooten, 87 Ga. 203, 13 S. E. 509.

It is not enough for the carriers to show merely that the goods were lost; it must go further and show the loss was caused by act of God.

Van Winkle v. South Carolina R. Co. 38 Ga. 32; *McCoy v. Keokuk & D. M. R. Co.* 44 Iowa, 424; *Alden v. Pearson*, 3 Gray, 342; *Wolf v. American Exp. Co.* 43 Mo. 29 L.R.A. (N.S.)

421, 97 Am. Dec. 406; *Wallingford v. Columbia & G. R. Co.* 26 S. C. 258, 2 S. E. 19; *Baltimore & O. R. Co. v. Morehead*, 5 W. Va. 293; *The Warren Adams*, 20 C. C. A. 486, 38 U. S. App. 356, 74 Fed. 413; *Rich v. Lambert*, 12 How. 347, 13 L. ed. 1017; *Hudson River Lighterage Co. v. Wheeler Condenser & Engineering Co.* 93 Fed. 374; *St. Louis Southwestern R. Co. v. Martin* (Tex. Civ. App.) 35 S. W. 28; *St. Louis, I. M. & S. R. Co. v. Lesser*, 46 Ark. 236.

Williams, J., delivered the opinion of the court:

At the beginning of the trial the question was raised upon whom the burden rested in the trial of said cause, and it appeared that it had been stipulated and agreed between the parties thereto that the value of the goods involved in the action was as alleged in the petition, whereupon the court said: "My judgment is the burden is on the defendant to establish that they were lost in the flood. They plead it was an act of God." No objection or exception was taken to this ruling of the court, and that amounts, in view of the recitals of the answer, to an admission by the plaintiff in error that said goods were received by it, and that they were of the value as alleged. Under that status the plaintiff in error could not be prejudiced by the plaintiffs' petition not being more certain in the respect complained of, and, if there was any error committed by the court in overruling said motion, it was without injury, and not a reversible one.

The burden being on the defendant to make out its defense under the issues joined, it will be observed that after the flood subsided the goods in question were never identified. They were not of the character of perishable goods, which were "dumped." On the part of the defendant, the witness states that the goods that were badly damaged, and were not capable of being identified, were supposed to be, or were probably, sent to the claim department at Chicago. Another witness says that the unidentified goods were sent to Chicago, but that all that he saw were not worth the freight charges, showing that he was testifying in part as to hearsay, and not of his own knowledge. Nor is there any effort to show by any witnesses from the claim department that the unidentified goods from said car were sent to Chicago, or what the condition of the same was,—whether the damage was partial or complete, or whether they were not damaged, but incapable of being identified. The unidentified or damaged goods sent to Chicago were doubtless inventoried by the plaintiff in error, and,

if so, it could have easily shown whether or not the damage was partial or complete; and, if not damaged, but no means of identification, it could have been shown. All this was peculiarly within the duty and power of the carrier. Whenever a carrier claims that the loss occurred on account of a flood so extensive as to come within the exception of an act of God or irresistible superhuman cause, and therefore excusing the carrier, the burden of proving this fact rests upon him. *Hutchinson, Carr.* 3d ed. § 287, p. 304, and authorities cited in footnote 43; *Moore, Carr.* 1906, § 3, p. 301; *Ray, Negligence of Imposed Duties, Common Carriers*, §§ 2, 10; *Montgomery & W. P. R. Co. v. Moore*, 51 Ala. 396; *Jackson v. Sacramento Valley R. Co.* 23 Cal. 272; *Richmond & D. R. Co. v. White*, 88 Ga. 807, 15 S. E. 802; *J. W. Cownie Glove Co. v. Merchants' Dispatch Transp. Co.* 130 Iowa, 329, 4 L.R.A.(N.S.) 1060, 114 Am. St. Rep. 419, 106 N. W. 749; *Michaels v. New York C. R. Co.* 30 N. Y. 564, 86 Am. Dec. 415; *Wilson's Rev. & Anno. Stat. (Okla.)* 1903, § 718. Nor was there any evidence on the part of the defendant to show what condition the car was in after the flood, as to whether the seal was broken, or where located with reference to the freight house, or whether any of the merchandise placed therein immediately prior to the flood was missing from said car, and what the appearance of the same was immediately before and after the flood had subsided. It appears that where the car was standing the flood waters rose 8 feet from the ground. The employees of the defendant that loaded this car may have had some knowledge as to where the goods of the character herein involved were located in said car. The fact that the testimony of such employees was not offered, and no more evidence was forthcoming from the defendant, upon whom rested the burden, and also to whom alone, if to anyone, the evidence was accessible, may have caused the jury to conclude that the defendant had not discharged the burden resting upon it to explain what became of the goods, and to show by proof that the same were lost on account of the flood.

In the case of *Charlotte, C. & A. R. Co. v. Wooten*, 87 Ga. 203, 13 S. E. 509, the court said: "The question is whether the goods lost by the carrier and never delivered should be paid for as sound or as damaged goods. If they were damaged, it was by a freshet, and without fault of the carrier. The goods not lost or stolen were damaged; but there is no direct evidence that those which disappeared were damaged, or, if so, to what extent. So far as appears, they were never seen during or after the freshet, and, consequently, to say that they were 29 L.R.A.(N.S.)

damaged when the carrier lost possession of them would be a mere conjecture. They might or might not have been stolen during the confusion in business occasioned by the freshet, and when stolen they may or may not have been damaged. It seems that the burden of proof on this subject must necessarily rest upon the carrier. It had the custody of the property, and that custody has been lost. Exactly when does not appear. We can discover no reason for holding that, under the evidence, the jury made any mistake in finding the value of the goods as proved, irrespective of the mere chance that their value may have been impaired before they were lost." In the case of *St. Louis & S. F. R. Co. v. Jamieson*, 20 Okla. 662, 95 Pac. 420, this court held: "Where the evidence in a case leaves it doubtful whether the particular carrier who is sued for the loss of goods, or another from whom that carrier received the same, is liable, the supreme court will not disturb the finding of the jury. *Illinois C. R. Co. v. Cowles*, 32 Ill. 117." This holding was made unquestionably for the reason that it was peculiarly within the power of the carrier to show on the line of what particular carrier the liability for loss or damage arose, and, failing to discharge its burden of proof, except to the extent to leave it doubtful as to the particular carrier causing the loss, this court would not disturb the finding of the jury. The same rule would apply to a carrier in trying to discharge itself by showing that there was a loss through an act of God. If it discharges the burden only to the extent of leaving it doubtful as to whether the loss was by the flood or through some other means, or that merely the consignment address upon the boxes had become unintelligible, and that the goods supposedly or probably had been sent to the claim department at Chicago, and no showing made from that department with reference thereto, the finding of the jury against such carrier, under such circumstances, on review in this court, should not be disturbed.

In this case it is to be assumed that the issues joined were submitted to the jury under proper instructions. The jury found the same against the defendant, and, in view of the testimony, we do not feel that we would be justified in holding that as a matter of law the jury erred in its findings.

The judgment of the lower court is affirmed.

Kane, Ch. J., and Hayes and Turner, JJ., concur.

Dunn, J., dissenting:

In the conclusion reached by the court,

holding that the evidence in this case fails to establish the destruction of the goods by the flood, I am unable to concur. The evidence on this proposition is entirely from the defendant, and its agents and servants. It is undenied, is reasonable, fully corroborative of itself, and there is nothing to detract in any particular from its full probative force. To my mind it conclusively shows that the goods in question were received by the company and promptly placed in a sealed car; that the flood submerged the ground where this car stood to a depth of 8 feet; that, when the car was opened, the marks on the packages within which these goods were contained were so obliterated as a result of the flood that they could not be distinguished. To show the muddy character of the water and its effects on property with which it came in contact, witness Chaplin, from whose testimony the majority opinion quotes, further testified, in answer to interrogatories, as follows:

Q. After the water subsided, how did it leave the freight in the freight house of the Chicago, Rock Island, & Pacific Railway Company, and in the cars that were standing in the yards adjacent thereto?

A. On the freight in the freight house it left a deposit of mud from 1 to 3 feet deep. The goods that were capable of being damaged by mud and water were practically ruined. In a lot of cases I noticed they were broken open, and the goods were simply a mass of mud.

Q. State what effect the water had on the goods themselves and the marks with reference to the identification after the flood.

A. The water seemed to have erased all the marks, or did in a great number of cases erase all marks, and when we unloaded goods we had a gang of men scrubbing off the boxes and trying to find the marks. The majority of the freight we couldn't find the marks on. We washed them off the best we could.

The matters submitted in this case for the determination of the court, it occurs to my mind, should be decided upon a reasonable, common-sense basis. The petition shows that the goods which were contained in this shipment were made up of \$285.72 worth of fancy ribbons, \$34.06 worth of fancy dry goods and notions, \$60.98 worth of glove-fitting corsets, and \$27.63 worth of black hats and caps. The testimony is that goods that were plainly marked were taken up with the consignee, and in most cases disposition was made of them. Those which were entirely worthless, such as crackers, etc., were dumped in the river, and goods such as were in this shipment, which the

parties were unable to identify, probably went to Chicago; and the same witness further testified that all the unidentified goods were sent to Chicago, and all that he saw were in such a shape that they were not worth the freight charges. It seems to me that it is a matter of simple common sense, when we consider the character of these shipments, the class of goods which made them up, that, when packages in which they were contained were soaked by the waters of this flood to such an extent as to entirely obliterate the marks, it would result in the total destruction of the marketable value of the goods. Of what value could hats and caps, fancy ribbons, and glove-fitting corsets be, after being submerged for a week or ten days in the muddy waters making up that flood? This testimony, being undisputed, being reasonable, and fully corroborated, to my mind, establishes beyond cavil or question that these goods were, as contended by defendant, destroyed in a manner under which it was relieved of responsibility.

The suggestion that there is no evidence showing the condition of the car after the flood, as to whether the seal was broken, or as to whether any merchandise placed therein was missing from the car, and suggesting this as a basis for liability, involves a journey into the realm of mere conjecture and guess, which to my mind is not justified by the claims of the parties, or within the issues. To hold that a party in whose hands goods are placed, which are then involved in a flood of the magnitude of this, being clearly an act of God, is liable for their value when he does not produce, fully identify, or more fully account for them than is here done after the occurrence is over, is virtually to lay down the rule that the greater the flood or catastrophe, and the more completely the property is destroyed, and the party's physical evidence annihilated, the more certain he is to be held liable.

Necessarily, disputed questions of fact are to be decided by a jury, and not by an appellate tribunal; but to my mind there is no room for dispute or difference on what the evidence in this case proves. The agents of the defendant, after the flood, were unable to find these goods and identify them; that is, select them out from other submerged goods contained in the car with them. The conditions which brought this about for all practical purposes totally destroyed the goods. If, however, there was left a modicum of value therein, for that only should the defendant be held liable and not for the full value.

Petition for rehearing denied.

OKLAHOMA SUPREME COURT.

M. B. ARMSTRONG et al., Pliffs. in Err.,
v.
ILLINOIS CENTRAL RAILROAD COM-
PANY.

(— Okla. —, 109 Pac. 216.)

Carrier — damage to goods — prima facie case — evidence:

1. In an action against a carrier by a shipper for loss or damage to a car of organs, said shipment having been delivered to the carrier in good condition, and by it to the consignee in a damaged state, this makes prima facie case against the carrier.

Same — prima facie defense — act of God — burden of proof.

2. In an action by a shipper against a carrier to recover on a shipment consisting of a car of organs damaged by a flood when the organs were in a car on a side track in defendant's yard, such car in due course of business having been received at that point on June 4th, and on June 5th, with seventy-four other cars, tendered to the connecting carrier, forty of said cars being accepted, and this car, with the balance, being declined on the ground that

it was unable, on account of the flood, to handle all the business tendered it; also on June 6th and June 7th, it, with other cars, being tendered to such connecting carrier, and likewise refused, it was then removed to the side track in the yards where the damage occurred, the same being as reasonable a place of safety as was available at that time, the damage being admittedly occasioned by an act of God,—this constituted a prima facie defense.

(a) The carrier, by proving the damage was due entirely to the flood or act of God, overcomes such prima facie case, and the burden shifts to the shipper, then, to show that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment, in order to recover.

Same — negligence — evidence.

3. The car of organs having been received on the morning of June 4th in regular course of business, and with seventy-four others, in due course of business, being tendered to the connecting carrier on June 5th, only forty of which were accepted, the others being declined on account of the inability of such connecting carrier to handle same, that of itself, without more, is not sufficient to show negligence contributing to the loss.

Headnotes by WILLIAMS, J.

(May 10, 1910.)

Note. — Duty of carrier where act of God has occurred or is threatened.

It may be laid down as a general rule of law that even where an act of God has occurred the duty is still incumbent upon a carrier to use due and reasonable diligence to save the goods intrusted to his care, and that if he fails to do this he is liable for their loss though the primary cause of their loss was an act of God; but if he uses all the means in his power, and if, in spite of his exertions, the goods are lost or injured, he cannot be held responsible.

Thus, in *Blythe v. Denver & R. G. R. Co.* 15 Colo. 333, 11 L.R.A. 615, 22 Am. St. Rep. 403, 25 Pac. 702, it was declared to be the rule that if, by proper diligence and attention, goods in the course of carriage could be rescued from an act of God, a failure to secure them would fix the liability of the carrier. Here recovery against a carrier was denied for the loss of goods, where it appeared that the car in which they were was overthrown by a furious wind, and immediately caught fire from a burning stove and kerosene lamp therein, rendering it impossible for the carrier to save the goods.

In *Black v. Chicago, B. & Q. R. Co.* 30 Neb. 197, 46 N. W. 428, it was held that, in the face of an act of God, the carrier was required to exercise ordinary or reasonable diligence to secure the property committed to his custody from loss or damage, in order to protect himself from liability. In this case recovery was refused against a carrier for the loss of live stock which occurred while the trains on which they were being

transported were snowed up, where it appeared that the carrier's employees omitted nothing that a prudent man would have done under the circumstances to avert the loss.

And in *The Lynx v. King*, 12 Mo. 272, 49 Am. Dec. 135, Judge Scott, in a concurring opinion, declared that if a cargo sustained injury by an inevitable accident, it was the duty of the master of the vessel to use the most exact diligence to countervail the effect of it, and that the occurrence of the accident would not relieve him from the responsibilities of a common carrier; and that he was still bound to the strictest diligence for the preservation of the cargo, and to use all reasonable exertions to retrieve it from the consequences of the accident. Here the specific conclusion was that it was not incumbent upon a carrier by water to dry wheat which, in the course of carriage, had been wet and damaged by inevitable accident.

In accordance with this rule a carrier was held in *Smith v. Western R. Co.* 91 Ala. 455, 11 L.R.A. 619, 24 Am. St. Rep. 929, 8 So. 754, not to be liable for the loss of goods in course of carriage which were overwhelmed by an extraordinary flood that no human foresight or prudence could have anticipated, where its employees used all reasonable diligence consistent with personal safety to save the goods.

But in *Feinberg v. Delaware, L. & W. R. Co.* 52 N. J. L. 451, 20 Atl. 35, a carrier was held liable for loss of live stock which it took out of the cars to await the clearing of a snow storm, and housed in a shed which was insufficient to protect them, where it

ERROR to the District Court for Oklahoma County to review a judgment in defendant's favor in an action brought to recover damages for injuries to goods while in its possession for transportation. Affirmed.

The facts are stated in the opinion.

Messrs. Harris & Wilson, for plaintiffs in error:

A verdict will only be directed where it is shown that the act of God, causing the damage, could not be foreseen, and that the carrier took all such precaution as was possible, and the fact that it took such precaution is not denied by the other party.

Long v. Pennsylvania R. Co. 147 Pa. 343, 14 L.R.A. 741, 30 Am. St. Rep. 732, 23 Atl. 459.

The act of God or *vis divina* must be the sole and immediate cause of the injury. If there be any co-operation of man or any admixture of human means, the injury is not, in a legal sense, the act of God.

Michaels v. New York C. R. Co. 30 N. Y.

564, 86 Am. Dec. 415; Atchison, T. & S. F. R. Co. v. Madden, S. & Co. 46 Tex. Civ. App. 597, 103 S. W. 1193.

Mr. R. M. Campbell, for defendant in error:

Ordinary and reasonable diligence for the protection of property from a flood is all that is required.

American Brewing Asso. v. Talbot, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679; Dougan v. Champlain Transp. Co. 56 N. Y. 1; Hubbell v. Yonkers, 104 N. Y. 431. 58 Am. Rep. 522, 10 N. E. 858; Nelson v. Chicago, M. & St. P. R. Co. 30 Minn. 74, 14 N. W. 360; Allison Mfg. Co. v. McCormick, 118 Pa. 519, 4 Am. St. Rep. 613, 12 Atl. 273; Wabash, St. L. & P. R. Co. v. Locke, 112 Ind. 404, 2 Am. St. Rep. 193, 14 N. E. 391; Richards v. Rough, 53 Mich. 212, 18 N. W. 785; Sjogren v. Hall, 53 Mich. 274. 18 N. W. 812; O'Malley v. Missouri P. R. Co. 113 Mo. 319, 20 S. W. 1079; Cooley. Torts, 91 et seq.; Withers v. North Kent R. Co. 27 L. J. Exch. N. S. 417; Loftus v.

appeared that the carrier also had a large stable substantially built and covered not far from the sheds, and which could have more efficiently protected the cattle.

And in Lang v. Pennsylvania R. Co. 154 Pa. 342, 20 L.R.A. 360, 35 Am. St. Rep. 846, 26 Atl. 370, recovery was allowed against a carrier for the loss of whisky being transported on a train which was overtaken by the Johnstown flood of 1889, but not swept away, and the whisky was not destroyed thereby, where it appeared that a part of it was stolen without any attempt of the train men to prevent it, and the remainder was destroyed by a volunteer guard of citizens in order to prevent it from falling into the hands of dangerous men.

By statute in Georgia a carrier is bound to use extraordinary diligence in the carriage of goods, and in Wallace v. Clayton, 42 Ga. 443, the court, in discussing a carrier's duty under such statute when the goods in his charge were threatened by an unprecedented flood, used the following language: "It does not therefore follow [because the carrier is excused for a loss of goods caused by an act of God] that the carrier may fold his hands, or that he is to be excused if he is negligent, or fails in exercising the diligence of a very prudent man. That duty is always upon him. Even amid the fury of the storm or the rush of the flood, he must use that prudence, discretion, and energy which experience teaches very prudent men to use under such circumstances. If the loss be by reason of the want of extraordinary diligence in the carrier, then, though the agent of the loss be flood or storm, the carrier is liable."

So, it was held in Richmond & D. R. Co. v. White, 88 Ga. 805, 15 S. E. 802, that, under such statute, a carrier was bound to exercise extraordinary diligence in protecting goods in his care from damage by flood, but 29 L.R.A. (N.S.)

if they were damaged in spite of such diligence he would be excused from liability.

And where an act of God is threatened and foreseen, or by the exercise of due care should have been foreseen, the same measure of diligence is required of a carrier to protect the goods from injury.

Thus, in Smith v. Western R. Co. supra, it was declared to be the rule that where an act of God was foreseen it was the carrier's duty to guard against its effects by the exercise of reasonable diligence and prudence, and that a failure to do so would be negligence.

And in Savannah, F. & W. R. Co. v. Commercial Guano Co. 103 Ga. 590, 30 S. E. 555, the rule was laid down that the carrier was not protected by the fact that the casualty which caused the injury might be regarded as an act of God, where he could have foreseen the happening of the event, or by the exercise of due diligence could have provided against such an occurrence. Accordingly, recovery was allowed against a steamboat company for the loss of freight which it had unloaded on the bank of a river at a point below high-water mark while it was raining and the river was rising, by reason of which the goods were at the time of unloading in imminent danger of being submerged.

And in Lamar Mfg. Co. v. St. Louis & S. F. R. Co. 117 Mo. App. 453, 93 S. W. 55, it was declared that "when an extraordinary natural disturbance gives warning of its time and path of its approach, and of its general magnitude and power," carriers are charged with the duty of exercising care commensurate with the exigencies of the situation to protect the goods in their charge against injury from the approaching danger.

And in Michaels v. New York C. R. Co. 30 N. Y. 564, 86 Am. Dec. 415, the court

Union Ferry Co. 84 N. Y. 455, 38 Am. Rep. 533; Cleveland v. New Jersey S. B. Co. 68 N. Y. 306; Sutton v. New York C. & H. R. R. Co. 66 N. Y. 243; Bishop, Non-Contract Law, 182, 447; Bishop v. Union P. R. Co. 14 R. I. 314, 51 Am. Rep. 386; Wright v. Wilmington, 92 N. C. 156.

It is not negligence not to take precautionary measures to prevent an injury which, if taken, would have prevented it, when the injury could not reasonably have been anticipated, and would not, unless under exceptional circumstances, have happened.

Ray, Negligence of Imposed Duties, pp. 133, 134; Webb's Pollock, Torts, enlarged Am. ed. pp. 45, 46.

Williams, J., delivered the opinion of the court:

That the defendant in error received the car of organs, assigned to an Oklahoma point, which were damaged about June 10,

1903, on account of the inundation of the east bottom of the Mississippi river opposite the city of St. Louis, resulting in the destruction of much property, and afterwards in such damaged condition reached the consignee, is not controverted. That said flood was so extensive as to comprise a superhuman agency is not disputed. It is claimed, however, that on account of the proximate negligence of the carrier it should not be excused from answering for the damages sustained. The facts in this case are practically the same as those in *Grier v. St. Louis Merchants' Bridge Terminal R. Co.* 108 Mo. App. 565, 84 S. W. 158. That action arose out of the same flood.

In the case at bar, the car of organs reached East St. Louis over the defendant's line, which terminated at that point, on the morning of June 4, 1903. It was handled in the usual manner, and on June 5th, with 74 other cars, in due course of business, tendered to the Terminal Railway Association,

said: "A carrier cannot fold his arms when property is entrusted to him, and, because it is subjected to natural causes that may work its destruction, make no effort to save or protect it from such causes or agencies, and then claim to be exempted from liability;" and allowed a recovery for the loss of goods which the carrier in the course of carriage stored in its freight house, and failed to use due diligence to protect from a threatened flood, though it had sufficient time and opportunity to secure the goods against injury.

And in *Cunningham v. Pennsylvania R. Co.* 40 Pa. Super. Ct. 212, it was held that when a carrier, by the exercise of reasonable diligence, could have foreseen the happening of the act of God that caused the injury to the goods in carriage, and failed to make use of the means at its command to guard against it, and the goods were thereby lost or injured, he would be liable, and a judgment for the shipper was reversed because the trial court charged that under such circumstances carriers should use "every precaution that was absolutely necessary" to save the goods, and that "if they did all under the exigencies of the occasion that they possibly could do" to save the goods, they were not liable.

And in *Nashville & C. R. Co. v. David*, 6 Heisk. 261, 19 Am. Rep. 594, the rule was laid down that where an act of God was threatened a carrier was "bound to use such means as would suggest themselves to and be within the knowledge and capacity of well informed and competent business men in such positions, and such diligence as prudent, skilful men engaged in that kind of business might fairly be expected to use under like circumstances; and that this diligence and these means should be actively used to protect and secure the property confided to their care. In other words, there should be no failure to use actively and en-

ergetically all the known and usual means which may fairly be expected to be found within the knowledge of men of average qualifications, engaged in a responsible business of this kind, where large amounts of property of the citizens pass through their hands, and are intrusted to their care."

The foregoing language was quoted with approval in *Lamont v. Nashville & C. R. Co.* 9 Heisk. 59, and in *Nelson v. Great Northern R. Co.* 28 Mont. 297, 72 Pac. 642, in which recovery was allowed against a carrier for the loss of sheep which it had shipped in spite of the knowledge on its part that the "worst blizzard ever known" was prevailing along the line of its road.

In accordance with this rule, in *Baltimore & O. R. Co. v. Keedy*, 75 Md. 320, 23 Atl. 643, and in *Pinkerton v. Missouri P. R. Co.* 117 Mo. App. 288, 93 S. W. 849, recovery was allowed against carriers for the loss of goods from a flood, where it appeared that the employees failed to act promptly upon a warning they had of impending danger, and failed to have the cars moved to a place of safety before the flood reached such a height that it was impossible to move them.

In *Smith v. Baltimore & O. R. Co.* 223 Pa. 118, 72 Atl. 264, it was held to be a question for the jury whether there was negligence on the part of a carrier in leaving cars of grain near a river which was rising rapidly and continuously, and failing to move the cars to higher ground, because its employees placed implicit reliance on the reports received from the weather bureau and a river coal company that the flood would not come beyond a certain height, though they knew floods of much greater height had taken place four times in five preceding years.

As to burden of proof when defense is act of God, see note to *Chicago, R. I. & P. R. Co. v. Logan S. & Co. ante*, 663.

J. A. C.

its connecting carrier, which accepted 48 of them, and refused the others, including the one in question, stating that it was unable to handle all of the business on account of the flood. On the next day (June 6th) it, with 164 cars, was again tendered to the Terminal Railway Association, and was again refused on account of its tracks being under water, and not being able to handle it. On June 7th, it, with 219 other cars, was offered, but it was impossible to either exchange traffic or work construction trains on account of water having flooded the tracks of said association, etc. Thereupon, the car was taken to defendant's yards, where the other cars were taken, for protection from the high water, and levees were also erected by the use of dirt and sacks of sand to protect such yards. The uncontradicted evidence shows that such yards were safe and secure against any ordinary flood, or any flood which could reasonably be expected, and that the car in question among others in the possession of the defendant, on account of the congestion of the traffic resulting from the flood, could not be moved from East St. Louis to any safer place. On June 5th, the water beginning to rise rapidly in the Mississippi bottom, and that portion of the city where the tracks of the Illinois Central Railroad Company lay appearing to be dangerous, as well as all other portions of East St. Louis, it being protected mainly by the embankments of the railroads leading into the city, the mayor of said city called a meeting of the officials of the various railroads for the purpose of taking concerted and immediate action toward saving the city form being inundated, and the request was made of all railroads to render all the aid and assistance they could, by furnishing to said municipal authorities their engines, cars, and dirt, as well as all the men they could, for the purpose of bringing dirt into the city to raise the embankments and make temporary levees to keep the water out of the city. The defendant company complying with this request, as a result during such time, it could not bring any freight or passenger trains in or carry any out of said city over its tracks. Those trains only hauling dirt for embankments to protect the city were permitted by the municipal authorities to be operated. On June 5th, 1903, the mayor forbade the defendant from running any trains into or out of the city except for such purposes, this order remaining in force until June 15th. On the 9th or 10th of June, a washout occurring on the Illinois Central Railroad embankment in the southeast part of the city, after that date, it was unable to get trains of any kind or character into the city or resume

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operation until about the 15th of June, 1903. This flood was the most extraordinary since the year 1844.

This case, in point of fact, is fully as strong in favor of the carrier as the case of *Grier v. St. Louis Merchants' Bridge Terminal R. Co.* supra; and if the conclusion reached in that case is correct, the judgment rendered in favor of the defendant in error by the trial court should be affirmed. We are referred to the case of *Atchison, T. & S. F. R. Co. v. Madden, S. & Co.* 46 Tex. Civ. App. 597, 103 S. W. 1193, as being contrary thereto. In that case, the co-operating negligence consisted in the improper location of the carrier's yards without providing reasonable protection in the light of previous inundations. It is not in point, for the further reason that the car was, on June 7th, set out in the yard at a reasonable place of safety, when it was ascertained that it was not reasonably practical to get the car out of the bottom.

Our attention is also called to the case of *Michaels v. New York C. R. Co.* 30 N. Y. 575, 86 Am. Dec. 415, in which the shipment, consisting of boxes containing dry goods, was received by the carrier at Albany to be transported to Rochester, twelve days later being delivered to the consignee in a damaged condition. When the shipment was received at Albany, instead of prompt transportation, same was held for back charges and placed in a warehouse close to the river's (Hudson) edge, and not out of reasonable reach of rising water. Three days after being placed therein, "one of those freshets not uncommon in the upper sources and tributaries of the Hudson, and at Albany, occurred." The defendant took no reasonable steps to protect the boxes and their contents against the probable effects of the river's rise after it began. It could, with exercise of reasonable care, have prevented the damage. The carrier in that case was properly held not excusable from liability. Here, the inundation was appalling. Not only was the property of the carrier in greater danger, but the lives of the inhabitants of a city of great population were in peril after June 5th, the loss or damage being, without controversy, occasioned by this flood. This was a complete defense against the plaintiffs' prima facie case that the car of organs was delivered to the defendant in good condition and received by the connecting carrier from it in a damaged condition. When the loss occurs from such a cause that the law will not presume negligence, or where it happens by an act of God, the burden of proving negligence and that it contributed to the loss, by the weight of authority, is upon the plaintiff. *Hutchinson, Carr. 3d ed.*

1906, § 449, p. 480, and authorities cited in footnote 23; vol. 3, Id. § 1355, pp. 1604, 1605, 1607, and authorities cited in footnotes. See also *Grier v. St. Louis Merchants' Bridge Terminal R. Co.* supra. Unless such negligence appeared by the defendant's evidence in showing the damage to be the result of an act of God, the burden shifted to the plaintiffs, and it was incumbent upon them to show that defendant was guilty of negligence that contributed to the loss or damage, and that, but for such negligence, the loss could have, with the exercise of reasonable care, been avoided. This burden it failed to sustain. The record in this case discloses that the defendant did everything within reason to protect not only this car of organs, but all other property in its custody. Its duty was to all shippers alike. The car was handled in due course of business, and, within one day after its receipt, tendered to the connecting carrier. There is nothing to show that it could have been tendered earlier, and, if so, that it would have been accepted, only about half of the cars tendered on June 5th being received. Nor does it appear that defendant had reason to believe that the connecting carrier could or would not receive said car after June 4th. On the contrary, same was tendered to it on each of the three succeeding days. Then realizing that the connecting carrier could not handle it, it took same to the safest place available for detention, it not being reasonably practicable to get this car out of the bottom after June 4th until June 17th. See also *Chicago, R. I. & P. R. Co. v. Logan, S. & Co.* 23 Okla. 707, ante, 663, 105 Pac. 343; *American Brewing Asso. v. Talbot*, 141 Mo. 674, 64 Am. St. Rep. 538, 42 S. W. 679; *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* 94 Minn. 269, 69 L.R.A. 509, 110 Am. St. Rep. 361, 102 N. W. 709, 3 A. & E. Ann. Cas. 450.

The judgment of the lower court is affirmed.

All the Justices concur.

KENTUCKY COURT OF APPEALS.

CLARENCE RUPP, Appt.,

v.

WESTERN LIFE INDEMNITY COMPANY.

(138 Ky. 18, 127 S. W. 490.)

Insurance — beneficiary with no insurable interest.

One may insure his own life for the benefit of another having no insurable interest 20 L.R.A. (N.S.)

therein, where he makes the contract and pays the premiums himself.

(April 26, 1910.)

APPEAL by plaintiff from a judgment of the Common Pleas Branch, Second Division, of the Circuit Court for Jefferson County, dismissing an action brought to recover the amount alleged to be due on certain life insurance policies. Reversed.

The facts are stated in the opinion.

Messrs. Edwards, Ogden, & Peak, for appellant:

A person may take out insurance upon his own life, and designate whom he pleases as the beneficiary.

Hess v. Segenfelter, 127 Ky. 351, 14 L.R.A. (N.S.) 1172, 128 Am. St. Rep. 343, 105 S. W. 476; *Hahn v. Supreme Lodge*, 136 Ky. 823, 125 S. W. 259.

Messrs. Henry Burnett and Beckley & Scott for appellee.

Nunn, J., delivered the opinion of the court:

Appellant, Clarence Rupp, brought this suit against appellee, Western Life Indemnity Company, on two policies of insurance alleged to have been issued upon the life of his uncle, George McCormack, appellant being named in both policies as the beneficiary. The petition is in two paragraphs, in each of which it is sought to recover \$1,000, the amount of each of the policies, and is in the form usually employed in bringing such actions, except it is alleged that, "by the directions and under the instructions of the assured, George McCormack, the defendant issued the policies payable to this plaintiff, and this without this plaintiff's instance, request, or knowledge." Appellee's answer was composed of five paragraphs; to some of which a demurrer was filed, but never acted upon as to the answer, but was carried back to and sustained as to the petition. Plaintiff declined to amend his petition.

Note. — The question whether designation by the insured of a person without insurable interest, as the beneficiary of the contract of insurance, contravenes public policy, is discussed in the note to *Dolan v. Supreme Council C. M. B. A.* 16 L.R.A. (N.S.) 555. The rule there stated, which upholds the right of such a beneficiary, is also sustained by two cases reported since the preparation of that note. *Deal v. Hainley*, 135 Mo. App. 507, 116 S. W. 1, and *Pollock v. Household of Ruth*, 150 N. C. 211, 63 S. E. 940.

The analogous question as to the validity of an assignment of a life insurance policy to one having no insurable interest is discussed in the note to *Rylander v. Allen*, 6 L.R.A. (N.S.) 128.

tion, and the court dismissed it upon the ground that appellant, a nephew of McCormack, had no insurable interest in his uncle's life; that such a contract partook of the nature of a wager, and was void as being against public policy. And this is the only question necessary or proper to be considered upon this appeal.

This court has held in several cases that a person could not take out an insurance policy on the life of another, pay the premiums, and become himself the beneficiary, unless he had an insurable interest in the life of the person insured, for the reason that such would be a wagering contract, and violative of public policy. The court did not hold such contract of insurance void, but only held that the person who had no insurable interest and obtained the policy and paid the premiums thereon could not collect it. This, however, is not the question before us. The point is. Has a person a right to obtain a policy, pay the premiums, and name any person he wishes as beneficiary? This is the first time this question has been brought directly before this court. Appellee's counsel contend that such a policy cannot be enforced, even though the beneficiary named in the policy had nothing to do with procuring it and was ignorant of its issue, and cite the following Kentucky cases, which they claim support their position: *Caudell v. Woodward*, 96 Ky. 646, 29 S. W. 614; *Leaf v. Leaf*, 92 Ky. 166, 17 S. W. 354, 854; *Embry v. Harris*, 107 Ky. 65, 52 S. W. 958; *Griffin v. Equitable Assur. Soc.* 119 Ky. 856, 84 S. W. 1164; and *Schlamp v. Berner*, 21 Ky. L. Rep. 324, 51 S. W. 312. The question before us was not in issue in any of the cases cited, and was not considered, except by a slight reference in the first-styled case. The opinions in the first two cases referred to construe contracts of insurance issued by what are known as "assessment or benevolent association," and the court decided them upon the construction of the organic law governing these associations. In the case of *Embry v. Harris*, supra, Harris, as the surety of Embry to a bank for nearly \$4,000, obtained a policy on the life of Embry, payable to his (Embry's estate for the sum of \$5,000, and the policy was placed in the hands of Harris to indemnify him against loss as such surety. The court upheld that contract. In the case of *Schlamp v. Berner*, supra, Mary Berner took out a policy on her life which was made payable to her administrator. She afterwards assigned the policy to her cousin, Barbara Schlamp. The court held that Barbara Schlamp had no insurable interest in the life of Mary Berner, and took no interest in the policy by rea-

son of the assignment of the policy to her. It will be observed that these opinions do not touch the question before us, except the *Caudell Case*, which we will refer to hereafter. The exact question before us was thoroughly considered in the case of *Hess v. Segenfelter*, 127 Ky. 348, 14 L.R.A. (N.S.) 1172, 128 Am. St. Rep. 343, 105 S. W. 476. The policy in that case was issued by a benevolent association, and the opinion was based upon and controlled by §§ 678 and 680 of the Kentucky Statutes (Russell's Stat. §§ 4399, 4401); but the question at bar was thoroughly considered, and the following conclusion announced: "All the courts of last resort, with possibly one exception, and the text writers on insurance generally, are agreed that a person may take out insurance upon his own life, and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purpose of speculation, or be tempted to take his own life in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction, and not in the continuance, of his own life. *Vance, Ins.* § 49; *Heinlein v. Imperial L. Ins. Co.* 101 Mich. 250, 25 L.R.A. 627, 45 Am. St. Rep. 409, 59 N. W. 615; *Morrell v. Trenton Mut. L. & F. Ins. Co.* 10 Cush. 282, 57 Am. Dec. 92; *Connecticut Mut. L. Ins. Co. v. Schaefer*, 94 U. S. 457, 24 L. ed. 251; *May, Ins.* § 112; *Bliss, Ins.* § 76; *Bacon, Ben. Soc.* § 729; *Beach, Ins.* § 861; *Joyce, Ins.* § 729; *Bloomington Mut. Ben. Assn. v. Blue*, 129 Ill. 121, 60 Am. Rep. 558, 11 N. E. 331; *Union Fraternal League v. Walton*, 109 Ga. 1, 46 L.R.A. 424, 77 Am. St. Rep. 350, 34 S. E. 317; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 69 Am. St. Rep. 380, 52 N. E. 772; *Northwestern Masonic Aid Assn. v. Jones*, 154 Pa. 99, 35 Am. St. Rep. 810, 20 Atl. 253; *Albert v. Mutual L. Ins. Co.* 122 N. C. 92, 65 Am. St. Rep. 693, 30 S. E. 327. On the other hand, what is known as 'wagering or gambling insurance' is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has not an insurable interest, growing out of kinship, dependence, or the relation of debtor and creditor. He cannot obtain an assignment of such insurance, nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, if there is any evidence tending to show that the insurance was obtained with a view

avoid or evade the law against speculative insurance."

This is a sound and reasonable rule, and if it were otherwise, it would be in conflict with the universal doctrine that a person who is *compos mentis* can give away his property to any person he pleases; it would operate to render invalid all devises to persons not closely enough related to have an insurable interest in the life of the testator. What reason can be given warranting the declaring of an insurance policy void when a friend, a stranger in blood, is made the beneficiary by the assured, that would not apply with the same force to a testator devising property to a person not having an insurable interest in the life of the testator? Yet such devises have been universally upheld. Is it possible that a beneficiary in an insurance policy such as is alleged in the case at bar would have a greater desire for the premature death of the assured and take steps to produce it, than a creditor would, especially Harris, who was only the surety of Embry in the case, *supra*, and in which case the policy was upheld, and declared not to be a wagering contract? In the cases of *Hill v. United L. Ins. Asso.* 154 Pa. 29, 35 Am. St. Rep. 807, 25 Atl. 771, and *Northwestern Masonic Aid Asso. v. Jones*, *supra*, the supreme court of Pennsylvania said: "A man may insure his own life, paying the premium himself, for the benefit of another who has no insurable interest, and that such a transaction is not a wagering policy. This results from the right which a man has to dispose of his own property." The following cases also sustain this principle: *Prudential Ins. Co. v. Hunn*, *supra*, and *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192. In the last-named case the identical question involved in this case was considered, and the court said: "Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own, to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligations. And the fact that he continues to pay the premium himself, and retains the control of the policy up to the time of his death, leaves no room for speculation, or the improper practices which a few years ago brought such a scandal upon the life insurance business in this state."

It is claimed that the case of *Caudell v. Woodward*, *supra*, establishes a different principle. That case was decided upon the organic law of a fraternal order, but language is used in the opinion which, seemingly, sustains appellee's contention. However, the conclusion reached in the case at bar is also announced in that opinion; that

is, one who obtains a policy of insurance on the life of another must have an insurable interest in the life of that other. The opinion in that case also announced the doctrine that one is prohibited from inducing another to take out insurance, or become the owner of such insurance by assignment, unless he has an insurable interest in the life of that other; and that Mrs. Woodward, a stranger, could not recover on the policy, because it is well settled that one obtaining a policy of insurance on the life of another, or who induced another to take out a policy for his benefit, must have an insurable interest. All these propositions are fundamental and sound in law. There is nowhere, however, any reason given in the *Caudell Case* why a person cannot take out insurance on his own life, pay the premiums, and make a person who is not related to him the beneficiary; nor could there have been presented any reason against it that would not have applied with equal force to a gift of the same amount by will as well.

For these reasons, the judgment of the lower court is reversed, and remanded for further proceedings consistent herewith.

LOUISIANA SUPREME COURT.

GEORGE BURVANT and Wife

v.

J. TOWSEND WOLFE, Appt.

(126 La. 787, 52 So. 1025.)

Negligence — crossing street — failure to look for automobile.

1. An eleven-year-old boy is not negligent in standing in or moving diagonally across a street toward the scene of a commotion to which many people are going, without looking out for automobiles which may come up behind him, but to do so must be on the wrong side of the street.

Automobile — injury to pedestrian — inattentive driver — liability.

2. The driver of an automobile is liable for running down a boy standing in or moving diagonally across the street ahead of him, and unaware of his peril, if the driver failed to see him and avoid a collision because he permitted his attention to be diverted in another direction.

Appeal — right to increase verdict.

3. An allowance of \$1,500 may be raised by the appellate court to \$3,000 as damages to be awarded parents for the negligent killing of their eleven-year-old boy.

(June 6, 1910.)

Note. — As to negligence of child in running in front of automobile, see note to *Zoltovski v. Gzella*, 26 L.R.A. (N.S.) 435.

APPEAL by defendant from a judgment of the Civil District Court for the Parish of Orleans, Division D, in plaintiffs' favor in an action brought to recover damages for the alleged negligent killing of plaintiffs' son. Modified.

The facts are stated in the opinion.

Messrs. Woodville & Woodville, for appellant:

The defendant was not bound to anticipate that plaintiffs' son would leave the sidewalk, and run in front of his automobile.

Cloud v. Alexandria Electric R. Co. 121 La. 1062, 18 L.R.A. (N.S.) 371, 46 So. 1017; Miller v. St. Charles Street R. Co. 114 La. 409, 38 So. 401; Campbell v. New Orleans City R. Co. 104 La. 183, 28 So. 985; McLaughlin v. New Orleans & C. R. Co. 48 La. Ann. 23, 18 So. 703; Culbertson v. Crescent City R. Co. 48 La. Ann. 1376, 20 So. 902; Lafferty v. Third Ave. R. Co. 85 App. Div. 592, 83 N. Y. Supp. 405; Meloy v. Philadelphia Rapid Transit Co. 217 Pa. 189, 66 Atl. 253; Young v. Small, 188 Mass. 4, 108 Am. St. Rep. 457, 73 N. E. 1019; Tatum v. Rock Island, A. & L. R. Co. 124 La. 921, 50 So. 796.

Mr. Armand Romain, for appellees:

The responsibility which should be imposed upon owners of automobiles must be measured by the character of the machines, the place where they are used, and the dangers attending their use.

La. Laws 1904, Motor Vehicle Law, p. 1311; Ingraham v. Stockamore, 63 Misc. 114, 118 N. Y. Supp. 399.

Provosty, J., delivered the opinion of the court:

The little eleven-year-old son of the plaintiffs was struck down by the automobile of the defendant, and died the next day. The street upon which defendant was driving his automobile was asphalted. It had no gutters, and its surface was less than a foot lower than the sidewalk. As defendant entered the block, there was at the lower end of it a large crowd gathered around a police patrol wagon which had made an arrest, and more people were hastening towards this center of excitement. Defendant slackened speed to 6 or 7 miles an hour; and, as the crowd was densest on the right-hand, or downtown, side of the street, where the patrol wagon stood, he steered towards the left, or uptown, side, hoping to be able to pass,—tooting his horn, so as to give warning to the crowd to open a passage for him. The accident occurred half way down the block, and 2 to 4 feet from the left-hand, or uptown, side curbing. The boy had run down with other boys from some distance up the street towards the scene of the excitement, and seems to have lagged

behind, for we gather that at the moment of the accident he was alone in the middle part of the block, except that there were persons seated on their doorsteps, or standing at their gates.

One witness, a colored woman, says that the boy was standing in the street when the automobile came from behind and struck him. Another witness, Mrs. Duker, says the boy was walking, not running; that he stepped from the sidewalk to the street, going in the direction of the patrol wagon; that he made two steps in the street, and, as he was making the third, the automobile struck him. Another witness, Valcour, says that five little boys were running on the banquette towards the excitement; that, when they got in the middle of the block, they jumped into the middle of the street, and the automobile came along and struck one and knocked him down; that he left the banquette 10 or 15 feet ahead of the automobile." A witness for defendant, Mrs. Oddo, says that the boy came running on the sidewalk, "looking at the patrol wagon; he stepped right in front of the automobile." Another witness for defendant, Police Officer Kiernan, says that "the boy ran right out, jumped out, into the street, and the automobile struck him; it was the wheel that struck him." Another witness for defendant, Police Officer Duffy, says that "this little boy, he must have come from the banquette, and was going to cross the street, and I think the lamp of the automobile struck him." Another witness for defendant, Galt, says: "This little boy was standing on this side of Johnson street; the doctor was on the lower side, and he ran across the street, looking towards the patrol wagon, and not bothering about the automobile or anything else, and when he found himself in front of the automobile, it looked like he fell back a little, and the doctor ran this way, and he ran into the machine." Another witness for defendant, Mrs. Blanchard, one of the occupants of the automobile, says: "The child was on the sidewalk, and he just crossed over right in front of the automobile when it struck him."

Defendant himself says he was blowing his horn "in order to get an opening sufficient to go through this immense crowd that was there at the corner, and didn't see the boy until he was struck." From this evidence we conclude that the child was first going straight down the banquette on the uptown side, and that, when he got about the middle of the block, he started to the right, in the direction of the patrol wagon, which was at the downtown corner, so that his course and that of the automobile tended to converge. We find nothing to show that his course was squarely across

the street. Therefore, had the defendant been duly observant, as anyone using a death-dealing machine upon a public street is bound to be, he would have noticed that the course of the boy was convergent with his own, and that the boy was not paying attention. True, if the boy was running, there may have been very little time for stopping or shunting the machine; but the defendant should have been observant and allowed the child this chance for the saving of his life. *Crisman v. Shreveport Belt R. Co.* 110 La. 640, 62 L.R.A. 747, 34 So. 718. Defendant's whole attention evidently was centered upon setting an opening through the crowd ahead; he became unmindful for the moment of the danger to which he might be exposing those who, like himself, from the same cause of the excitement ahead, might be in his way upon the street.

There can be no question of contributory negligence in the case. Cases of persons going upon railroad tracks have no analogy. The boy's attention was fixed upon the excitement ahead of him, as everybody else's was. He was simply following others who had just preceded him, going in the same direction. If he had thought of the matter at all, he would have had the right to assume that an automobile or other fast-moving private vehicle would not run him down. But if there was contributory negligence, still the defendant would be responsible, under the last-chance doctrine, for had he been looking (as he was legally bound to be doing), he would have seen the boy, and seen that he was unaware of the danger into which he was going. Possibly it would, even then, have been too late; but defendant should have been sufficiently attentive to have been in a position to make the trial.

One thing is certain, that the boy did not know that the machine was so near. Combining the testimony of the witnesses who say that the boy was "standing" in the street with that of Mr. Galy, that, "when he found himself in front of the automobile, it looked like he fell back a little," we would conjecture that a toot of the machine attracted the attention of the boy and checked his course, and that just then he was run over. In other words, that the tooting of the machine was not continuous, as one uninterrupted blowing, but consisted of successive tootings at short intervals; and that the quickly moving machine passed from the lower to the upper side of the street in the interval between two blowings. This would account for the boy's not having heard. His not having seen is accounted for by the machine having been behind his back. The innate sense of self-preservation would have checked him, had he either seen or

heard; hence, our assuming that he did neither.

Plaintiffs claim \$25,000 damages, distributed, as follows: For the loss of the society and affection of their child, and the future assistance and support they might expect to receive from him, \$5,000; for the sufferings of the child, \$5,000; for their own suffering, mental as well as physical, \$10,000; punitive damages, \$5,000. There is no evidence of the child having suffered. His skull was so badly fractured that an operation was deemed inadvisable. From this we infer that he was unconscious and insensible from the moment of the blow. Mr. Burvant testifies that the death of his boy has made "a wreck of his life;" that for nearly nine months he was "physically incapable of attending to my business, because to me life was not worth living." Mrs. Burvant is less exaggerated in her statement. She says that it made her "very nervous;" that for fifteen days she was sick in bed, just getting in and out of bed, from nervous prostration. The plaintiffs are forty-four and forty-five years old, and the child was their youngest. How many more they had, the record does not show. Whether they were healthy, ordinarily constituted people, or of so nervous a temperament that a stroke of this kind would affect them to a greater extent than ordinary people, the record does not show. The jury, who saw them on the witness stand, allowed them \$1,500. This was by a divided vote of nine for and three against.

The moderation of this allowance was doubtless responsive to a sentiment on their part that Dr. Wolfe was more unfortunate than culpable in this sad affair; as is in truth the case. The liability is more legal, or, we might say, technical, than moral. We realize this fully; at the same time there is a legal liability, and \$1,500 is not commensurate. The feelings of a parent, especially of a mother, on such an occasion, are not susceptible of exact computation in dollars and cents; if an estimate were attempted, it would doubtless exceed the fortune of Dr. Wolfe. The physical suffering of plaintiffs we hardly can take into consideration alongside of their so incomparably greater mental suffering.

In the case of *Buechner v. New Orleans*, 112 La. 600, 66 L.R.A. 334, 104 Am. St. Rep. 455, 36 So. 603, where the court allowed \$6,000, there was no question raised in connection with the amount allowed by the jury, and the court simply affirmed the verdict. In the case of *Sundmaker v. Yazoo & M. Valley R. Co.* 106 La. 111, 30 So. 285, the court allowed \$4,000. Considering all the circumstances of the case, we have con-

cluded to fix the amount in this case at \$3,000.

It is therefore ordered, adjudged, and decreed that the judgment appealed from be increased to \$3,000, and that, as thus amended, it be affirmed.

Petition for rehearing denied June 28, 1910.

OREGON SUPREME COURT.

D. H. SIMPSON, Resp't.,

v.

A. C. MILLER, Appt.

(— Or. —, 110 Pac. 485.)

Witness — mistaken falsity — effect.

1. A witness false in one part of his testimony, because mistaken as to the facts, is

Note. — Necessity of qualifying by reference to conscious falsity in instruction under a statute enacting the maxim, Falsus in uno, falsus in omnibus, without that qualification.

It is not the purpose of this note to consider the general common-law rule as to the form of instruction under the maxim, *Falsus in uno, falsus in omnibus*, and its scope does not include the innumerable cases holding that, in the absence of a statute, an instruction that a witness false in one part of his testimony is to be distrusted in others must contain also a qualification to the effect that he must be wilfully false in order so to be distrusted.

Three states, California, Montana, and Oregon, seem to have statutes exactly alike on this subject, providing that "the jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect and value of evidence addressed to them, except when it is declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: . . . 3. That a witness false in one part of his testimony is to be distrusted in others." Under these statutes, the decisions, while approving the common-law rule, and in some cases holding the statute to be in effect but an expression thereof, and generally holding the giving of a qualified instruction, or the qualification by the court of an instruction requested, in the form of the statute, to be proper and desirable, also hold that an instruction in the form of the statute cannot be said to be erroneous, though unqualified.

Several of the California and Montana cases are reviewed, and the latest decisions of those states followed in *SIMPSON v. MILLER*, which seems to be the only case in Oregon which has passed upon the necessity, in giving an instruction pursuant to the statutory provision, for a qualification to the effect that a witness must be wilfully false.

People v. Strong, 30 Cal. 151, the earlier L.R.A. (N.S.)

not within the rule that a witness false in part of his testimony is to be distrusted in other parts.

Trial — instruction — absence of request for correction.

2. It is not reversible error to instruct in the language designated by the statute, that a witness false in one part of his testimony is to be distrusted in others, where no request is made to limit the rule to testimony wilfully false.

(August 3, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Polk County in plaintiff's favor in an action brought to recover the alleged contract price of certain standing timber alleged to have been sold. Reversed.

The facts are stated in the opinion.

est California case cited in the above opinion, seems to have been decided before the enactment of the present California statute on that subject, and the report does not mention any statute. In that case the court modified a requested instruction, "If the jury believe that any witness has sworn falsely with respect to any one material fact," etc., by inserting the word "wilfully" before the word "sworn," and it was held that the charge unqualified, as requested, was not authorized by rules of law, and was correct as given. This is in accordance with the common-law rule.

People v. Sprague, 53 Cal. 491, decided after the enactment of the statute in its present form, involved the modification by the court of an instruction requested substantially in the form of the statute, by inserting the "wilfully" qualification. The supreme court affirmed the judgment below holding that the statute is but declaratory of the common-law rule; that the word "false" in the statute is not the equivalent of "mistake;" that the word "wilfully" added to the words of the requested instruction did not change its effect; and that the instruction was correct as given.

In *People v. Luchetti*, 119 Cal. 501, 51 Pac. 707, where the defendant requested an instruction substantially covering the provision of the Code, that "a witness false in one part of his testimony is to be distrusted in others," which the court modified by inserting "wilfully" before "false," it was held, citing *People v. Sprague*, supra, that the modification did not render the instruction erroneous, nor change the effect of the instruction as offered.

In *People v. Wilder*, 134 Cal. 182, 66 Pac. 228, the court said that an instruction that "a witness who wilfully testifies falsely as to one fact in giving his testimony is to be distrusted in other parts of his testimony" is in substance the same as the statutory form, that "a witness false in one part of his testimony is to be distrusted in others," citing *People v. Sprague*, supra.

Messrs. McFadden & Bryson and Weatherford & Wyatt for appellant.

Mr. Oscar Hayter, for respondent:

An instruction to the effect that a witness mistaken in one part of his testimony is to be distrusted in others is not erroneous, where the jury are informed that they are the exclusive judges of the credibility of witnesses, the instructions as a whole are correct, and it does not appear that the jury were misled, as the instruction merely states a truth which no one needs to be told.

State v. Connors, 37 Mont. 15, 94 Pac. 199; People v. Hower, 151 Cal. 638, 91 Pac. 507; United States v. Lee Huen, 118 Fed. 442; Wigmore, Ev. § 1008.

It is not error for the court to instruct in the language of the written law.

People v. Dobbins, 138 Cal. 694, 72 Pac. 339; State v. Connors, supra.

A witness may impeach himself by ex-

hibiting such a want of intelligence or of memory as to incapacitate him from representing a past event so that reliance can be placed on his statement.

Stafford v. Leamy, 2 Jones & S. 269; Thomas v. Ribble, 2 Va. Dec. 321, 24 S. E. 241; Boulton v. Robinson, 4 Grant, Ch. (U. C.) 109; Maverick v. Reynolds, 2 Bradf. 360; Willcox v. Hill, 11 Mich. 256; Coit v. Dowling, 4 Terr. L. R. 464; Grant v. Bradstreet, 87 Me. 583, 33 Atl. 165.

A witness's memory may be so permeated with mistakes and discrepancies as to be wholly worthless; however honest, he may be lacking in sufficient intelligence or memory to properly inform the court.

United States v. Lee Huen, supra.

Slater, J., delivered the opinion of the court:

The only question presented for review

And in People v. Fitzgerald, 138 Cal. 39, 70 Pac. 1014, an instruction containing the "wilfully" qualification was held to be "substantially according to the Code," and proper.

So, also, in People v. Stevens, 141 Cal. 488, 75 Pac. 62, the court held that a charge containing the qualification in question "was proper and in substantial accord with the statute as construed in People v. Fitzgerald, supra."

In People v. Soto, 59 Cal. 367, the court gave an instruction so limited as to apply to witnesses who "had wilfully testified falsely," and while the dispute in this case involved only the latter part of the instruction, as to the statutory duty of the jury in regard to wilfully false testimony, the instruction as given, including the word "wilfully," was held correct.

In People v. Plyler, 121 Cal. 160, 53 Pac. 553, though the point directly involved was another qualification of the words of the statute, the instruction, both as proposed and as given, containing the word "wilfully," the court said: "The subdivision [of the statute] is but a brief paraphrase of the terse maxim, *Falsus in uno, falsus in omnibus*. The Code provision, like the Latin maxim, is not a complete exposition of the law. Well understood by jurists, it would be misleading to the nonprofessional mind. It requires construction and amplification. This it has received. People v. Sprague, 53 Cal. 494; People v. Soto, 59 Cal. 368. The proposed instruction is an accurate exposition of its meaning, and should have been given."

In People v. Demouset, 71 Cal. 611, 12 Pac. 788, 7 Am. Crim. Rep. 1, a similar instruction, containing the "wilfully" qualification, was approved, though in that case no point was made as to the correctness of such qualification.

And to like effect are People v. Flynn, 73 Cal. 511, 15 Pac. 102, 7 Am. Crim. Rep. 126, and People v. Clark, 84 Cal. 573, 24 Pac. 313.

29 L.R.A. (N.S.)

In People v. Hicks, 53 Cal. 354, it appears that the court at the trial instructed the jury in the words of the California statute, that "a witness false in one part of his testimony is to be distrusted in others," but that counsel for defendant asked the court to charge the jury "that if they believed any witness had upon the stand wilfully sworn falsely in respect to any matter material to the issue on trial, they should disregard his testimony altogether." The court on appeal, assuming, on the authority of People v. Sprague, supra, that the correct construction of the statute implied "wilfully" before "false" therein, affirmed the judgment of the trial court, impliedly at least, approving the instruction as given in the words of the statute, and held the requested instruction properly refused, though upon the ground that it incorrectly stated the effect of the latter part of the statute, and not because it contained the word "wilfully."

In O'Rourke v. Vennekohl, 104 Cal. 254, 37 Pac. 930, the trial court refused a requested instruction which covered, in amplified form, the substance of the statute, and included "wilfully;" but instead charged the jury on this point in the precise words of the statute, without the "wilfully" qualification; and the court on appeal said: "While we think the instruction as requested was proper and should have been given, nevertheless we are unable to hold that there was error in the action of the court. In refusing the instruction as asked, the court charged the jury upon the point in the language of the statute, and this, it has been repeatedly held, was sufficient. People v. Treadwell, 69 Cal. 238, 10 Pac. 502, 7 Am. Crim. Rep. 152, and cases there cited."

In People v. Righetti, 66 Cal. 184, 4 Pac. 1063, 1185, the trial court gave an instruction which was in effect the language of the statute, and defendant urged, on appeal, that the court should have said "wilfully false;" but the supreme court held

arises upon the giving of the following instruction: "These witnesses do not all agree, and so the rule of law in that matter is this: That a witness false in one part of his testimony is to be distrusted in others. As to whether a witness is false so as to be there distrusted is for you to determine; and it may be that a witness is false intentionally, or he may be false by mistake. A mistaken witness would be a false witness in the meaning of that rule."

To this instruction defendant excepted. His counsel complain of the instruction: First, because it was not so qualified as to apply only to a witness who wilfully, knowingly, or intentionally testified falsely; and second, because the jury was advised that a mistaken witness is a false witness within the meaning of the rule. The first part of the instruction is in the language of the statute (Bellinger & C. Anno. Codes & Statutes, § 857, subd. 3), which is as follows: "The jury, subject to the control of the court, in the cases specified in this Code, are the judges of the effect or value of evidence addressed to them, except when it is thereby declared to be conclusive. They are, however, to be instructed by the court on all proper occasions: . . . (3) That a wit-

ness false in one part of his testimony is to be distrusted in others."

Subdivision 3 of this statute has been generally held by the courts to be substantially the legal equivalent of the common-law maxim, *Falsus in uno, falsus in omnibus*. "The notion behind the maxim," says Mr. Wigmore at § 1013, vol. 2, of his valuable work on Evidence, "is that, though a person may err in memory or observation or skill upon one point and yet be competent upon others, yet a person who once deliberately misstates one who goes contrary to his own knowledge or belief, is equally likely to do the same thing repeatedly, and is not to be reckoned with at all. Hence, it is essential to the application of the maxim that there should have been a conscious falsehood."

The text above quoted is supported by a great array of decisions cited in the footnote, which approach a unanimity of authority, and to which reference may be made. It is further said by that author, however, that occasionally a court is found declaring, through carelessness, that proof of a material error (contradiction), or self-contradiction, will justify the application of the maxim. The first case cited in the footnote to this declaration is that of Churchwell

that the instruction as given was proper, arguing, on the holding of *People v. Sprague*, supra, to the effect that the word "wilfully" did not change the effect of the language of the statute, and that the word "false" was not the equivalent of mistake; that, therefore, "if a witness be believed to have sworn 'falsely,' he is believed to have sworn so wilfully."

In *People v. Treadwell*, 69 Cal. 226, 10 Pac. 502, 7 Am. Crim. Rep. 152, an instruction substantially in the language of the statute was challenged on the ground that the word "wilfully" was not inserted immediately before the word "false" therein, but the court held that the instruction as given was correct, saying: "The defendant did not ask for a modification in that regard. But the omission of the word did not affect the correctness of the proposition." And they further say, on the authority of *People v. Sprague*, supra, that the effect of the instruction is the same whether or not it contains the word "wilfully."

In *People v. Ah Sing*, 95 Cal. 654, 30 Pac. 796, an instruction substantially in the language of the Code, without qualification as to the wilfulness of the false swearing, was approved, the court citing *People v. Treadwell*, supra.

In *People v. Lon Yeck*, 123 Cal. 246, 55 Pac. 984, defendants complained of an instruction of which the court said: "This enunciation of the law is framed substantially in the language of the statute, and has been directly approved in *People v. Treadwell*, supra, and *People v. Ah Sing*, 29 L.R.A. (N.S.)

95 Cal. 656, 30 Pac. 796. However, in giving instructions to the jury bearing upon this particular question of law, courts would do well to heed the suggestions given out in the recent case of *People v. Plyler*, 122 Cal. 160, 53 Pac. 553. It may be further suggested that the instruction of which complaint is now made was given at the request of the defendants, and it is not for them to now insist in this court that it does not contain a sound declaration of law."

In *People v. Dobbins*, 138 Cal. 694, 75 Pac. 339, where the trial court had given an instruction substantially in the words of the statute, the supreme court, on appeal, after quoting from *People v. Plyler*, supra, held that it was not error for the court to instruct in the language of the written law, saying: "While the instruction cannot be commended as a full or clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court, in giving the law, to have conformed to the language of the Code, and to have omitted what the Code itself omits."

In an earlier Montana case where the trial court refused to give an instruction requested by the defendant substantially in the language of the statute, which refusal was made one of several grounds for a motion for a new trial, which was granted, the supreme court, affirming on other grounds the order granting the new trial in discussing this ground, said: "Presumably, the case was one where the court should have given the instruction requested

v. State, 117 Ala. 124, 23 So. 72. While there appears in that case to have been only a contradiction between two witnesses upon a material point, it was made an occasion for a requested instruction to this effect: "If any witness testifying has been impeached, then the jury may disregard the entire testimony of such witness," etc. The question whether the facts presented furnished a proper occasion for the application of the maxim, or whether the use of the word "impeached" in the instruction was a sufficient statement of the legal point involved, does not appear to have been raised by the parties, or considered by the court; the only point considered and decided was whether the following limitation, "unless it be corroborated by other testimony not so impeached," added to the instruction, rendered it amenable to an objection interposed by the state. The court said upon that point that, if the charge asked by the defendant is faulty, in that it is too favorable to the state in the use of the words last quoted, the state cannot complain. The case of *Martin v. People*, 54 Ill. 225, is also cited as an instance of a court having carelessly lapsed from a correct statement of the rule. But the court, in our opinion,

held to the main principle stated by the learned author. The trial court had refused to instruct the jury to the effect that they would not be warranted in disregarding the statements of certain witnesses, unless their testimony had been successfully impeached. It was held that "this instruction was properly refused, as it was for the jury to determine, in view of all the facts and circumstances, the degree of weight to be given to the testimony of each witness. The jury might consider the witnesses named perfectly honest, but yet mistaken in portions of their evidence; or even if their evidence was uncontradicted by that of others, there might be portions of it so improbable that a jury would be inclined to doubt its truth." We do not see that this rule is in conflict with the main principle stated by the learned author, or that it can be fairly criticized. The instruction refused was in the negative form, and impinged upon other rules governing juries in estimating the effect of evidence, such as those contained in § 695, *Bellinger & C. Anno. Codes & Statutes*, as follows: "A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which he testifies, by the charac-

or the substance of it, by way of caution to the jury upon effect of evidence. And we can readily understand the aid furnished to a jury by declaring to them the principle meant to be enunciated by the statute, that a witness who has wilfully testified falsely as to any material matter must be distrusted as to other parts of his testimony. The statute is not applicable, however, to unintentional errors, or evidence given upon immaterial matters, and without intent to deceive. Its sense is to require the jury to distrust only a witness who wilfully swears falsely as to material matters; and we are of opinion that it ought always to be given with the words 'wilfully' and 'material' expressed as qualifications of the rule it declares." *Cameron v. Wentworth*, 23 Mont. 70, 57 Pac. 648.

In *Ashley v. Rocky Mountain Bell Teleph. Co.* 25 Mont. 286, 64 Pac. 765, defendant complained that the court erred in instructing the jury substantially in the words of the statute without qualification, and it was held, on the authority of *Cameron v. Wentworth*, supra, that such instruction was erroneous, notwithstanding the language of the statute, and that the words "wilfully" and "material" should be used in proper places in such instruction.

A different conclusion, however, is reached in *State v. Connors*, 37 Mont. 15, 94 Pac. 199, where one of defendant's specifications of error, upon appeal, related to an instruction in the exact words of the statute, as follows: "That a witness false in one part of his testimony is to be distrusted in

others;" and the court, after a somewhat lengthy discussion of the decisions of that state and of California, from which state the Montana statute came, and after pointing out that in *Cameron v. Wentworth*, supra, "this court justified the order of the district court upon another ground altogether, but made some observations with respect to this instruction, but nowhere decided that the instruction was erroneous and ought not to have been given," held that an instruction in the words of the statute, omitting qualifications, was good, saying: "It cannot be that subdivision 3 of § 3390 correctly states the law of this state when found in the Code, but that the same language when embodied in an instruction of a court does not do so. As said above, the Code establishes the law of this state respecting the subjects to which it relates, and unless there is apparent some inadvertent omission or some apparent misuse of terms, which renders the meaning of the statute obscure or uncertain, we think courts are not justified in attempting to improve upon the action of the legislature in enacting laws, by interpolating into statutes words which may, or may not, have been intended to be used by the law-making body, which in this state is the legislature, and not this court." This and the later California decisions to the same effect, reviewed in the opinion in *SIMPSON v. MILLER*, are followed in the decision of that case, so that the holdings of the latest cases in all the states where the above statute is in force seem to be in accord, to the effect stated.

A. C. W.

ter of his testimony, or by evidence affecting his character or motives, or by contradictory evidence; and where the trial is by the jury, they are the exclusive judges of his credibility." The principle then announced involves merely the indulgence of a presumption as to the truth of a witness's statement, until overcome by certain circumstances which destroy the presumption, but does not necessarily require the rejection of the evidence. But the principle now under consideration is the effect upon all the testimony of the witness who has been found to be false in one part only of his testimony, which does not involve a contradiction or a number of contradictions, nor the question of the inherent improbability of his testimony.

We have examined the remainder of the cases cited in the footnote alluded to, but we find none of them directly in conflict with the main principle under consideration. The mere fact that the testimony of the witness is contradictory or is contradicted as to any material fact or facts is not conclusive as to the falsity of his evidence as to those facts, for the jury may nevertheless believe the evidence, although contradicted. To justify the application of the principle contained in the statute, there must be a state of facts from which the jury may be authorized to believe, and they must believe, the evidence wilfully false in some particular, before they are authorized to discredit the whole of the evidence of such witness. *Ivey v. State*, 23 Ga. 578, 581; *Wilkins v. Earle*, 44 N. Y. 172, 182, 4 Am. Rep. 655; *Deering v. Metcalf*, 74 N. Y. 501, 503.

The maxim, *Falsus in uno, falsus in omnibus*, applies only when truth is intentionally disregarded, and not when by defect of memory it is innocently departed from. *Annesley v. Angelsea*, 17 How. St. Tr. 1139, 1421; *Kinney v. Hosea*, 3 Harr. (Del.) 397, 401; *Pease v. Smith*, 61 N. Y. 477; *Jennings v. Kosmak*, 20 Misc. 300, 45 N. Y. Supp. 802; *Gottlieb v. Hartman*, 3 Colo. 53, 60; *McPherrin v. Jones*, 5 N. D. 181, 65 N. W. 685; *Callaman v. Shaw*, 24 Iowa, 441, 444; *State v. Sexton*, 10 S. D. 127, 72 N. W. 84; *White v. State*, 52 Miss. 216, 227, 2 Am. Crim. Rep. 454; *Chicago City R. Co. v. Olis*, 192 Ill. 514, 61 N. E. 459; *Hanchett v. Haas*, 219 Ill. 546, 76 N. E. 845; *Barney v. Dudley*, 40 Kan. 247, 19 Pac. 550; *Cahn v. Ladd*, 94 Wis. 136, 68 N. W. 652.

Recurring to the first criticism made by counsel to the form of the instruction now under consideration, it appears that in states having no specific statute declaring the substance of the Latin maxim as the form of the instruction, it has been uniformly held that it is error to instruct the jury

that if they find a witness has testified falsely in one part of his testimony, they may disregard the whole of the testimony of such witness, without limiting the word "falsely" by a qualifying word such as "knowingly," "wilfully," or "corruptly," and without adding the additional limitation "upon a material point." See the authorities heretofore cited. If these authorities are to control, the instruction is faulty in the matter complained of. But in those states having statutes similar to our own, a different rule is announced, although agreeing with and following the legal interpretation of such maxim. The states of California and Montana each have statutes upon this subject identical with ours, and it is important to consider the decisions from these states. In *People v. Strong*, 39 Cal. 151, 156, an instruction substantially in the words of the statute was asked by the defendant, but the court modified the instruction by inserting the word "wilfully." Error was predicated thereon, but the supreme court held that a charge so unlimited was not authorized by the rules of law, and would be committing to the jury the exercise of a discretion that might subvert the ends of justice. In *People v. Sprague*, 53 Cal. 491, the same question was presented under identical circumstances, and the former ruling of that court was followed; but it was also held that the statute is but declaratory of the Latin maxim, *Falsus in uno, falsus in omnibus*, and, by requiring the jury to distrust, necessarily authorizes them to disregard all the testimony of such a witness, in a proper case, that the word "false" used in the statute is not the equivalent of "mistake," and, by adding the word "wilful" to the words of the requested instruction, did not thereby change its effect, and the instruction as given was sustained. In *People v. Soto*, 39 Cal. 367, the same instruction, so limited as to apply to the witness who "has wilfully testified falsely," was given, and was upheld by the supreme court; but in *People v. Righetti*, 66 Cal. 184, 4 Pac. 1065, 1185, the trial court gave an instruction substantially in the language of the statute, and it was held good on appeal; citing *People v. Sprague*, supra. In *People v. Flyler*, 121 Cal. 160, 163, 53 Pac. 553, the defendant requested an instruction in a limited form, including the words, "upon a material matter," but the court struck out the latter, and gave an instruction closely approximating the language of the statute, but included the word "wilful." It was said on the appeal in that case that "the Code provision, like the Latin maxim, is not a complete exposition of the law. Well understood by jurists, it would be misleading

the nonprofessional mind. It requires construction and amplification." The judgment was reversed because of the omission of the words, "upon a material matter," from the instruction. Again in *People v. Dobbins*, 138 Cal. 694, 698, 72 Pac. 339, the trial court instructed substantially in the language of the statute, and upon appeal the supreme court, after quoting what was said in *People v. Plyler*, supra, said: "But nowhere has it been decided, nor indeed could it with reason be held, that it is error for the court to instruct in the language of our written law. . . . While the instruction cannot be commended as a full or clear exposition of the meaning of the section of the Code, still it cannot be said that it was error for the court, in giving the law, to have conformed to the language of the Code, and to have omitted what that Code itself omits."

We shall not review the cases from Montana, but will refer to the latest decision of that court (*State v. Connors*, 37 Mont. 15, 94 Pac. 199). In that case an instruction was given in the language of the statute, and it was claimed upon appeal that it was erroneous in that it omitted the word "wilfully" before the word "false," and the words, "as to a material matter," after the word "testimony." After reviewing the previous decisions of that court, and also those of the state of California, it was held that the instruction, being in the form prescribed by the statute, must be held good. The court said: "Since the Code establishes the law of this state respecting the subjects to which it relates, . . . we certainly cannot say that a court may not do what the Code says it may do," and so we feel bound to say that, as the statute of this state declares the form in which the instruction may be given, the one given, so far as it follows the language of the statute, states a sound principle of the law, and a party who made no request to the trial court for an amplification of the instruction given cannot afterwards be heard to complain; for an exception in general terms to an instruction which is correct in point of law cannot avail a party on appeal. *Kearney v. Snodgrass*, 12 Or. 311, 7 Pac. 309; *Anderson v. Aupperle*, 51 Or. 556, 95 Pac. 330.

When the court, however, instructed the jury that a mistaken witness was a false witness, within the meaning of the rule, it announced a principle in conflict with the law, one contrary to the practically unanimous decisions of the courts, and opinions of text writers on that point, and therefore committed reversible error. "There is no ground of logic or of precedent for such a conclusion," says Mr. Wigmore at § 1013, 29 L.R.A. (N.S.)

pp. 1175, 1176, vol. 2, of his work on Evidence, "and it has frequently been repudiated when advanced,"—citing, among other authorities, *Gullihier v. People*, 82 Ill. 146; *Chicago City R. Co. v. Allen*, 169 Ill. 287, 48 N. E. 414; *Beedle v. People*, 204 Ill. 197, 68 N. E. 434; *Hahn v. Bettingen*, 84 Minn. 512, 88 N. W. 10; *Wilkins v. Earle*, 44 N. Y. 172, 182, 4 Am. Rep. 655; *Deering v. Metcalf*, 74 N. Y. 501, 503.

The judgment will therefore be reversed, and the cause remanded for a new trial.

PENNSYLVANIA SUPREME COURT.

RE ESTATE OF JAMES GARDNER, Deceased.

JOHN LEAHEY, Exr., etc., of Michael Morrice, Deceased, Appt.

(228 Pa. 282, 77 Atl. 509.)

Limitation of actions — certificate of deposit — presentation.

1. The statute of limitations does not begin to run upon a certificate of deposit issued by a bank, which is payable on its return six months after date, until it is presented for payment.

Same — decedent's estate.

2. Upon the granting of letters of administration upon the estate of a member of a banking partnership the statute of limitations begins to run against any claim upon his estate for payment of a certificate of deposit issued by the partnership, and the fact that the depositor had no notice of the death is immaterial.

(May 16, 1910.)

Note. — When does statute of limitations begin to run on certificate of deposit.

Some of the cases on this subject are set out in the note to *Elliott v. Capital City State Bank*, 1 L.R.A. (N.S.) 1130, and will not be repeated here.

An examination of the cases gathered in this note will reveal that practically every certificate of deposit consists of a statement generally made by a bank, acknowledging the receipt of the money deposited, or that a certain person has deposited a certain sum of money, and a promise on the part of the bank or other depository to pay the same "on return of the certificate" or on "demand." The question when the statute of limitations begins to run against an action on such an instrument, it will be readily seen, must necessarily depend upon the further question whether a demand is necessary as a condition precedent to a right of action thereon, or, in other words, whether demand is necessary to mature the instrument, unless indeed the view be taken that the statute will in any event com-

APPEAL by John Leahey, executor of Michael Morriccy, deceased, claimant, from an order of the Orphans' Court for Blair County dismissing exceptions to the report of A. W. Porter, auditor, distributing the moneys in the hands of James P. Gardner, surviving executor of James Gardner, deceased, which held claimant's claim barred by the statute of limitations. Affirmed.

The facts are stated in the opinion.

Mr. J. Lee Plummer, for appellant:

James Gardner was a trustee for the depositors of Gardner, Morrow, & Company.

Kane v. Bloodgood, 7 Johns. Ch. 90, 11 Am. Dec. 417; App v. Dreisbach, 2 Rawle, 287, 21 Am. Dec. 447; Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507;

mence to run after the lapse of a reasonable time in which to make the demand. It is the attempt to answer this question that gives rise to a conflict among the authorities as to when the statute commences to run.

In a number of jurisdictions a deposit in a bank is considered a loan, and a certificate of deposit considered as having all the earmarks of a promissory note payable on demand, and in effect nothing but such. These cases naturally follow the rule generally laid down in regard to demand promissory notes, and hold that a right of action on a certificate of deposit accrues on the date of the certificate, and that the statute of limitations consequently begins to run from that time.

Such cases are *Brummagim v. Tallant*, 29 Cal. 503, 89 Am. Dec. 61; *Mereness v. First Nat. Bank*, 112 Iowa, 11, 51 L.R.A. 410, 84 Am. St. Rep. 318, 83 N. W. 711; overruled in *Elliott v. Capital City State Bank*, 128 Iowa, 275, 1 L.R.A.(N.S.) 1130, 111 Am. St. Rep. 198, 103 N. W. 777; *Mitchell v. Easton*, 37 Minn. 335, 33 N. W. 910; *Curran v. Witter*, 68 Wis. 16, 60 Am. Rep. 827, 31 N. W. 705. This rule was evidently also recognized in *Tripp v. Curtenius*, 36 Mich. 494, 24 Am. Rep. 610.

The reason for the holding of the courts in the above cases is well stated in *Curran v. Witter*, supra, where it was said: "What would be the equivalent of this certificate were it put in the usual form of a promissory note? Undoubtedly it would be for the same amount, payable on demand to the same payee or order, perhaps at the office of the maker, and probably without interest until actual presentation and demand of payment. It would be substantially in this form: 'For value received, on demand, I promise to pay James Curran, or order, at my bank in Grand Rapids, Wisconsin, \$540, without interest until after demand.' That such a note is due presently, and the statute of limitations commences to run against it from its date, is well settled. What valid reason can be given why the same results should not follow the giving of a certificate of deposit which contains

McGough v. Jamison, 107 Pa. 336; *Humphrey v. County Nat. Bank*, 113 Pa. 417, 6 Atl. 155.

The certificate of deposit is payable on return of the certificate.

Patterson v. Poindexter, 6 Watts & S. 227, 40 Am. Dec. 554; *Riddle v. First Nat. Bank*, 27 Fed. 503; *Brown v. McElroy*, 52 Ind. 404; *Young v. American Bank*, 44 Misc. 308, 89 N. Y. Supp. 915.

The claim was not barred by the statute of limitations, since, as the certificate of deposit was payable "on return of the certificate," it was an obligation payable on the future performance of a condition, and the right of action did not accrue on it until the performance of the condition.

McGough v. Jamison, supra; *Finkbone's*

the same contract and is the exact equivalent of such a note? If any such reason exists, we have failed to comprehend it.

The cases which hold that such a certificate is not due until presented for payment, and hence that the statute of limitations does not commence to run against it until such presentation, seem to go upon the ground that the transaction is not alone of money, creating a debt against the drawer of the certificate, but rather that it is in the nature of a bailment, upon which no cause of action accrues until demand; in other words, it is said the transaction is in contemplation of law a deposit, and not a loan. . . . With all due deference to the very able courts which have adopted this view, we cannot give our approval to the doctrine thus enunciated by them. We think that when a person deposits money in a bank in the usual course of business he loans it to the bank, and the bank thereby becomes his debtor to the amount of the deposit,—not his bailee of the money. By the deposit the title to the money passes to the bank, and it is thereafter its money, subject to its absolute control and disposition. The depositor cannot reclaim the specific money. He cannot maintain replevin or trover for it (as he might were the deposit a bailment), but only assumpsit for the amount deposited. In short, the transaction has no element of a bailment, but every essential element of a loan of money."

As was above intimated, the holding of these cases rests upon the general rule that the statute of limitations, as against an action on a demand note, begins to run immediately, which in turn follows from the rule that suit may be brought on a note payable on demand without any previous demand,—the suit itself being all that is necessary. This last rule, in fact the foundation for the holding of the above cases, has frequently been criticized. . . . It would seem rightly so, on the ground that it is an anomaly in the law that a breach of a contract should be made good by the very fact of suing upon it.

The death of the depositor does not . . .

Appeal, 86 Pa. 368; Riddle v. First Nat. Bank, supra; Cook v. Carpenter, 212 Pa. 165, 1 L.R.A.(N.S.) 900, 108 Am. St. Rep. 854, 61 Atl. 799, 4 A. & E. Ann. Cas. 723; Cook v. Carpenter, 212 Pa. 180, 61 Atl. 805; Swearingen v. Sewickley Dairy Co. 198 Pa. 68, 47 Atl. 1135; Smith v. Bell, 107 Pa. 352; Taylor v. Witman, 3 Grant, Cas. 138; 5 Am. & Eng. Enc. Law, 2d ed. p. 804; 1 Bolles, Modern Law of Bkg. p. 462; Law of Limitations in Pennsylvania (Trickett) § 224; Humphrey v. County Nat. Bank, supra; Girard Bank v. Bank of Penn Twp. supra.

The death of the party prior to the happening of the contingency does not set the statute in motion in favor of his estate.

19 Am. & Eng. Enc. Law, 2d ed. p. 194.

interrupt the statute of limitation. Mereness v. First Nat. Bank, supra.

Nor do knowingly false representations by the bank to the estate of a decedent, amounting to a denial of liability, toll the statute, since the deceased must have known otherwise. Ibid.

However, the majority of cases have taken a different view; and hold that a deposit not only creates a debt, but is also of the nature of a bailment, and hence necessitates a demand on the part of the depositor. These cases logically hold that since demand is necessary, and no right of action exists until demand, the statute of limitations does not begin to run until demand. Cases so holding are Elliott v. Capital City State Bank, supra; Fells Point Sav. Inst. v. Weedon, 18 Md. 320, 81 Am. Dec. 603; Sharp v. Citizens' Bank, 70 Neb. 758, 98 N. W. 50; Bank of Commerce v. Harrison, 11 N. M. 50, 66 Pac. 460; Howell v. Adams, 68 N. Y. 314; Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186; McGough v. Jamison, 107 Pa. 336; Hagood's Appeal, 38 S. C. 361, 16 S. E. 1003; Tobin v. McKinney, 15 S. D. 257, 91 Am. St. Rep. 694, 88 N. W. 572; Riddle v. First Nat. Bank, 27 Fed. 503; RE GARDNER; 5 Am. & Eng. Enc. Law, 2d ed. p. 804.

This rule was also recognized in Re Cook, 86 App. Div. 586, 83 N. Y. Supp. 1009.

And see Elliott v. Capital City State Bank, 128 Iowa, 275, 1 L.R.A.(N.S.) 1130, 111 Am. St. Rep. 198, 103 N. W. 777; McGough v. Jamison, 107 Pa. 336; Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507; Finkbone's Appeal, 86 Pa. 368; Tobin v. McKinney, 14 S. D. 52, 91 Am. St. Rep. 688, 84 N. W. 228; Smiley v. Fry, 100 N. Y. 262, 3 N. E. 186; Payne v. Gardiner, 29 N. Y. 146; and other cases as set out in the note to Elliott v. Capital City State Bank, 1 L.R.A.(N.S.) 1130.

Many of the above cases lay especial stress upon the terms of the certificate of deposit, that is, that it is payable "on return of the certificate."

In Gutch v. Fosdick, 48 N. J. Eq. 353, 27 Am. St. Rep. 473, 22 Atl. 590, where a deposit was made with a certain person, 29 L.R.A.(N.S.)

As between the bank and its depositors the relation so far partakes of the relation of a trustee and *cestui que trust* as to remove it from the operation of the statute of limitations.

McGough v. Jamison and Girard Bank v. Bank of Penn Twp. supra; 19 Am. & Eng. Enc. Law, 2d ed. p. 204; Finkbone's Appeal, supra.

Upon the death of a trustee with the account between him and his *cestui que trust* unsettled, his personal representative may be called upon to settle the account and discharge the trust more than six years after his death and granting of letters testamentary on his estate.

App v. Dreisbach, supra; Oliver's Appeal, 101 Pa. 299; Girard Bank v. Bank of

and evidenced by a writing to the effect that the depositary certified that he held in trust for the depositor a certain sum for which he, the depositary, agreed to pay interest at a certain per cent per annum and promised to refund the sum on demand, the court, evidently considering the instrument a certificate of deposit or an instrument similar thereto, held that the statute of limitations commenced to run from the time of demand.

It was said in Daniel on Negotiable Instruments, vol. 2, 5th ed. § 1707a: "Certificates of deposit are designed to subserve with convenience the purpose of temporary investments of money, and whether the expression used in them as to payability be 'on the return of this certificate,' or 'on presentation of this certificate,' or 'on return or surrender of this certificate properly indorsed,' the substantial meaning is the same; that is to say, that the certificate is payable when payment is demanded by the party entitled to receive the money, and who avouches the fact by producing the instrument with evidence of title. If the statute of limitations begins to run at once, suit must, of course, be maintainable at once, and therefore no prior demand would be necessary. But such is not the usual contemplation of either the depositor or the bank. The former seeks an indefinite investment of his funds. The bank is not expected, according to the usage and practice of such institutions, to seek him and offer payment, as in the ordinary case of a demand loan. And the better opinion seems to us to be that the statute of limitations only begins to run when there is an actual demand of payment in due form, and that such demand must precede a suit."

There are, without doubt, many other cases where a person deposited money with another not a banker, such transaction being evidenced by a "writing obligatory" executed by the person with whom the money was deposited, in which, however, the instrument was not called, in terms at least, a certificate of deposit. No effort has been made to include all those cases.

A case of this nature is Patterson v.

Penn Twp. *supra*; Hubley's Appeal, 19 Pa. 138; *Com. v. Moltz*, 10 Pa. 527, 51 Am. Dec. 499.

While the trust is undischarged the statute of limitations is not a bar to the claim of the *cestui que trust*.

25 Cyc. Law & Proc. p. 1150; *Johnston v. Humphreys*, 14 Serg. & R. 394; *Patterson v. Nichol*, 6 Watts, 379, 31 Am. Dec. 473.

The doctrine of "trusts exclusively cognizable in equity, and not enforceable at law," has not been applied to bank deposits.

Girard Bank v. Bank of Penn Twp.; *McGough v. Jamison*; and *Humphrey v. County Nat. Bank*,—*supra*.

The assignment by the surviving partners of the firm of Gardner, Morrow, & Company did not start the running of the statute of limitations against the claim in suit of the appellant. If the said assignment affected the claim at all it tolled the statute.

Heckert's Appeal, 24 Pa. 482; *Coates's Estate*, 2 Pars. Sel. Eq. Cas. 258.

Claimant has not lost his right to participate in the distribution of the personal estate of James Gardner, by reason of his neglect to exhibit his claim to the executor

within twelve months, as required by statute.

Re Cowan, 184 Pa. 339, 39 Atl. 59.

Messrs. W. I. Woodcock, O. H. Hewitt, Stevens & Pascoe, Robert W. Smith, Edmund Shaw, and H. A. McFadden, for appellees:

The engagement of a bank with its depositors is not to pay absolutely and immediately, but when payment shall be required at the banking house; and therefore it is not in default until demand and refusal; nor does the statute of limitations begin to run until demand has been duly made; but if the bank has rendered an account, claiming the deposit as its own, or if it has suspended payment and closed its doors against its creditors, or has done any act that operates as a notice of its intention not to pay its deposit, a demand is dispensed with, and the statute begins to run from the date of such act.

Wood, Limitations, 1883 ed. p. 40; *Watson v. Phoenix Bank*, 8 Met. 217, 41 Am. Dec. 500; *Farmers' & M. Bank v. Planters' Bank*, 10 Gill & J. 422.

If an act on the part of a creditor, such as demand or notice, be necessary to complete his cause of action, such act must be

Blanchard, 98 Ga. 518, 25 S. E. 572, where it was held that an action on a "writing obligatory" acknowledging the receipt from an intestate of a specified sum, and concluding with the words, "We are to allow you 8 per cent on the amount," but specifying no time of payment, did not accrue so as to start the statute of limitations, until demand and refusal to pay.

Another case of this nature is *Wright v. Paine*, 62 Ala. 340, 34 Am. Rep. 24. In this case the question was also raised when the statute of limitations would commence to run to recover money which, as was shown by two instruments, had been deposited at certain times with a certain person. By the first instrument, the depositor acknowledged that a certain person had deposited with him for "safe keeping" a certain number of dollars in gold coin, which he was to return "whenever called for." The second instrument acknowledged the receipt of a number of dollars in gold "on deposit, to be paid" to the depositor "on demand." The court, after holding that by the first instrument a special deposit was created, and that it might be conceded that, in the absence of circumstances excusing it, a demand, or something equivalent to it, was a condition precedent to an action founded on it, held that where no demand was made for eleven years after the deposit, and suit not brought until six years thereafter, the death of the depositor in the meantime intervening, the delay, in the absence of explanation, was unreasonable, and conclusive against recovery. As re- 29 L.R.A. (N.S.)

guards the second instrument, it was held not to be a contract of bailment, but a loan of money, payable presently on request, against which the statute of limitations, following the cases of promissory notes payable on demand, would commence to run not from the date of demand, but from the date of the writing.

Conceding that the statute of limitations begins to run on a certificate of deposit only from the time of demand, it will be readily noted that it may become important to know whether demand must nevertheless be made within a reasonable time, and what will be held to be a reasonable time, or whether demand may be postponed indefinitely.

For a discussion of this particular phase of the question, attention is called especially to the note to the *Elliott Case*, in 1 L.R.A. (N.S.) 1130.

In *RE GARDNER* it was said that if the banking firm had been a going concern up to the time the owner of the certificate had presented it to the firm and demanded payment,—nearly eighteen years after the certificate of deposit was issued,—the statute of limitations would have been no defense to it. But see *Wright v. Paine*, *supra*.

It will be noted that in the *GARDNER CASE*, the real question in issue was what effect the death of one of the members of the banking firm had upon the running of the statute of limitations.

In *Riddle v. First Nat. Bank*, *supra*, it was held that the statute was not set in motion by the appointment of a receiver

done within six years from the date of the contract; and from that date the statute of limitations begins to run against the claim.

Morrison v. Mullin, 34 Pa. 12; *Swearingen v. Sewickley Dairy Co.* 198 Pa. 68, 53 L.R.A. 471, 47 Atl. 941; *Franklin Sav. Bank v. Bridges*, 5 Sadler (Pa.) 238, 20 W. N. C. 43, 8 Atl. 611.

Section 19 of the act of assembly of the 19th of April, 1794, providing that "all such of the intestate's relatives and persons concerned who shall not lay legal claim to their respective shares within seven years after the decease of the intestate shall be debarred from the same forever," applies to claims against the estates of deceased persons, whether payable in the lifetime of the decedent or falling due after his death.

Scott, Intestate Law, 1871 ed. p. 300; *Blackmore v. Gregg*, 2 Watts & S. 182; *Man v. Warner*, 4 Whart. 455; *Campbell v. Fleming*, 63 Pa. 242; *Mitchell's Estate*, 2 Watts, 87; *Stoever's Appeal*, 3 Watts & S. 154; *Yorks's Appeal*, 110 Pa. 69, 1 Atl. 162, 2 Atl. 65.

All three of the partners having died from twelve to fifteen years ago, notice of administration was the only notice required, and was binding on the claimant.

Curry's Estate, 1 Leg. Gaz. 166; *Priestley's Appeal*, 127 Pa. 420, 4 L.R.A. 503, 17 Atl. 1084.

Messrs. Charles Geesey, Thomas J. Baldrige, and M. A. Young also for appellees.

Brown, J., delivered the opinion of the court:

James Gardner, Anthony S. Morrow, and William Jack were partners, trading and doing business in Hollidaysburg as a private banking house, under the firm name of Gardner, Morrow, & Company. On May 14, 1891, Michael Morrice deposited with them \$3,050, and they delivered to him a certificate, of which the following is a copy:

No. 7582.

Banking House of Gardner, Morrow, & Co.
Hollidaysburg, Pa.,

May 14, 1891.

Michael Morrice has deposited in this bank three thousand and fifty dollars, payable to his order, on return of this certificate, six months after date, with interest at 4 per cent per annum.
\$3050.

Gardner, Morrow, & Co.

of the bank which issued the certificate of deposit.

In *Rentchler v. Kunkelman*, 17 Ill. App. 343, it was held that a certificate of deposit "due in one year from date upon return of the certificate properly indorsed" was not payable until the lapse of that year; and therefore an action brought thereon within five years thereafter was not barred, although brought against the stockholders more than five years after the insolvency of the bank. It will be noted that this case cannot be considered as authority for the possible contention that the statute of limitations begins to run against an action on a certificate at the time when, by its terms, it is payable, and not at the time payment was demanded, since conceding that the statute does begin to run from the first-named date, limitations had not run against the action.

Although, as will be noted, the cases gathered here are authority for the question whether dead is necessary to mature a certificate of deposit, it should be remembered that the real subject of discussion here is one of limitation of actions, and that so far as the former question is concerned, the cases here form only an incidental collection. It is therefore permissible to point out that a case from a foreign jurisdiction holding that the statute of limitations, against an action on a certificate of deposit, begins to run only from demand, may not be of much weight in a jurisdiction where it has been already determined by other cases not involving the 29 L.R.A. (N.S.)

statute of limitations, that a certificate of deposit is similar to a demand promissory note, and that demand is not a condition precedent to a right of action thereon. The same would naturally be true of the reverse conditions. For cases on the general question of maturity of certificate of deposit, see note to *First Nat. Bank v. Security Nat. Bank*, 15 L.R.A. 386.

It remains to call attention to the fact that in those jurisdictions where the statute of limitations is held to commence to run against an action on a certificate of deposit from demand, what appears on its face to be a certificate of deposit may be held by the court to be in fact a promissory note, and not a certificate of deposit, necessitating the holding, of course, that the statute of limitations commences to run from its date.

A case of this nature is *Baker v. Leland*, 9 App. Div. 365, 41 N. Y. Supp. 399, where an instrument marked "certificate of deposit" and continuing as follows: "Mr. Luzern Eaton has deposited in this bank two hundred dollars, payable to the order of himself, three months after date, in current funds, on return of this certificate properly indorsed, and shall receive interest at the rate of 7 per cent per annum if left — months from date," was held to be a promissory note, and not a certificate of deposit, and therefore an action brought upon it more than six years after the instrument became due was barred by the statute of limitations. G. V.

On April 5, 1894, James Gardner, then a member of the said banking firm, died, and letters testamentary were duly issued to executors named in his will. After his death, Morrow and Jack, the surviving members of the firm, continued the banking business under the same firm name until September 18, 1896, when they executed a deed of assignment for the benefit of creditors. The assignee closed up the assigned estate, the creditors receiving a little less than 12 per cent on their claims. James Gardner, some time before his death, sold limestone in place, which was to be paid for as quarried, and his executors, since his death, have been in receipt of income from the sale of it. They have filed six partial accounts of his personal estate, including the income from the limestone, all of which have been duly audited by the orphans' court below, and distribution has been made of the moneys in the hands of the executors to the decedent's creditors, among whom were depositors in the banking firm of Gardner, Morrow, & Company, who made deposits prior to his death. The last distribution was of the funds in the hands of the surviving executor according to the sixth account. Michael Morricey failed to present his certificate of deposit for payment, either at the banking house of Gardner, Morrow, & Company, during the lifetime of James Gardner, or while it was conducted by his surviving partners after his death, or at the distribution of the assigned estate of the surviving partners, or at any of the distributions of the personal estate of James Gardner made on the first five accounts filed. He lived in the mountains some 30 miles from Hollidaysburg, and could neither read nor write. He had no knowledge of the death of James Gardner, of the failure of the banking house, of the distribution of the assigned estate of the surviving partners, or of the five distributions made on the estate of James Gardner, until some time in 1907. On April 28, 1909, he presented his certificate for payment to the auditor making distribution on the sixth account. The auditor held that the claim was barred by the statute of limitations. While we cannot follow with approval some of the reasons given by the learned judge below for sustaining the report of the auditor, we do concur in his conclusion that the claim of appellant's decedent was properly disallowed.

Although the certificate of deposit issued to Morricey by the banking firm of Gardner, Morrow, & Company, was payable on its face to his order upon its return six months after date, it was not due so as to give a right of action upon it until payment was demanded. The rule as to a certificate of 29 L.R.A. (N.S.)

deposit issued by a banking house and payable to the order of the depositor upon the return of the certificate is that it is not due or suable until return of it and demand has been made for the money, from which time the statute of limitations begins to run; and it is no defense against a claim on such a certificate that demand had not been made within six years from its maturity. *Girard Bank v. Bank of Penn Twp.* 39 Pa. 92, 80 Am. Dec. 507; *Finkbone's Appeal*, 86 Pa. 368; *McGough v. Jamison*, 107 Pa. 336; *Riddle v. First Nat. Bank (C. C.)* 27 Fed. 503; 1 *Bolles*, *Modern Law of Bkg.* p. 462. If the banking firm of Gardner, Morrow, & Company had continued to be a going concern up to April 28, 1909,—nearly eighteen years after the certificate of deposit was issued to Morricey,—and he had then presented it to the firm and demanded payment, the statute of limitations would have been no defense to it; but this is not the situation here presented. What we are to determine is whether, under the conditions existing when the certificate of deposit was presented for payment to the surviving personal representative of Gardner, the deceased partner, the right to recover upon it was barred by the statute of limitations. Changed conditions at times beget new duties to parties to an existing contract, and what might not have been a duty on the part of Morricey while the banking firm continued in existence might have become so when it ceased to exist. The claim as now made by Morricey's personal representative is against the estate of one of the deceased partners who died fifteen years before the certificate was ever presented against his estate. His death *ipso facto* dissolved the partnership, and the law presumes that Morricey had notice of his death. Ignorance of it, and ignorance of the dissolution of the partnership that followed upon it, will not be regarded by the law as any excuse for the delay of the unfortunate depositor in presenting his claim. The law knows only that he delayed for fifteen years from the time Gardner died in making a demand for payment against his estate, and the question is whether he could thus sleep on his conceded right to make a demand during all that period, and then be heard to say that the statute of limitations did not commence to run until 1909, because he had chosen not to make demand before that time. As stated, he is conclusively presumed to have known that Gardner died and that the partnership was dissolved. He is further presumed to have known that the law contemplates the settlement of a decedent's estate and the payment of creditors within a year from the time of death. Such is the plain intendment of the statutes

relating to the distribution of decedents' estates. After two years the real estate of a decedent is absolutely discharged from unrecorded claims, but, if the contention of this appellant should prevail, a claim on a simple contract not heard of for fifteen years from the time of the death of the decedent is to be allowed to participate in the distribution of his estate under the general rule that the statute of limitations does not run against certificates of deposit issued by a bank except from the time demand is made. It is often said that there is no rule without its exception, and this is true in the case before us. To hold that the estate of a deceased member of a banking firm is to be indefinitely liable to a depositor to whom his firm may have issued a certificate, payable on demand, would be to permit the estates of the other partners, if deceased, to be distributed without any opportunity to compel contribution by the representative of the deceased partner against whose estate the claim might be made and allowed. The only true, reasonable, and equitable rule to be applied in the present case is that laid down in *Morrison v. Mullin*, 34 Pa. 12: "But was the statute, therefore, never to close upon such an agreement,—never to commence running,—if the plaintiff chose to sleep on his rights? The statute fixes the period within which suit may be brought in case, to recover money, or to enforce a promise, to 'six years next after the causes of action, or suit, and not after.' 'From the time the right of action accrues.' *Overton v. Tracey*, 14 Serg. & R. 311. To give effect to the spirit of the statute, the law sometimes, in the absence of stipulation by the parties, fixes the time when the cause of action shall be taken to have accrued by the duty of diligence required of the party. Where the time for doing an act, necessarily precedent to bringing suit, is indefinite, it allows a reasonable time. When that reasonable time has elapsed, the duty of diligence begins. And, if this consists in the assertion of a legal right, then is the time from whence the statute should begin to run."

It would not be an unreasonable rule to hold, where there is a right to demand payment from the estate of a decedent,—such right as Morrice possessed when Gardner died,—that the demand ought to be made within the time contemplated by the statutes for the settlement of decedents' estates; but, in any event, the time within which such demand ought to be made against a decedent's estate should not exceed the period within which a right of action is enforceable. This conflicts with no settled rule. In the case at bar Morrice had a right to demand payment six months after 29 L.R.A. (N.S.)

the certificate was issued to him. As long as those who issued it continued to live, he was not called upon to make any demand to prevent the running of the statute, but when the conditions changed, when the partnership was dissolved by the death of Gardner, and his estate became at once liable to pay the depositors, it offends reason to say that, notwithstanding the right of the depositor, Morrice, to make demand for the payment of his certificate from Gardner's estate, he could sleep on that right for fifteen years and then for the first time make demand and have his claim allowed. The duty of diligence on the part of Morrice began with the death of Gardner, and the law indulged him in making demand for six years from the date that letters were granted upon the estate and there was someone upon whom he could make demand, but after that period, by analogy to the statute of limitations, it was too late to make the demand. For this reason the claim of the appellant was properly disallowed by the court below.

Decree affirmed at appellant's costs.

SOUTH DAKOTA SUPREME COURT.

CHARLES SCHULL, Respt.,

v.

HOLLIS L. HOPKINS, Appt.

(— S. D. —, 127 N. W. 550.)

Libel—charging candidate for office with unfitness.

1. A publication charging a candidate for renomination for the office of state's attorney with unfitness for office because of his record in prosecuting gamblers only under threat of removal from office is not libelous *per se*.

Same—necessity of actual malice.

2. One publishing to voters a false charge against a candidate for re-election to the office of state's attorney, to the effect that he was unfit for office because he prosecuted gamblers only under threat of removal from office, is not answerable for libel unless shown to have been actuated by actual malice.

Same—desire to defeat candidate—evidence of malice.

3. The mere expression in a communication to voters of a desire to defeat a certain candidate for office is not sufficient to show a malicious motive for the publication, so as to render the publisher answerable for libel in case there are false state-

Note.—As to whether malice precluding qualified privilege may be inferred from publication alone, see note to *Sunley v. Metropolitan L. Ins. Co.* 12 L.R.A. (N.S.) 91.

ments in the publication, tending to injure the candidate, where there was probable cause for the statements.

Same — probable cause.

4. Probable cause for charging a candidate for re-election to the office of state's attorney with unfitness for office because of unwillingness to prosecute gamblers exists where he was seen about gambling places, did not act upon complaints against gamblers, and locked his doors against a committee seeking to interview him upon the subject.

Same — failure to establish justification — malice.

5. Failure of one sued for libel in charging a candidate for office with unfitness therefor because of facts stated, to establish a plea of truth as a defense, cannot be taken into consideration by the jury in estimating damages, as tending to show malice.

(June 18, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Codington County in plaintiff's favor, and from an order denying a new trial in an action brought to recover damages for the publication of an alleged libel. Reversed.

The facts are stated in the opinion.

Messrs. Sherin & Sherin, for appellant:

The burden was on the plaintiff to prove actual malice before any recovery could be had.

Lauder v. Jones, 13 N. D. 525, 101 N. W. 907; *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233; *Boucher v. Clark Pub. Co.* 14 S. D. 72, 84 N. W. 237; *Ross v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182; *Hemmens v. Nelson*, 138 N. Y. 517, 20 L.R.A. 444, 34 N. E. 342; *Western U. Teleg. Co. v. Cashman*, 9 L.R.A. (N.S.) 145, 81 C. C. A. 5, 149 Fed. 367, 9 A. & E. Ann. Cas. 693; *Scougale v. Sweet*, 124 Mich. 311, 82 N. W. 1062.

An attempt to prove justification was not evidence of malice unless such attempt was made in bad faith.

Pfister v. Milwaukee Free Press Co. 139 Wis. 627, 121 N. W. 938; *Marx v. Press Pub. Co.* 134 N. Y. 561, 31 N. E. 918; *Willard v. Press Pub. Co.* 52 App. Div. 448, 65 N. Y. Supp. 73; *Upton v. Hume*, 24 Or. 420, 21 L.R.A. 493, 41 Am. St. Rep. 863, 33 Pac. 810; *Distin v. Rose*, 69 N. Y. 122; *Cruikshank v. Gordon*, 118 N. Y. 178, 23 N. E. 457; *Bisbey v. Shaw*, 12 N. Y. 67; *Klinck v. Colby*, 46 N. Y. 427, 7 Am. Rep. 360; *Spooner v. Keeler*, 51 N. Y. 527.

Defendant had probable cause for the charges made.

Scougale v. Sweet, supra.

Messrs. Loucks & Mather also for appellant.

Mr. Wilbur S. Glass for respondent.
29 L.R.A. (N.S.)

McCoy, J., delivered the opinion of the court:

It appears from the record: That the respondent, Charles Schull, plaintiff in the circuit court, was on the 4th day of June, 1908, the duly elected, qualified, and acting state's attorney for Codington county, and that at that time he was a candidate for renomination and election at the then approaching primary election to be held on June 9, 1908. That the appellant, Hollis L. Hopkins, defendant in the lower court was a resident and elector of said county, and that he was instrumental and concerned in publishing and circulating among the voters of said county the following printed handbill or circular:

The Ministers Take a Fall Out of Charles Schull.

The following address is being sent out by letter mail this week by the ministers, to every voter in Codington county outside this city:

"Watertown, S. Dak. June 4, 1908.

"To the Voters of Codington County:

"Gentlemen:—

"Since Charles Schull is giving a false interpretation to certain statements which we, the undersigned, indorsed in our desire to be more than fair to one with whom we are forced to differ radically, and since he has published the statement that 'there is no real issue at all between himself and the ministers,' we feel called upon to give a definite statement regarding the matter. Had it not been for the use of the word 'repeatedly' in the statement made in the *Watertown Times* of May 21st regarding our attempt to see Mr. Schull, no further word from us on the matter would have been necessary.

"The attempt to see Mr. Schull was made as a matter of courtesy, to give him a chance if he would use it, knowing that his connection with the gambling element of this city was such that we could not expect him to prosecute them. When he remained behind a locked door, as he now admits, after we had made an appointment over the telephone to see him just the hour we called, we felt that further attempts would be useless. When the gambling houses were raided we did not let Mr. Schull know of it until the gamblers and their property were in the hands of the sheriff, because we were afraid, judging by the attitude he had taken toward gambling up to that time, three months ago, that the raid would be useless if he were notified. His prosecution of the cases made with the threat hanging over him that a failure to do so would constitute the ground for proceedings to remove

him from office. We feel that his record, personally and officially, unfit him in every way for the high and responsible office of state's attorney.

"We are not working in the interest of any faction or party, but in the interest of law enforcement, by a man of character and ability, when we urge all who cast a ballot at the Republican primaries June 9th, who favor the suppression of open gambling, to lay aside all fractional prejudice and cast a vote for Perry F. Loucks, who has pledged himself to do that work if elected.

"We have every reason to believe that our attitude in this matter is shared by all the ministers of this city.

"If any doubt this, or about the genuineness of this statement in general, we will consider it a favor if you will see us personally or make use of the telephone.

"Rol. L. Palmerton, Phone-Green 557,
"Pastor First Baptist Church.

"John P. Clyde, Phone-Red 144,
"Pastor First Congregational Church."

Respondent thereafter instituted this suit to recover damage against appellant, alleging in his complaint that said publication, and the charge therein contained, was wholly false and without foundation in fact, and was known to be so by appellant; that the same was published by appellant with express malice against respondent, intending thereby to injure him in his office and occupation as attorney. Appellant denied generally the allegations of said complaint, and also alleged that said publication was in fact true in substance and in fact, and that the said matter contained in the said publication was of public interest to the people of said community, and that the same was a privileged communication because of the candidacy of respondent for the office of state's attorney. The trial resulted in a verdict and judgment in favor of respondent. Motion for new trial being overruled, appellant has brought the cause before this court on appeal, assigning, among other things, the insufficiency of the evidence to sustain the verdict, in this: that there is no evidence to show that appellant had any actual malice against or towards respondent at the time of said publication. In this contention we are of the opinion that appellant is right. The publication in question is not libelous *per se*. It does not charge respondent with the commission of any criminal act. Upon its face and by its purport, it appears to be a privileged publication, and could only become libelous where the publication was shown to be made with actual malice. The burden was on respondent to show by competent evidence that appellant acted

with actual malice. Malice under such circumstances is never inferred or presumed from the falsity of the charge alone. The publication being privileged, the presumption of good faith prevails until overcome by evidence showing actual malice.

The proposition here involved has heretofore been clearly and well considered by this court in some very similar cases. In the case of *Myers v. Longstaff*, 14 S. D. 98, 84 N. W. 233, the trial court instructed he jury as follows: "The law provides that a privileged communication, so far as it relates to this case, is one made in a communication, without malice, to a person or persons interested therein, by one who is also interested, or by one who stands in such relations to the persons interested as to afford a reasonable ground for supposing the motive for the communication innocent. The defendant claims that, the plaintiff being at the time a candidate for office at the hands of the voters of this community, and he (the defendant) being a resident of the city of Huron, he was interested in the result, and that the residents of the city, to whom the publications were addressed and who read the paper published by him, were also interested in like manner; that he was not actuated or inspired by malice in publishing the articles referred to; and that they are therefore privileged under the rules which I have given you, and were therefore not libelous. And generally, upon the question of privileged communications, I charge you that the law is that the fitness and qualifications of a candidate for an elective office may be a subject for the freest scrutiny and investigation, either by the proprietor of a newspaper or by a voter or person having an interest in the matter, and that much latitude must be allowed in the publication for the information of voters of charges affecting the fitness of a candidate for the place he seeks so long as it is done honestly and without malice. Nor will such a publication be actionable without proof of express malice, although it may be harsh, unjust, and unnecessarily severe; for these are matters of opinion, of which the party making the publication has a right to judge for himself. In the case of such a publication, the occasion rebuts the inference of malice which the law would otherwise raise from the falsity, and no right of action exists, even though the character of the party has suffered, unless he is able to show the existence of actual malice. You will, however, understand that this privilege accorded to a newspaper publisher or any

other person cannot avail anyone as a defense who may seek under cover of it to maliciously attack or traduce the character of any person by publishing of such person false and libelous articles concerning himself. If a publication attacks the private character of a candidate for office by falsely imputing to him a crime in some respect, not specially going to the question of his fitness for the office to which he aspires, it is not privileged by the occasion, either absolutely or qualifiedly, is actionable *per se*, and the law implies malice; and it is no justification that the publication was made with honest belief in its truth, in good faith, and for the purpose of influencing voters. Such publications can only be justified by proof of their truth." This instruction was wholly sustained and approved by this court. In rendering decision in that case, Justice Corson quoted with approval the following: "A communication to be privileged must be made upon a proper occasion, from a proper motive, and must be based upon reasonable or probable cause. When so made in good faith, the law does not imply malice from the communication itself, as in the ordinary case of libel. Actual malice must be proved before there can be a recovery. And whether a communication be privileged or not is a question for the court, not for the jury. . . . That the description of cases recognized as privileged communications must be understood as exceptions to this . . . [general rule]. The rule of evidence as to such cases is accordingly so far changed as to impose it upon the plaintiff to remove those presumptions flowing from the seeming obligations and situations of the parties, and to require him to bring home to the defendant the existence of malice as the true motive for his conduct." And Justice Corson, in rendering such decision, also used this pertinent language: "In the case at bar the occasion was a proper one, and the publication a privileged one, and in such case, as we have seen, the law does not imply malice, but actual malice must be proved before there can be a recovery. The court, therefore, was clearly right in his instructions to the jury." The same principles are held in *Boucher v. Clark* Pub. Co. 14 S. D. 72, 84 N. W. 237, and in *Ross v. Ward*, 14 S. D. 240, 86 Am. St. Rep. 746, 85 N. W. 182. Now, in this case at bar, the evidence shows that defendant, the appellant, expressed a desire to defeat respondent for renomination. This is the only possible evidence in this case outside of the publication itself which might tend to show a malicious motive on 20 L.R.A.(N.S.)

the part of appellant, but we are of the opinion that no such inference can reasonably be drawn therefrom. The appellant, as an American citizen and voter, had the right to oppose the renomination of respondent, and, so far as shown by the record, his desire to defeat the renomination of respondent must be presumed to have been based on the matter stated in said publication. While respondent, in a manner, denied any connection with the gambling element in his county, or that he was dilatory in prosecuting gambling offenses, or that he had taken an attitude in opposition to such proceedings, still it conclusively appears from the evidence, and from the cross-examination of respondent, that there was much probable cause for a reasonable person to honestly and in good faith so conclude. It conclusively appears that respondent had been seen about such places; it conclusively appears that complaint had been made to him and prosecutions requested; it conclusively appears that prosecutions were not started by him on such complaints; and it conclusively appears that what prosecutions were started were instituted by other attorneys; it conclusively appears that when a committee, interested in such prosecutions, telephoned to respondent that they were coming to see him, that they found, on arrival at his office a few minutes later, the door locked, and were unable to gain admittance; it conclusively appears that respondent was in his office at that time. These circumstances, while not conclusive evidence of the truth of the matters stated in the publication complained of, were sufficient to show probable cause for honestly so believing, and sufficient to overcome any inference of bad faith that might otherwise arise from the surrounding circumstances of the case, so far as disclosed by the record. In the case at bar the evidence not only fails to show actual malice, but, on the contrary, the undisputed evidence tends to show probable cause, such as would justify a reasonable person in honestly entertaining the belief that said article was true. A mistake in such belief or judgment under such circumstances cannot be the subject of libel. One who is a candidate for an office at the hands of the people invites consideration of his qualifications and fitness for such office, and, in such consideration thereof, those interested may freely discuss the past official record of such candidates, in order to ascertain whether they desire to oppose or support him, without being liable to prosecution for libel, where such persons act without actual malice, and in good faith, although, as a matter of fact, they may be mistaken as to the truth of assertions made under such cir-

cumstances; the exception to this rule being that one under guise and cover of this privilege will not be permitted in bad faith to maliciously attack or traduce the character of a candidate for office by publishing of and concerning him false and libelous articles. There is nothing in the evidence of this case which has a tendency to show that appellant was using this privileged communication other than in good faith. Notwithstanding respondent denied and attempted to explain away the circumstances in connection with the matters stated in said article, there still remained, undisputed, the facts which constitute probable cause. If appellant in this case had, at the close of all the testimony, moved for a directed verdict, and assigned the overruling thereof as error, as was done in *Boucher v. Clark Pub. Co.* supra, then almost precisely the same situation would exist in this case as in that. The appellant in the case at bar has accomplished the same result by another route in moving for a new trial on the ground of insufficiency of the evidence.

Among other things, the jury was instructed as follows: "The defendant has pleaded the truth. When the defendant in such case as this pleads the truth, and alleges in his answer that the article the publication of which he complains of is true, and a material part of that justification fails, the plea fails altogether, and the fact that he has pleaded so, stated in his answer that the article was true, and then fails to establish its truth, may be taken into consideration by the jury in estimating damages, if, having found all the issues in plaintiff's favor, they have passed to the question of damages, as it is evidence in such case, tending to show malice, and continued malice." To which instruction appellant excepted and now assigns as error. We are of the opinion that this instruction was erroneous, and embodied law not applicable to this class of cases, and was prejudicial and misleading. If the principles laid down in the instructions given in *Myers v. Longstaff*, supra, are correct, then this instruction must necessarily be error. There it is held that malice should not be inferred from the falsity of the charge in this class of cases. In this class of cases the defendant may not be guilty, although the publication is ever so false, providing he honestly and in good faith believed (under circumstances warranting such belief) the article to be true, although he was, as a matter of fact, mistaken. It is the bad faith of the defendant, coupled with the falsity of the article, that constitutes the gist of plaintiff's cause of action, and although an article may be shown to be

false, in order to entitle plaintiff to recover, he must further prove, outside of and beyond the article itself, the actual malice and bad faith of defendant, and which in this case is wholly wanting.

For the reasons stated, the judgment of the Circuit Court is reversed and a new trial ordered.

Haney, J.:

I concur in the conclusion that the judgment should be reversed on the ground of error in the charge to the jury.

Whiting, P. J.:

I concur in the view of Haney, J., as above set forth.

Petition for rehearing denied.

VERMONT SUPREME COURT.

A. H. PIERSON

v.

FRANK L. HUNTINGTON.

(82 Vt. 482, 74 Atl. 88.)

Commercial paper — bona fide holder — suspicious circumstances.

1. One who purchases negotiable paper without inquiry, when the circumstances are such as would excite the suspicion of a prudent and careful man, does not stand in the position of a bona fide holder.

Same — transfer in breach of agreement — fraud.

2. The transfer of a note in violation of an agreement that it will be returned if the property for which it was given did not give satisfaction is a fraud, which casts upon the transferee the burden of showing that he took the note in good faith, which includes proof that he paid full value for it.

Same — absence of notice — effect.

3. That a note was purchased without notice of a defense does not, of itself, as matter of law, entitle the holder to enforce it, where it was transferred in violation of an agreement to return it if the property for which it was given did not give satisfaction.

(October 18, 1909.)

EXCEPTIONS by plaintiff to rulings of the Washington County Court made

Note. — As to whether the fact that a negotiable instrument was, contrary to agreement, transferred before the happening of a certain contingency, imposes the burden of proof as to bona fides upon the holder, see note to *McKnight v. Parsons*, 22 L.R.A. (N.S.) 718.

See also note to *Mee v. Carlson*, ante, 351.

during the trial of an action brought to recover upon a promissory note which resulted in a judgment for defendant. Affirmed.

The facts are stated in the opinion.

Mr. William N. Theriault, for plaintiff:

The defense of want or failure of consideration cannot be asserted against a remote party who is a bona fide holder for value, for such a holder of negotiable paper takes the title free from the equities which might be asserted against prior parties.

4 Am. & Eng. Enc. Law, 2d. ed. p. 198; Farlin v. Lovejoy, 29 Ill. 45; Mulford v. Shepard, 2 Ill. 583, 33 Am. Dec. 432.

It is incumbent on the defendant to show notice of want of consideration at the time indorsee received the note, or that there was fraud in making it.

Farlin v. Lovejoy, *supra*; Swift v. Tyson, 16 Pet. 1, 10 L. ed. 865; Mulford v. Shepard, *supra*.

Merely suspicious circumstances or carelessness are insufficient to necessitate inquiry and prevent a person from being a bona fide holder.

Borgess Invest. Co. v. Vette, 142 Mo. 560, 64 Am. St. Rep. 567, 44 S. W. 754; Lehman v. Press, 106 Iowa, 389, 76 N. W. 818; Rockville Nat. Bank v. Citizens' Gaslight Co. 72 Conn. 582, 45 Atl. 361; Sherman v. Apperson, 4 Fed. 25; Matthews v. Poythress, 4 Ga. 287.

A collateral agreement cannot be set up as a defense to a note valid in its inception, when the plaintiff purchased in good faith for value and without notice, nor does the collateral agreement affect the validity or negotiability of the note.

Miller v. Ottoway, 81 Mich. 199, 8 L.R.A. 428, 21 Am. St. Rep. 513, 45 N. W. 665; Rublee v. Davis, 33 Neb. 779, 29 Am. St. Rep. 509, 51 N. W. 135.

Where a party is in possession of a negotiable instrument, the presumption is that he holds it for value, and the burden of proof is upon him who disputes it, an exception being where the defect appears on the face of the instrument.

Goodman v. Simonds, 20 How. 343, 15 L. ed. 934; Swift v. Smith, 102 U. S. 442, 26 L. ed. 193; Brown v. Spofford, 95 U. S. 474, 47 L. ed. 508; Doe v. Northwestern Coal & Transp. Co. 78 Fed. 62; Hotchkiss v. National Shoe & Leather Bank, 21 Wall. 354, 22 L. ed. 645.

Mr. John G. Wing, for defendant:

Plaintiff acquired the note without making inquiry, when the facts were sufficient to put an ordinarily prudent man upon inquiry as to the same, and therefore was not a bona fide holder.

Ormsbee v. Howe, 54 Vt. 182, 41 Am. Rep. 841; Roth v. Colvin, 32 Vt. 126; Gould v. 29 L.R.A. (N.S.)

Stevens, 43 Vt. 125, 5 Am. Rep. 265; Passumpsic Sav. Bank v. First Nat. Bank, 33 Vt. 82; Limerick Nat. Bank v. Adams, 76 Vt. 132, 40 Atl. 166; Bank of the Republic v. Baxter, 31 Vt. 101; Capital Sav. Bank & T. Co. v. Montpelier Sav. Bank & T. Co. 77 Vt. 189, 59 Atl. 827.

Munson, J., delivered the opinion of the court:

The note in suit was given by the defendant to the Woodford Distilling Company, and was indorsed by that company to the plaintiff. The plaintiff's case was submitted in depositions, and consisted of the note and evidence of its transfer for value before maturity. The defendant's evidence was confined to matters affecting the note in the hands of the payee. The plaintiff offered nothing in reply. The trial court found that the note was indorsed to the plaintiff without recourse, for a valuable consideration, and before maturity; and that it was received without notice of a defense, but without inquiry. The court found further that the assignment was not made in due course of business, basing its conclusion upon the fact that the plaintiff took the note thus indorsed without inquiry, when he was wholly unacquainted with the defendant and his financial condition. The plaintiff claims that there was no evidence to support the finding that he bought the note without inquiry, and that, if the finding is sustained, the conclusion drawn from it falls short of a finding that he is not a bona fide holder. The note was given for liquors in bond, and at the time it was given the payee agreed, by a separate writing, that if the goods did not give satisfaction they might be held subject to its order, and that the note should be returned on a return of the certificates. The goods were not satisfactory, and the defendant returned the certificates and demanded the note; but the payee refused to return it, and soon after sold it to the plaintiff. These facts were found from evidence received subject to the plaintiff's exception.

The plaintiff claims that the findings touching his conduct, if warranted by the evidence, are not sufficient to support the judgment. We are referred to a list of cases, decided in many jurisdictions, which concur in holding that one who takes negotiable paper before due for a valuable consideration in good faith, will not be affected by an existing defense, even though he was aware of circumstances that ought to have excited the suspicion of a prudent man; but the cases cited are not in accord with the decisions of this court. It is held in the state that a purchaser of negotiable paper

must exercise reasonable prudence and caution in taking it; and that if he take it without making inquiry, when the circumstances are such as would excite the suspicion of a prudent and careful man, he will not stand in the position of a bona fide holder. This doctrine was promulgated in *Roth v. Colvin*, 32 Vt. 125, and was reaffirmed in *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166, and again in *Capital Sav. Bank & T. Co. v. Montpelier Sav. Bank & T. Co.* 77 Vt. 189, 59 Atl. 827. It remains to be seen whether this distinction will be of importance in the determination of the case presented. The case states that nothing appeared tending to show that the plaintiff made any inquiry regarding the note or its maker. The defendant contends that the evidence he introduced was such as cast on the plaintiff the burden of showing that he took the note in good faith, and that this required more than proof of a purchase for value before maturity. The questions raised by this claim are the first for consideration.

The production of a negotiable instrument, properly indorsed, is prima facie evidence of the holder's right to recover against the maker; but the maker may compel the holder to support his prima facie case with further evidence, by showing a defense that would have been available against the payee. The defenses which have ordinarily been recognized as imposing this additional burden are illegality, procurement by fraud or duress, want of consideration, and an intervening theft or loss. This enumeration is in accord with the statements generally made in our own decisions. It was said, however, in *Quinn v. Hard*, 43 Vt. 375, 5 Am. Rep. 284, that it did not appear to be very clearly settled in what cases and to what extent the burden of proof would be thrown upon the plaintiff by the introduction of matters amounting to a defense against the payee. The more recent cases have apparently relieved the subject of some of its uncertainty, for the statement is now generally framed in terms that cover fraud in the transfer as well as in the inception of the note, and a subsequent failure of consideration as well as an original want of it. 4 Am. & Eng. Enc. Law, pp. 320, 322; 8 Cyc. Law & Proc. p. 236; *National Reserve Bank v. Morse*, 163 Mass. 383, 40 N. E. 180; *Sperry v. Spaulding*, 45 Cal. 544.

The existence of a rule of this character has long been affirmed in this state, whatever uncertainty may have been felt regarding its application. It was directly involved in the decision of *Sandford v. Norton*, 14 Vt. 228, where it was said that, when the defendant makes out a case upon which none but a bona fide holder for value is

entitled to recover against him, it is incumbent upon the plaintiff to show that he is entitled to sue in that character. It was recognized in *Blaney v. Pelton*, 60 Vt. 275, 13 Atl. 504, where it was said that if the defendant offers evidence tending to prove fraud in obtaining the note, or an entire failure of consideration for it between the original parties, the burden of proof is thereby cast upon the plaintiff to show that he was an innocent purchaser of the note for value while it was current. It was restated and applied in *Limerick Nat. Bank v. Adams*, 70 Vt. 132, 40 Atl. 166, where it was held that evidence offered by the defendants which tended to show that the note was without consideration and void for fraud as between the original parties was properly admitted as a step in their defense, and for the purpose of casting upon the plaintiff the burden of showing that it was not chargeable with knowledge of the fraud, if the fraud alleged was established. In some jurisdictions the courts have found no difficulty in applying the rule to defenses not connected with the inception of the instrument. It is said that, after proof that the paper was once in the hands of a fraudulent holder, it may justly be presumed to continue in the hands of a holder of that character until the contrary be proved; that possession is not enough to support a recovery by one who must trace title through fraudulent practices; and that this is equally true whether the fraudulent practices were connected with the inception of the paper or occurred subsequently. *Parsons v. Utica Cement Co.* 82 Conn. 333, 73 Atl. 785; *Totten v. Bucy*, 57 Md. 446. It is frequently said in cases of wrongful procurement that the reason for the rule is found in the presumption that one who has obtained a note illegally or fraudulently will cause it to be sued in the name of another. 4 Am. & Eng. Enc. Law, p. 323; *Perkins v. Prout*, 47 N. H. 387, 93 Am. Dec. 449; *Kellogg v. Curtis*, 69 Me. 212, 31 Am. Rep. 273. The situation in which the payee is placed by a failure of consideration affords a basis for the same presumption, and this seems to justify the conclusion that no distinction need be made between defenses existing at the inception of the contract and those subsequently arising.

We see no reason why the additional burden should not rest upon the plaintiff in this case. It is true that the defense had no existence when the note was delivered to the payee, and that it never would have existed but for a further contemporaneous agreement of which the note gave no notice; but the terms of the agreement were such that the acts of the parties with reference to it worked an entire failure of the con-

sideration of the note, and operated as a defeasance of the payee's title to it, and made the transfer of it a fraud upon the maker. The objection that the holder ought not to be prejudiced by a matter not ascertainable from the note has no greater force than it would have had if the fraud or defect of title had existed at the making of the contract. The effect of the payee's wrongful act upon the maker, and the inducement to a collusive transfer, would be the same in either case. The rule is not one that abridges the holder's substantive right as determined by the law merchant; it merely puts the burden of proof upon the one who knows the facts. If he is an innocent holder, the fact that the maker has a complete defense against the payee cannot affect him. So, when the maker shows a transfer made in fraud of his right, it is not unreasonable to require that the transferee offer some evidence tending to show that he bought in good faith.

Evidence that the note was taken for value before maturity will not meet the requirement. The plaintiff cannot prove himself a bona fide purchaser of the note merely by showing that he paid value for it before maturity. He must go further, and show that he had no knowledge or notice of the fraud. *Vosburgh v. Diefendorf*, 119 N. Y. 357, 16 Am. St. Rep. 836, 23 N. E. 801. He must show that he bought the note in good faith as well as for a valuable consideration, and his good faith can be shown only by proof that he had no knowledge of the payee's fraudulent conduct, and was not equitably chargeable with notice of it. *Parsons v. Utica Cement Co. supra*; *Tilden v. Barnard*, 43 Mich. 376, 38 Am. Rep. 197, 5 N. W. 420. To establish his good faith, the plaintiff must show the circumstances connected with his procurement of the note, and what he paid for it. *Holme v. Karsper*, 5 Binn. 469; *Totten v. Bucy, supra*. Evidence that the plaintiff gave value for the note is very different from evidence that he gave full value. *Millard v. Barton*, 13 R. I. 601, 43 Am. Rep. 51. It is proof of the payment of full value that raises a presumption of good faith. *Market & F. Nat. Bank v. Sargent*, 85 Me. 349, 35 Am. St. Rep. 376, 27 Atl. 192. So, we hold that the burden was on the plaintiff to show that he took the note in good faith, and that his statement that he bought it for value before maturity did not meet the requirement. The trial court has not found the fact of good faith, and there was nothing before it that required the finding. The plaintiff's contention that the findings made do not amount to a finding that he was not a purchaser in good faith is made immaterial by our holding regarding the burden. The only 29 L.R.A. (N.S.)

question now available to the plaintiff is whether any of the facts reported required the conclusion that he was such a purchaser.

We have seen that the note was indorsed to the plaintiff without recourse. It appears from the plaintiff's evidence that he is an attorney, and resides in Chicago, where the payee does business; that he knows the company in a business way; that he bought this and four other notes at the same time; that he is not acquainted with the defendant; and that at the time he bought the note he had no notice of what it was given for. The trial court has found from this evidence that the note was received without notice of a defense. This is not equivalent to a finding that the purchaser acted in good faith; for he may have had suspicions that led him to avoid knowledge, and this may have made him a purchaser in bad faith, although without notice. *Goodman v. Simonds*, 20 How. 343, 367, 15 L. ed. 934, 942. If a conclusion of good faith might have been drawn from the absence of notice, it was for the trial court to do it; but the court cannot have drawn this conclusion, for it rendered judgment against the plaintiff. The question whether the plaintiff made inquiry was included in the question of good faith, and the fact that there was no evidence tending to show that he made inquiry justified an affirmative finding that he made none. So, if the finding that the plaintiff made no inquiry influenced the court in reaching its conclusion on the question of good faith, this will not defeat the judgment. No special consideration need be given to the distinction between the rule prevailing in most jurisdictions and that adopted here touching the duty of inquiry; for, if the case were to be tested by the former, error would not appear.

Judgment affirmed.

VERMONT SUPREME COURT.

JOHN H. BROWN

v.

VERMONT MUTUAL FIRE INSURANCE COMPANY.

(83 Vt. 161, 74 Atl. 1061.)

Insurance — settlement with wrongdoer — release.

1. The owner of insured property destroyed through the negligence of a rail-

Note. — Effect of discharge of person primarily liable for loss of insured property, or of a contractual provision giving him benefit of insurance, upon insured's right of action against insurer.

Since, as to the debt for the tortious de

road company does not release the liability of the insurer by settling with the railroad for an amount representing the difference between the value of the property and the amount of insurance, and giving a receipt stating that the amount is above that for which the property is insured, which latter amount is to be paid by the insurance company.

Appeal — contract — evidence of intention — nonprejudicial error.

2. Error in receiving evidence of the intention of the parties with respect to a written contract does not require a reversal, if the construction given by the court to the contract was in exact harmony with the legal construction of the instrument.

(January 7, 1910.)

EXCEPTIONS by defendant to rulings of the Orleans County Court made during the trial of an action brought to recover the amount alleged to be due on a fire insurance policy, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Mr. F. L. Laird, for defendant:

Where the assured settles with the railroad company or wrongdoer causing the loss,

struction of or injury to insured property, the liability of the tortfeasor is primary, and that of the insurer secondary, payment of a loss by the latter will subrogate it to all the assured's rights against the former. It follows therefore that, inasmuch as an absolute release by the insured, of all his claims against the person through whose fault the insured property was destroyed, would destroy this right of subrogation, such release will bar any action by the assured upon his policy. But if the release is not an absolute one, and includes only such losses as are not covered by the insurance, it will not affect the assured's remedy against the insurer, since the latter, upon payment of the insurance, will still retain his right of action against the tortfeasor. Upon these propositions all the authorities are in accord with *BROWN v. VERMONT MUT. F. INS. CO.*

Thus, in *Farmers' Alliance Mut. F. Ins. Co. v. Vallie*, 35 Colo. 72, 83 Pac. 962, and *Farmers' Alliance Mut. F. Ins. Co. v. Sanborn*, 35 Colo. 78, 83 Pac. 964, it was held that if the insurance policy contained no express stipulation for the subrogation of the insurer, the assured might settle with and release the negligent party as to damage other than that insured against, without affecting his remedy against the insurer; but if he collected his whole loss, he could not afterwards sue upon his policy. A recovery was therefore allowed against an insurer where it appeared that, though the insured had settled with the person whose negligence caused the loss of the insured property, a written release executed by the assured upon such settlement

and gives it a general and full release, without excepting the insurance, thus depriving the insurance company of its right of subrogation in case it should make payment, the insurer has a good defense to a subsequent action to recover the insurance.

1 *Clement, Fire Ins. p. 366*; *Sims v. Mutual Ins. Co.* 101 Wis. 586, 77 N. W. 908; *Niagara F. Ins. Co. v. Fidelity Title & T. Co.* 123 Pa. 516, 10 Am. St. Rep. 543, 16 Atl. 790; *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562; *Insurance Co. of N. A. v. Fidelity Title & T. Co.* 123 Pa. 523, 2 L.R.A. 586, 10 Am. St. Rep. 546, 16 Atl. 791.

Mr. J. W. Redmond, for plaintiff:

The settlement neither invaded nor abridged any right of defendant, but left unimpaired its right, upon payment of the \$250 insurance, to be subrogated to plaintiff's right of action against the Boston & Maine Railroad.

Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304; *Hart v. Western R. Corp.* 13 Met. 99, 46 Am. Dec. 719; *Clark v. Wilson*, 103 Mass. 219, 4 Am. Rep. 532; *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *Connecticut F. Ins. Co. v.*

expressly declared that he had deducted from his claim "a substantial portion" of his insurance, and that the difference was "collectable" from the insurer.

And in *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171, a release given by the insured in "settlement in full of all claims, demands, and causes of action" against the wrongdoer, for loss and damage by fire, in which it was declared that the settlement was not intended to discharge the insurer from any claim which the assured had against it, was held to be no defense to an action by the assured upon his policy.

And in *Insurance Co. of N. A. v. Fidelity Title & T. Co.* 123 Pa. 523, 2 L.R.A. 586, 10 Am. St. Rep. 546, 16 Atl. 791, a release in which it was expressly stipulated that it was not to affect the claim of the assured against the insurer for the loss covered by the insurance, thus making the settlement include only the loss not covered by insurance, was held not to affect the insured's right of action upon his policy.

This principle finds support also in *Atlantic Ins. Co. v. Storrow*, 5 Paige, 285, in which it appeared that the insured goods were stolen while on shipboard under such circumstances as to make the master or shipowners liable for the loss, and in which it was held that if the insured had received compensation for his loss from the shipowners, and assigned his policy for their benefit merely to enable them to recover the amount of the insurance, it would be a good defense at law to an action on the policy, at least to the amount thus received, and that the rule would hold if the policy

Erie R. Co. 73 N. Y. 399, 29 Am. Rep. 171; Lumbermen's Mut. Ins. Co. v. Kansas City, Ft. S. & M. R. Co. 149 Mo. 165, 50 S. W. 281; Brighthope R. Co. v. Rogers, 76 Va. 443; Garrison v. Memphis Ins. Co. 19 How. 312, 15 L. ed. 656; Mason v. Sainsbury, 3 Dougl. K. B. 61; Rockingham Mut. F. Ins. Co. v. Bosher, 39 Me. 253, 63 Am. Dec. 265; Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co. 25 Conn. 265, 65 Am. Dec. 571; London Assur. Co. v. Sainsbury, 3 Dougl. K. B. 245; Louisville & N. R. Co. v. Manchester Mills, 88 Tenn. 653, 14 S. W. 314; Hall v. Nashville & C. R. Co. 13 Wall. 367, 20 L. ed. 594; St. Louis, I. M. & S. R. Co. v. Commercial Union Ins. Co. 139 U. S. 223, 35 L. ed. 154, 11 Sup. Ct. Rep. 554.

Powers, J., delivered the opinion of the court:

The plaintiff's barn and its contents were insured for \$250 by the defendant company. In June, 1908, by a fire communicated thereto by a locomotive of the Boston & Maine Railroad, they were totally destroyed, resulting in a loss to the plaintiff of at least

had been assigned to a third person, and the assignee had received such compensation after the assignment.

So, in *Kirton v. British America Assur. Co.* 10 Ont. Week. Rep. 498, which was an action against a railroad company for the loss of farm buildings which were valued, for the purposes of the action, at \$1,250, and were insured for \$550, and the assured settled with the railroad company for \$1,000, it was held that the insured was entitled to a judgment for the balance against the insurance company. No other terms of the settlement appear in the opinion.

On the other hand, it was held in *Chicago, B. & Q. R. Co. v. Emmons*, 42 Ill. App. 138, that if the assured released the person whose negligence caused the loss of the insured goods, from the entire amount of his loss, he could not have a second satisfaction of the insurer.

And in *Dilling v. Draemel*, 16 Daly, 104, 9 N. Y. Supp. 497, it was held that if the assured, absolutely and without reservation, released the wrongdoer, he thereby discharged the insurer to the full extent to which he had defeated the insurer's remedy over by right of subrogation.

And in *Sims v. Mutual F. Ins. Co.* 101 Wis. 586, 77 N. W. 908, a release given by the insured, which did not confine itself to so much of his claim for damage as was not covered by insurance, but was sweeping in language and released and forever discharged the persons whose negligence caused the loss of the insured property from any and all claims, was held to discharge the insurer also.

On the same principle it was held in *New England Mut. M. Ins. Co. v. Dunham*, 3 Cliff. 332, Fed. Cas. No. 10,155, affirming 1 Low. Dec. 353, Fed. Cas. No. 4152, that a 29 L.R.A. (N.S.)

\$600. After the fire, the plaintiff effected a settlement with the railroad, evidenced by a writing then executed by him, of which the following is a copy:

Boston & Maine Railroad, September 18, 1908, to John H. Brown, Barton Landing, Vermont, Dr. For barn and contents destroyed by fire communicated by your locomotive engines on the 18th day of June, 1908, situated in the town of Coventry, Vermont, near Coventry Station, above the amount of two hundred and fifty dollars (\$250), for which said property was insured, payment of said two hundred and fifty dollars (\$250) to be paid by the insurance companies.

Approved for \$300.

[Signed] Charles S. Pierce.

Received, Boston, Sept. 29, 1908, of the Boston & Maine Railroad, \$300 in full of above account.

[Signed] John H. Brown.

Having complied with all the require-

ment against the person whose negligence caused the loss of the insured goods would discharge the insurer from his liability *pro tanto*. The court said that, upon the loss of insured property, the insured might, if he saw fit, pursue his remedy against the one responsible therefor, and that, if he acted with due diligence and in good faith, he was obliged to account to the underwriters only for what he received from the wrongdoer, and that, while full satisfaction would doubtless operate as a discharge of the claim upon the insurer, nothing short of that would have such effect in the absence of fraud or proof of collusion or negligence.

While in all the cases heretofore cited there was either no express stipulation in the policy as to subrogation, or the court made its existence doubtful by failing to refer to it, and while the language in which the rule is enunciated in *Farmers' Alliance Mut. F. Ins. Co. v. Vallie*, supra, might lead to the conclusion that the existence of such a stipulation might affect the question of the effect of a release by the assured of the person whose negligence caused the loss of the insured property, it would seem to make no difference whether the contract of insurance contained such provision or not, since in the following cases in which the policies sued upon contained such stipulation, the same rules of law were applied:

Thus, in *Hartford F. Ins. Co. v. Wabash R. Co.* 74 Mo. App. 106, it was held that if the insured recovered compensation from the person responsible for the loss of the insured goods, it was a discharge *pro tanto* of the insurer.

And in *Niagara F. Ins. Co. v. Fidelity & T. Co.* 123 Pa. 516, 10 Am. St. Re.

ments of the policy, the plaintiff brings this suit to recover the amount of his insurance. The company defends on the ground that the receipt above set forth discharged it from liability.

If the railroad was liable for the destruction of this property, its liability was primary, and that of the defendant secondary; and the latter, upon payment, would be subrogated, *pro tanto*, to the plaintiff's rights against the railroad. *Cushman & R. Co. v. Boston & M. R. Co.* 82 Vt. 390, 73 Atl. 1073. This result, as was pointed out in that case, not from contract or privity, but from the relation which exists between the parties,—the railroad standing in the position of a principal and the defendant in that of a surety for the plaintiff's loss. It follows, as a necessary and logical result of a recognition of such right of subrogation, that a release by the plaintiff of his claim against the railroad would bar his action against the defendant. *Packham v. German F. Ins. Co.* 91 Md. 515, 50 L.R.A. 828, 80 Am. St. Rep. 461, 46 Atl. 1066; *Niagara F. Ins. Co. v. Fidelity, Title & T. Co.* 123

Pa. 516, 10 Am. St. Rep. 543, 16 Atl. 790, 1 Clement, Fire Ins. 366. And this is but an application of the familiar rule of the law of suretyship that a release of the principal discharges the surety. *Fletcher v. Jackson*, 23 Vt. 581, 56 Am. Dec. 98; *Ellis v. Allen*, 48 Vt. 545; *Paddleford v. Thacher*, 48 Vt. 574.

But the release to which we are referring is a full release,—one that covers the whole liability. That an owner can settle with the wrongdoer in such a way as to reserve his right to pursue the insurer is well established. 1 Clement, Fire Ins. 367; 4 Cooley, Briefs on Insurance, 3912. The case of *Connecticut F. Ins. Co. v. Erie R. Co.* 73 N. Y. 399, 29 Am. Rep. 171, is a leading authority to this effect. The plaintiff therein insured certain buildings worth \$3,400 for \$1,500. They were destroyed by fire through the defendant's negligence. The defendant paid the owner a part of the loss, taking from him a release which contained the following: "This settlement is not intended to discharge the Connecticut Fire Insurance Company from any claim which

543, 16 Atl. 790, the effect of a release given by an insured, which was passed upon by the same court in *Insurance Co. of N. A. v. Fidelity Title & T. Co.* supra, and sufficiently set forth in the review of that case, was not in question, but the court went on to say that if it extinguished all claims for damages against the person causing the loss, that alone would be a sufficient reason for refusing a recovery by the insured upon the policy, under the rule laid down in *Carstairs v. Mechanics' & T. Ins. Co.* 18 Fed. 473 (hereinafter reviewed).

And in *Highlands v. Cumberland Valley Farmers' Mut. F. Ins. Co.* 203 Pa. 134, 52 Atl. 130, it was held that an absolute release of the wrongdoer extinguished the insured's right of action against the insurer.

Upon the same principle it was held in *Packham v. German F. Ins. Co.* 91 Md. 515, 50 L.R.A. 828, 80 Am. St. Rep. 461, 46 Atl. 1066 (in which also the policy contained an express stipulation for subrogation), that an insured who destroyed the insurer's right of subrogation to a claim against the persons causing the loss of insured goods, by consenting, in an action by him against such persons to recover for the loss of other property than the insured goods, to exclude any claim for the latter from the consideration of the jury and from the damages recovered, would thereby lose any right of action against the insurer on account of such insured goods.

So, in *Bloomington v. Columbia Ins. Co.* 84 N. Y. Supp. 572, it was held that where a policy in addition to the stipulation for subrogation provided that the insured should not enter into an agreement with a carrier releasing it from its liability

ity for damage to the insured property, it was avoided by a breach of the latter provision, though it was claimed that the loss was due to a fire of incendiary origin for which the carrier was not liable.

Attention should here be called to *Algase v. Horse Owners' Mut. Indemnity Asso.* 77 Hun, 472, 29 N. Y. Supp. 101, in which it was held that a release given to a person negligently causing the death of an insured horse which the assured had mortgaged, at the same time assigning his policy, with the consent of the insurer, to the mortgagee, was no defense to an action upon the policy by the assignee, in the absence of proof that he aided the owner of the horse in presenting his claim to the tortfeasor or in obtaining a settlement with it, or had consented to a discharge of the mortgage or to a liquidation of the policy collateral thereto.

Attention should also be called here to *Pentz v. Aetna F. Ins. Co.* 9 Paige, 568, reversing 3 Edw. Ch. 341, in which it appeared that insured property was destroyed by the order of city authorities, to prevent the spreading of a fire, and the assured afterwards obtained an assessment of his damages by a jury impanelled for that purpose, in conforming with a statute, which assessment was in litigation. It was held that the assessment was not conclusive of the actual amount of injury which the insured sustained, but that he was entitled to recover the difference between what he recovered from the city and the whole amount of his loss.

In all of the cases above reviewed, the release in question was given by the insured after the occurrence of the loss, but obviously the same question as to the effect of a release may arise when the same

said Martin has against them for insurance, but as a full settlement with, and discharge of, the Erie Railway Company only." Afterwards the insurance company paid the amount of its policy and brought suit against the railway company, which sought to bar the action by the release. It was held that the plaintiff could recover, since the provision in the release above quoted would prevent its being a defense to an action on the policy. Much the same in principle is *Thomas v. Montauk F. Ins. Co.* 43 Hun, 218. The plaintiff had a mortgage on certain real estate of one Emerson, and carried insurance on it. The policy ran to Emerson, but the loss was payable to the plaintiff as mortgagee. The buildings having burned, the plaintiff and Emerson settled, and the plaintiff gave a receipt reserving the insurance money. In an action on the policy it was held that the receipt was no bar. In *Atchison, T. & S. F. R. Co. v. Home Ins. Co.* 59 Kan. 432, 53 Pac. 459, there was a partially insured fire loss caused by the negligence of the railroad company. The owner accepted from it the excess of the

loss above the insurance, and gave a release conditioned that it should operate as a full discharge only when the insurance was paid. The insurance company paid its policy and brought suit against the railroad company. It was held that the suit could be maintained. See also *Fidelity Title & T. Co. v. People's Natural Gas Co.* 150 Pa. 8, 24 Atl. 339.

The case in hand falls within these holdings. The receipt which the plaintiff signed plainly indicates an intention on the part of both parties to it to reserve to the plaintiff a right to collect the avails of his policy. It was as effective in the accomplishment of that purpose as though its terms were more explicit. It admits of no other interpretation. Its meaning was for the court, and the error, if any, in receiving evidence of the intention of the parties, was harmless for the finding based thereon is in exact harmony with the legal construction of the instrument, and adds nothing to the plaintiff's case.

Judgment affirmed.

is given before the damage to the property has occurred. Here there is some conflict of authority as to whether the same rules of law will apply.

In *Downs Farmers' Warehouse Asso. v. Pioneer Mut. Ins. Asso.* 41 Wash. 372, 83 Pac. 423, it was held that a policy expressly providing for the subrogation of the insurer to the rights of the assured against any person responsible for the loss was breached if, after the issuance of the policy, the assured contracted with a railroad company releasing it from liability for any loss of the insured goods that might be caused by it.

And in *Kennedy Bros. v. State Ins. Co.* 119 Iowa, 29, 91 N. W. 831, it was held that an agreement between a railroad company and the owner of property which stood upon ground leased from the former, that the risk of all loss, injury, or damage by fire, however caused, was to be assumed by the lessees, rendered void a policy insuring such property, afterwards issued, expressly stipulating for subrogation.

And the principle governing the cases last cited seems to find some support in *Fire Asso. of Philadelphia v. La Grange & L. Compress Co.* 50 Tex. Civ. App. 172, 109 S. W. 1134, in which it appeared that the insured had entered into a similar agreement with a railroad company, and the question was whether the insurer was chargeable with knowledge of the existence thereof. The court, in holding that the right of subrogation was a valuable right and material to the risk, used the following language: "It may be that if the insurance company had no knowledge of the existence of the contract between the compress company and the railway company, relieving the latter of liability for negli-

gently causing the destruction of the subject of insurance, and thereby defeating the right of subrogation preserved by the insurance company in its contract of insurance, the policy was voidable."

Upon the other hand in *Pelzer Mfg. Co. v. Sun Fire Office*, 36 S. C. 213, 15 S. E. 562, in which the same state of facts appeared as in the two cases last cited, recovery was allowed without passing upon the question here discussed, the decision turning upon whether the omission to disclose the release was a fact material to the risk and known so to be to the insured. The court said that it did not understand that the insurer's "right of subrogation would extend to any right of action or any indemnity which the insured may have once had, but had released before the contract of insurance was entered into."

And in *Tate v. Hyslop*, L. R. 15 Q. B. Div. 368, in which recovery was denied to the owners of goods insured against the risks of crafts and lighters, upon the sole ground that they had failed to disclose to the underwriters, at the time of procuring the insurance, that they had previously agreed with the lighterman that he should not be liable except for loss caused by his own negligence, which agreement was held to be material to the risk, because the underwriters, to the knowledge of the insured, had previously established two rates of premium depending upon whether they would have recourse over against lightermen, Lord Brent said that but for the two rates of premium established by the underwriters and known to the assured, the latter's omission to disclose their agreement with the lighterman could only have affected the amount of the salvage which the underwriters might have, and would

have been immaterial to the risk and consequently to the insurance.

Effect of contract giving carrier benefit of insurance.

Though there is but little authority upon the question, the rule seems to be that where the owner of insured goods has contracted with the carrier to give him the benefit of any insurance thereon, and the policy contains no express stipulation for subrogation, the insurer will nevertheless be liable; but not if the policy expressly provides for subrogation.

Thus, in *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728, 2 N. E. 103, it was held that if a policy contained no express stipulation for subrogation, it was no defense to an action on the policy for a loss of insured property, that the insured had, by contract with the carrier responsible for the loss of the goods, given him the benefit of any insurance effected, if there was no fraud or concealment on the part of the person effecting the insurance.

And the case just reviewed was, with *Tate v. Hyslop*, supra, relied upon in *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312, 29 L. ed. 873, 6 Sup. Ct. Rep. 750, 1176 (an action by an insurer against the carrier who was responsible for the loss of insured goods), in holding that, under a policy containing no express stipulation as to subrogation, a provision in the bill of lading that the carrier should have the benefit of any insurance on the goods would afford no defense to an action on the policy in the absence of fraudulent concealment or misrepresentation by the owner in obtaining the insurance.

On the other hand, in *Carstairs v. Mechanics' & T. Ins. Co.* 18 Fed. 473, it was held, under a policy expressly stipulating for subrogation, that there could be no recovery for goods destroyed while in the course of carriage under a bill of lading giving the carrier the benefit of the insurance.

Of course, where a policy expressly provides that the insurer shall be discharged of any liability for loss if the insured agrees to give the carrier the benefit of such insurance, such agreement on the part of the insured will avoid the policy. *Pennsylvania R. Co. v. Mannheim Ins. Co.* 56 Fed. 301; *Southard v. Minneapolis, St. P. & S. Ste. M. R. Co.* 60 Minn. 382, 62 N. W. 442, 619; *Fayerweather v. Phenix Ins. Co.* 118 N. Y. 324, 6 L.R.A. 805, 23 N. E. 192; *Insurance Co. of N. A. v. Easton*, 73 Tex. 167, 3 L.R.A. 424, 11 S. W. 180.

In *Jackson Co. v. Boylston Mut. Ins. Co.* 139 Mass. 508, 52 Am. Rep. 728, 2 N. E. 103, supra, it was held that a provision in a contract of carriage that the carrier should have the benefit of any insurance upon the goods carried was not within the clause of the policy covering such goods, avoiding the same if the policy should be sold, assigned, transferred, or pledged with-

out the consent of the insurers. The court said: "The policy and the interest in it are still retained by the owner; it is neither transferred nor pledged. There is a collateral agreement only, that the carrier, having incurred a liability, shall have the benefit of the insurance that may have been effected."

On the other hand, it was held in *Dundee Chemical Works v. New York Mut. Ins. Co.* 12 Misc. 353, 33 N. Y. Supp. 628, that a stipulation in a bill of lading giving the carrier the benefit of the insurance was a breach of a policy warranting that the interest of the assured had not been and would not be assigned to any carrier, upon the ground that the stipulation of the bill of lading was equivalent to an assignment of the interest of the insured.

In *St. Paul F. & M. Ins. Co. v. Kidd*, 5 C. C. A. 88, 14 U. S. App. 201, 55 Fed. 238, affirming 35 Fed. 351, it was held that the fact that insured goods were shipped under a bill of lading giving the carrier the benefit of any insurance thereon did not breach a policy covering the same, which expressly stipulated for subrogation, where, by special form attached to the policy, it was provided that the insurance was only for excess of value above a certain sum, that the carriers might limit their liability to that amount, and that the shipper might in an action for loss collect such sum from the carrier, and release the latter from all liability, without affecting the liability of the insurer; upon the ground that the special conditions of the form were inconsistent with the retention of the insurer's right of subrogation, and were intended to give to the owners the sole and exclusive benefit, in the event of loss, of any remedy against any carrier responsible therefor.

The question involved in such cases as *Cushman & R. Co. v. Boston & M. R. Co.* 82 Vt. 390, 73 Atl. 1073, as to the effect, in an action brought by the assured for the benefit of the insurer, of a release by the assured of the tortfeasor, is not within the scope of this note. J. A. C.

MAINE SUPREME JUDICIAL COURT.

CANADIAN PACIFIC RAILWAY COMPANY

v.

MOOSEHEAD TELEPHONE COMPANY.

(— Me. —, 76 Atl. 885.)

Telephone — right of way — railroad tracks.

1. The necessary authority to condemn a

Note.— *Power to authorize construction of telegraph or telephone line along railroad right of way, without compensation to railroad company.*

A Federal statute providing that any telegraph company organized under the

right of way for a telephone line along a railroad right of way is conferred by a statute permitting such construction upon or along a railroad.

Same—right to compensation.

2. The legislature cannot authorize a telephone company to construct its line along a railroad right of way, unless it makes provision for just compensation to the railroad company.

Same—provision for condemnation—effect.

3. The constitutionality of a statute permitting the railroad commission to authorize the construction of a telephone line along a railroad right of way, which makes no provision for compensation, is not saved by a section permitting the telephone company to condemn a right of way, where it invokes the assistance of the commission and makes no attempt to condemn the right.

Injunction—construction of telephone line.

4. Injunction lies to prevent a telephone company from attempting to construct and maintain its line upon a railroad right of way, where its acts in so doing are unlawful.

(January 31, 1910.)

REPORT by the Supreme Judicial Court for Piscataquis County for the opinion of the full bench of a suit to enjoin defendant from maintaining its poles and wires upon the plaintiff's right of way. Injunction granted.

The facts are stated in the opinion.

laws of any state should have the right to construct, maintain, and operate lines of telegraph over and along any post road of the United States, cannot be construed to allow the construction of a telegraph line along a railroad right of way without compensation to the railroad. *Atlantic & P. Teleg. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158, Fed. Cas. No. 632. Recognition of the constitutional provision against the taking of private property without compensation is found in the following from the opinion in this case: "It is true that a railroad has certain public uses, and is, for certain purposes, subject to the control of the state; and in consequence of these public uses the law authorizes the condemnation of private property; but still, when the property has thus been acquired, it becomes private property, notwithstanding the railroad has public uses; that is to say, the property can be used for the benefit of the shareholders of the company. The right of way can be so used, just as much as the roadbed itself, the ties, the rails, the locomotives, or the cars; they are all to be used for the benefit of the shareholders, although such uses may be of a public character, and the public may have a certain limited control over them.

But the right to construct a telegraph line 29 L.R.A. (N.S.)

Mr. E. C. Ryder, for plaintiff:

Any attempt to take land by right of eminent domain under a statute which does not provide for compensation may be enjoined.

Lewis, Em. Dom. 452; *State, Mulligan, Prosecutor, v. Perth Amboy*, 52 N. J. L. 132, 18 Atl. 670; *Cherry v. Keyport*, 52 N. J. L. 544, 20 Atl. 970; *Re Montgomery*, 48 Fed. 896; *East & West R. Co. v. East Tennessee, V. & G. R. Co.* 75 Ala. 280; *Cobb v. Illinois & St. L. R. & Coal Co.* 68 Ill. 233; *Browning v. Camden & W. R. & Transp. Co.* 4 N. J. Eq. 47; *Bass v. Metropolitan West Side Elev. R. Co.* 39 L.R.A. 711, 27 C. C. A. 147, 53 U. S. App. 542, 82 Fed. 857; *Western R. Co. v. Alabama Grand Trunk R. Co.* 96 Ala. 272, 17 L.R.A. 474, 11 So. 483; *Bonaparte v. Camden & A. R. Co.* Badlw. 205, Fed. Cas. No. 1,617; *Rigney v. Tacoma Light & Water Co.* 9 Wash. 576, 26 L.R.A. 425, 38 Pac. 147.

A telephone line on a railroad right of way is an additional burden.

Lewis, Em. Dom. 2d ed. § 141a.

There is nothing in the statute which authorizes the taking of property of a railroad company by right of eminent domain. Unless it does grant such authority and that authority is clearly expressed, the right does not exist.

Thacher v. Dartmouth Bridge Co. 18 Pick. 501; *Proprietors of Mills v. Com.* 164 Mass. 227, 41 N. E. 280; *Pittsburgh Junction R. Co.'s Appeal*, 122 Pa. 511,

thereon necessarily interferes with the absolute right of the railroad to its right of way. That is a right which cannot be taken without compensation. It is a right of property existing in the railroad company, which no person or other company can take from it without its consent or without paying for it."

It was held in *Southwestern R. Co. v. Southern & A. Teleg. Co.* 46 Ga. 43, 12 Am. Rep. 585, that a state statute empowering telegraph companies to construct their lines upon the right of way of the several railroad companies in the state was unconstitutional because it made no efficient provision for the payment of compensation to the railroads.

And it has been held that, before a telegraph or telephone company can take advantage of the Federal statute authorizing the construction of wire lines along post roads, just compensation must have been fixed and paid to the railroad for the use of its right of way. *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* 23 Utah 474, 90 Am. St. Rep. 705, 65 Pac. 735.

Other cases have recognized the right of a railroad to be compensated for the use of its right of way, without passing upon that specific point.

W. A. S.

9 Am. St. Rep. 128, 6 Atl. 564; *Ft. Wayne v. Lake Shore & M. S. R. Co.* 132 Ind. 558, 18 L.R.A. 367, 32 Am. St. Rep. 277, 32 N. E. 215; *Little Neautucca Toll Road Co. v. Tillamook County*, 31 Or. 1, 65 Am. St. Rep. 802, 48 Pac. 465; *Lake Erie & W. R. Co. v. Seneca County*, 57 Fed. 945; *Re Buffalo*, 68 N. Y. 167.

If there is no express grant in the statute, the necessity must not be simply a question of economy or convenience, but must arise from the very nature of things, and be so absolute that without it the grant itself will be defeated.

Pittsburgh Junction R. Co.'s Appeal, supra; *Scranton Gas & Water Co. v. Northern Coal & I. Co.* 192 Pa. 80, 73 Am. St. Rep. 798, 43 Atl. 470.

Even if the statute provided all the machinery necessary to take land by right of eminent domain, it would still have no force, for the reason that it makes no provisions for compensation.

Cushman v. Smith, 34 Me. 247; *Lee v. Pembroke Iron Co.* 57 Me. 481, 2 Am. Rep. 59; *Thacher v. Dartmouth Bridge Co.* supra; *Atty. Gen. v. Old Colony R. Co.* 160 Mass. 62, 22 L.R.A. 112, 35 N. E. 252; *Vanhorne v. Dorrance*, 2 Dall. 304, 1 L. ed. 391, Fed. Cas. No. 16,857; *Bonaparte v. Camden & A. R. Co.* supra; *Hollingsworth v. Tensas Parish*, 4 Woods, 280, 17 Fed. 109; *Coster v. Tide Water Co.* 18 N. J. Eq. 54; *Southwestern R. Co. v. Southern & A. Teleg. Co.* 46 Ga. 43, 12 Am. Rep. 585.

Messrs. *Hudson & Hudson*, for defendant:

The damages are nominal.

Postal Teleg. Cable Co. v. Oregon Short Line R. Co. 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735.

The taking by the defendant is not such a taking as is within the provisions of the Constitution where just compensation is given.

Massachusetts C. R. Co. v. Boston, C. & F. R. Co. 121 Mass. 124.

The defendant has a right to maintain its poles and wires on the right of way of the plaintiff corporation.

Lewis, Em. Dom. § 269; *Postal Teleg. Cable Co. v. Oregon Short Line R. Co.* supra; *St. Louis & S. F. R. Co. v. Southwestern Teleph. Co.* 58 C. C. A. 198, 121 Fed. 276; 15 Cyc. Law & Proc. p. 625, note 62; *Boston & M. R. Co. v. York County*, 79 Me. 386, 10 Atl. 113.

The legislature of Maine has the right to determine and regulate the use of all common and public rights and easements.

Com. v. Essex Co. 13 Gray, 247; *Inland Fisheries Comm. v. Holyoke Water Power Co.* 104 Mass. 446, 6 Am. Rep. 247, 29 L.R.A. (N.S.)

Additional compensation need not be provided for.

Briggs v. Lewiston & A. Horse R. Co. 79 Me. 363, 1 Am. St. Rep. 316, 10 Atl. 47.

Savage, J., delivered the opinion of the court:

By this bill in equity the plaintiff seeks to enjoin the defendant telephone company from maintaining its line of poles and wires upon the plaintiff's right of way. The defendant contends that it is so maintaining them under statute authority. The case comes up on report.

The defendant corporation was organized in 1900 under the general law for the organization of telephone companies. Stat. 1895, chap. 103. But it does not appear to have taken any steps affecting the plaintiff's right of way until 1904. Its right to do so, therefore, must be determined by the statutes in force in 1904. Chapter 378 of the Public Laws of 1885, and chapter 103 of the Public Laws of 1895, which are cited by the defendant as the source of its authority, except so far as incorporated in the revision of 1903, were expressly repealed by the general repealing act in the present Revised Statutes (page 1015). The defendant's right, if any, must be found in chapter 55 of the Revised Statutes. Section 24 of that chapter provides that "such [telephone] company . . . may construct a line upon or along any railroad by the written permit of the person or corporation operating such railroad, but in case such company cannot agree with the parties operating such railroad, as to constructing lines along the same, or as to the manner in which lines may be constructed upon, along, or across the same, either party may apply to the railroad commissioners, who after notice to those interested, shall hear and determine the matter and make their award in relation thereto, which shall be binding upon the parties."

In 1904 the defendant, alleging that it could not agree with the plaintiff railway company as to the construction, maintenance, and operation of its line along the plaintiff's right of way, and that the plaintiff had unreasonably refused its consent, petitioned the railroad commissioners, as provided in § 24, which we have quoted, to determine the manner in which its line should be constructed, maintained, and operated along the plaintiff's right of way. Upon this petition, after hearing, the railroad commissioners in terms granted the defendant the right to construct, maintain, and operate its telephone line upon the plaintiff's right of way between Greenville junction and Holeb station, and prescribed the manner in which the line should be con-

constructed. Thereafter the defendant constructed and has since maintained a telephone line of poles and wires upon the plaintiff's right of way, in accordance with the decree of the railroad commissioners.

The plaintiff contends: (1) That the right to construct and maintain a telephone line over its right of way can be acquired, *in invitum*, only by an express and explicit grant of the right of eminent domain for that purpose; (2) that § 24 of chapter 55 of the Revised Statutes, under which the defendant justifies, does not contain any such express and explicit grant; and, if it does (3), that it makes no provision for compensation to the railroad for the land taken, and is therefore unconstitutional.

It is not denied that the legislature has power to enable a telephone corporation to construct its lines upon the right of way of a railroad corporation. *Eastern R. Co. v. Boston & M. R. Co.* 111 Mass. 125, 15 Am. Rep. 13; *Postal Telegr. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Lewis, Em. Dom.* 2d ed. § 269. It should be observed that Mr. Lewis, when he says in the section just cited that "a telegraph may be established along a railroad right of way, it being no material interference with the use for railroad purposes," is speaking of the right of condemnation with compensation, and not of the right of using without condemnation or compensation. But it is claimed that the right in such cases is not to be presumed from a grant of a general power of eminent domain, and that it exists only when granted expressly or by necessary implication. Such is the general rule. *Housatonic R. Co. v. Lee & H. R. Co.* 118 Mass. 391; *Re Providence & W. R. Co.* 17 R. I. 324, 21 Atl. 965; *Lewis, Em. Dom.* § 267; 15 Cyc. Law & Proc. p. 623.

But we think that, so far as the question of authority is concerned, when a telephone company is authorized by statute to construct and maintain its lines "upon or along a railroad," it is necessarily implied that it may "take" the right of way so far as is reasonably necessary for that purpose. The use of words like "take," or "take and hold," is not essential. If it so constructs its lines, it necessarily so far takes the right of way, and authority to "construct" is necessarily an authority to "take." *St. Louis & C. R. Co. v. Postal Telegr. Co.* 173 Ill. 508, 51 N. E. 382; *Postal Telegr. Cable Co. v. Farmville & P. R. Co.* 96 Va. 661, 32 S. E. 468; *South Carolina & G. A. R. Co. v. American Teleph. & Telegr. Co.* 65 S. C. 459, 43 S. E. 970; 15 Cyc. Law & Proc. p. 625. This differs from the use of the general words "to take and hold" land, from which no necessary implication arises that

the power may be exercised upon land already devoted by the state to public uses, in that the statute explicitly authorizes the using, and therefore the taking, of a railroad right of way.

But, while the power of the legislature is plenary in this respect, it cannot constitutionally exercise this power unless it makes provision for that just compensation which the Constitution secures when private property is taken for public uses. *Const. art. 1, § 21*. The location of a telephone line upon a railroad right of way is a taking of it, and imposes a burden upon it for which the owner is entitled to compensation. *Atlantic & P. Telegr. Co. v. Chicago, R. I. & P. R. Co.* 6 Biss. 158, Fed. Cas. No. 632; *American Teleph. & Telegr. Co. v. Smith*, 71 Md. 535, 7 L.R.A. 200, 18 Atl. 910; *Southwestern R. Co. v. Southern & A. Telegr. Co.* 46 Ga. 43, 12 Am. Rep. 585; *Mercantile Trust Co. v. Atlantic & P. R. Co.* (C. C.) 63 Fed. 513; *Postal Telegr. Cable Co. v. Oregon Short Line R. Co.* 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735; *Lewis, Em. Dom.* § 141 a; 2 Wood, Railroads, 864. Though the railroad property is devoted to public uses, the owner of the right of way has a private right of property which is protected. *Atlantic & P. Telegr. Co. v. Chicago, R. I. & P. R. Co.* and *Southwestern R. Co. v. Southern & A. Telegr. Co.* supra. And this is true, whether it owns the land in fee, or merely the easement of a right of way. *Lewis, Em. Dom.* § 141a; 2 Wood, Railroads, 864; *Atlantic & P. Telegr. Co. v. Chicago, R. I. & P. R. Co.* supra. The principle is the same as when a highway is authorized to be laid out across a railroad (*Old Colony & F. River R. Co. v. Plymouth County*, 14 Gray, 155); or when one railroad is authorized to cross another (*Massachusetts C. R. Co. v. Boston, C. & F. R. Co.* 122 Mass. 124; *Lake Shore & M. S. R. Co. v. Cincinnati, S. & C. R. Co.* 30 Ohio St. 604; *Chicago & A. R. Co. v. Joliet, L. & A. R. Co.* 105 Ill. 388, 44 Am. Rep. 799). It is not an objection to the application of the principle, that the damages are merely nominal. The railroad company has a right to be heard upon that question.

It follows that the statutory authority to construct its line on the plaintiff's right of way, under which the defendant claims to have acted, was nugatory unless the statute itself, or some other statute so connected with it as to be regarded as *in pari materia* with it, made provision for compensation to the defendant. *Lewis, Em. Dom.* § 452; *Cushman v. Smith*, 34 Me. 241; *Thacher v. Dartmouth Bridge*, 18 Pick. 50.

It is very clear that § 24 of chapter 55 of the Revised Statutes, upon which the defendant bases its authority, makes

provision for compensation. Under that section the railroad commissioners had power only to determine as to constructing the line and the manner thereof. There is no word which relates to compensation.

The defendant, however, contends that this omission is supplied by § 11 of the same chapter, which provides that a telephone company "may purchase, or take and hold as for public purposes, land necessary for the construction and operation of its lines. Land may be so taken and damages therefor may be estimated, secured, determined, and paid for as in case of railroads." The answer to this proposition is that it is manifest that the defendant has not proceeded, nor has it attempted to proceed, under § 11. It has not taken the land by any legal proceeding contemplated by that section, for it has not pursued any of the steps required in the case of railroads. Rev. Stat. chap. 51, § 31. The general power to take lands granted by § 24 would not, as we have already seen, be sufficient to authorize the defendant to construct its lines upon the plaintiff's right of way. But if it is considered, which we do not decide, that § 24 is to be interpreted in connection with § 11, and that, so interpreted, § 24 supplies the authority to construct upon the railroad's right of way, which is wanting in § 11, and that § 11 supplies the compensation features which are wanting in § 24, it still remains true that the telephone company must, by proper condemnation proceedings under § 11, "take" the right of way and pay the compensation, to be ascertained as in the case of railroads. This it has not done and could not do under § 24, under which alone it has acted.

The result is that the defendant is unlawfully maintaining its telephone line upon the plaintiff's right of way; and in such case injunction is an appropriate remedy. Lewis, Em. Dom. § 452, and cases cited. See also Peirce v. Bangor, 105 Me. 413, 74 Atl. 1039.

Lastly, it is contended that the plaintiff is barred by laches. If this point were otherwise tenable against the plaintiff's clear legal right, it is sufficient to say that the record in this case discloses no facts which warrant its application. The case does not show when the telephone line was constructed. But it shows that at the hearing before the railroad commissioners, in 1904, the plaintiff protested against the defendant's procedure under § 24. It objected to the construction of the line later. It does not appear to have slept upon its rights. Its claim is neither stale nor inequitable.

Bill sustained, with costs. Writ of permanent injunction to issue as prayed for. 29 L.R.A. (N.S.)

NEBRASKA SUPREME COURT.

CHARLES RISEMAN, Appt.,
v.
HAYDEN BROTHERS.

(86 Neb. 610, 126 N. W. 288.)

Highway — refuse on sidewalk — injury to pedestrian — liability of abutting owner.

Action by plaintiff against defendant for damages resulting from personal injuries caused by a fall upon the sidewalk by reason of plaintiff having stepped upon a hidden tomato which slipped under his foot, causing the accident. An ordinance of the city of Omaha, in which the accident occurred, making it unlawful for any person to throw or leave upon the sidewalk of the city any straw, rubbish, or other refuse was introduced in evidence, but there was no evidence that defendant had violated any provision of the ordinance, or was in any way responsible for the presence of the tomato upon the sidewalk. Held, that the verdict and judgment in favor of defendant should be affirmed.

(April 23, 1910.)

APPEAL by plaintiff from a judgment of the District Court for Douglas County in defendant's favor is an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Weaver & Giller for appellant.

Messrs. Smyth, Smith, & Schall, for appellee:

The ordinance gave no right of action to the plaintiff.

Lincoln v. Janesch, 63 Neb. 707, 56 L.R.A. 762, 93 Am. St. Rep. 478, 89 N. W. 280; Frontier Steam Laundry Co. v. Connolly, 72 Neb. 767, 68 L.R.A. 425, 101 N. W. 995; Rochester v. Campbell, 123 N. Y. 405, 10 L.R.A. 393, 20 Am. St. Rep. 760, 25 N. E. 937; Kirby v. Boylston Market Asso. 14

Headnote by REESE, Ch. J.

Note. — Liability of abutting owner for injury to pedestrian by refuse on sidewalk.

RISEMAN v. HAYDEN BROS. finds support for its decision in Kelly v. Otterstedt, 80 App. Div. 398, 80 N. Y. Supp. 1008, in which it was held that a motion to direct a verdict for defendant was improperly denied in an action against an abutting owner for injuries sustained by a fall by reason of slipping upon a small quantity of green vegetables which had been scattered over the sidewalk in supplying customers from a vegetable stand in front of defendant's store, where there was no evidence as to the length of time the vegetables had remained on the

Gray, 252, 74 Am. Dec. 682; Heeney v. Sprague, 11 R. I. 456, 23 Am. Rep. 502; Keokuk v. Independent District, 53 Iowa, 352, 36 Am. Rep. 228, 5 N. W. 503; Flynn v. Canton Co. 40 Md. 312, 17 Am. Rep. 603; Taylor v. Lake Shore & M. S. R. Co. 45 Mich. 74, 40 Am. Rep. 457, 7 N. W. 728.

Reese, Ch. J., delivered the opinion of the court:

This action was commenced in the district court of Douglas county. Plaintiff's claim is founded upon personal injuries alleged to have been caused by the negligence of the defendant. It is averred in the petition that Hayden Brothers is a corporation organized under the laws of the state of Nebraska, the business being the operation and carrying on of a department store, in the city of Omaha; that one entrance to the grocery department, which is in the basement, is by means of an elevator between the sidewalk and the store building, by the use of which the groceries, fruits, and vegetables purchased and sold are carried to and from the rooms of the department, and in making such transfer the merchandise is conveyed to and from the delivery wagons across the sidewalk; that in violation of an ordinance, set out in the petition, defendant negligently allowed and permitted the sidewalk at and near the said elevator to become littered with straw and other substances, and "carelessly and negligently permitted a piece of green tomato to be and remain on the sidewalk, underneath the hay, straw, and refuse so negligently permitted by defendant to be and remain upon said sidewalk;" that plaintiff is passing on and along said sidewalk, as was his right, and without negligence on his part, stepped upon some hay or straw which had been allowed to accumulate, and that said green tomato, being under said straw, was not seen nor

was its presence known by plaintiff, until by reason of his weight upon said straw and tomato the tomato was crushed and slipped under plaintiff, and he was thrown upon the sidewalk, receiving severe and painful injuries to his damage, etc. Defendant answered, admitting its corporate existence, and that it was engaged in business as alleged, denying other allegations, and setting out at some length the method by which its goods and wares were transported into and from its place of business across the sidewalk in question, but which need not be further referred to. The reply is a general denial. A jury trial was had, resulting in a verdict and judgment in favor of defendant, and from which plaintiff appeals.

The ordinance referred to is as follows: "Sec. 24. It is hereby declared unlawful for any person to throw, drop, place, or sweep upon any sidewalk along any paved street or alley in the city of Omaha, or to throw, drop, place, or leave in any gutter of any paved street or alley in the city of Omaha, or to throw, drop, leave, or place upon the pavement of any street or alley of the city of Omaha, any papers, sweepings, straw, filth, or rubbish of any kind or description, or to throw, place, or leave upon any sidewalk, gutter, or street in the city of Omaha, any dead rat, or other dead animal, or any thing which may cause a litter or nuisance, and any person doing any such unlawful act, and any firm, company, or corporation owning or occupying any store, office, or other building in the city of Omaha who shall authorize, permit, or allow any sweepings, paper, rubbish, or other thing herein specified, to be thrown, placed, or left upon any paved street or alley or upon any sidewalk or in any gutter of any paved street shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding one hundred

sidewalk, or that the defendant had not used reasonable diligence to keep the walk clean, or to show plaintiff's freedom from contributory negligence.

But in Garibaldi v. O'Connor, 210 Ill. 284, 66 L.R.A. 73, 71 N. E. 379, affirming 112 Ill. App. 53, it was held that while the presence of a loose banana upon the sidewalk cannot be regarded as the sole cause of the fall of a pedestrian in stepping thereon, where the merchants used the walk adjoining their places of business for receiving and shipping goods to such an extent as to confine travelers to a narrow passageway during most of the business hours of the day, yet such wrongful use of the walk is a contributing cause which will render the merchants liable for the injury, though there is no direct proof that they or any of their employees dropped or caused it to be upon the walk. The court said the condition of

the sidewalk rendered them bound to use reasonable care to see that such passageway was kept safe, and that they cannot be regarded as having done so where they permitted it to be strewn with straw and loose bananas.

And in O'Dwyer v. Northern Market Co. 24 App. D. C. 81, it was held that a market company which had no authority to occupy sidewalk adjoining its market house for market purposes, but which, nevertheless, exercised dominion over the sidewalk for such purposes by inviting dealers and hucksters to occupy it, and collected toll from them according to the space occupied by them, and undertook in a lease of a store fronting on such sidewalk to have the sidewalk cleaned each day,—was liable to a pedestrian for injuries sustained by slipping and falling upon refuse vegetable matter on the sidewalk.

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(§100) dollars for each and every offense. And it is hereby further declared unlawful for any person, firm, company, or corporation to sweep or authorize or permit to be swept in front of his or its premises any sidewalk in front of any store, office building, or other business building along any paved street in the city of Omaha between the hours of 8 o'clock A. M. and 10 o'clock P. M., and any person so sweeping or authorizing or allowing such sweeping of any such sidewalk between said hours of 8 o'clock A. M. and 10 o'clock P. M. shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in any sum not exceeding ten (§10) dollars; provided, however, that the foregoing provision relating to sweeping sidewalks shall not apply to sweeping any snow which may fall upon or accumulate thereon." Thomas's Revised Ordinances of the City of Omaha, chap. 54, § 24.

The evidence discloses, without contradiction, that plaintiff, at or about the place referred to, slipped and fell upon the public sidewalk and received a very severe, painful, and perhaps permanent, injury. There seems to be no doubt about this, and it is quite well established that his fall was caused by stepping upon a green tomato which was crushed, and under his weight slipped upon the walk, and that the injury resulted from the fall. For the purposes of this case we may assume, but without deciding, that the ordinance in question was violated by someone, that its violation imposed a liability upon the guilty party, the proof of which might be considered evidence of negligence; that plaintiff's injury occurred adjacent to defendant's place of business, and near where it received and sent out its merchandise, and yet plaintiff could not recover owing to the fact that the evidence failed to show that the tomato was left upon the sidewalk by defendant or any of its employees. We have searched the bill of exceptions throughout and are unable to find such proof. It may be that the fact that the tomato was upon the sidewalk in front of defendant's place of business, and near the place of receiving and sending out its fruits and vegetables, might be considered with other evidence as a circumstance, if unexplained, in support of the claim that it was placed or allowed to remain there by defendant or its employees. Yet, in view of the fact that the sidewalk was along one of the principal streets of the city, that very near the spot where plaintiff fell other dealers in the same character of goods were engaged in business, and that the sidewalk was in common and continual use of the pedestrian public, defendant could not, upon those facts alone, be held to have

violated the ordinance. The burden rested upon plaintiff to establish by a preponderance of the evidence that defendant had been guilty of some act, or had failed to discharge some duty, which resulted in plaintiff's injury. The accident was a very unfortunate one for plaintiff; but the fact of the injury alone, without proof that defendant was in some way responsible for it, would not permit a recovery or justify a judgment against it. Defendant may have been guilty of wrong, and proof of such guilt out of reach of plaintiff, yet, that could not alter the legal result.

Complaint is made of two instructions given the jury, but as plaintiff could not recover in any event, for want of sufficient evidence to sustain a verdict, no good purpose could be subserved by examining them.

The judgment of the District Court is affirmed.

Petition for rehearing denied.

OREGON SUPREME COURT.

CHARLES F. JOHNSON, Resp't.,
v.
SAM IANKOVETZ.

(— Or. —, 110 Pac. 398.)

Pleading — replevin — allegation of title.

1. An allegation in replevin that, at all times and dates mentioned, plaintiff was and now is the owner and entitled to the immediate possession of the property, is a sufficient allegation that he was so at the beginning of the action.

Sale — taking check — losing title.

2. Taking a check which proves to be worthless, in payment of goods sold for cash, is not a waiver of the right to an immediate cash payment, so as to pass title to the vendee, which he can transfer to a stranger.

(July 26, 1910.)

Note. — Right of purchasers or creditors levying on goods sold for cash, but delivered without payment.

This note is supplementary to the note to McIver v. Williamson-Halsell-Frazier Co. 13 L.R.A. (N.S.) 696.

According to the weight of authority, in an ordinary sale of personal property for cash, payment to be made on delivery, payment is a condition precedent to the passing of title as between the parties, and, in the absence of laches, waiver, or estoppel on the part of the seller, a subsequent purchaser, although purchasing bona fide and for value, or a subsequently levying creditor, is in no better position than the purchaser, to claim

APPEAL by defendant from a judgment of the Circuit Court for Multnomah County in plaintiff's favor in a replevin action to recover possession of certain personal property. Affirmed.

Statement by Eakin, J.:

This is an action of replevin commenced in the justice court for the recovery of two guns of the value of \$45.05. On August 25, 1908, E. C. Adams contracted to purchase from plaintiff the two guns at the price named, and, for the purpose of payment, gave to him his check for \$45.30 on the Merchants' National Bank. He had no money in the bank, and the check was dishonored. At the time of the transaction, plaintiff delivered the goods to Adams, who, the same

day, sold them to defendant for the sum of \$22. Upon appeal to the circuit court of Multnomah county, judgment was rendered in favor of plaintiff. Defendant appeals.

Messrs. Harry Yanckwich and Leon Yanckwich, for appellant:

A vendor having no title can pass none, but a bona fide purchaser for value, without notice of fraud, from one who has fraudulently obtained both possession and property, will be protected.

24 Am. & Eng. Enc. Law, 2d ed. p. 1009; Singer Mfg. Co. v. Graham, 8 Or. 17, 54 Am. Rep. 572; Church v. Melville, 17 Or. 413, 21 Pac. 387; Cobbe, Replevin, §§ 460, 410; Soltan v. Gerdau, 119 N. Y. 322, 1 Am. St. Rep. 843, 23 N. E. 864; Taylor v.

that title has passed. As shown in the note mentioned, however, a different rule prevails in some jurisdictions. The majority rule finds support in JOHNSON v. LANKOVETZ.

The majority doctrine was applied in Jones v. Southern Cooperage Co. (Ark.) 127 S. W. 704, as to personal property sold and delivered under an agreement by the purchaser to execute to the seller a mortgage in payment thereof. It was held that title did not pass until the execution of the mortgage, and a subsequent purchaser of the property, before the execution of the mortgage, acquired no title thereto, there being no laches or waiver on the part of the seller.

And in Amundson v. Standard Printing & Mfg. Co. 140 Iowa, 464, 118 N. W. 789, it was held that where a purchaser was to execute a mortgage in payment of goods at the time of delivery, no title passed upon delivery until the execution of the mortgage, and it not having been executed, the property was not subject to be levied upon by the creditors of the purchaser although in his possession.

So, where goods were sold and shipped under express agreement that the purchaser was to inspect same, and if satisfactory should pay cash therefor, an attaching creditor of the purchaser attaching them while in his possession, but before the purchaser had inspected or paid for them, acquired no rights therein as against the seller. Porter v. Rice (Ky.) 128 S. W. 70.

The fact that the seller of personal property took in payment thereof a check of the purchaser, and delivered to him the property, does not, as a matter of law, amount to a waiver by him of his right to insist that payment is a condition precedent to the passing of title, where the check was in due course presented for payment and dishonored; and hence the goods are not, as a matter of law, subject to attachment by the creditors of the buyer. It is, however, a question of fact for the jury whether under such circumstances the delivery was made and the check accepted as absolute payment, with intention to pass title to the purchaser. Continental Bank 29 L.R.A. (N.S.);

& T. Co. v. Hartman (Tex. Civ. App.) 123 S. W. 179.

But a delay of five months after delivery of personal property which was to have been settled for upon delivery, during which time the seller repeatedly urged a settlement, but did not question the sale nor claim that title had not passed, is a waiver of his right to reclaim the property on the theory that payment was a condition precedent to the passing of title, where the buyer in the meantime had been placed in the hands of a receiver and the property had been sold at receiver's sale. E. I. Dupont Co. v. John Shields Constr. Co. 96 C. C. A. 197, 171 Fed. 305.

And see Baltimore & O. S. W. R. Co. v. Good, post, 713, wherein it is recognized that the delivery of a car of grain to be paid for in cash after weighing the same would not amount to a waiver by the seller of his right to insist upon payment as a condition precedent to the passing of title, but where he gave the buyer an order for the car of grain, thereby constructively delivering it into his hands, and where the custom was to pay the purchase price or a large portion thereof upon delivery of the order, it was held that, as against a subsequent bona fide purchaser relying upon the order, the original seller had waived his right to insist that title did not pass until payment.

In Wright v. Mississippi Valley Trust Co. 144 Mo. App. 640, 129 S. W. 407, it was recognized that where the seller delivered a bill of lading to the buyer, the bill of lading being a negotiable instrument, title to the property covered thereby would pass to any bona fide holder thereof for value, although the bill was delivered on the understanding that cash was to be paid upon delivery. This rule, however, was held not to apply to the case under consideration, as the holder of the bill of lading was a bank which had received same from the buyer to apply upon his over draft then existing, and hence the bank was held not to be a bona fide purchaser for value within the rule, it not having parted with any money or extended any credit in reliance on the bill.

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State, 32 Tex. Crim. Rep. 110, 22 S. W. 148; State v. Skinner, 29 Or. 599, 46 Pac. 368; Zink v. People, 77 N. Y. 114, 33 Am. Rep. 589; State v. Ryan, 47 Or. 338, 1 L.R.A. (N.S.) 862, 82 Pac. 703; Bigelow, Torts, § 515; Corbin's Benjamin, Sales, 6th Am. ed. § 649; Hindmarch v. Hoffman, 127 Pa. 284, 4 L.R.A. 369, 14 Am. St. Rep. 842, 18 Atl. 14; White v. Garden, 10 C. B. 919; Babcock v. Lawson, L. R. 4 Q. B. Div. 394; Moyce v. Newington, L. R. 4 Q. B. Div. 34; Collins v. Ralli, 20 Hun, 246; Mowrey v. Walsh, 8 Cow. 238; Wood's Appeal, 92 Pa. 379, 37 Am. Rep. 694; McCarty v. Vickery, 12 Johns. 348; Pelham v. Chattahoochee Grocery Co. 146 Ala. 216, 8 L.R.A. (N.S.) 448, 119 Am. St. Rep. 19, 41 So. 12; 24 Am. & Eng. Enc. Law, 2d ed. p. 1166; Beckwith v. Galice Mines Co. 50 Or. 542, 16 L.R.A. (N.S.) 723, 93 Pac. 453.

A bona fide purchaser is he who takes the property for value, in good faith, and without notice of the adverse interest sought to be enforced against him.

24 Am. & Eng. Enc. Law, 2d ed. pp. 1169, 1174; Dudley v. Gould, 6 Hun, 98.

In a sale of personal property, title passes when the agreement is concluded; in the absence of an express agreement to the contrary, absolute delivery of possession amounts to a waiver of all conditions.

Wadhams v. Balfour, 32 Or. 318, 51 Pac. 642; 24 Am. & Eng. Enc. Law, 2d ed. pp. 1051, 1053; 2 Kent, Com. *498.

Where the agreement is that goods are to be paid for in cash on delivery, and the goods are delivered, the sale is complete, whether the payment is made or not.

Warder v. Hoover, 51 Iowa, 491, 1 N. W. 795; Beckwith v. Galice Mines Co. supra.

Where a sale is for cash, and the vendor accepts for the price the check of the vendee, upon delivery of the property, which check is later dishonored, a bona fide purchaser from such vendee will acquire a good title.

24 Am. & Eng. Enc. Law, 2d ed. p. 1166; Moyce v. Newington, supra.

Messrs. Bigger & Wilson, for respondent:

Where personal property is by contract sold for cash, and the goods are put into the possession of the buyer in expectation that he will immediately pay the price, and he does not do it, the seller will be at liberty to treat the delivery as conditional, and at once reclaim the goods, even from a subvendee for value. An attempted payment by check which is dishonored is no payment, and the goods sold for cash and delivered on said check may be reclaimed.

6 Am. & Eng. Enc. Law, 2d ed. pp. 456, 457; National Bank v. Chicago, B. & N. R. Co. 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. 29 L.R.A. (N.S.)

Rep. 566, 46 N. W. 342, 560; Canadian Bank v. McCrea, 106 Ill. 281; Mathews v. Cowan, 59 Ill. 347; Evansville & T. H. R. Co. v. Erwin, 84 Ind. 463; Stone v. Perry, 60 Me. 48; Peabody v. Maguire, 79 Me. 572, 12 Atl. 630; Hirschorn v. Canney, 98 Mass. 149; Adams v. O'Connor, 100 Mass. 515, 1 Am. Rep. 137; Com. v. Devlin, 141 Mass. 423, 6 N. E. 64; Empire State Type Founding Co. v. Grant, 114 N. Y. 40, 21 N. E. 49; Turner v. Moore, 58 Vt. 455, 3 Atl. 467; Dudley v. Sawyer, 41 N. H. 327; Shipman v. Seymour, 40 Mich. 274; Ketchum v. Brennan, 53 Miss. 596; Bauendahl v. Horr, 7 Blatchf. 548, Fed. Cas. No. 1,113; Leath v. Uttley, 66 Tex. 82, 17 S. W. 401; Hodgson v. Barrett, 33 Ohio St. 63, 31 Am. Rep. 527; Hammett v. Linneman, 48 N. Y. 399; Kinsey v. Leggett, 71 N. Y. 387; 1 Benjamin, Sales, Revised ed. § 362; Craig v. California Vineyard Co. 30 Or. 58, 46 Pac. 421; Kershaw v. Ladd, 34 Or. 379, 44 L.R.A. 236, 56 Pac. 402; Harner v. Fisher, 58 Pa. 453; 2 Kent, Com. 13th ed. 497.

If the seller accompanies the delivery with the declaration of the conditional terms, or if that be the implied understanding of the parties, the sale is conditional.

2 Kent, Com. *497; 2 Parson, Contr. 7th ed. 922-928.

Possession without title gives no authority to sell. In such case good faith is of no avail. *Caveat emptor* applies to such sales.

Benjamin, Sales, 571, 572; Church v. Melville, 17 Or. 413, 21 Pac. 387.

The defendant, when he purchased and acquired the personal property in controversy from E. C. Adams, took only the interest which Adams had therein.

Schneider v. Lee, 33 Or. 578, 17 Pac. 269; Velsian v. Lewis, 15 Or. 539, 3 Am. St. Rep. 184, 16 Pac. 631; 1 Mechem, Sales, §§ 154, 155.

Eakin, J., delivered the opinion of the court:

It is first urged that the complaint does not state facts sufficient to constitute a cause of action, in that it does not allege that, at the time of the commencement of the action, plaintiff was the owner and entitled to the possession of the goods. But counsel overlooks the sixth subdivision of the complaint, which states that, at all times and dates mentioned, plaintiff was and now is the owner and entitled to the immediate possession of the property, which is a sufficient allegation in that regard.

The question for determination is whether, by the delivery of the goods to Adams, such a title passed that an innocent purchaser from him might acquire a title thereto as against plaintiff. That depends upon wheth-

er the sale was one in which the title to the goods was to remain in the vendor until some condition precedent is fulfilled, or the delivery was unconditional. The law presumes a sale to be for cash when nothing is said to the contrary, and, upon a sale for cash, payment and delivery are concurrent acts. If the price is not paid at the time of the delivery of the goods, the vendor may immediately reclaim them. *Mechem, Sales*, § 551. *Benjamin, on Sales*, 7th Am. ed. at § 320, states the rule as to cash sales, *viz.*: "Where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer." And in his notes to this rule, at page 299, he says: "It being clear that, in the absence of any credit expressly or impliedly allowed, payment is a condition precedent, or at least concurrent, it necessarily follows that the right of property does not pass until that is done, even though the article is delivered." No title will pass, even to an innocent purchaser for value from the vendee, unless the circumstances show that the vendor waived his right to immediate payment. *Johnson-Brinkman Commission Co. v. Central Bank*, 116 Mo. 558, 570, 38 Am. St. Rep. 615, 22 S. W. 813. Whether the vendor, upon delivery of the goods, thereby waives immediate cash payment, and thus permits the title to pass, is a question of fact to be determined from the circumstances. If the delivery is voluntarily made, without immediate payment being insisted on, the condition is waived. Some authorities hold that, in case of an innocent purchaser from the vendee, waiver will be more readily inferred from delivery, if there is no express reservation of title. *Mechem, Sales*, § 554; *Benjamin, Sales*, p. 299; *National Bank v. Chicago, B. & N. R. Co.* 44 Minn. 224, 9 L.R.A. 263, 20 Am. St. Rep. 566, 46 N. W. 342, 560; *Hirschorn v. Canney*, 98 Mass. 149; *Armour v. Pecker*, 123 Mass. 143.

In the present case the sale was a cash sale, and payment was attempted to be made by check on the bank in which the purchaser had neither funds nor credit. Delivery of the goods was made with the understanding that the check represented the cash. The delivery was, therefore, conditioned that the check would be honored. There is a distinction between a sale induced by fraud, in which the vendor, in ignorance of the fraud, transfers the title and possession, in which the sale is voidable, but not void, and an innocent purchaser from the vendee may acquire a good title (*Burns v. Ken-* 29 L.R.A. (N.S.)

nedy, 49 Or. 588, 90 Pac. 1102; *Truxton v. Fait & S. Co.* 1 Penn. (Del.) 483, 73 Am. St. Rep. 81, 42 Atl. 431; *Moore v. Moore*, 112 Ind. 149, 2 Am. St. Rep. 170, 13 N. E. 673), and a case in which the vendor does not intend to part with the title until the price is paid, the delivery and payment being concurrent acts, and although the goods are delivered to the vendee, yet without payment no title will pass. In the one case it is intended that the title shall pass; in the other, that it shall not. *National Bank v. Chicago, B. & N. R. Co. supra*; *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527.

It is said in *Evansville & T. H. R. Co. v. Erwin*, 84 Ind. 457, 464, "Where payment is to be made simultaneously with delivery and is omitted, evaded, or refused by the vendee on getting the goods under his control, the delivery in such case is merely conditional, and the nonpayment would be an act of fraud entering into the original agreement, which would render the whole contract void, and the seller would have the right instantly to reclaim the goods." The judge quotes with approval from *Coggill v. Hartford & N. H. R. Co.* 3 Gray, 543: "The vendee, in such cases, acquires no property in the goods. . . . The delivery, which in ordinary cases passes the title to the vendee, must take effect according to the agreement of the parties. . . . The vendee, therefore, in such cases, having no title to the property, can pass none to others." He further holds that the attempted sale by the vendee did not preclude the vendor from regaining his property.

In *Schneider v. Lee*, 33 Or. 578, 17 P. 269, relating to a conditional sale, where it was urged that the purchaser from the vendee in such a case should be protected, Mr. Justice Thayer holds to the contrary, following *Singer Mfg. Co. v. Graham*, 84 Ill. 17, 34 Am. Rep. 572, and *Harkness v. Russell*, 118 U. S. 663, 30 L. ed. 285, 7 Sup. Ct. Rep. 51. In the sale in the case of *Schneider v. Lee*, the title was expressly reserved, pending payment, but the vendor's rights did not depend upon notice to the subvendee, but upon want of title in the original vendee.

In *National Bank v. Chicago, B. & N. R. Co.* and *Johnson-Brinkman Commission Co. v. Central Bank*, *supra*, *Canadian Bank v. McCrea*, 106 Ill. 281, and *Com. v. DeWitt*, 141 Mass. 423, 6 N. E. 64, the sales were for cash, and payments were made by checks which were dishonored, and it was held that no title passed to the vendee, and that the goods might be reclaimed by the vendor from a subsequent purchaser.

Mechem on Sales, § 554, states that where the payment of the purchase price

expressly or impliedly a condition precedent to the passing of title, the delivery is deemed to be conditional, and, if payment is refused, the vendor may reclaim his goods either from the vendee or anyone claiming through him. To the same effect are §§ 551, 552, 555, *Id.*; Benjamin, *Sales*, §§ 320, 343, and note on page 299; Johnson-Brinkman Commission Co. v. Central Bank; National Bank v. Chicago, B. & N. R. Co.; Hirschorn v. Canney; Armour v. Pecker; and Evansville & T. H. R. Co. v. Erwin,—*supra*; Merrill Furniture Co. v. Hill, 87 Me. 17, 32 Atl. 712; Dudley v. Sawyer, 41 N. H. 326.

If the intention of the vendor in a cash sale, as gathered from the circumstances of the transaction, was to pass the title with the delivery of possession, or if he waived immediate payment, then as to an innocent purchaser the title will pass. Mechem, *Sales*, § 552; Bowen v. Burk, 13 Pa. 146; Merrill Furniture Co. v. Hill, *supra*; Oester v. Sitlington, 115 Mo. 247, 21 S. W. 820. As to such a waiver of immediate payment, see also note to Fishback v. Van Dusen, 24 Am. L. Reg. N. S. 514.

In the present case every circumstance tends to show that the vendor did not waive immediate payment of the price of the goods. The purchaser was a stranger to him, and there was no intention to deliver the goods upon his credit, but plaintiff expected to receive the cash upon the presentation of the check, and evidently would not have parted with the goods otherwise. The delivery was conditional, and defendant acquired no title. The judgment is affirmed.

OHIO SUPREME COURT.

BALTIMORE & OHIO SOUTHWESTERN RAILWAY COMPANY, *Pf.* in Err.,
v.

HENRY J. GOOD et al.

(82 Ohio St. 278, 92 N. E. 435.)

Sale — cash — title — when passes.

1. In sales of specific chattels for cash on delivery, delivery and payment are concurrent acts, and delivery in the expectation of receiving immediate payment is not absolute, but conditional, and, when there is no waiver of payment, the property does not pass until the price is paid.

Same — bona fide purchaser from vendee — title.

2. In a sale for cash on delivery, when the goods are in the custody of a bailee, and the vendor, without requiring payment, gives to

the vendee a delivery order directing the bailee to deliver the goods to the vendee or to his order, intending to transfer both the property and possession, and the bailee pursuant to the order delivers the goods to a bona fide purchaser from the vendee, the delivery is, as to the innocent purchaser, absolute, and not conditional, and the title of such subvendee is good against the seller, although the sale between the vendor and vendee was fraudulent.

Same — facts — conclusion.

3. G. sold a car of oats to B., terms cash on delivery, the weight to be ascertained and certified by the official weigher of the Cincinnati Chamber of Commerce, of which both were members. G., at the time of sale, gave B. a delivery order on the carrier in whose custody the car was, to deliver the car to B. or to B. or order. B. sold the oats to M., and transferred to him the delivery order. M. sold the oats to G. B., who surrendered the order to the carrier and ordered the car turned over to another carrier, which was done. M., on account of the sale to him, paid B. \$400, and G. B. paid M. \$250. B. was insolvent, and G. replevied the car in the possession of the carrier who had received it for G. B. Held, that G. was not entitled to recover the car.

(June 7, 1910.)

ERROR to the Circuit Court for Hamilton County to review a judgment reversing a judgment of the Court of Common Pleas in defendant's favor in an action of replevin to recover possession of certain grain. Reversed.

Statement by Summers, Ch. J.:

In September, 1905, a car of oats was shipped to Good & Company at Cincinnati with a sight draft attached to the bill of lading. Upon arrival of the car in Cincinnati on the Cincinnati, Hamilton, & Dayton Railroad, the consignee paid the draft and surrendered the bill of lading to the railroad company. The official grain inspector for the Cincinnati Chamber of Commerce graded the car, and delivered a sample of the oats to the consignee, who, on the same day, sold the oats on "change" to A. Bender at 30 cents per bushel, and gave him the following written delivery order:

To the Cincinnati, Hamilton, & Dayton Railroad Company:—

Please deliver to the order of A. Bender or A. Bender car 1427 oats consigned to us. Good & Company.

On the same day Bender sold the car of oats to Maguire & Company at 29½ cents, and turned the delivery order over to them and received their check for \$400 and something over,—the exact amount is not given. The following day Maguire & Company sold the oats to Gale Brothers at 30 cents, and gave them the delivery order and received

Headnotes by the COURT.

Note.—See note to Johnson v. Iankovetz, ante, 709.
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their check on account for \$250. Gale Brothers surrendered the delivery order to the Cincinnati, Hamilton, & Dayton Railroad Company, and ordered the car turned over to the plaintiff in error, the Baltimore & Ohio Southwestern Railway Company, to be placed at their elevator, and the Cincinnati, Hamilton & Dayton Railroad Company accepted the delivery order and placed the car in the yards of the Baltimore & Ohio Southwestern Railway Company. At the time of the sale Bender was insolvent, and, for the purposes of this case, it is assumed that the purchase by him was fraudulent. After the car had been turned over to the Baltimore & Ohio Southwestern Railway Company, and before it had been placed by that company at the elevator of Gale Brothers, Good & Company replevied the car from the railroad company. The jury found against Good & Company, and on error in the circuit court that court reversed the judgment, and upon the undisputed facts entered judgment for Good & Company.

Mr. H. D. Peck, for plaintiff in error:

Before the issuance of the writ of replevin, the rights of Gale Brothers as bona fide purchasers without notice and for value had attached, so that the grain could not be retaken by Good.

Eaton v. Davidson, 46 Ohio St. 362, 21 N. E. 442; Hamet v. Letcher, 37 Ohio St. 358, 41 Am. Rep. 519; Dean v. Yates, 22 Ohio St. 396.

Mr. L. W. Goss also for plaintiff in error.

Messrs. Kelley & Hauck for defendants in error.

Summers, Ch. J., delivered the opinion of the court:

All the parties to the sale were members of the Cincinnati Chamber of Commerce. The sale was there made, and was subject to the following rule of the organization governing purchases of grain: "Rule 7. Section 1. All purchases of grain, unless otherwise agreed upon, are understood to be for cash and to be paid for on delivery."

A witness for the plaintiffs testified that the manner of selling grain in car-load lots on "change" is as follows: The official grain inspector of the chamber of commerce grades the grain in the car in the railroad yards, and delivers a sample of the uniform grade of the grain in the car to the consignee or owner, who then exhibits the sample on "change," and when he makes a sale he delivers to the purchaser the sample and a delivery order like that set out in the statement of facts, to the carrier to deliver the car to the purchaser or order, and the purchaser then orders the car to

his elevator or switch, or wherever he wishes to unload it, and as it is being unloaded it is weighed by the official weigher, who gives the seller a certificate of the weight, and the seller then makes a bill to the buyer at the agreed price, which the buyer pays in cash upon its receipt. A witness for the defendant testified on cross-examination that on "change," in the trade, a delivery of the order is considered a delivery of the property, and that when the order is delivered it is customary for the buyer to pay 80 per cent of the price, according to the estimated weight of the car, and that the balance is paid upon receipt of a bill with the certificate of the official weigher attached.

It is undisputed that settlement was to be based upon the certificate of the weigher, and the circuit court based its decision upon the assumption that, as under the rule sales were cash on delivery, and as under the usage the weight was to be ascertained as the car was unloaded, delivery could not be complete until the weight was certified. It is elementary in a sale of specific chattles that neither payment nor delivery is essential to the passing of title. The passing of the title may be conditional on payment; but generally in such sales the title passes; but delivery and payment are immediate and concurrent acts, and if delivery be made in expectation of immediate payment, and such payment is not made, the seller may reclaim the goods. When the goods must be counted, weighed, or measured in order to identify them, the property does not pass; but when they are specific, and these acts are to be done merely to ascertain the sum to be paid, the title may pass, although the goods have not been delivered. The passing of the title depends upon the intention. If delivery has not been made, or if made in order that the price may be ascertained, the presumption is that the property has not passed. If the sale is for cash, or cash on delivery, and delivery is made, the presumption is that it was made in expectation of immediate payment, and that the delivery was conditional; and the same is true and the presumption stronger when weighing is to be done by the buyer. In Wabash Elevator Co. v. First Nat. Bank, 23 Ohio St. 311, there was a sale on "change" between two commission men of 5,000 bushels of corn. The seller sent by a clerk warehouse receipts to the buyers in expectation of immediate payment. The buyers accepted the receipts and informed the clerk that they would credit the seller with the price. The seller would not consent to this, and the buyers refused to return the receipts. The court held that a delivery with the ex-

pectation of receiving immediate payment is not absolute, but conditional until payment is made, and, when there is no waiver of payment, no title vests in the purchaser until the price is paid. In *Hodgson v. Barrett*, 33 Ohio St. 63, 31 Am. Rep. 527, the sale was of a barge load of coal, one half cash. The coal was delivered and a check given for the cash. The check went to protest, and the seller replevied the coal, and it was held: "(2) Where goods are sold for cash, delivery and payment are concurrent conditions of the sale; and a delivery made in expectation of immediate payment is conditional only; so that, if payment be refused, the vendor may reclaim the goods. (3) Where payment is made by a check drawn by the purchaser on his banker, this is a mere mode of making a cash payment, and not the acceptance of a security. Such payment is conditional only, and if the check upon due presentation is dishonored, the vendor's right to retake the goods from the purchaser remains in full force."

But payment as a condition may be waived by the seller, and if it is, the property vests in the buyer. All attending circumstances may show that the delivery was not conditional, even when weighing is necessary to ascertain the price, and that the intention was to transfer both the title and possession, and to trust the buyer to pay when the price is ascertained. In the present case no presumption of waiver would arise merely from the delivery of the car to the buyer, for by the rule of the Chamber of Commerce the sale was for cash on delivery, and the sum to be paid could not be ascertained until the oats were weighed, which by the usage on "change" was to be done by the official weigher as the car was unloaded, so that delivery would not be complete until the oats were weighed. But if by the usage on "change" the delivery of a delivery order was the delivery of the oats, and 80 per cent of the estimated price was then payable, and the balance when the weight was officially certified, then Good & Company waived payment in cash on delivery, when they gave the delivery order without the cash payment, and the 80 per cent either was payable on demand or credit, for the whole price was extended to Bender until the weight was officially certified, and the title of an innocent subvendee from Bender would be good against Good & Company. And, independently of the usage last referred to, when it is considered that the sale was made on "change" by one dealer to another dealer, and not to a consumer, and that a delivery order was given directing the delivery not merely to the buyer,

but to him or to his order, the conclusion must be that Good & Company assented to a sale and delivery of the oats by Bender, and that it was the intention of Good & Company, by the sale and the giving of the delivery order, to transfer both the title and the unconditional possession of the property to Bender.

The transaction, though fraudulent on the part of Bender, was not void, but only voidable. If the delivery without payment was merely a waiver of immediate payment, or an extension of credit, it may be that, as between the vendor and the vendee, the vendor could have protected himself, for it is an implied condition in a sale of credit that the buyer shall keep his credit good. *Diem v. Koblitz*, 49 Ohio St. 41, 34 Am. St. Rep. 531, 29 N. E. 1124. Good & Company, as against Bender, might have repudiated the transaction; but they could not do so at the expense of an innocent subvendee. "When a vendee obtains possession of a chattel with the intention by the vendor to transfer both the property and possession, although the vendee has committed a false and fraudulent misrepresentation in order to effect the contract or obtain the possession, the property vests in the vendee until the vendor has done some act to disaffirm the transaction; and the legal consequence is that, if before the disaffirmance the fraudulent vendee has transferred either the whole or a partial interest in the chattel to an innocent transferee, the title of such transferee is good against the vendor." *Kingsford v. Merry*, 11 Exch. 577; *Pease v. Gloahec*, L. R. 1 P. C. 219.

It is true that a delivery order, unlike a bill of lading, is not considered a symbol of the goods so that a transfer of it is constructively a delivery of the goods, but is considered merely a request in writing by the owner of goods to his agent or bailee having custody of the goods, to deliver them as therein directed; and that the seller may revoke the order against an innocent subvendee of the goods and transferee of the order. But when the order has been executed and the goods have been delivered to an innocent subvendee, or the bailee has attorned to him, it is too late to revoke the order. As to him there is nothing to revoke; the delivery has been actually or constructively made, and the goods are no longer in the possession of the seller, but in the possession of the subvendee or in the possession of his agent. In *Ker & Butterworth's* 5th edition of *Benjamin on Sales* (471), it is said, in substance, that in this country, as well as in England, purchases by an insolvent buyer who does not intend to pay are treated as voidable, and not void, and that, while in some of the states

the transaction is treated as absolutely void, the rights of innocent purchasers from a fraudulent buyer are protected, and that it is of little practical importance whether the protection is afforded on the ground that the original contract of sale is valid until disaffirmed, or whether the preference of the right of an innocent third person is based upon the principle that, when one of two innocent parties must suffer from the fraud of a third, the loss shall fall on the one who enabled the third party to commit the fraud.

It follows that the correct result was reached in the Court of Common Pleas, and that the Circuit Court was in error in reversing the judgment, and the judgment of the Circuit Court is reversed, and the judgment of the Court of Common Pleas is affirmed.

Spear, Davis, Shauck, and Price, JJ., concur.

WASHINGTON SUPREME COURT.

RE N. W. BOLSTER.

(— Wash. —, 110 Pac. 547.)

Deposition — power to compel witness to attend.

1. A court is empowered to compel a witness to produce papers before a commissioner authorized to take depositions, by statutes providing that a witness may be required to attend and give evidence before the court and bring with him required papers, and that he may be required to appear and give his deposition before any officer authorized to take depositions, in like manner as he may be compelled to attend as a witness before any court, and authorizing the court to compel attendance before the commissioner, and providing that, in case of failure to attend before the commissioner, the latter shall ask an order to compel him to attend and testify.

Evidence — corporate books — privacy.

2. The officers of a corporation cannot refuse to produce its books in court for inspection, in response to a subpoena in a cause in which the matter contained in them is material, on the theory that the privacy with which its business is carried on is a trade secret, which it is entitled to protect from the inspection of strangers.

(August 26, 1910.)

A PPEAL by applicant from an order of the Superior Court for King County dismissing a proceeding to compel certain corporate officers of the John J. Sesnon Company to produce its books before ap-
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applicant as commissioner, for the taking of depositions for examination. Reversed.

The facts are stated in the opinion.

Messrs. Farrell, Kane, & Stratton and Ira Campbell, for appellant:

The statutes empowered the court to compel the officers to produce their corporate books.

State v. Bourne, 21 Or. 218, 27 Pac. 1048; Burns v. Superior Court, 140 Cal. 1, 73 Pac. 597; Re Edison, 68 N. J. L. 494, 53 Atl. 696; Re Shephard, 3 Fed. 12; 3 Jones, Ev. §§ 671, 801.

A party is not relieved from producing books and documents merely because they are private.

3 Jones, Ev. §§ 729, 789; Burnham v. Morrissey, 14 Gray, 226, 74 Am. Dec. 676; Re Dunn, 9 Mo. App. 255; Taylor v. Milner, 11 Ves. Jr. 41; Johnson Steel Street-Rail Co. v. North Branch Steel Co. 48 Fed. 191; First Nat. Bank v. Hughes, 6 Fed. 741; Missouri-American Electric Co. v. Hamilton-Brown Shoe Co. 91 C. C. A. 251, 165 Fed. 285; First Nat. Bank v. Abbott, 91 C. C. A. 538, 165 Fed. 855.

The burden is upon Mathews to show that the books sought contain trade secrets which would be divulged by an examina-

Note. — Refusal to produce books or papers in response to subpoena, upon ground that they contain private matter.

This note is confined to cases where the refusal to produce books or papers is based upon the ground that they are private, or, though the portions sought are not private, that their production will lead to the disclosure of private matter found in close connection therewith. Other grounds of refusal are omitted, such as, that the person seeking information is engaged in a fishing expedition, that the books and papers contain incriminating matter, that the information sought is privileged, because consisting of confidential communications between attorney and client, physician and patient, etc., that the documents sought relate to the title to witness's lands, etc.

It is a general rule of law that a witness possessing knowledge of facts material to the vindication of the rights of another may be compelled by judicial process to appear and give evidence in behalf of that other party, notwithstanding the evidence thus coerced may uncover the witness's private business. See First Nat. Bank v. Hughes, 6 Fed. 741. No attempt has been made to collect the authorities for this general proposition.

This rule is also generally held applicable when the information sought is contained in books and papers. Accordingly, it has been held that it is no ground for the refusal of a witness to produce books and papers when required by lawful authority, that they are private. First Nat. Bank v.

tion of them; and the court must not only find from such evidence that the books contain trade secrets which would be divulged, but that the evidence is plainly privileged.

Vulcan Detinning Co. v. American Can Co. 72 N. J. Eq. 387, 12 L.R.A.(N.S.) 102, 67 Atl. 339.

The law recognizes no absolute privilege for trade secrets.

William v. Prince of Wales Life, etc., Co. 23 Beav. 238; *Finance Co. v. Charleston, C. & C. R. Co.* 48 Fed. 188; *Wertheim v. Continental R. & Trust Co.* 21 Blatchf. 246, 15 Fed. 716; *Marion Nat. Bank v. Abell*, 88 Ky. 428, 11 S. W. 300; *Rice v. Rice* (N. J. Eq.) 25 Atl. 321; 3 Wigmore, Ev. § 2212.

Hughes, 6 Fed. 737, appeal dismissed for want of jurisdiction in 106 U. S. 523, 27 L. ed. 268, 1 Sup. Ct. Rep. 489; *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* 48 Fed. 191; *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175, affirmed in 52 L.R.A. 734, 45 C. C. A. 354, 106 Fed. 396, where this question was not involved; *Burnham v. Morrissey*, 14 Gray, 226, 74 Am. Dec. 676; *United States v. Terminal R. Asso.* 148 Fed. 486; *Re Dunn*, 9 Mo. App. 255; *Elder v. Bogardus*, 1 Edm. Sel. Cas. 110; *Boston & M. R. Co. v. State* (N. H.) — L.R.A.(N.S.) —, 77 Atl. 996.

Thus, under a state statute authorizing an auditor, in case he has reason to believe that any person is evading his personal property tax, to issue compulsory process, require the attendance of witnesses, and examine them on oath regarding the matter, and if any person so summoned shall neglect or refuse to attend or to answer lawful questions, to apply to the probate judge to issue a subpoena to the contumacious witness to appear and give evidence before said probate judge, and, on such witness's refusal to appear or give evidence, to commit the contumacious witness for contempt, an officer, even of a national bank, may be compelled to appear and produce the books of the bank, in order that the auditor may determine whether any person had on deposit with the bank any money subject to taxation which had not been returned by the owners, although the bank objects that the enforced exhibition of its books will expose its business, lessen public confidence, diminish its deposits and consequent profits, and impair the value of its franchise; nor is the bank protected by a section of the national banking law, providing that no national banking association shall be subjected to any visitatorial powers other than such as are authorized by that law, or are vested in the courts of the country, since the exercise of the power conferred by such state statute is not an exercise of a visitatorial power. *First Nat. Bank v. Hughes*, 6 Fed. 739.

A Federal court cannot in such case enjoin an examination by a state court. *Ibid.* 29 L.R.A.(N.S.)

Mr. William H. Gorham, for respondent:

A subpoena duces tecum will not be granted unless clear affirmative statutory power is shown.

Re Strauss, 30 App. Div. 610, 52 N. Y. Supp. 392.

A witness has the privilege to refuse or produce documents called for, which will disclose trade secrets.

Crocker-Wheeler Co. v. Bullock, 134 Fed. 241; *United States v. Terminal R. Asso.* 154 Fed. 268; *United States v. Terminal R. Asso.* 148 Fed. 486.

Fullerton, J., delivered the opinion of the court:

On March 5, 1910, the superior court of

So, in a suit for infringement of a patent, in which the defense is lack of novelty, an officer of a corporation, not a party to the suit, may be compelled to produce drawings tending to show that the patented article was in use before the patent was obtained, though the corporation objects that thereby valuable business secrets regarding its methods of manufacture, obtained at great labor and expense, will be disclosed, causing it great loss. *Johnson Steel Street-Rail Co. v. North Branch Steel Co. supra.*

No organization, or the members thereof, can withhold the evidence of contracts made by it or them with other persons or the public, on the ground that it is a secret order, and that the production of the books which contain the evidence will expose its secrets; nor can such organization or persons determine the legal effect of its resolutions pertaining to the matter of the contract. *National Fertilizer Co. v. Holland*, 107 Ala. 412, 54 Am. St. Rep. 101, 18 So. 170.

A statute providing for the punishment of any telegraph agent who makes known, or causes to be made known, the contents of any despatch, etc., "or in any other way unlawfully expose another's business or acts," etc., does not apply to testimony in a court of justice or to the production of telegrams for use therein; and an agent duly subpoenaed may be compelled to produce such telegrams. *Henisler v. Freedman*, 2 Para. Sel. Eq. Cas. 274.

A telegraph company not a party to the action may be compelled to produce telegrams, or their copies, sent over its line. *United States v. Babcock*, 3 Dill. 566, Fed. Cas. No. 14,484; *Ex parte Brown*, 72 Mo. 83, 37 Am. Rep. 426.

A postmaster cannot refuse to produce in court, in answer to a subpoena, the record of his office, containing the names of renters of postoffice boxes, on the ground that post-office departmental regulations forbid. *Rice v. Rice* (N. J. Eq.) 25 Atl. 321.

A party to a suit cannot refuse to produce private letters from a stranger, though marked "private and confidential," and though the writer refuses to consent to

the state of California in and for the city and county of San Francisco, in a cause pending therein, issued a commission authorizing and empowering one N. W. Bolster, a notary public of the state of Washington, residing at the city of Seattle, to take the depositions of E. J. Mathews and one T. A. Davies, president and vice president, respectively, of a corporation known as the John J. Sesnon Company, and to require them to produce such books and papers of the corporation as should be in their possession or under their control, that the same might be examined touching the matters at issue in the cause mentioned. On the receipt of the commission, the commissioner caused a subpoena to be issued to the witness E. J. Mathews, requir-

ing the witness to appear before him at a certain time and place to testify pursuant to the commission, and also to bring and produce before the commissioner certain books, papers, and documents belonging to the John J. Sesnon Company. The witness obeyed the subpoena in so far as to attend in person, but refused to bring in the books and other documents described in the subpoena. The commissioner thereupon applied to the superior court of King county asking that court to require the witness to attend before him with the documents mentioned. The court, however, after a hearing, refused to grant the application, and dismissed the proceedings on the ground that the documents sought were "trade secrets of the John J. Sesnon

their production; but the party seeking their production will be compelled to give an undertaking not to use them for any collateral object. *Hopkinson v. Burghley*, L. R. 2 Ch. 447.

In *Williams v. Prince of Wales Life, etc.* Co. 23 Beav. 338, it was held that a plaintiff obtaining information from the production of documents in the defendant's possession is not at liberty to make it public, and that an injunction, if necessary, will be granted to restrain; and, as the facts in that case showed that there was danger to the defendant's business from the publication of the contents of documents sought, an order for their production for inspection by plaintiff was made conditional upon the plaintiff's undertaking not to make public, or communicate to any stranger to the suit, the contents of such documents, and not to make them public in any way.

The early rule in New York seems to be a matter of some uncertainty. Thus, it has been held that the court will not, on motion, compel a third person in no way interested in the suit, to produce a private paper of his own for the inspection of a party. *Davenbakh v. McKinnie*, 5 Cow. 27 (deed in chain of title of a plaintiff in an action of waste, in possession of grantee in the deed). The court said: "It is aimed against a third person not interested in the cause, and seeks to pry into his private papers. If the plaintiff deem it material, he must compel its production by subpoena duces tecum, or in some other way than by motion."

It was held in *Bank of Utica v. Hillard*, 5 Cow. 419, that in an action where a bank is a party, the opposite party cannot compel the cashier to produce the books and papers by a subpoena duces tecum. This was placed on the ground that the effect would be to compel a person to produce evidence against himself. The matter is now regulated by statute.

In an *ex parte* action by a county to re-establish lost records, an abstractor cannot be compelled by a subpoena duces tecum to produce his abstract books, the financial

value of which consists largely in their privacy and secrecy, where the pleadings do not allege or set out anything whatever as the specific contents to be proved, except generally the contents of a deed book of a certain number covering a certain period of time. *Ex parte Calhoun*, 87 Ga. 359, 13 S. E. 694. The court said: "Most certainly there was no warrant in the prior law for using it as a means to compel discovery of the contents of books or documents, with a view to establish copies of them to stand in lieu of the originals. It could be used to bring in evidence to show that an alleged copy was a true copy; that is, it could be used to obtain evidence, as contradistinguished from discovery. To verify what is alleged is a legitimate use of the subpoena, but, without anything for verification being alleged, to employ it for ascertaining what is to be verified, and at the same time for verifying the matter thus discovered, is giving it a double operation, the first half of which is illegitimate. The difference is that between making a statement and then fishing with the subpoena for proof of it, and fishing in silence for proof, treating the proof itself as supplying the statement to be established."

A bank cannot, in an action to which it is not a party, in advance of the trial, and not in connection with a deposition of one of the officers, be compelled to produce its books for the inspection of one of the parties, to enable him to prepare his case for trial. *Marion Nat. Bank v. Abell*, 88 Ky. 428, 11 S. W. 300.

Necessity of relevancy.

A party has no right, and the court has no power, to compel the production, either in court or before a magistrate, of the private papers of a witness which are not relevant and material to the case. *Daniel v. Goodyear Shoe Machinery Co.* 128 Fed. 753; *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241; *Victor G. Bloede Co. v. Joseph Bloedcroft & Sons Co.* 98 Fed. 175 (order for inspection before trial, affirmed in 52 L.R.A. 734, 45 C. C. A. 354, 106 Fed. 396, where the

Company, and as such . . . privileged." This appeal is from the order of dismissal.

While the trial judge seems not to have rested his decision on that ground, it is contended in this court on behalf of the witness that the superior court was without authority to make the order requested. But without following the argument in detail, we are satisfied that the statutes are ample in this respect, even if it be conceded that the court has no such inherent power. By the Code (Rem. & Bal. Code, § 1216) it is provided that a witness may be compelled to appear and testify before the courts of this state, by means of a subpoena issued out of the court, and served upon him, and the subpoena may require not only the personal attendance of the

witness to whom it is directed, but may also require the witness to bring with him any books, documents, or things under his control. By another section it is provided that any witness may be subpoenaed to appear and give his deposition before any officer authorized to take depositions, at any place within 20 miles of the abode of the witness, "in like manner as he may be subpoenaed and compelled to attend as a witness in any court." Rem. & Bal. Code, § 1235. The sections authorizing the court to compel the attendance of the witness before the commissioner are the following:

"Sec. 1236. The superior court shall have power to compel the attendance of witnesses, within this state, before notaries

point was not involved; *Elder v. Bogardus*, 1 Edm. Sel. Cas. 110.

Any practice which sanctions such a proceeding is unwarranted, and an infringement upon a fundamental personal right guaranteed by the Federal Constitution. *Dancel v. Goodyear Shoe Machinery Co.* supra.

Before compelling the production of private books and papers by a subpoena duces tecum, the court will sufficiently inquire into the matter to determine if the evidence appears to be material, and, if not satisfied on this point, will decline to issue the writ. *Ibid.*

A witness should not be compelled to disclose trade secrets embedded in documents in his possession, when their disclosure will be prejudicial to him or his company, and they are not relevant to the controversy in the suit or action in which he is a witness, or otherwise admissible in evidence therein. *Crocker-Wheeler Co. v. Bullock*, 134 Fed. 241.

Where a subpoena duces tecum is issued from a court in one Federal district, to obtain evidence for use in a trial in another Federal district, and the witness refuses to produce the books and papers asked, because they are irrelevant and contain private matter whose disclosure will be prejudicial to himself, the court issuing the subpoena will determine the question of relevancy before requiring an answer. *Ibid.*

The constitutional provision that the charter of the city of St. Louis shall be "in harmony with, and subject to, the Constitution and laws of Missouri," is not violated by an ordinance passed in substantial compliance with the charter, which allowed the legislative branch of the city government, or a committee of the same, to issue writs of subpoena duces tecum, compelling the production of private books and papers, when making investigation of any question or matter on which it might lawfully take action, without a preliminary showing that the documents sought are material, although the general laws of the state so provide in case of suits between parties. *Re Dunn*, 9 Mo. App. 255.

The court will not compel the officers of 29 L.R.A. (N.S.)

a private corporation to allow a party to inspect its corporate records and documents, when the latter desires merely to gratify an idle curiosity by prying into its affairs. *Phoenix Iron Co. v. Com.* 113 Pa. 563, 6 Atl. 75; *Victor G. Bloede Co. v. Joseph Bancroft & Sons Co.* 98 Fed. 175. Cases dealing with right of stockholder to inspect books of corporation not in connection with any suit are not here considered.

—sealing irrelevant portions.

The court may allow a witness who has been ordered to produce his private books and papers, to seal up or cover those portions not relevant to the controversy, so as to protect their privacy. *Pynchon v. Day*, 118 Ill. 9, 7 N. E. 65 (ledger of a defendant stockbroker); *Titus v. Cortelyou*, 1 Barb. 444; *Elder v. Bogardus*, supra; *Carver v. Pinto Leite*, L. R. 7 Ch. 94.

But if the adverse party can show any fair grounds for supposing any part has been sealed up which is material, the court may compel it to be opened. *Titus v. Cortelyou*, supra.

—other protection of irrelevant portions.

It was held not error for the court to allow a defendant stockbroker who had been ordered to produce his journal containing, in addition to records of transactions with plaintiff, records of many other irrelevant transactions with third persons, to refuse to allow plaintiff to inspect the whole journal, but in lieu thereof to allow the defendant to make a verified transcript of the record of transactions with the plaintiff, accompanied by a certificate of the clerk of court that he had examined the journal and found that the transcript contained all the items. *Pynchon v. Day*, supra.

Danger of civil suit.

A witness not a party may be compelled to produce a document material to the issue, though it may subject him to a civil suit. *Doe ex dem. Egremont v. Date*, 3 Q. B. 609; *Bull v. Loveland*, 10 Pick. 9; *Bos-*

public, justices of the peace, or any other person authorized by the laws of this state to take depositions, in causes pending in any court of the state, or in any court of any other state, or in any court of the United States, or in any court of a foreign country.

"Sec. 1237. The officer before whom the deposition is to be taken, in case of the refusal of any witness to attend or testify, shall report to the superior court in and for the county in which the witness resides, or is found, by petition, that due notice has been given of the time and place of taking the depositions, and that the witness has been summoned in the same manner that witnesses are now summoned to appear and testify in the superior court of this state; and the fees and mileage of the witness has been paid or tendered to the witness, for his attendance and testimony, and that the witness has failed and refused to attend or testify before such officer, in the cause mentioned in the notice and the subpoena; and ask an order of the court compelling the witness to attend and testify before such officer."

It is argued that these sections may authorize the court to compel a witness to appear and give his oral deposition before the officer therein named, but do not authorize the court to compel the witness to bring with him books and documents under his control, no matter how pertinent or material to the inquiry such books and documents may be. But we think this a too narrow construction of the statute. Manifestly the sections quoted were intended to make effective the previous sections of the statute, and these, as we have seen, authorize officers empowered to take depositions to issue subpoenas requiring the production of books and other documents.

The objection that the documents sought are privileged as trade secrets of the corporation seems to us to be equally without foundation. The term "trade secret" as it is usually understood means a secret formula or process, not patented, known only to certain individuals who use it in compounding or manufacturing some ar-

ticle of trade having a commercial value. It is rarely, if ever, used to denote the mere privacy with which an ordinary commercial business is carried on. Yet it is in this latter sense the term seems to have been used in the finding of the trial court, as we find nothing in the record to indicate that anything more than such matters as are usually learned by the examination of the books of an ordinary business concern would be learned by an examination of the books of the corporation here in question. But a corporation or other person keeping books is not relieved from producing them when they contain matters material to an issue, merely because they are private. A witness can be compelled to testify orally to private affairs connected with his business when material, and his books and documents stand on no higher plane. As was said in *Wertheim v. Continental R. & Trust Co.* (C. C.) 21 Blatchf. 246, 15 Fed. 716: "It may be inconvenient, and sometimes embarrassing, to the managers of a corporation, to require its books and papers to be taken from its office and exhibited to third persons, but it is also inconvenient and often onerous to individuals, to require them to do the same thing. Considerations of inconvenience must give way to the paramount right of litigants to resort to evidence which it may be in the power of witnesses to produce, and without which grave interests might be jeopardized, and the administration of justice thwarted." See *Johnson Steel Street-Rail Co. v. North Branch Steel Co.* (C. C.) 48 Fed. 191; *Crocker-Wheeler Co. v. Bullock* (C. C.) 134 Fed. 241.

The order appealed from is reversed and the cause remanded, with instructions to enter an order requiring the witness to appear before the commission and produce the required documents, if they are within his control.

Rudkin, Ch. J., and Chadwick and Morris, JJ., concur.

ton & M. R. Co. v. State (N. H.) — L.R.A. (N.S.) —, 77 Atl. 996.

A tradesman may be compelled to produce his books, though they contain admissions against himself. *Holtz v. Schmidt*, 2 Jones & S. 28.

A surety on a bond is bound to produce books of his deceased principal in his possession, although the books when produced would furnish evidence against him in a civil suit. *Hawkins v. Sumter*, 4 Desauss. 29 L.R.A. (N.S.).

Eq. 102; *Hawkins v. Sumter*, 4 Desauss. Eq. 446.

Cases like *Pickering v. Noyes*, 1 Barn. & C. 263, dealing with right of party or witness to refuse inspection of his title deeds, are not here included.

On general doctrine as to furnishing evidence against one's self in civil action, see note to *Levy v. Superior Court*, 29 L.R.A. 815.

R. A. E.

ARKANSAS SUPREME COURT.

STATE OF ARKANSAS

v.

ROY LISMORE et al

(— Ark. —, 126 S. W. 855.)

Disorderly house — official sanction — liability of officer.

1. Members of a city council who pass an ordinance providing for the licensing of bawdyhouses do not become participants in the keeping of houses kept under the resolution, so as to render themselves liable to punishment as such keepers.

Judgment — former conviction — offenses within time covered by prior prosecution.

2. A conviction of keeping a bawdyhouse, upon an instruction authorizing conviction if the jury find that accused had kept such house at the place alleged within twelve months before the filing of the information, bars another prosecution for the maintenance of such house at the place alleged within the twelve months, although on different days from those specified in the first information.

(March 14, 1910.)

CCROSS APPEALS from judgments of the Circuit Court for Ouachita County convicting defendant Lismore, and acquitting under affirmative instructions defendants Agee et al., of maintaining a bawdyhouse; defendant Lismore appealing from the judg-

Note. — Unlawfully issuing license for disorderly house as keeping the same.

As the offense of maintaining a disorderly house is a misdemeanor, all persons aiding directly or indirectly in its perpetration are indictable as principals. *Clifton v. State*, 53 Ga. 241; *Kessler v. State*, 119 Ga. 301, 46 S. E. 408.

And the keeping of a bawdyhouse being a public offense, every person who voluntarily aids in establishing such a nuisance should be deemed guilty of a misdemeanor. *Ross v. Com.* 2 B. Mon. 417; *Harlow v. Com.* 11 Bush, 610.

The offense of keeping a disorderly house is a common-law offense and a misdemeanor, and the rule that those who aid and abet, as well as the actual participants, are all principals, which applies to misdemeanors in general, applies to that offense. *Com. v. Kellar*, 8 Ky. L. Rep. 537.

If one participates with others in conducting a place in a manner obnoxious to the criminal laws, and lends his aid to maintaining it, the law marks him with guilt as a principal offender. *Engeman v. State*, 54 N. J. L. 257, 23 Atl. 679.

If the defendant aided and assisted others in committing the offense charged in the 29 L.R.A. (N.S.)

ment of conviction, and the state appealing from the judgment of acquittal. Judgment of conviction reversed. Judgment of acquittal affirmed.

The facts are stated in the opinion.

Messrs. Powell & Taylor and T. W. Hardy for defendant Lismore.

Messrs. H. L. Norwood, Attorney General, and William H. Rector for the State.

Battle, J., delivered the opinion of the court:

The appeals in the above-styled cases grow out of the same trial, had on the 5th day of November, 1909, under the same indictment. It is charged in the indictment that Roy Lismore, F. L. Agee, Ed Harper, J. G. McDonald, and E. H. Carson kept and maintained a bawdyhouse in the city of Camden, in the state of Arkansas, on the 2d day of August, 1908, and on divers other days between that day and the 10th day of April, 1909. The defendants pleaded not guilty to the indictment, and Roy Lismore, in addition to the plea of not guilty, filed a plea of former conviction of the same offense, verifying it by the record.

There was no evidence tending to prove that Carson, Harper, Agee, and McDonald were guilty of the crime charged. They were aldermen and members of the city council of Camden, which passed a resolution, the effect of which, if enforced, would have been to license the keeping of bawdyhouses in Camden by anyone upon the month-

indictment, he is equally guilty in the eye of the law with those who actually hired and controlled the house. *Com. v. Gannett*, 1 Allen, 7, 79 Am. Dec. 693.

While it might be very plausibly argued that the members of the city council, in passing an ordinance which purported to have the effect of licensing the keeping of disorderly houses, were aiding and abetting therein, so as to be liable within the rule laid down in the foregoing cases, yet it is to be noted that in each of the above cases the defendant did in fact have some more or less active part in conducting the house. A search has failed to reveal any other case in which a public officer was charged with the crime of conducting a disorderly house merely because he had unlawfully assumed to issue a license to another for that purpose.

There are undoubtedly cases in which public officers have been charged with conniving at the existence of disorderly houses or with failure to suppress them, but in such cases the gist of the charge was the failure to perform their duty, and not, as in *STATE v. LISMORE*, actually keeping such a house. It is very clear that there is a marked distinction between the two charges.

W. M. G.

ly payment of \$25, and they voted for the resolution. But this was not sufficient to make them participants in the keeping of the bawdyhouses in Camden that were kept after the resolution was passed. They were properly acquitted.

The defendant Roy Lismore offered to prove the allegations made in her plea of former conviction. She offered to prove that an information accusing her of keeping a bawdyhouse on the 3d day of July, 1909, in the city of Ouachita, in this state, was filed against her before W. A. Perry, a justice of the peace of Ouachita county, Arkansas, and to prove by the record of the Ouachita circuit court that this accusation was taken by appeal from the court of W. A. Perry, a justice of the peace, and tried in that court before a jury; to prove the evidence adduced in the trial; to prove that the jury was instructed by the court that, if they believed from the evidence in the case, beyond a reasonable doubt, that the defendant Roy Lismore in Ouachita county, Arkansas, and within twelve months before the filing of the information, did unlawfully keep and maintain a certain bawdyhouse, etc., they should find her guilty, and assess her punishment at a fine of some amount not to exceed \$100, and by imprisonment in the county jail for some period of time not to exceed three months; and to prove the judgment of the court by competent evidence, and thereby that she was convicted by the jury, who assessed her punishment at a fine of \$100 and three months' imprisonment in the county jail, and the judgment was rendered accordingly; and the court refused to allow her to make any part of such proof, and on motion of the plaintiff struck from the record of the court her plea of former conviction of the same offense,—to all of which the defendant excepted, and reserved exceptions.

After hearing the evidence adduced for their consideration, the jury found the defendant Roy Lismore guilty, and assessed her punishment at a fine of \$100 and three months' imprisonment. The court rendered judgment according to the verdict, and the defendant Lismore appealed.

In *State v. Nunnally*, 43 Ark. 68 it is said: "The established rule is that the former conviction is a bar to a subsequent indictment for any offense of which the defendant might have been convicted under the indictment and testimony in the first case."

In the case in which appellant was charged with keeping a bawdyhouse, by the information filed before a justice of the peace, the state could have shown, if it had sufficient evidence, that the offense was

committed within twelve months before the 6th day of July, 1909, the date of the filing of the information, and for that purpose could have adduced all the evidence of the commission of such offenses within that time, and relied upon the whole proof for a single conviction. In that case the appellant could have been convicted of any one of the offenses proved, if any; and such a conviction would be a bar to a subsequent indictment for any offense of which the defendant might have been convicted upon the testimony under the information in the first case. *State v. Blahut*, 48 Ark. 34, 2 S. W. 190; *Bryant v. State*, 72 Ark. 419, 81 S. W. 234.

Under the instructions given by the court in the prosecution instituted by the filing of the information before the justice of the peace on the 6th day of July, 1909, the jury could have found the defendant guilty of any keeping of a bawdyhouse which they believed from the evidence adduced in this case, beyond a reasonable doubt, that the defendant committed in Ouachita county within twelve months before the filing of the information, a period of time extending from the 6th of July, 1908, to the 6th of July, 1909, and embracing the time within which the offense is charged in the indictment before us to have been committed; to wit, from the 2d day of August, 1908, to the 10th day of April, 1909. If such evidence proved that more than one of such offenses were committed in the twelve months, and the defendant was convicted of any one of them, then such conviction is a bar to an indictment for any of them. According to this test the evidence offered by the defendant and refused by the court was sufficient to entitle her to the submission of the issue, tendered by her plea of former conviction, to the jury for determination upon the evidence, and the court erred in striking same from the record.

The judgment in favor of Agee, Harper, McDonald, and Carson is affirmed, and the judgment against the defendant Lismore is reversed, and the cause is remanded for a new trial.

KANSAS SUPREME COURT.

STATE OF KANSAS EX REL FRED JACKSON, Attorney General,
v.

TOPEKA CLUB.

(82 Kan. 756, 109 Pac. 183.)

Statute — title — construction.

1. When a statute is attacked as being a violation of § 16 of article 2 of the Constitution.

Headnotes by GRAVES, J.

tution, for the reason that it is not within the title of the act, such title will be liberally interpreted for the purpose of upholding the law.

Same — scope.

2. It is not necessary that the title contain every detail of the entire act. It will be sufficient if it fairly indicates, though in general terms, its scope and purpose. "Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the body of the act without violating the constitutional inhibition."

Same — sale of intoxicants — regulation — social clubs.

3. Section 4371, Gen. Stat. 1909, being originally § 16, chap. 128, Laws 1881, the title to which enactment reads, "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors except for Medicinal, Scientific, and Mechanical Purposes, and to Regulate the Manufacture and Sale thereof for Such Excepted Purposes,"—is within such title, and is not unconstitutional.

(June 11, 1910.)

PETITION for a writ of quo warranto to oust, enjoin, and prohibit defendant from permitting intoxicating liquors to be stored or used on its premises and from permitting people to resort there for the purpose of drinking any such liquors. Granted.

The facts are stated in the opinion.

Messrs. F. S. Jackson, Attorney General, John Marshall, Charles D. Shukers, and J. J. Schenck, for the State:

The defendant social club and its members are violating the statute in keeping a place in which intoxicating liquor is received and kept for the purpose of use as a beverage.

State v. Nickerson, 30 Kan. 545, 2 Pac. 654; State v. Horacek, 41 Kan. 87, 3 L.R.A. 687, 21 Pac. 204; State v. Peak, 66 Kan. 701, 72 Pac. 237; Com. v. Baker, 152 Mass. 337, 25 N. E. 718; Com. v. Fleckner, 167 Mass. 13, 44 N. E. 1053; Barden v. Montana Club, 10 Mont. 330, 11 L.R.A. 593, 24 Am. St. Rep. 35, 25 Pac. 1042; Mohrman v. State, 105 Ga. 709, 43 L.R.A. 398, 70 Am. St. Rep. 74, 32 S. E. 143, 17 Am. & Eng. Enc. Law, p. 362; 23 Cyc. Law & Proc. p. 117; South Shore Country Club v. People, 228 Ill. 75, 12 L.R.A. (N.S.) 519, 119 Am.

Note.—As to applicability of liquor laws to social club dispensing liquors to members, see note to Manning v. Canon City, 23 L.R.A. (N.S.) 192, and earlier notes therein referred to.

The question whether a provision in a statute against giving away intoxicating liquors is embraced by a title prohibiting or regulating sales is treated in the note to State v. Fulks, 15 L.R.A. (N.S.) 430. 29 L.R.A. (N.S.)

St. Rep. 417, 81 N. E. 805, 10 A. & E. Ann. Cas. 383; State v. Neis, 108 N. C. 787, 12 L.R.A. 412, 13 S. E. 225.

Messrs. Charles Blood Smith and John Switzer for defendant.

Graves, J., delivered the opinion of the court:

This action was commenced in this court by the state to oust, enjoin, and prohibit the Topeka Club, a corporation, from permitting intoxicating liquors to be stored, used, kept, or delivered on its premises for the purpose of being used as a beverage, and from permitting people to resort there for the purpose of drinking intoxicating liquors as a beverage. The facts are substantially as follows: The Topeka Club has been an incorporated body for twenty years. Its members are stockholders, and consist of prominent business and professional men who reside in the city of Topeka, except a few of its members who are nonresidents of the city. The club owns a commodious building on Harrison and Sixth streets, which is provided with all the furniture and equipments necessary for the purposes of the club. The object of the club, as stated in its charter and as evidenced by the manner in which it has been conducted, is to furnish social enjoyment for its members and their families. It has a capital stock of \$100,000, which is divided into 500 shares of the value of \$200 each. The building has three floors, and is arranged so that the wives and families of the members can procure meals, and hold social entertainments, card parties, receptions, and other social functions there. This feature has been largely patronized. The clubhouse is conveniently located with reference to both the business and the residence portions of the city. It has parlors, dining rooms, reception rooms, card rooms, reading rooms, sleeping rooms, a kitchen, and every equipment for social entertainment. Meals are served regularly, and members constantly patronize the dining rooms, and a few members make the club their permanent home. The management of the entire house is in charge of a steward, who resides in the building, and is held responsible for the manner in which the club is conducted. There is a room in the building called the "locker room," where there are eighty-seven lockers furnished for the use and convenience of the members who desire them. These lockers are compartments 14 by 15 by 18 inches. They are built like a filing cabinet or case of pigeon holes. Each locker has a door and lock and key, the key being in the possession of the owner. The locker may be used by the owner in which to keep anything de-

sired. Its size and shape made it a very convenient place to keep bottles of beer, wine, whiskey, or other intoxicating liquors, such as are sometimes used as a beverage at banquets and other social functions. These lockers are used principally for the safe-keeping of such liquors. Only fifteen members have lockers. The club does not furnish or purchase the liquor for those who have lockers. The employees of the club have nothing whatever to do with the liquor, except that when a member wishes to use some of the liquor belonging to him, he furnishes a locker key to a waiter, who is authorized to procure the liquor and serve it. The glasses, ice, and other things used in serving the liquor, are the property of the club. The club does not receive anything, either directly or indirectly, for the liquors thus consumed. They belong to the member. At the time this action was commenced the club had 140 members.

Upon these facts the state presents a complaint, which in its charging part reads: "That the said defendant, the Topeka Club, in violation of the laws of the state of Kansas, and without authority therefor under its charter, as hereinbefore set out, now does exercise, and continuously for more than five years last passed has exercised, within the city of Topeka, Shawnee county, Kansas, the corporate right and franchise of keeping and maintaining a place where persons are and have been permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are and have been kept for delivery to such persons in violation of law, and does now exercise and continuously for more than five years last passed, within the city of Topeka, Shawnee county, Kansas, has exercised the corporate right and franchise of keeping a place for the storage of intoxicating liquors, to be there used as a beverage, and of keeping ice, glasses, tables, chairs, ice boxes, and other furniture, fixtures, and property to be used in using such intoxicating liquors as a beverage at the place kept and maintained by the said defendant, where persons are and have been permitted to resort for the purpose of drinking intoxicating liquors as a beverage, and where intoxicating liquors are and have been kept for delivery in violation of law, and that the said defendant does now exercise, and continuously for more than five years last passed has exercised, within the city of Topeka, Shawnee county, Kansas, the corporate right and franchise of keeping and maintaining a clubroom and place in which intoxicating liquors are, and have been, received and kept for the purpose of use as a beverage, all contrary to the form of the statutes in 29 L.R.A. (N.S.)

such cases made and provided, and in violation of the corporate rights, privileges, and powers conferred by the charter of said defendant upon said defendant."

The real point to this charge is that the Topeka Club keeps and maintains a place where intoxicating liquors are permitted by it to be stored and kept for use by its members as a beverage, and beyond this permits members to bring a limited number of friends to participate with them in this convivial pleasure. It is claimed by the state that this violates § 4371 of the General Statutes of 1909 (Laws 1881, chap. 128, § 16) which reads: "Every person who shall directly or indirectly, keep or maintain, by himself or by associating or combining with others, or who shall in any manner aid, assist, or abet in keeping or maintaining any clubroom or other place in which any intoxicating liquor is received or kept for the purpose of use, gift, barter, or sale as a beverage, or for distribution or division among the members of any club or association by any means whatever. . . ." It seems clear that the purpose of the locker system, and its only purpose, is to enable members of the club to have intoxicating liquors where they can be readily obtained for consumption as a beverage, by themselves and their invited guests. It does not seem unreasonable therefore to say that the Topeka Club keeps and maintains a place where intoxicating liquors are received and kept for use as a beverage. This clearly violates the law.

It is urged, however, that such an interpretation of the statute makes it unconstitutional as violative of § 16 of article 2 of the Constitution; and the case of the State v. Barrett, 27 Kan. 213, is cited in support of this proposition. In our view that case does not go to the extent claimed by the defendant. It was there decided that § 128 of chapter 128 of the Laws of 1881, which prohibits persons from becoming intoxicated was unconstitutional for the reason that becoming intoxicated is an offense not included in the title to the act. This action is brought under § 16 of the same chapter and is therefore covered by the same title. The title does not embrace anything but the manufacture and sale of intoxicating liquors. It is argued that, if becoming intoxicated is outside of the title, it must be held that keeping intoxicating liquors for use as a beverage is also outside thereof, as it does not pertain to either the manufacture or sale of intoxicating liquors, so that the provision forbidding such act must for that reason be void under the clause of the Constitution above mentioned. It is also contended that the use, keeping, sale, or delivery of intoxicating liquors

not within this limitation, and the statute prohibiting these acts is void. It has always been the rule in this state to interpret titles to legislative enactments liberally, and not in a narrow or technical sense. In the case of *Lynch v. Chase*, 55 Kan. 367, 376, 40 Pac. 666, 668, it is said: "It is not necessary that the title should be an abstract of the entire act, but it is deemed to be sufficient if the title fairly indicates, though in general terms, its scope and purposes. Everything connected with the main purpose and reasonably adapted to secure the objects indicated by the title may be embraced in the act, without violating the constitutional inhibition." The expressed purpose of this act is to prohibit—that is, prevent—the sale of intoxicating liquors for other than the excepted purposes. The language used by Mr. Justice Brewer in the case of *the State v. Nickerson*, 30 Kan. 545, 2 Pac. 654, is pertinent here. It reads: "By this section it is evident that the legislature recognized a fact, which is a matter of common knowledge, that human ingenuity is ever seeking some means to evade the prohibitions of the statute, and obtain a sale of liquors without transgressing the letter of the law; and intended to bring within the law and punish every disposition of liquor not expressly authorized and permitted." In the case of *Feibelman v. State*, 130 Ala. 122, 30 So. 384, it is said: "Our prohibition statutes very generally have provisions which are merely intended to be ancillary to, and to prevent evasions of, or to avoid difficulties of proof in respect of, their main purpose,—to prevent the sale of intoxicants. For instance, it is quite usual for them to interdict the giving away of intoxicating liquors. Now, it is not in the minds of the legislators that enough such liquor is going to be given away to constitute the evils intended to be eradicated; but it may well be that the prohibition of the sale could and would be evaded under the forms and color of gifts, to such extent as to defeat in great measure the purpose of the statute. So, too, some of the statutes prohibit the sale, etc., of fruit preserved in alcoholic liquor, but this is not upon any idea that bona fide sales or gifts of such fruits would emasculate the statute or would be an evil, but it is upon the other consideration that such sales, etc., would not be in good faith of the fruit, but that the fruit would be employed as a cover for transactions really involving sales of intoxicating liquors; and there is no doubt but that bona fide sales of fruit so preserved, not sales of the liquor preservative, may be prohibited because to allow such sales would open the door to mischievous

evasions of the statute aimed at sales of intoxicating liquors."

There is a collection of cases upon this subject in a note in 15 L.R.A.(N.S.) 430. It is there said (p. 431) that an Indiana statute relating to intoxicating liquors was entitled, "An Act to Regulate and License the Sale of Spirituous Liquors," etc. It prohibited the giving away of intoxicating liquors, and the question arose whether that provision was within the title of the law. The supreme court of Indiana held it to be properly connected with the subject embraced in the title, saying: "One branch of the subject included in the title of the act in question is the licensing—the regulating of—the retail of intoxicating liquors. That subject includes the limitations as to time, place, person, quantity, etc., to be imposed upon the sale, and when we consider the object for which such a law was passed, viz., to prevent abuse which might flow from the unrestrained disposal of liquors in these respects, it would seem that the giving away under circumstances which might produce the same evil results as the selling would be a matter properly regulated in connection with the selling. Indeed, it may be regarded as a necessary incident to a statute regulating the sale, to secure its efficient operation. It is a necessary precautionary provision to prevent evasion of the prohibition to sell. All experience under license laws proves this." *State v. Adamson*, 14 Ind. 296. See also *Thomasson v. State*, 15 Ind. 449; *Williams v. State*, 48 Ind. 306.

There is also a note with a collection of cases in 64 Am. St. Rep. 100, in which occurs the following: "The title, 'An Act to Prohibit the Sale of Intoxicating Liquors,' is not insufficient because of the fact that the body of the statute makes it unlawful to 'sell' or 'give' the same away (*Parkinson v. State*, 14 Md. 184, 74 Am. Dec. 522; *Cearfoss v. State*, 42 Md. 403, 1 Am. Crim. Rep. 460; *Carson v. State*, 69 Ala. 235); or because of a provision in the act against the sale of Plantation Bitters, or other intoxicating bitters sold under the name of patent medicines (*Howell v. State*, 71 Ga. 224, 51 Am. Rep. 259)."

The legislature doubtless believed that, if persons were permitted to maintain club-rooms in which liquor is kept for use as a beverage, the practice, however innocent in itself, when carried on in good faith, might easily be converted into a medium for the sale of liquor under the form of maintaining a club, and to prevent this practice, forbade a course of conduct where sales, if made, would be difficult to detect and punish. This same principle was followed by

this court in the case of *Monroe v. Lawrence*, 44 Kan. 607, 10 L.R.A. 520, 24 Pac. 1113. In that case an ordinance of the city of Lawrence was upheld which prohibited the sale of sweet cider in quantities of less than one gallon. It was conceded that sweet cider is a wholesome and harmless beverage, and that there is nothing vicious in its sale. But it was held that where liquids are sold by the drink, the opportunities and temptations to evade the law against the sale of intoxicating liquor, prohibited both by the state and the city, are so great that the ordinance was a proper regulation as a means to prevent unlawful sales of such liquors. Presumably, for the same reason, the legislature has now prohibited the sale of intoxicating liquors even for the excepted purposes (Laws 1909, chap. 164; Gen. Stat. 1909, §§ 4361 et seq.), as it has been shown by experience that such sales afford so great an opportunity to evade the law that it could not be effectively enforced.

The main and principal object of this statute does not seem to be merely to prevent people from drinking their own liquor as a beverage, but its real purpose is to prevent the organization of associations for the purpose of maintaining a place where a large number of people are permitted to keep intoxicating liquor and use it as a beverage. The Topeka Club has 140 members, each of whom, under the rules of the association, may bring a limited number of guests to enjoy a convivial visit with him. This clubhouse is furnished with all the equipments necessary for an enjoyable "feast of reason and a flow of soul," and is well calculated to attract the patronage of those who enjoy pleasures of this character. It may be said to the credit of the Topeka Club that not more than 15 of its 140 members have lockers and take advantage of this privilege. This, however, is due to the character of its membership, rather than to the character of the organization. If it should be held that a law which interdicts this practice is unconstitutional and void; or that the right of a member of such an association to invite guests to the clubroom and there, with other members and their guests, indulge in drinking, without limit, intoxicating liquors which he provides and keeps in store there for such purpose, is identical with his right to invite the same guests to the private hospitality of his home, and there, as a part of the social pleasures of an evening's entertainment, provide a limited quantity of wine, beer, or other intoxicating liquors,—it seems reasonable to assume that such organizations would rapidly multiply in 29 L.R.A. (N.S.)

number, and, under the opportunities thus afforded, the law would be evaded to such an extent that the difficulties already encountered in its enforcement would be greatly increased. It may be assumed that these considerations were well known to the legislature when this statute was enacted, and that the chief purpose of this section was to prevent a practice which might encourage and perhaps lead to sales of intoxicating liquors at such places. It is therefore fairly within the scope of the title of the act, and is not unconstitutional. It may be said of this club that, on account of the careful manner in which it has been managed, no serious objections have been urged against it; but under the rules and regulations which it has adopted, an association of men inclined to violate the law and trespass upon the peace and good order of society might become a very unsatisfactory and objectionable institution.

The writ is allowed.

All the Justices concur except Porter, J., who did not sit.

MAINE SUPREME JUDICIAL COURT.

ANNETTE J. McALLISTER

v.

DEXTER & PISCATAQUIS RAILROAD COMPANY.

(— Me. —, 76 Atl. 891.)

Dower — land purchased for railroad gravel pit.

1. A railroad does not take land purchased for a gravel pit free from the right of the grantor's wife to dower, although it so far devotes the land to public use as to secure therefrom materials for its roadbed.

Same — statutory rights — repeal — effect.

2. Under a statute providing that, upon the granting of a divorce to a wife, she shall have dower, to be recovered and assigned as if the husband were dead, her

Note. — Right to dower in land purchased by railroad company.

This note does not include cases where the railroad company secured land for right of way or other purposes by eminent domain proceedings.

It will be noted that in *McALLISTER v. DEXTER & P. R. Co.* it was said that the authorities agree that a widow has no right of dower in lands purchased by a railroad company for a right of way. Although this was wholly unnecessary for the court to make this broad statement, in a measure it is supported by the authorities; at least no case has been found holding that a

rights become fixed upon the granting of the divorce, and are not affected by the subsequent repeal of the statute.

Pleading — variance — dower rights.

3. One cannot defeat an action for dower, on the theory that he is not possessed of the freehold, if he pleaded in bar denying plaintiff's right to dower.

Dower — demand — reference to deed.

4. A demand for dower in premises described by reference to a recorded deed is sufficient, although the deed includes two parcels, and dower is claimed in one only of them.

Attorney — demand for dower — authority.

5. Written authority is not necessary to enable an attorney to sign a demand for dower.

Same — excessive demand — effect.

6. A demand for dower by an attorney with authority to make demand with re-

spect to one parcel of land is not vitiated by the fact that his demand includes another parcel also.

Same — designating details.

7. A demand for dower need not state the portion of the income which is claimed, as affected by the question whether issue was living at the time it became consummate or not.

Damages — refusal of dower — gravel pit.

8. The damages for failure to allot dower out of a gravel pit are the amount which the doweress could have secured by the reasonable use of her share of the property during the period had she been in possession of it.

(February 1, 1910.)

EXCEPTIONS by defendant to rulings of the Supreme Judicial Court for Pis-

widow is dowerable in lands purchased by a railroad company for a right of way.

In *Venable v. Wabash Western R. Co.* 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493, overruling 19 S. W. 45, it was held that an inchoate right of dower is destroyed by a voluntary conveyance executed by the husband alone, without payment of any consideration, of a right of way to a railroad company to be used only for railroad purposes. The court, in support of its decision, said: "It is conceded in this case that, where the purpose is to appropriate lands to a public use, *e. g.*, for a street, highway, jail, courthouse, or market place, the husband, as the owner of the fee, represents the wife, and that his deed or dedication is equally as effective in barring the wife's inchoate dower as would be condemnation proceedings; but a similar operative effect as to a deed to another public use, to wit, a right of way to a railroad company, is denied. We are satisfied, from an examination of the authorities and from the very nature and reason of the case, that this distinction is unwarranted and unsound, and will not bear the test of judicial scrutiny. There is no warrant for the assertion, and there is no authority or reason for the assertion, that one public highway, dedicated by deed to public use, should escape the incubus of inchoate dower, while another highway, proclaimed by the Constitution of the state to be a public highway and equally dedicated by deed to public use, should be compelled to bear such a burden unless resort were had to condemnation proceedings. What particular virtue inheres in such proceedings? Why should a judgment which condemns an easement—a right of way over a man's land—do more than that man's deed executed for the same purpose? These questions answer themselves.

"Though, in case of a railroad, the land in one sense is appropriated or accepted for the private gain, of the particular railroad company, yet the use is none the less a
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public one, as all the authorities show; and but for the fact that the use is a public one, there would be no basis laid, in either law or fact, for the exercise of the right of eminent domain, in either of the methods mentioned. Wherever the right of eminent domain exists, there exists also, as its companion and legal equivalent, the right to accept a voluntary dedication. The two rights are the inseparable and inevitable concomitants of each other. To rule otherwise would be to deny the cogent reasoning of the authorities cited; to rule otherwise would produce these anomalous results: that a railroad company, though ever so desirous of doing so, could not accept a voluntary relinquishment of the husband to lands for a right of way, without incurring long years afterwards, upon the death of the husband, the peril and the penalty of a demand for dower, consummate and unsatisfied, in a right of way for which compensation in full had long since been paid. Under such a ruling, a railroad company would of necessity be forced to reject the proffered deed, the amicable settlement, and be driven to condemnation proceedings in order to cut off inchoate rights, possibilities, and expectancies,—something the value and duration of which the law as yet has furnished no method and provided no machinery for estimating. Such a ruling would be to encourage litigious strife,—something assuredly not favored by the law. Besides, if in the hypothetical case the parties 'could agree,' there would be no basis for proceedings to condemn, because the essential jurisdictional fact of nonagreement would be wholly lacking; and therefore there could be no such proceeding had, except by practising a fraud on the court by making an averment in the pleadings at war with the real fact, that the parties litigant had failed to agree."

This question again came before the Missouri court in *Chouteau v. Missouri P. R. Co.* 122 Mo. 375, 22 S. W. 458, where the facts were practically similar to those of

cataquis County made during the trial of an action brought to establish dower rights in certain lands which resulted in a verdict for plaintiff, and motion by defendant for a new trial. Overruled.

The facts are stated in the opinion.

Messrs. **J. B. Peaks** and **F. C. Peaks** for defendant.

Mr. Bartlett Brooks, for plaintiff:

Possession by the husband during coverture, under claim of title, is sufficient prima facie evidence of seisin, and unless impeached or explained will entitle to dower.

14 Cyc. Law & Proc. p. 994; Mann v. Edson, 39 Me. 25; Knight v. Mains, 12 Me. 41; Bolster v. Cushman, 34 Me. 428.

Demand may be made for the widow by one authorized by parol. It need not be made by the widow personally.

Lothrop v. Foster, 51 Me. 368.

Demand made in writing by a counsellor of the court, at the verbal request of plaintiff, is sufficient.

Baker v. Baker, 4 Me. 67; Stevens v. Reed, 37 N. H. 51; Payne v. Smith, 12 N. H. 38; White v. Hildreth, 13 N. H. 108.

Demand of dower in more land than plaintiff is entitled to is not invalid.

Hamblin v. Bank of Cumberland, 19 Me. 66; Williams v. Williams, 78 Me. 84, 2 Atl. 884.

Demand need not describe the locus, if it refers to recorded deeds under or through which tenant has title.

Ford v. Erskine, 45 Me. 485.

The defense that demand was of two parcels, and suit for only one of them, is invalid.

Fulton v. Fulton, 19 N. H. 168; Williams v. Williams, 78 Me. 82, 2 Atl. 884.

Demand need not state the legal measure of dower claimed.

Davis v. Walker, 42 N. H. 482.

The conveyance by deed from plaintiff's husband to defendant for a railroad gravel pit cannot bar plaintiff's dower.

the Venable Case, the only essential difference being that the husband, without the wife joining in the deed, conveyed to a third person who conveyed to another, and who in turn conveyed to the railroad company. The court (in division), after coming to the conclusion that a railroad company, when it purchases property for its right of way, only takes an easement, and not a fee, although the deed purported to convey the fee, held that, since a widow is not dowerable in an easement, the widow of a husband formerly seised of premises purchased by a railroad company for a right of way could have no dower therein. As a further reason for its decision, the court took note of the fact that the charter, when providing for voluntary relinquishment or condemnation of property, used the term "owner." This, according to the court, made it ordinarily unnecessary for the wife to join in the conveyance, and this rule was not changed by the fact that the property reached the railroad company through mesne conveyances. Because of the dissent of one of the judges, the cause was transferred to court in banc, and on reargument the same result was reached by a divided court of four to three. Justice Barclay in a separate opinion, which may be found in 122 Mo. 390, 30 S. W. 299, at that time, as his reason for supporting the judgment, took occasion to say: "If the deed of the husband, when made directly to the company, is effective to extinguish the inchoate right of dower by reason of the terms of our statutory law on the subject, what is the proper meaning to be placed on that law in respect to such a state of facts as we have now in view?"

"That law provides no machinery or mode to acquire by condemnation an inchoate right of dower, such as plaintiff had at the time of the deed by her husband to

Guinotte. There was no need to make her husband a party to proceedings to condemn at any time afterwards, for he had parted with his interest. Can it be possible that the intent of the law, as applied to such a state of facts, is that a railroad corporation desiring to subject property to public use, can neither acquire the inchoate right of dower by paying for it in appropriate legal proceedings, nor yet defeat its force when developed later into a vested interest at the death of the husband? It has been frequently said in recent years that we may properly consider the effects and consequences of any proposed construction of a law, as an aid in ascertaining the probable intention of the lawgiver as expressed in it. Applying that rule to elucidate the statute law on this subject, we discover that one consequence of adopting the construction proposed by plaintiff would be to practically preclude the acquisition for public use of such interests as inchoate dower by any form of legal procedure. Did the legislature so intend?

"The terms of the law regulating the exercise of that most necessary and useful power in civilized government, the power of eminent domain, in Missouri, indicate that when the estate of the husband is acquired for, and subjected to, public use, the wife retains no contingent right to dower in the property so devoted to public purposes. In this view of the subject, it is wholly immaterial what may be the duration of the estate of the corporation in invoking the power of eminent domain. So long as the property is lawfully in use for public purposes, no right to dower can be asserted to interfere with the paramount right of the public." In this opinion one of the four judges concurred, and the other two concurred for the reasons stated in the opinion given in division.

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Nye v. Taunton Branch R. Co. 113 Mass. 277.

A release of dower by the wife must be specially pleaded, and cannot otherwise be given in evidence.

14 Cyc. Law & Proc. p. 988; Hitchcock v. Carpenter, 9 Johns. 344.

Evidence of the release of dower, if admissible, could operate only in favor of one who took title under it, which defendant does not.

French v. Lord, 69 Me. 537; French v. Crosby, 61 Me. 502.

Plaintiff's dower, consummate by divorce in 1891, could not be divested by any later statute.

Curtis v. Hobart, 41 Me. 230; Given v. Marr, 27 Me. 212; Stilphen v. Houdlette, 60 Me. 447; Burke v. Barron, 8 Iowa, 132; Duncan v. Terre Haute, 85 Ind. 104; May v. Fletcher, 40 Ind. 575, 14 Cyc. Law & Proc. pp. 884, 887; 2 Scribner, Dower, chap. 11, § 3; Barbour v. Barbour, 46 Me. 9; Talbot v. Talbot, 14 R. I. 57; 8 Cyc. Law & Proc.

p. 909; Davis v. O'Ferrall, 4 G. Greene, 358.

A tenant in dower may dig and operate mines and quarries open by the husband during coverture.

Moore v. Rollins, 45 Me. 493; Billings v. Taylor, 10 Pick. 460, 20 Am. Dec. 533, 5 Mor. Min. Rep. 65; Rockwell v. Morgan, 13 N. J. Eq. 384.

Plaintiff had the right to take sand and gravel to any extent.

Crouch v. Puryear, 1 Rand. (Va.) 258, 10 Am. Dec. 528, 15 Mor. Min. Rep. 113; Sayers v. Hoskinson, 110 Pa. 473, 1 Atl. 308.

Savage, J., delivered the opinion of the court:

Action of dower. The case comes up on exceptions to the ruling of the presiding justice upon the undisputed evidence, that the plaintiff is entitled, as a matter of law, to dower in the premises described in her writ, and upon the defendant's motion for

Evidently at about the same time as the Chouteau Case, the court was again called upon to determine the question whether a wife was entitled to dower in property which her husband, without joining her in the deed, had conveyed to a third person, who in turn had conveyed it to the railroad company for the purposes of a right of way. The case referred to is Baker v. Atchison, T. & S. F. R. Co. 122 Mo. 396, 30 S. W. 301, where it was again held, with a divided court of four to three, that in such case the wife's right of dower is cut off. Justice Sherwood, who also wrote the opinion in the Venable Case and the opinion in division in the Chouteau Case, at this time said: "The owner of the land, whoever he is, represents the fee, and compensation to him appropriates the entire fee, and he is the only one to be looked to when the right of way is to be acquired, whether by condemnation or otherwise. There is, and there can be, no difference in this regard between dedication and condemnation. The former being voluntary and the latter compulsory; both are mere conduits through which flows the current of eminent domain."

It will be noted that in the McALLISTER CASE, Nye v. Taunton Branch R. Co. 113 Mass. 277, was cited as supporting the proposition that, while it might be true that a widow has no right of dower in lands purchased for a right of way, the reasons therefor would not apply where the railroad company purchased a gravel pit, or other property which a railroad company might be said to hold for its private use, rather than for a public use. In the Nye Case the facts were as follows: The husband had bought the property and secured payment of the purchase money by a mortgage which his wife did not sign; sometime thereafter his equity of redemption was sold under execution, the purchaser of which

sold to another, who in turn, without restrictions in the deed, conveyed to the railroad company, which used the property for its freight station, tracks, and approaches. Whether a freight station with its necessary approaches is such property that a railroad company might be said to hold it for its private use, rather than for a public use, is difficult to determine; suffice it to say that there is nothing in the language of the court in the Nye Case, practically the whole of which is quoted in the McALLISTER CASE, which would tend to show in any way that the holding of the court would have been different had the use of the property been for a right of way.

At first glance, therefore, it might seem that the Nye Case is opposed to the doctrine of the Missouri cases. In fact, in the Venable Case, supra, it was persistently urged that the Nye Case supported the contention of the widow that her dower was not bound by the deed of her husband, but the court, after reviewing the facts of that case, and saying that upon those premises it was properly ruled that the land in question was subject to the demand for dower, continued: "But how different that case is in its facts from the one at bar? First, there the land was simply sold under execution, and so the husband never represented his wife in receiving compensation for his land, and so her inchoate dower was not extinguished therein for that reason, and the land passed to the first and subsequent purchasers with the burden of inchoate dower fettered to it; second, the land in that case was conveyed by the last purchaser to the railroad company in fee, unhampered by a single restriction and unburdened by a single use, and the railroad company took it just as a 'natural person' might have done. Here, on the contrary, the husband represented the wife, received

a new trial. Since the same questions arise on the exceptions, except the amount of damages, as upon the motion, they may be considered together.

The plaintiff was married to Frank B. McAllister in September, 1885, and was divorced from him for his fault, other than impotence, in September, 1891. No children were born of this marriage, nor of any other contracted by Mr. McAllister. During coverture, Frank B. McAllister was the owner of the premises described in the writ. In 1889 he conveyed to the defendant a strip of land 4 rods wide, which is now its right of way. By the same deed, but as a distinct parcel, he conveyed to the defendant, "for a gravel pit for said railroad," the lot of land in which the plaintiff now claims dower. The plaintiff has never released her right of dower in the premises to the defendant. Upon these facts the defendant contends that the plaintiff has no dower: (1) Because the land was purchased for, and devoted to, public uses; and (2) because the statute in

force at the time she secured her divorce, by which she became entitled to dower (Rev. Stat. 1883, chap. 60, § 9), was repealed by Stat. 1895, chap. 157, § 11, by which the right of a divorced wife was enlarged from dower to "one third in fee in common and undivided, of all his real estate." We think neither ground is tenable.

Rev. Stat. 1883, chap. 51, § 16, in force when the defendant took its deed, authorized railroad companies to "purchase or take and hold, as for public uses, land for borrow and gravel pits." In the case of a purchase, it took the land in fee; but in case of a statutory taking, it exercised the right of eminent domain, and held only an easement. Not only are the processes different, but some of the consequences are different. It is well settled that a widow is not dowable of lands taken by the right of eminent domain for public use. The reason is well stated in *French v. Lord*, 69 Me. 537: "In all such cases a division of the estate thus taken would

or waived compensation for the land, and only granted an easement, which is precisely just what that company would have gained at the end of condemnation proceedings." In the *Chouteau Case* the court also found it necessary to distinguish the *Nye Case*, and it took occasion to say: "In *Nye's Case* the railway company obtained the entire fee by reason of the deed made, 'just as a natural person would do,' and the corporation could convey the land thus obtained, when no longer necessary for its purposes, to whomsoever it would. Not so in the case at bar; no fee was obtained, only in form and outward semblance; not in fact or in law. And whatever right was acquired by the defendant company or its predecessor could not have been disposed of except as a whole, and not in detached or fractional portions; and when disposed of could only have been disposed of to another railroad corporation for those uses, and those alone, for which the original grant was made. The attempt to divert the subject of the grant to other purposes would result in reversion to the last owner of the premises."

In this connection should be read the dissenting opinion of Justice Gantt in the *Baker Case*, where he also gives his reasons for dissenting in the *Chouteau Case*. The justice, after reviewing the distinction made in the *Venable Case* between it and the *Nye Case*, and citing the facts in the *Chouteau Case*, said: "Certainly we will all agree that, when a married man in this state sells and conveys lands in which he is seised of an estate of inheritance, and his wife does not join and relinquish her dower, as to her dower he does not represent her in receiving whatever compensation he may for the land, and she is not barred or estopped from demanding her

dower, if she survives him. So that, if in the *Nye Case* 'the first and subsequent purchasers took the land burdened with inchoate dower,' it seems irresistible to me that *Berenice Chouteau and Guinotte* and their grantee, the railroad company, took the lands in suit burdened with *Mrs. Chouteau's inchoate dower*. In other words, it seemed to me in division, and now, that there could be no substantial distinction drawn between the *Nye Case* and that case, and as we had all so unreservedly declared that, 'upon the premises' in the *Nye Case*, it was properly ruled that the land in question was subject to the demand for dower, I could not see how we were to deny the demandant her dower in the *Chouteau Case*, seeing that she had brought herself into a like situation." The dissenting opinion then vigorously criticizes that part of the opinion in the *Chouteau Case* which determined that the railroad company merely acquired an easement in the property; thus nullifying the distinction made in that case between it and the *Nye Case*. As a final reason for his dissent from the *Chouteau Case*, Justice Gantt calls attention to the part of the opinion wherein the widow's dower was denied because she was not an "owner," within the meaning of the word as used in the charter of the railroad; that her interest was in fact simply an inchoate right of dower, not susceptible of computation, and that her husband represents the entire fee, and his voluntary alienation by deed wrought as complete an extinguishment as if it had been condemned by the judgment of a court of competent jurisdiction. The justice, in regard thereto, said: "Inasmuch as in the *Chouteau Case* there were no condemnation proceedings, and no attempt to proceed under the statute requiring 'the owners' to be notified, it seems

destroy it for the use to which it has been appropriated. Private interests must give way to the public convenience and necessity,—rights in dower, as well as any other interest in real estate.” And there is authority to the effect that a widow is not dowerable in lands purchased by a railroad company for public purposes in general. And all authorities agree that she has no right of dower in lands so purchased for a right of way. And this obviously is on the ground that public convenience and necessity require that the railroad company should be in the exclusive and undivided possession, control, and use of its right of way. In pursuance of its public duties, it must occupy and use it. It cannot abandon it without liability to forfeiture. It cannot even change it without the permission of the estate, granted through the railroad commissioners.

But none of these considerations apply to a gravel pit. While it may be purchased as for a public use, the public use, so called, affects the public only incidentally and indi-

rectly. The company need not use it all. It may abandon it. It may sell it, as a private person would sell his property. It owes the public no duty respecting it. While it is doubtless true that it is necessary, in the present stage of railroad development, that a railroad company should have gravel pits, it is not necessary, so far as the public is concerned, that it should have any particular one. If it should have to divide the pit, or contribute out of the rents and profits, it would not in any sense interfere with the public convenience or necessity. It would only affect the company pecuniarily in its private capacity. Therefore, since the reason for the rule of the exclusion of dower in lands devoted to public uses does not apply to a gravel pit purchased by the railroad company, outside its right of way, we hold that a widow, in 1891, was dowerable of it, just as she was in any other land purchased by the company, and not devoted to technically public uses. For, while it is true that all the property of a public service cor-

to me that the very able discussion and argument offered to show that the wife of a tenant in fee is not an ‘owner,’ within the meaning of that statute, is not fairly within the record in that case, for two reasons: First. Pierre M. Chouteau was never a party defendant, as ‘owner’ of this land, in any condemnation proceeding. He never conveyed this land or an easement in it to any corporation. He never, by his deed or by any act *in pais*, dedicated this land to the public, but granted it to a private person who, according to the laws of this state, took it ‘with the burden of inchoate dower fettered to it.’ . . . Second. The Pacific Railroad had the option of condemning an easement in these lots or of purchasing the fee simple title in the whole of the lots. It elected to buy and get the title by deed to the whole, instead of a mere easement.”

A case of interest in this note, although possibly not strictly in point, since the court looked upon the proceedings as those concerning eminent domain, is *Arnold v. Buffalo, R. & P. R. Co.* 32 Pa. Super. Ct. 452, where the question was raised whether the inchoate dower of a wife is defeated by the survey, location, and adoption of a right of way of a railroad over the land of her husband, an agreement by him and the railroad company upon the amount of damages to be taken, the payment of such damages, a grant of the right to construct and operate the road upon the location adopted, and a release of damages therefor, and the construction and operation of the road upon the location agreed upon. The court, after reviewing the various ways in which a railroad might secure a right of way, and saying that there could be no question that in this case the railroad com-

pany in taking the property was exercising the right of eminent domain, continued: “The statutes which invested the railroad company with the power to appropriate land for a right of way clearly indicate the legislative intention that such taking should vest in the company the right to so occupy the land perpetually and exclusively. The Constitution of the commonwealth, and the legislation thereunder, require only that settlement be made with the owner. Samuel Arnold owned the land at the time of its appropriation by the railroad company by a title in fee simple, he was the only person who had any estate in the land, and there were no creditors holding liens. He was, therefore, the only party who was entitled to be heard upon the question of his damages, and by the settlement with him the railroad company acquired a perpetual right of way. The railroad company was authorized to appropriate this land, and the legislation which conferred that authority gave no right to compensation to the wife of the owner, for an inchoate right of dower, nor is such right guaranteed to her by the constitutional provision. She had no estate in the land, nor had she any lien thereon. The assertion of any right to have dower assigned to her out of the right of way acquired by the railroad company is inconsistent with the provisions of the legislation under which the railroad acquired title.”

The question of the power of a husband to create easements in a homestead without the wife's consent, which includes cases concerning the conveyances of a railroad right of way by the husband, is treated in a note to *Delisha v. Minneapolis, St. P. R. & D. Electric Traction Co.* 27 L.R.A. (N.S.) 963. G. V.

poration is in one sense devoted to public uses, the use of a gravel pit is not of that kind of public uses which should debar a widow from claiming her right of dower.

This view is supported by *Nye v. Taunton Branch R. Co.* 113 Mass. 277. In that case the railroad company had purchased land outside its location, for a freight station. The court held that a widow who had not barred her interest was dowable of it. And after stating the two methods by which the railroad company might, under the statutes of that state, as under our own, take the land, namely, by purchase and by exercise of the right of eminent domain, the court said: "By the first method the corporation obtains a fee in the soil; by the second the land is condemned to a servitude, and an easement is created in the corporation, which may be permanent in its nature and practically exclusive. *Hazen v. Boston & M. R. Co.* 2 Gray, 574. When it holds by the first, it derives its title solely from the deed; if the deed is without restriction, reservation, or condition, the corporation may convey the land, if no longer necessary for its purposes. When it takes by the second, if the use is abandoned, the easement is extinguished, and the land reverts to the owner of the soil. The one is simply an authority to buy and hold land for certain purposes, as a natural person may do; the other puts the land into the possession of the corporation by the exercise of the power of eminent domain. The proceedings are entirely distinct, the rights acquired are different, and it does not change the character of the deed, because the land could have been taken against the will of the grantor.

But it is not necessary to consider that question here, or to decide what would have been the effect upon the demandant's right of dower, if the land had been taken, against the consent of the owner, on application to the county commissioners, in the exercise of the power of eminent domain. As the statute authorized the purchase for the purposes therein named, the land did not pass to the tenant under the exercise of the right of eminent domain, accompanied by such powers and limitations as the exercise of that right imposes, but by deed, subject to all the incidents attending that form of contract between parties.

The land was at that time subject to the demandant's inchoate right of dower, which is now consummate by the death of her husband, and the purposes to which the corporation has in the meantime devoted the land are immaterial, as it may change them at will, and sell the land if it de-

sires." In this connection the vigorous dissent of the minority of the supreme court of Missouri, based upon the *Nye Case*, is of interest. *Baker v. Atchison. T. & S. F. R. Co.* 122 Mo., at page 400. 30 S. W. 301. See also *Venable v. Watawa Western R. Co.* 112 Mo. 103, 18 L.R.A. 68, 20 S. W. 493.

We have thus far treated the case as if the plaintiff became a widow in 1891. But she did not. She then became divorced for her husband's fault. But her rights, such as they were in 1891, were the same as if her husband had then died. The statute (Rev. Stat. 1883, chap. 60, § 9) provided that, "when a divorce is decreed to the wife for the fault of the husband for any other cause" than impotence, "she shall have dower in his real estate, to be recovered and assigned to her as if he were dead." And such a divorce affected the right of dower precisely as would the husband's death. *Stilphen v. Houdlette*, 60 Me. 447. Therefore, at the outset, we have only to inquire what would have been a widow's rights under the same circumstances. There is no controversy but that, if the husband had died in 1891, the plaintiff, as widow, would have been entitled to dower in all the dowable lands of which he had been seised during coverture, and of which she had not become barred. Under the statute, her right as a divorced wife was the same. *Lewis v. Meserve*, 61 Me. 374. There being no issue of this or of any previous marriage of McAllister living in 1891, his divorced wife was dowable, as commonly expressed, in one half of his real estate. Rev. Stat. 1883, chap. 103, § 14.

The defendant, however, contends that by the enactment of chapter 157 of the Laws of 1895, the dower provision for divorced wives was repealed. That chapter enlarged the right of widows in the real estate of their deceased husband from dower to an estate in fee. *Golder v. Golder*, 95 Me. 259, 49 Atl. 1050. It also provided in § 9 that when a divorce is decreed to the wife for the fault of the husband, for any other cause than impotency, "she shall be entitled to one third in common and undivided of all his real estate, except wild lands, which shall descend to her as if he were dead." [Rev. Stat. 1903, chap. 62.] The dower provision in the previously existing statute, which has been referred to, was omitted. And while the dower right of widows which had become consummate by the death of their husbands, but which had not been assigned, was expressly saved to them by the terms of the statute, it is claimed that there was no such saving provision for the rights of divorced

wives. Hence, it is contended that the plaintiff's right of dower, which she had in consequence of her divorce, was lost by reason of the statute of 1895.

We deem it unnecessary to inquire whether the statute of 1895, upon fair interpretation, is open to this construction, because we think the legislature could not constitutionally deprive the plaintiff of the right to dower which she then had. Prior to 1895, when dower, by that name, was abolished, a woman, if she had not barred it, had an inchoate right of dower in the lands of which her husband was seised during coverture; upon his death, or in this state upon the granting of a divorce to her for his fault, and prior to assignment, that right became consummate, and her right to demand and enter upon the enjoyment of her dower interest commenced; after assignment, her estate was said to be assigned or vested, and she entered into the possession of it for the term of her life. 14 Cyc. Law & Proc. p. 882. Since dower does not result from contract, but by operation of law, it is within the power of the legislature to increase, diminish, alter, or abolish it, while the right thereto is merely inchoate, and has not become consummated by the death of the husband or by divorce. *Barbour v. Barbour*, 46 Me. 9; 8 Cyc. Law & Proc. p. 909. While a widow's right to dower does not become vested or fixed until it becomes consummate, yet a consummate right of dower, though before assignment it is a mere right of action (*Johnson v. Shields*, 32 Me. 424), is nevertheless a vested property right under constitutional protection. She has no vested interest in any of her husband's real estate, but she has a vested right to have a share of it assigned to her for life. Mr. Scribner, in his work on Dower, says: "There seems to be no conflict of authority upon the point that, after it [dower] has become consummate, whether there has been an assignment or not, it is so far a vested right as to be beyond legislative control." 2 Scribner, Dower, chap. 2, § 3; 8 Cyc. Law & Proc. p. 909, and cases cited.

It remains to consider some minor defenses. The defendant says that its deed from McCallister, which is a quitclaim deed in form, is merely a "release deed," and "that it does not claim, and never has claimed, that it had any fee in the land described," but that the deed was only a release of the land "for a gravel pit." This is equivalent to saying that the defendant is not tenant of the freehold. But this defense is not open under the pleadings. They are the general issue and a brief statement denying that the plaintiff

has any right of dower, or any right to have dower set out. That is a plea in bar. But it is provided in Rev. Stat. 1903, chap. 105, § 4, that the defendant, in an action for dower "may plead in abatement, but not in bar, that he is not tenant of the freehold." *Lewis v. Meserve*, supra. The defendant, therefore, must be deemed to be tenant of the freehold.

Next the defendant contends that the plaintiff's demand for dower was insufficient to maintain the action. It has been held that the want of a sufficient demand must be specially pleaded in bar. *Ayer v. Spring*, 10 Mass. 80. Under our practice it might have been pleaded by way of brief statement. But even that was not done in this case. Nevertheless, since much stress is laid upon it, we will briefly consider the merits. The statutes (Rev. Stat. 1903, chap. 105, § 2) require a dowress, before bringing suit, to demand dower of the tenant of the freehold, and by § 3, in case the tenant of the freehold is a corporation, she must demand her dower in writing. In this case a demand in writing was made. The first objection is that there was not a sufficient description of the premises in the writing. They were in fact described as "the premises described in a certain deed to you, the said Dexter & Piscataquis Railroad Company, from said Frank B. McAllister, . . . said deed being dated June 15, 1889, and recorded in the registry of deeds for said Piscataquis county in volume 101, on page 265 of said registry." A reference to this deed shows that two parcels were clearly and definitely described therein, one of which is the parcel involved in this suit. We think the description in the demand is sufficient. It was held in *Ford v. Erskine*, 45 Me. 484, that the description may be in terms, or by reference to a recorded deed under which the tenant claims. See also, *Baker v. Baker*, 4 Me. 67; *Atwood v. Atwood*, 22 Pick. 283. Furthermore, it is objected that the demand embraced two parcels, while the suit is to recover dower in one only. We see nothing in this objection. The defendant is neither embarrassed nor injured because the plaintiff has abandoned her claim for dower in one of the parcels. Whatever her demand, she may recover according to her right, not exceeding the demand. A demand is not vitiated because the widow demands more than she is entitled to. *Hamblin v. Bank of Cumberland*, 19 Me. 66; *Williams v. Williams*, 78 Me. 82, 2 Atl. 884; *Davis v. Walker*, 42 N. H. 482; *Fulton v. Fulton*, 19 N. H. 169.

The demand in this case was signed in the name of the plaintiff by her attorney. The

defendant contends that it should have been signed by her personally, or that, if signed by an agent or attorney, he should have had written authority therefor. We do not think so. The statute does not require either. It has even been held, and we think properly, that oral authority given to an attorney by a dowress to bring action for the dower was sufficient authority to make a written demand, which the statute made a prerequisite to bringing suit. *Stevens v. Reed*, 37 N. H. 51. This case is not like *Sloan v. Whitman*, 5 Cush. 532, cited by the defendant, where an attorney had written authority to demand dower "in any and all the beforementioned premises or any other," but no premises had been mentioned. Nor is there any reason for saying, as the defendant does, that if the attorney, having authority to make demand for one parcel only, made demand for two, the demand was vitiated as to the authorized parcel.

The defendant further contends that the demand should have stated whether the plaintiff claimed the use and income of one third of the real estate, or one half; the right depending upon whether issue was living in 1891 or not. But that was not necessary. *Davis v. Walker*, supra; 14 Cyc. Law & Proc. p. 977.

Without further discussion, we conclude that there was no error in the ruling that the plaintiff is entitled to dower in the defendant's gravel pit. We conclude, further, that the plaintiff has taken all the necessary steps to enforce her right. This disposes of the exceptions, and of all the grounds of the motion for a new trial, except the claim that the damages awarded by the jury for the detention of dower were excessive.

Considering this last claim, we find that the period for which the plaintiff was entitled to recover damages was three months. *Rev. Stat. 1883, chap. 103, § 19*. The jury awarded \$100. The plaintiff's right is not to be measured by what was actually taken from the gravel pit during the period, but by what might have been taken under existing circumstances, including the prevalent demand for gravel, the state of the market, and like considerations. She was entitled to the use, and to the profits which reasonably would have accrued from the use, of one half of the pit, during the period. Her damages arise, under the circumstances of this case, not from any use or want of use which the defendant made of the pit, but from the prevention of her right to use it, which was a valuable right. The rule was correctly stated by the presiding justice in this case, when he instructed 29 L.R.A. (N.S.)

the jury to "ascertain how much revenue or profit, by reasonable industry, reasonable care, the owner of that property, if owned as a gravel pit, could have obtained from the sale of sand and gravel from that pit during that time," and, when they had found that sum, to "divide it by two, because she is only entitled to one half." There was evidence that the jury might well believe that there was a good demand for gravel at Dover during the whole period, that a team hauling from 25 to 35 bushels at a load could make four or five trips a day, and that the price of gravel delivered ranged from 5 to 8 cents a bushel. It is evident that the jury, after allowing for the expense of hauling, estimated that the reasonable profit which might have obtained was about \$2.50 a day. We cannot say that this estimate is clearly wrong. Motion and exceptions overruled.

MAINE SUPREME JUDICIAL COURT.

LEWIS J. FORD.

v.

FRANK HOWGATE.

(— Me. —, 76 Atl. 939.)

Statute of frauds — sale of unissued corporate stock — delivery.

1. A contract for sale of unissued stock in a corporation and an interest in an automobile is taken out of the statute of frauds by entering into possession of the business with the other owners, carrying it on as contemplated by the contract, and taking and using the automobile as one of the owners.

Same — duty to secure certificate.

2. One who sells his stock in a corporation the certificate of which has never been issued is under no duty of securing a certificate of issuance, and delivering it to the purchaser.

(May 31, 1910.)

EXCEPTIONS by defendant to ruling of the Supreme Judicial Court for York County made during the trial of an action brought to recover the purchase price of property alleged to have been sold, which resulted in a verdict for plaintiff. Overruled.

The facts are stated in the opinion.

Note. — As to necessity of writing to transfer shares of stock, see note in *French v. White*, 2 L.R.A. (N.S.) 804.

As to whether contract for sale of corporate stock is one for the sale of goods, within the statute of frauds, see note in *Sprague v. Hosie*, 19 L.R.A. (N.S.) 874.

Mr. George W. Hanson, for defendant:

A subscriber to stock in a corporation is a stockholder, although no certificate has been issued to him.

Cook, Corp. 6th ed. §§ 10, 192.

An agreement for the sale of stock in a corporation cannot be treated as an agreement to sell the corporation's property as the property of a stockholder.

Cook, Corp. 6th ed. § 11; *Morawetz, Priv. Corp.* § 233.

The alleged agreement was not for the sale of plaintiff's "business." He had none to sell. It was simply an agreement for the sale of stock in a corporation, and as such, void, under the statute of frauds.

Cook, Corp. 6th ed. § 339.

The agreement was void, though no certificate for the stock had ever been issued.

Boardman v. Cutter, 128 Mass. 388;

Pray v. Mitchell, 60 Me. 430.

If a delivery of part was impossible, the exception relied on cannot exist, to take the case out of the statute.

Pray v. Mitchell, supra; *Tisdale v. Harris*, 20 Pick. 14.

There can be no delivery without acceptance; there must be delivery by the vendor with intent to divest title.

Hinchman v. Lincoln, 124 U. S. 38, 49-53, 31 L. ed. 337, 341-343, 8 Sup. Ct. Rep. 369.

Mere words are not enough to show acceptance.

Ibid; *Tompkins v. Sheehan*, 158 N. Y. 617, 53 N. E. 502.

Mr. Natt T. Abbott for plaintiff:

King, J., delivered the opinion of the court:

This case is before the law court on defendant's exceptions to certain instructions to the jury.

The plaintiff was one of the incorporators of the Crystal Spring Water Company, a corporation, and as such was the owner of seven shares of its capital stock. Seven other shares were owned by Mr. Wentworth, and the remaining share by Mr. Abbott. These three persons were the officers and directors of the corporation. No certificates of stock had been issued. The plaintiff and Mr. Wentworth owned an automobile used by them for pleasure, and also used in and about the business of the corporation. The plaintiff claimed that he and defendant made an agreement whereby the defendant purchased of him his interest in the corporation, and his interest in the automobile, for the gross sum of \$1,000. No writing was made, no money paid, and no certificate of the seven 29 L.R.A. (N.S.)

shares of stock was tendered or demanded. But the plaintiff introduced evidence that, after the contract was made, the defendant went into the company's shop and there assisted in the business of the corporation for about ten days, and while there used the automobile. This evidence was introduced for the purpose of showing, as claimed by plaintiff, that the defendant had taken possession of the interest in the business of the corporation and of the automobile, as an owner under his alleged purchase. The defendant claimed that he only agreed to purchase plaintiff's interest in the business provided he found it as represented, and he denied that he took possession of the business under the alleged sale, and claimed that he went into the shop only to assist Mr. Wentworth, at his request, and also for the purpose of examining into the business affairs of the corporation, to ascertain if they were as represented by the plaintiff. He further denied that the plaintiff's interest in the automobile was included in the proposed sale.

It was urged, among other defenses: (1) That the alleged agreement was void under the statute of frauds; and (2) that the plaintiff could not recover without delivery or tender to the defendant of a certificate of the shares of stock.

Section 4, chap. 113, Rev. Stat., commonly known as the "statute of frauds," provides: "No contract for the sale of goods, wares, or merchandise, for \$30 or more, shall be valid, unless the purchaser accepts and receives part of the goods, or gives something in earnest to bind the bargain or in part payment thereof, or some note or memorandum thereof is made and signed by the party to be charged thereby, or by his agent."

The plaintiff did not contend at the trial that the subject-matter of the contract of sale, comprising, as he claimed, his ownership of the shares of stock in the corporation and his interest in the automobile, was not "goods, wares, or merchandise," within the meaning of the statute of frauds. Such claim, if made, would have been without support in reason or authority. *Pray v. Mitchell*, 60 Me. 430.

But it was the plaintiff's theory that, although the oral contract of sale was within the terms of the statute, nevertheless it had been taken out of the operation and effect of the statute by reason of a compliance with the provisions of the exception that if "the purchaser accepts and receives a part of the goods," the contract is valid and enforceable. Upon this branch of the case the presiding justice

instructed the jury "that although all the right which Mr. Ford had in the business was his shares, it being a corporation, nevertheless it was a corporation in which he was acting as men do with their own property, and he and Mr. Wentworth had been operating it. It was a business, and the sale of the interest in the business gave Mr. Howgate an equitable right to have the stock delivered to him; and if he went into the possession of the business under the trade which he claims, and took part in it as owner, it was an executed contract. It was all done; nothing to be done except to pay. And when a contract has been executed and completed,—finished,—and the parties have gone into the business, carrying it out, then the statute of frauds does not apply." In respect to the effect of an acceptance and receipt of the automobile by defendant, as claimed by the plaintiff, the presiding justice said: "And the plaintiff claims in this case that the automobile was physically accepted, that is, the defendant, Howgate, took it into his possession; not into his sole possession, because it was only an undivided interest in an automobile that he bought anyway, but that he took it and used it as one of the owners. If he did, then that would be an acceptance of it, and an acceptance of a part of the whole thing that was furnished,—interest in the business and automobile,—and that would take it out of the statute of frauds also. So that, upon the plaintiff's theory that the defendant made the trade and went into the execution of it by taking the business, or taking his part of the business, the statute of frauds does not apply."

Summarizing his instructions as to the statute of frauds as a defense, the justice said: "And it comes back, so far as those legal defenses are concerned, to the proposition which I stated earlier, that if the trade was made as the plaintiff claims, that the interest in the business and the half interest in the automobile were sold at an agreed price of \$1,000, and the defendant, Howgate, entered into the possession of the business with the other man, running it as an owner, carrying it on as contemplated by the contract, and took the automobile in the same way, then he must pay what he agreed, so far as any evidence in this case is concerned."

The defendant contends, in support of his exceptions, that the instructions given did not sufficiently distinguish the plaintiff's interest in the business, being only an intangible right of ownership in the shares of stock in the corporation, from an ownership in the physical property of the corporation, and for this reason the jury 29 L.R.A. (N.S.)

were permitted to conclude, and naturally did conclude, that if the defendant went into possession of the business of the corporation with Mr. Wentworth, he thereby physically accepted and received the plaintiff's "interest in the business," which was the subject of the sale, and thereby the exception in the statute was necessarily complied with.

We do not think the instructions are open to that objection. The theory on which they were given is that, because the plaintiff's interest in the business was only the intangible right of ownership of the shares of stock, for which no certificate had ever been issued, the contract of sale gave the defendant all and the same right to the ownership of those shares which the plaintiff before had, no act on the part of the plaintiff remaining to be done; and if the defendant, on his part, accepted that contract, and used and enjoyed the privileges and benefits it was intended to afford him, then the contract became executed, and for that reason the statute of frauds was not applicable to it.

The language of the instructions does not express the meaning that the defendant's act in taking possession of the tangible property of the corporation was *ipso facto* an actual acceptance and receipt of the thing sold; but, on the other hand, the meaning is clearly expressed that if the defendant "entered into the possession of the business with the other man, running it as an owner, carrying it on as contemplated by the contract," such act on the part of the defendant was evidence, and sufficient evidence, that he had accepted the contract as completed, and entered upon the enjoyment of the fruits of it. Or, in other words, the jury were instructed in effect that, if they found the facts to be as the plaintiff claimed, they would be authorized to draw from those facts the conclusion that the defendant had been placed in possession and enjoyment of the thing sold, the ownership of the shares of stock in the corporation, and he, on his part, had accepted and received it as owner of it. We think the instructions given were not erroneous, but appropriate and applicable to this phase of the case.

In the valuable note to *Shindler v. Houston*, 49 Am. Dec. 316, note 325-340, will be found an able discussion, and painstaking collection of authorities, relative to the provision of the statute of frauds as to the acceptance and receipt of a part of the goods by the vendee. See also the extended note, on the same subject, following the report of *Devine v. Warner*, in 96 Am. St. Rep. 211, note 215-229.

Although there is much conflict and con-

troversy to be noted in the vast number of judicial decisions touching the meaning and application of this exception in the statute of frauds, yet we think the decisions will be found substantially harmonious in support of the rule that, when it appears from evidence, in addition to that which establishes the contract itself, that something was done with respect to the subject-matter of the contract, either concurrent with or subsequent to it, which unequivocally indicates that there was a delivery by the vendor, with an intention of vesting the right of possession of the subject-matter of the sale in the vendee as owner, and an acceptance and receipt of the same by the latter, with an intent thereby to become the owner thereof, then the contract is so far executed that the statute of frauds does not apply to it.

"If, after goods have arrived, the vendee does any act to the goods of wrong if he is not the owner of the goods, and of right if he is the owner of the goods, the doing of that act is evidence that he has accepted them." Erle, J., in *Parker v. Wallis*, 5 El. & Bl. 21. Both delivery and acceptance may be inferred as conclusions from the attendant circumstances. *Leonard v. Medford*, 85 Md. 666, 37 L.R.A. 449, 37 Atl. 365. If the vendee does some act that is only reconcilable with the fact that he is owner of the subject-matter of the sale, such act is evidence that he has accepted the sale, and it is no longer executory.

In the case at bar the subject-matter of the sale, so far as it included the plaintiff's ownership of the unissued shares of stock in the corporation, was incapable of any manual tradition, and for that reason no act remained for the plaintiff to perform to execute the contract. And what more significant act could the defendant have done to evidence his ownership of the shares, and to show that the contract was executed, than to enter into the management of the business of the corporation as an owner? Assume, as an illustration, that the defendant, after the sale, had accepted and received a dividend apportioned to the shares; would not that act be evidence sufficient to show that the contract of sale of the shares to him was no longer executory? If the defendant did "enter into possession of the business with the other man, running it as owner, carrying it on as contemplated by the contract," such acts are irreconcilable with any other conclusion than that he had become the owner of the shares, and that the contract of sale was executed; nothing remaining to be done under it except for him to pay the purchase price.

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All that has been said applies with added force to that part of the instructions relating to the acceptance and receipt of the interest in the automobile. That interest was capable of a manual delivery and receipt. It was a part of the property included in the one entire contract of sale. Acceptance and receipt of it took the whole contract out of the statute. In *Weeks v. Crie*, 94 Me. 463, 80 Am. St. Rep. 410, 48 Atl. 107, 108, it is said: "It is unquestionably the law in such case, that an acceptance and receipt of part of the articles purchased, or of all of one class of articles purchased, necessarily takes the whole contract out of the statute."

As to the other claim of defendant, that the plaintiff should have procured and delivered or tendered to him a certificate of the shares, the learned justice instructed the jury that that was not a necessary act on the part of the plaintiff to entitle him to recover. This instruction was correct. The plaintiff sold his ownership of the stock, which carried with it the right to have a certificate issued to the purchaser, no certificate having been issued up to that time. By virtue of the contract of sale, the defendant acquired the right which the plaintiff before had, to have a certificate of the stock issued to him by the corporation. It was not the duty of the plaintiff, and not included in the terms of the contract, that he should procure from the corporation a certificate of the shares to himself and transfer that to defendant, or that he should procure a certificate to be issued to the defendant.

Finding no error in the instructions, the entry must be:

Exceptions overruled.

UNITED STATES CIRCUIT COURT OF APPEALS, EIGHTH CIRCUIT.

RE GEORGE G. HARRALSON, Trustee, etc., of Joseph H. Huggins, Bankrupt, Petitioner.

(— C. C. A. —, 179 Fed. 490.)

Bankruptcy — selling encumbered property — costs.

A bankruptcy court which attempts to sell encumbered property of the bankrupt free from liens may charge the expense of

Note. — What fund is chargeable with costs and expenses of sale when encumbered property is sold in bankruptcy, free of liens.

When encumbered property is sold in bankruptcy, discharged of encumbrances, the liens are transferred to the proceeds. The question sometimes arises in such circum-

the sale against the general estate of the bankrupt if one exists, and permit the lien holder to take the entire proceeds of the sale if they do not exceed the amount of his claim.

(May 3, 1910.)

PETITION by George G. Harralson, trustee of the estate of Joseph H. Huggins, bankrupt, to review an order of the District Court of the United States for the Eastern District of Missouri sustaining the right of a lien creditor to have the purchase price paid by him at trustee's sale for certain encumbered property credited on his allowed claim, and denying the trustee and referee commissions out of the proceeds. Affirmed.

The facts are stated in the opinion.

Argued before Hook and Adams, Circuit Judges, and McPherson, District Judge.

Mr. Frank Kelly, for petitioner:

Referees are entitled to commissions on money paid secured creditors, as well as on dividends to unsecured creditors.

Loveland, Bankr. 3d ed. p. 150, §§ 36, 148, 202; Re Cramond, 145 Fed. 966; Re Sanford Furniture Mfg. Co. 126 Fed. 888; Re Williams, 84 C. C. A. 434, 156 Fed. 934; Stewart v. Platt, 101 U. S. 731-739, 25 L. ed. 816-818; Re Utt, 45 C. C. A. 32,

stances as to whether the expenses of the sale should be charged against the general fund, or should be deducted from the particular fund created by the sale. Of course, whether the costs and fees of the administration of the general estate are chargeable against the particular fund derived from the sale is another question.

It was held in Re Williams, 19 Am. Bankr. Rep. 389, that where the lienors come into court and apply for a sale of the property, which yields a sum less than the amount of the liens, the proceeds will be charged with the costs and expenses of the enforcement of the lien.

And in Re Johnson, Fed. Cas. No. 7,424, where it appeared that the proceeds of the sale were considerably less than the amount of the judgment lien, the court held that the general fund could not be charged with the expenses of the sale so as to allow the entire proceeds to go to the lienor, remarking that every fund must be charged with the expenses properly incurred in producing it. The court added that it did not matter whether the lienor assented to the sale or not, for if the order of sale was made in opposition to his wishes, his remedy was by a bill of review, and if he failed to object, he could not contest the charge for expenses.

So, it was held in Re J. H. Alison Lumber Co. 137 Fed. 643, 14 Am. Bankr. Rep. 84, that if encumbrancers ask the aid of the bankruptcy court to realize on their as-

105 Fed. 754; Re Prince, 131 Fed. 546; Re Bourlier Cornice & Roofing Co. 133 Fed. 983; Loveland, Bankr. 3d ed. 775; Mason v. Wolkowich, 10 L.R.A.(N.S.) 765, 90 C. C. A. 435, 150 Fed. 699.

Mr. George B. Webster, for respondent:
The Ozard Cooperage and Lumber Company, having a valid claim already allowed, was entitled to have the amount of its bid credited on that claim.

Loveland, Bankr. p. 708; Collier, Bankr. 6th ed. pp. 160, 610; Re Waterloo Organ Co. 118 Fed. 904; Re Saxton Furnace Co. 14 Am. Bankr. Rep. 483; Mills v. Virginia-Carolina Lumber Co. 21 L.R.A.(N.S.) 901, 90 C. C. A. 154, 164 Fed. 168; Smith v. Au Gres Twp. 17 Am. Bankr. Rep. 745; Re Anders Push Button Teleph. Co. 136 Fed. 995.

Hook, Circuit Judge, delivered the opinion of the court:

The trustee in bankruptcy complains of an order of the district court sustaining the right of a lien creditor who purchased the encumbered property at trustee's sale, to have the purchase price credited on his allowed claim, instead of requiring him to make payment in cash, and denying the trustee and referee their commissions out of the proceeds.

Among the assets of the bankrupt was

security, they must contribute ratably to the costs and expenses thereby incurred, where the proceeds of the unencumbered property are not sufficient to pay them.

So, upon the sale of mortgaged property free from liens, the lien of the mortgage upon the proceeds will be postponed in favor of the costs of court and the necessary expenses of the preservation and sale of the property. Re Frick, 1 Am. Bankr. Rep. 719; Re Forbes, 7 Am. Bankr. Rep. 42.

And where the property has been appraised at a value considerably less than the encumbrances on it, and the trustee thereafter sells it for the benefit of the mortgagees, who are thereby saved the expense of foreclosure, the trustee cannot pay the costs of the sale out of assets upon which the mortgagees have no lien, but must deduct the costs from such proceeds. Re Cogges, 107 Fed. 73, 5 Am. Bankr. Rep. 731.

In McNair v. McIntyre, 51 C. C. A. 59, 113 Fed. 113, 7 Am. Bankr. Rep. 639, it was held proper first to pay the entire costs of the sale out of the proceeds, and then to apply the residue to the liens in the order of their priority. From the facts of the case it is to be inferred that the proceeds were probably more than sufficient to meet the liens and costs. It should also be noted that this reverses the decision of the referee who proposed to charge the costs against the liens. Of course, if the proceeds are more than sufficient to meet all liens and costs, it does not matter whether the costs

a sawmill which was subject to a mortgage securing a note for \$1,640. It was admitted the mortgage was valid and a first lien. The mortgage creditor's claim was accordingly allowed as a secured one. The trustee and the creditor joined in a petition to the referee that the property be sold free of the mortgage and that the lien be transferred to the proceeds. The petition was granted, and at the sale duly made by the trustee the creditor became the purchaser. The purchase price was \$1,500, and the creditor asked that it be credited upon his allowed claim without deduction. The referee ordered him to pay the price in full to the trustee, or to pay their commissions on the sale, amounting to \$85. The creditor declined to do either, and upon his petition for review he was sustained by the district court. The trustee complains of the action of the court.

A court of bankruptcy should not assume charge of encumbered property and liquidate the liens on it, unless there are reasonable grounds for believing some advantage will accrue to the bankrupt's estate. If the validity of the liens is unquestioned, and their amount is such that there is probably no excess of value in the property, it should be surrendered to the lien holders or others entitled, unless some

other reason appears for retaining control. A court of bankruptcy is not a court of general jurisdiction for the adjudication of controversies or the administration of assets in which the bankrupt's estate is in no wise interested. If, however, cognizance is taken, it should be assumed some benefit or advantage was expected to accrue to the general creditors, and if it results otherwise it is equitable to make the general estate bear the cost of the proceeding. Here the proceeds of sale did not equal the admitted encumbrance, and the deficiency should not be further increased by deducting the commissions of the officers, if there is a general estate against which they can be charged. This is in analogy to the general practice in equity in foreclosure cases, where, if possible, the judgment lien creditors are paid in full, and if a deficiency results from deducting the costs from the proceeds, it goes as a judgment against the debtor. It appears here that there was a general estate of the bankrupt out of which the commissions might be paid. Therefore we need not determine what should be done in case of a sale by a trustee in bankruptcy at the instance or with the concurrence of a lien creditor, a deficit of proceeds, and no general estate.

The creditor was entitled to have the

are deducted before or after the payment of the liens. In either case the result is but to reduce the amount of the residue which is turned into the general fund. So, in this case, if the proceeds were greater than the sum of the liens and costs, the ultimate effect of the reversal of the referee's decision was to make the costs and expenses chargeable against the general fund, rather than against the encumbrancers.

In the two cases following it seems to be assumed in the discussion of other matters, rather than decided, that the costs of the sale are entitled to priority of payment out of the proceeds.

The proceeds of the sale free from liens must be applied to their satisfaction undiminished by anything except the costs of the sale, or the expenses, if any, which have been undertaken for, and result to, their benefit; and since the lienors are not concerned with the bankruptcy proceedings outside of this, they cannot be charged with the cost of instituting them or carrying them on. *Re Prince*, 131 Fed. 546, 12 Am. Bankr. Rep. 676.

As against a mortgagee who had no notice of court orders authorizing the receiver, and later the trustee in bankruptcy of the mortgagor, to continue the business of the latter, priority in the proceeds of a subsequent sale of the mortgaged property free from liens cannot be given to the general expenses of administering the estate or the

expenses of running the business, except the actual expenses of the sale and certain receivers' certificates issued as paramount liens for the purpose of paying urgent demands against the business; and this although the mortgagee and his attorney knew that the business was being conducted, where he did not know that nothing was being earned thereby. *Re Clark Coal & Coke Co.* 173 Fed. 658, 23 Am. Bankr. Rep. 273.

Where the sale of property covered by two mortgages yields less than enough to satisfy both, the proceeds will first be applied to the payment of the senior encumbrance, and the junior will be postponed to the payment of the costs and expenses of the sale. *Re Utt*, 45 C. C. A. 32, 105 Fed. 754, 5 Am. Bankr. Rep. 383.

So, it was held in *Re Bartenbach*, Fed. Cas. No. 1,068, that, ordinarily, where property subject to two mortgages is sold in bankruptcy, the proceeds should be applied to the payment first of the senior mortgage in full, and then of the costs and expenses of the sale, the residue going to the junior mortgagee.

And it was decreed in *Re Mebane*, Fed. Cas. No. 9,380, that where plaintiff in senior judgments failed to perfect his lien, the proceeds of the sale free from liens, if insufficient to meet the junior judgments, should be divided *pro rata* between the junior lienors, after paying the costs and expenses of the sale.

L. A. W.

purchase price credited on his allowed claim. It would have been a useless ceremony for him to pay the \$1,500 into court and then have it repaid him after credit on his allowed claim.

The petition to revise is denied.

OKLAHOMA SUPREME COURT.

MARGARET ZUFALL, Admrx., etc., of Oscar O. Zufall, Deceased, Plff. in Err.,
v.

MASTERSON PEYTON.

(— Okla. —, 110 Pac. 773.)

Administrator — sale — void deed — lien — foreclosure — defense.

1. A defendant in a suit to foreclose a vendor's lien reserved in an administratrix's deed purporting to convey to him certain lands of which he is in possession may resist the payment of the balance of the purchase money upon the ground that said administratrix's deed was void, but must, in order to avail himself of that defense, offer to restore the premises, together with the rents and profits accruing during the time possession was withheld.

Same — validity.

2. A purchaser at an administrator's sale has a right to suppose that by his purchase he will obtain the title of the decedent, and, if the order of sale is void, then his bid or other promise to pay is without consideration, and cannot be enforced.

(July 12, 1910.)

ERROR to the District Court for McIntosh County to review a judgment in defendant's favor in an action brought to foreclose a vendor's lien reserved in an administrator's deed. Reversed.

The facts are stated in the opinion.

Messrs. N. B. Maxey and Charles F. Runyan, for plaintiff in error:

A vendee having received a deed and the possession of land cannot resist the payment of the balance of the purchase money, when the title of the vendor has failed, and cannot avail himself of that defense, unless he offers in his pleadings to rescind the contract and restore the premises to the vendor.

Pugh v. Stigler, 21 Okla. 854, 97 Pac. 566; Williams v. Glenn, 87 Ky. 87, 12 Am. St. Rep. 461, 7 S. W. 610; Miller v. Tiffany, 1 Wall. 307, 17 L. ed. 540; Frost v. At-

Headnotes by KANE, J.

Note. — As to right of grantee in possession to question right of grantor to collect purchase money, see note to Lafferty v. Evans, 21 L.R.A. (N.S.) 363.
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wood, 73 Mich. 67, 16 Am. St. Rep. 560, 41 N. W. 96; Butler v. Fitzgerald, 43 Neb. 192, 27 L.R.A. 252, 47 Am. St. Rep. 741, 61 N. W. 640; Brady v. Carteret Realty Co. 67 N. J. Eq. 641, 110 Am. St. Rep. 502, 60 Atl. 938, 3 A. & E. Ann. Cas. 421.

At a judicial sale, the doctrine of *caveat emptor* applies, and after the confirmation thereof, the purchaser is estopped from denying that he received good title.

Freeman, Void Judicial Sales, § 48, pp. 162-164; Maupin, Marketable Title, §§ 45, 46, pp. 76-78.

Messrs. Horace Speed, R. B. Turner, and W. C. Leidke for defendant in error.

Kane, J., delivered the opinion of the court:

This action was commenced by the plaintiff in error, Margaret Zufall, administratrix of the estate of Oscar O., or Otto, Zufall, deceased, as plaintiff, against Masterson Peyton, the defendant in error, as defendant, for the purpose of foreclosing a vendor's lien reserved in an administratrix's deed executed by the plaintiff to the defendant. The petition alleged in substance that the plaintiff is the duly acting administratrix of the estate of said decedent, by appointment of the United States court for the western district of the Indian territory, at Muskogee, and that said probate matter was, at the time of the commencement of said suit, pending in the county court of McIntosh county, state of Oklahoma, by virtue of its being the successor of the United States court for the western district of the Indian territory; that the said decedent at the time of his death was a member of the Cherokee tribe of Indians, and that out of the lands of said tribe there had been allotted to him certain described lands, aggregating 90 acres; that the said land at the time of the sale was located in the western district of the Indian territory, and that the United States court at Muskogee had jurisdiction thereof; that the said decedent died, leaving certain debts outstanding against the estate, and that this plaintiff, acting under an order of the said United States court at Muskogee, offered for sale the said lands belonging to the said estate, after the same had been duly advertised, as required by law, on the 22d day of August, 1906, at the hour of 1 o'clock P. M., in the town of Checotah, in the western district of the Indian territory; that at said sale the said lands were bid off by Masterson Peyton, the defendant, for the sum of \$1,650, he being the best and highest bidder therefor; that the said Masterson Peyton paid to this plaintiff the sum

of \$550, one third of the purchase price, and that the administratrix executed to the said Masterson Peyton an administratrix's deed to said lands, which was duly confirmed by the court on the 25th day of August, 1906, wherein she reserved a vendor's lien on said lands for the balance of the purchase price, which remained unpaid, in the sum of \$1,100, which was evidenced by a promissory note of even date therewith, due in six months after date, with interest at 6 per cent per annum from date. Thereafter the defendant filed his answer, in which he sought to make Margaret Zufall, as administratrix, Margaret Zufall individually, Pearl Zufall, Maggie Zufall, Lewis Zufall, George Zufall, and Grace Zufall and Herbert Zufall, minors, as the sole heirs of the said decedent, parties defendant, and alleged as a defense to the action instituted by the plaintiff that the United States court for the western district of the Indian territory, at Muskogee, did not have jurisdiction of the real estate belonging to the said decedent, and therefore did not possess the authority to order a sale of said lands, and that the sale so ordered was void, because, under the treaty between the United States government and the Cherokee Indians, which provided for the allotment of the lands of said tribe, the said lands could not be sold by the allottee nor taken for debts against his estate for a period of five years from the approval of the said agreement, and that the said period of five years had not expired, and therefore the said lands belonging to the decedent were not subject to the payment of debts against his estate; that said court was, without authority to confirm the sale of said lands, and that the confirmation so made was void; that, as he did not obtain any title under said sale, said court ought not to foreclose said vendor's lien against him; that he was not liable under the law for the payment of the balance of the purchase money; and that he was entitled to have judgment against the said administratrix and against the heirs which he sought to be made parties defendant, for the sum of money he had paid to this plaintiff as a one third of the purchase price thereon, and a lien for said amount on the lands in controversy; and he prayed that said lien be enforced, and said lands be sold for the payment and satisfaction of said lien. Thereafter the plaintiffs, made defendants in the cross petition of the defendant, filed their reply and answer to the cross petition, denying all the material allegations of the defendant's answer and cross petition, and set up as an additional defense thereto that, if the sale so made

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was void, it had been ratified by the execution of quitclaim deeds from all of the adult heirs of the said decedent, and prayed as in the original petition. Thereafter the defendant filed his reply, wherein he denied that the adult heirs of the said decedent could legally confirm the title to said lands in him, because two of the said defendants were minors, and that the restrictions were still upon said lands, and that even the adult heirs were unable to make a valid conveyance thereof. Said cause was submitted to the court upon said pleadings without a jury, and at the time of the hearing the plaintiff and the defendants upon cross petition moved the court for leave to withdraw all pleadings except said petition, cross petition, and answer, which was allowed by the court, and thereupon, in open court, the plaintiff and defendants on cross petition filed their demurrer to the answer and cross petition of the defendant. The demurrer alleged that said answer and cross petition did not contain facts sufficient to constitute a defense to the amended petition theretofore filed in said cause, and prayed for judgment as in the original petition. The court thereupon overruled the demurrer of the plaintiff and of the defendants on cross petition, to the answer and cross petition of defendant, and gave judgment in favor of the defendant for the sum of \$725.67, which was the amount that he had paid to the said administratrix, with interest thereon from the date of payment, less the rents and profits which he had received from said lands while he had had the possession of the same; and the court decreed that Masterson Peyton was divested of the title of said lands by virtue of the administratrix deed and the quitclaim deeds executed by the heirs of said decedent, and that the same was again invested in the heirs of the said decedent. To reverse this judgment and decree, this proceeding in error was commenced.

Counsel for plaintiff in error contend that: (1) "A vendee having received a deed and the possession of land cannot resist the payment of the balance of the purchase money, when the title of the vendor has failed, and cannot avail himself of that defense, unless he offers in his pleadings to rescind the contract and restore the premises to the vendor." (2) That "at a judicial sale the doctrine of *caveat emptor* applied, and, after the confirmation thereof, the purchaser is estopped from denying that he received good title." The first of these propositions seems to be sustained by *Pugh v. Stigler*, 21 Okla. 854, 97 Pac. 566. In that case Stigler sued Pugh in the United States court in the Indian terri-

tory at Poteau, to recover a balance of \$300, with interest, alleged to be due as purchase money on a sale of land. The petition stated, in substance, that on the 19th day of August, 1904, defendant purchased of the Midland Valley Land Company certain lots situated in the town of Stigler, Indian territory, and agreed to pay therefor the sum of \$600, paying thereon \$300, and agreeing to pay the remaining \$300 within one year; that the contract was in writing, in which it is stipulated that the Midland Valley Land Company retained the title to the property and a lien upon all the buildings and improvements put on the property by the grantee or his assigns, until all the deferred payments had been made, after which it agreed to deliver to the grantee or his assigns a warranty deed to the property; that the lots were a part of the homestead allotment of Ellis Jefferson, deceased, and were conveyed for a valuable consideration by the adult heirs of Ellis Jefferson to J. W. McCloud, and from him to the Midland Valley Land Company; that it, on the 15th day of May, 1905, conveyed to defendant all its right, title, and interest in the property, and that defendant has been in possession ever since the execution of the bond; that since the maturity of the bond a warranty deed conveying the property has been tendered the defendant; that he has failed and refused to make the remaining payment. Plaintiff prayed judgment for \$300, and that the same be declared a lien on the premises. The defense was that the land in controversy was allotted to Ellis Jefferson, deceased, a duly enrolled Choctaw Indian by blood, and was commonly called a "dead claim;" that the restrictions upon the alienation of said land had never been removed from any of the heirs of said Ellis Jefferson, who were full-blood members of said tribe; that no patent had issued in the name of Ellis Jefferson. The prayer to the court was that the contract be rescinded, and for judgment against the Midland Valley Land Company for \$2,800, for breach of contract, and that the judgment be declared a lien upon the land, and for costs. Mr. Justice Turner, who delivered the opinion of the court, said: "It will be observed that the cross complaint discloses a prayer for a rescission of the contract upon the ground that the vendor had no title to convey; but the vendee makes no offer to restore the premises to the vendor. Therefore judgment should be rendered on this pleading in favor of the plaintiff, if its allegations are insufficient to sustain a judgment for the defendant." The second paragraph of the syllabus is as follows: "A vendee having

a bond for title and in possession of the land may resist the payment of the purchase money, when the title of the vendor has failed, but must, in order to avail himself of that defense, offer to rescind and restore the premises to the vendor." In the case at bar, there is no offer to restore the premises to the vendor, although the effect of the prayer, if granted, would be to rescind the administratrix's deed, and to grant to defendant affirmative relief in the way of a judgment against the defendant Margaret Zufall, as administratrix, and individually, for the sum of \$250, with interest, and a decree making said judgment a lien upon the premises. It is true that by the judgment of the court the defendant, Masterson Peyton, was ordered to surrender possession of the land in controversy to Margaret Zufall, administratrix, but there is no allegation in the pleadings to support this part of the judgment. Moreover, a surrender of possession will not restore the parties *in statu quo*, unless the rents and profits during the time possession was withheld can be definitely ascertained, and credit therefor given. The pleadings as they stand are not sufficient to do this.

On the second proposition, we cannot agree with counsel for plaintiff in error. It is true the answer of the defendant constituted a collateral attack upon the administratrix's deed, but, if there is a total want of jurisdiction of the subject-matter, the proceedings are void and a mere nullity, and confer no rights, and afford no justification, and may be rejected when collaterally drawn in question. *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381. The doctrine of *caveat emptor* as it applies to judicial sales is based upon the theory that the purchaser buys only such estate or interest as his debtor has, and he is bound to take notice of what that interest is. In the case at bar, however, notwithstanding the order of sale and the execution of the deed thereunder, the title to the land remained in the heirs at law of the decedent, and, if the rule of *caveat emptor* is strictly applied, they will not only retain the title to the land, but recover the purchase price also. Mr. Freeman, in his work on Void Judicial Sales, § 48, in discussing a similar situation, says: "Every purchaser has a right to suppose that by his purchase he will obtain the title of the defendant in execution in case of execution sales, and of the ward or decedent in the case of a guardian's or administrator's sale. The promise to convey this title is the consideration upon which his bid is made. If the judgment or order of sale is void, or if, from any cause, the convey-

ance, when made, cannot invest him with the title held by the parties to the suit or proceeding, then this bid, or other promise to pay, is without consideration, and cannot be enforced. He may successfully resist any action for the purchase money, whether based upon the bid or upon some bond or note given by him." "It has been held that the rule *caveat emptor* does not apply to cases in which the court had no jurisdiction to direct the sale at which the purchaser bid, and that in such a case the purchaser might have restitution of the purchase money, even after confirmation of the sale. And generally it has been held that a purchaser at a judicial sale which is void for want of jurisdiction in the court to order the sale, or for other cause, may resist the payment of the purchase money, even after the purchaser's bid had been accepted by the court. There can be no confirmation of that which is void." Maupin, Marketable Title to Real Estate, 2d ed. p. 82. Mr. Maupin, further discussing the same subject, on page 128, says: "These principles address themselves to our sense of equity and right, and many cases may be found which sustain them. But it is not to be denied that they strongly encroach upon, and are perhaps inconsistent with, the doctrine of *caveat emptor* as applied to execution sales." [This is a suit in equity, and the admitted facts, it seems to us, are such that it could be inequitable to grant the plaintiff the relief prayed for. Courts of equity sometimes, even after the payment of the money, bring the parties before them upon the suggestion of fraud, misapprehension, surprise, or other ground of equitable relief, and direct the sale to be vacated. *Reeman, Void Judicial Sales*, § 43.]

The judgment of the court below is reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

Dunn, Ch. J., and Williams, Hayes, and Turner, JJ., concur.

TEXAS COURT OF CRIMINAL APPEALS.

JOHN LAFRENTZ, Appt.,

v.

STATE OF TEXAS.

57 Tex. Crim. Rep. 464, 125 S. W. 32.)

Intoxicating liquor — sale — agent for purchaser.

One cannot be convicted of illegally selling intoxicating liquor if he merely acted as L.R.A.(N.S.)

the purchaser's agent in procuring it, although the intent was to evade the local option law.

(December 15, 1909.)

APPPEAL by defendant from a judgment of the Llano County Court convicting him of violating the local option law. Reversed.

The facts are stated in the opinion.

Messrs. Flack & Dalrymple for appellant.

Mr. F. J. McCord for the State.

Ramsey, J., delivered the opinion of the court:

Appellant was convicted in the county court of Llano county on the 3d day of April this year of selling intoxicating liquors in said county in violation of the local option law. The evidence showed a very peculiar state of facts. G. W. White, to whom the liquor was charged to have been sold, testified that he bought a bottle of whisky from appellant on or about December 1, 1908, for which he paid him \$1. He also testified that he was a member of the Llano Club, and had, at some time before the transaction in question, given an order for some beer, and that, while something was said about whisky, he did not order any whisky to be stored there for him; that he gave appellant his name, and that he put something down, he did not see what it was, and asked him how much beer he wanted, and he signed the order for beer, which may have included whisky. His testimony is a little obscure, and rather evidences an indisposition to state the facts with entire candor. Appellant's testimony is in some slight confusion and to some extent contradictory, though some of it is consistent with the idea that he was merely the manager of the club, that White had given an order for whisky, and that he kept the 2 gallons ordered by White to himself, and that no one else had access to it, and that in the entire transaction he acted as agent of White and derived no profit from the sale.

In this state of the record the charge of the court is to be specially noted in the respect that he gave all the special charges asked, both by counsel for appellant and for the state. Among other things in the general charge he gave the following: "If you believe from the evidence that defendant was manager of the club in Llano, on the north side, and that G. W. White was a member of such club, and that defendant

Note. — See notes to *Reed v. State*, 24 L.R.A.(N.S.) 268, and *State v. Lynch*, 28 L.R.A.(N.S.) 334.

tory at Poteau, to recover a balance of \$300, with interest, alleged to be due as purchase money on a sale of land. The petition stated, in substance, that on the 19th day of August, 1904, defendant purchased of the Midland Valley Land Company certain lots situated in the town of Stigler, Indian territory, and agreed to pay therefor the sum of \$600, paying thereon \$300, and agreeing to pay the remaining \$300 within one year; that the contract was in writing, in which it is stipulated that the Midland Valley Land Company retained the title to the property and a lien upon all the buildings and improvements put on the property by the grantee or his assigns, until all the deferred payments had been made, after which it agreed to deliver to the grantee or his assigns a warranty deed to the property; that the lots were a part of the homestead allotment of Ellis Jefferson, deceased, and were conveyed for a valuable consideration by the adult heirs of Ellis Jefferson to J. W. McCloud, and from him to the Midland Valley Land Company; that it, on the 15th day of May, 1905, conveyed to defendant all its right, title, and interest in the property, and that defendant has been in possession ever since the execution of the bond; that since the maturity of the bond a warranty deed conveying the property has been tendered the defendant; that he has failed and refused to make the remaining payment. Plaintiff prayed judgment for \$300, and that the same be declared a lien on the premises. The defense was that the land in controversy was allotted to Ellis Jefferson, deceased, a duly enrolled Choctaw Indian by blood, and was commonly called a "dead claim;" that the restrictions upon the alienation of said land had never been removed from any of the heirs, of said Ellis Jefferson, who were full-blood members of said tribe; that no patent had issued in the name of Ellis Jefferson. The prayer to the court was that the contract be rescinded, and for judgment against the Midland Valley Land Company for \$2,800, for breach of contract, and that the judgment be declared a lien upon the land, and for costs. Mr. Justice Turner, who delivered the opinion of the court, said: "It will be observed that the cross complaint discloses a prayer for a rescission of the contract upon the ground that the vendor had no title to convey; but the vendee makes no offer to restore the premises to the vendor. Therefore judgment should be rendered on this pleading in favor of the plaintiff, if its allegations are insufficient to sustain a judgment for the defendant." The second paragraph of the syllabus is as follows: "A vendee having

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a bond for title and in possession of the land may resist the payment of the purchase money, when the title of the vendor has failed, but must, in order to avail himself of that defense, offer to rescind and restore the premises to the vendor." In the case at bar, there is no offer to restore the premises to the vendor, although the effect of the prayer, if granted, would be to rescind the administratrix's deed, and to grant to defendant affirmative relief in the way of a judgment against the defendant Margaret Zufall, as administratrix, and individually, for the sum of \$725, with interest, and a decree making said judgment a lien upon the premises. It is true that by the judgment of the court the defendant, Masterson Peyton, was ordered to surrender possession of the land in controversy to Margaret Zufall, administratrix, but there is no allegation in the pleadings to support this part of the judgment. Moreover, a surrender of possession will not restore the parties *in statu quo*, unless the rents and profits during the time possession was withheld can be definitely ascertained, and credit therefor given. The pleadings as they stand are not sufficient to do this.

On the second proposition, we cannot agree with counsel for plaintiff in error. It is true the answer of the defendant constituted a collateral attack upon the administratrix's deed, but, if there is a total want of jurisdiction of the subject-matter, the proceedings are void and a mere nullity, and confer no rights, and afford no justification, and may be rejected when collaterally drawn in question. *Thompson v. Tolmie*, 2 Pet. 157, 7 L. ed. 381. The doctrine of *caveat emptor* as it applies to judicial sales is based upon the theory that the purchaser buys only such estate or interest as his debtor has, and he is bound to take notice of what that interest is. In the case at bar, however, notwithstanding the order of sale and the execution of the deed thereunder, the title to the land remained in the heirs at law of the decedent, and, if the rule of *caveat emptor* is strictly applied, they will not only retain the title to the land, but recover the purchase price also. Mr. Freeman, in his work on *Void Judicial Sales*, § 48, in discussing a similar situation, says: "Every purchaser has a right to suppose that by his purchase he will obtain the title of the defendant in execution in case of execution sales, and of the ward or decedent in the case of a guardian's or administratrix's sale. The promise to convey this title is the consideration upon which his bid is made. If the judgment or order of sale is void, or if, from any cause, the convey

ance, when made, cannot invest him with the title held by the parties to the suit or proceeding, then this bid, or other promise to pay, is without consideration, and cannot be enforced. He may successfully resist any action for the purchase money, whether based upon the bid or upon some bond or note given by him." "It has been held that the rule *caveat emptor* does not apply to cases in which the court had no jurisdiction to direct the sale at which the purchaser bid, and that in such a case the purchaser might have restitution of the purchase money, even after confirmation of the sale. And generally it has been held that a purchaser at a judicial sale which is void for want of jurisdiction in the court to order the sale, or for other cause, may resist the payment of the purchase money, even after the purchaser's bid had been accepted by the court. There can be no confirmation of that which is void." Maupin, Marketable Title to Real Estate, 2d ed. p. 82. Mr. Maupin, further discussing the same subject, on page 128, says: "These principles address themselves to our sense of equity and right, and many cases may be found which sustain them. But it is not to be denied that they strongly encroach upon, and are perhaps inconsistent with, the doctrine of *caveat emptor* as applied to execution sales." This is a suit in equity, and the admitted facts, it seems to us, are such that it would be inequitable to grant the plaintiff the relief prayed for. Courts of equity sometimes, even after the payment of the money, bring the parties before them upon the suggestion of fraud, misapprehension, surprise, or other ground of equitable relief, and direct the sale to be vacated. Freeman, Void Judicial Sales, § 48.

The judgment of the court below is reversed, and the cause remanded, with directions to proceed in conformity with this opinion.

Dunn, Ch. J., and Williams, Hayes, and Turner, JJ., concur.

TEXAS COURT OF CRIMINAL APPEALS.

JOHN LAFRENTZ, Appt.,

v.

STATE OF TEXAS.

(57 Tex. Crim. Rep. 464, 125 S. W. 32.)

Intoxicating liquor — sale — agent for purchaser.

One cannot be convicted of illegally selling intoxicating liquor if he merely acted as

the purchaser's agent in procuring it, although the intent was to evade the local option law.

(December 15, 1909.)

A PPEAL by defendant from a judgment of the Llano County Court convicting him of violating the local option law. Reversed.

The facts are stated in the opinion.

Messrs. Flack & Dalrymple for appellant.

Mr. F. J. McCord for the State.

Ramsey, J., delivered the opinion of the court:

Appellant was convicted in the county court of Llano county on the 3d day of April this year of selling intoxicating liquors in said county in violation of the local option law. The evidence showed a very peculiar state of facts. G. W. White, to whom the liquor was charged to have been sold, testified that he bought a bottle of whisky from appellant on or about December 1, 1908, for which he paid him \$1. He also testified that he was a member of the Llano Club, and had, at some time before the transaction in question, given an order for some beer, and that, while something was said about whisky, he did not order any whisky to be stored there for him; that he gave appellant his name, and that he put something down, he did not see what it was, and asked him how much beer he wanted, and he signed the order for beer, which may have included whisky. His testimony is a little obscure, and rather evidences an indisposition to state the facts with entire candor. Appellant's testimony is in some slight confusion and to some extent contradictory, though some of it is consistent with the idea that he was merely the manager of the club, that White had given an order for whisky, and that he kept the 2 gallons ordered by White to itself, and that no one else had access to it, and that in the entire transaction he acted as agent of White and derived no profit from the sale.

In this state of the record the charge of the court is to be specially noted in the respect that he gave all the special charges asked, both by counsel for appellant and for the state. Among other things in the general charge he gave the following: "If you believe from the evidence that defendant was manager of the club in Llano, on the north side, and that G. W. White was a member of such club, and that defendant

Note. — See notes to Reed v. State, 24 L.R.A. (N.S.) 268, and State v. Lynch, 28 L.R.A. (N.S.) 334.

as such manager, if he was, ordered whisky for said White, whether White requested defendant to do so or not, and that same was shipped along with other whisky ordered by defendant, if any, for other members of said club, and when received by defendant, if it was, it was all stored together in the wareroom of the club by defendant, and that the whisky ordered for said White, if any, was not marked or otherwise identified as the particular whisky ordered for him, if it was, and that it was not paid for by said White until it was actually delivered, and that defendant gave said White a ticket, representing the quantity of whisky ordered for him, if any, and if you further find from the evidence that said ticket entitled said White to present it to defendant, and, upon having it punched for the quantity of whisky desired and paying the price therefor, to receive from defendant whisky from that ordered for him, if it was, until same was exhausted, and that on or about the 1st day of December, 1908, and anterior to the presentment of the indictment herein, said White did present such ticket to defendant, and call for one bottle of whisky, and that thereupon defendant punched said ticket for one bottle of whisky, and delivered the bottle of whisky to said White, and received from said White in payment therefor \$1, then, if you so find from the evidence and believe beyond a reasonable doubt, and you further believe from the evidence that such transaction, if any, was a device to evade the law, you are charged that such transaction constituted a sale of whisky by defendant in violation of the local option law."

At the request of appellant he gave the following special instruction: "In this cause you are charged that, if you believe from the evidence the witness George White was a member of what is called the 'Llano Club,' and that the defendant was the manager and steward of said club, and that the said witness requested defendant to order for him whisky, and in obedience to said order the defendant did order whisky for said witness, and when said whisky arrived here, in Llano, the defendant set aside and segregated such whisky, and held same for said witness, and delivered a part or a portion thereof to said witness at the time alleged in the indictment against defendant, and defendant received payment therefor, and sent such payment back to the parties from whom defendant purchased said whisky, then, in such event, defendant would not be guilty of violating the local option law, and you are charged to return a verdict of not guilty; and if you have a rea-

sonable doubt of the existing of such facts, your verdict should be not guilty." Also the following charge at the request of counsel for appellant: "In this case, if you believe from the evidence that the witness White requested the defendant to order him some whisky, or if the defendant understood him to make such order, either verbally or in writing, and the defendant in good faith did make the order for him, and secured the whisky, and delivered it to the said witness as charged in the indictment, then defendant would not be guilty as charged, and you should return a verdict of not guilty; and if you entertain a reasonable doubt of the existence of said facts, your verdict should be the same, and this would be true whether the witness paid for said whisky when he got it or not."

At the instance of the state he gave the following special charge: "In this cause you are further instructed that if you believe from the evidence that the defendant was acting as the agent of George White in buying and delivering the whisky to said witness, as charged in the indictment, then you should acquit the defendant; but if you believe from the evidence that such agency, if any, was a mere device or subterfuge for the evasion of the law, then, if you believe from the evidence that the defendant, acting as such agent, and that such agency was a device to evade the law, ordered and delivered the whisky to said White, as charged in the indictment, you should find the defendant guilty."

The portion of the general charge copied above, as well as the special charge given at the instance of the state, are vigorously assailed in the motion for a new trial, and are as vigorously complained of in this court. We think that the court's general charge is subject to the objection that it attempts a recitation of the entire testimony, and instructs the jury that, if they find certain facts to exist, appellant will be guilty, and is open to the objection that it does not state the facts correctly, and as framed should not have been given. The special charge requested by counsel for the state is directly contradictory to the special charges given at the request of appellant, and is erroneous in that, in substance, it instructs the jury to convict the defendant if his intent or the effect of his act constituted an evasion of the local option law. A somewhat similar charge was expressly condemned by this court in the case of Vanarsdale v. State, 35 Tex. Crim. R. 587, 34 S. W. 931. The charge there given was in this language: "If the jury, however, believe from the evidence that the defendant, Vanarsdale, acted as the agent

Bingham in obtaining the intoxicating liquor, and at the same time acted together with others in obtaining the liquor by a borrowing or an exchange, for the purpose of evading the provisions of the local option law, then they will find the defendant guilty, and assess his punishment as directed above." In discussing this charge the court say: "The court in this charge tells the jury, if appellant acted as the agent of Bingham, but was interested with others in obtaining liquor by a borrowing or an exchange, for the purpose of evading the provisions of the local option law, then to find him guilty. It might be said that every method of procuring whisky in a local option precinct, except as authorized by law, is an evasion of the local option law; but every evasion of the law is not a criminal offense. The law makes criminal only a sale or exchange of intoxicating liquors in a local option precinct. Yet the court instructs the jury, in a general way, if the borrowing or exchange was for the purpose of evading the provisions of the local option law, that they would find the defendant guilty, when they were only authorized by the law to convict the defendant if, in such evasion, he became the seller or exchanger, or was interested, with the person selling or exchanging, in making such sale or exchange. The charge given was not the law, and was liable to mislead and confuse the jury." It is evident that the charge in this case is subject to all the objections noted in the case just mentioned.

It becomes unnecessary to review the other matters complained of, for the reason that they relate to matters which are not likely to occur upon another trial.

For the errors pointed out, the judgment is reversed, and the cause remanded.

MAINE SUPREME JUDICIAL COURT.

STATE OF MAINE

v.

INTOXICATING LIQUORS.

GRAND TRUNK RAILWAY OF CANADA,
Claimant.

(— Me. —, 78 Atl. 265.)

Evidence — presumption — sale of liquor.

1. An intent to sell the liquor unlawfully is presumed when 120 quart bottles of whisky are consigned to one address in prohibition territory.

Intoxicating liquor — seizure — possession of carrier.

2. Intoxicating liquor consigned to pro-
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hibition territory from another state is subject to seizure in the hands of the carrier where one holding the bill of lading has receipted for the entire consignment and taken away a portion, leaving that seized in the carrier's freight house for six days thereafter.

(November 23, 1909.)

REPORT by the Supreme Judicial Court for Androscoggin County for the opinion of the full bench of an appeal by claimant from a decree of the Lewiston Municipal Court declaring certain intoxicating liquors forfeited. Judgment for the State.

The facts are stated in the opinion.

Mr. Frank A. Morey for the State.

Messrs. White & Carter for claimant.

Emery, Ch. J., delivered the opinion of the court:

Ten cases, containing 120 quart bottles, of whisky, consigned to J. Hume, were seized at the depot of the Grand Trunk Railway Company in Lewiston, and were duly libeled, and are claimed by that railroad company.

The first question is whether the whisky was intended for unlawful sale. Unexplained, we think the quantity is sufficient

Note. — What is sufficient to terminate interstate transportation of intoxicating liquors.

This question is discussed in the notes to State v. Intoxicating Liquors, 11 L.R.A. (N.S.) 550, and State v. Intoxicating Liquors, 23 L.R.A. (N.S.) 1020. All the authorities there cited, of course, follow the interpretation placed by the United States Supreme Court upon the words "upon arrival in such state," found in the act of Congress of August 8, 1890, chap. 728, 26 Stat. at L. 313, U. S. Comp. Stat. 1901, p. 3177, that delivery of an interstate shipment of intoxicating liquor to the consignee is essential to constitute arrival in the state, in order to subject them to the police power of the state. Since the publication of those notes, this interpretation has not only been applied in the principal case, but in St. Louis & S. F. R. Co. v. State (Okla.) 109 Pac. 230.

It would seem that this Federal barrier to the operation of the police power of the state upon intoxicating liquors until they have reached the hands of the consignee has been removed by the act of June 30, 1906, chap. 3915, 34 Stat. at L. 768, U. S. Comp. Stat. Supp. 1909, p. 1187, commonly called the "pure food act," and hence it was held in State v. Intoxicating Liquors (Me.) 76 Atl. 268, following State v. Intoxicating Liquors, 104 Me. 502, 71 Atl. 788 (set out in the note in 23 L.R.A. (N.S.) 1020), that intoxicating liquors brought into the state in violation of the pure food act became subject to the laws of the state the moment they came within its limits. J. A. C.

evidence of such intention, and no explanation is offered.

The next question is whether at the time of seizure the whisky was so far undelivered and in the custody of the railroad company as an interstate common carrier as to be within the protection of the commerce clause of the Federal Constitution. Twenty-two cases were shipped from New York and arrived at Lewiston January 1, 1909. On January 8, 1909, one of the drivers of Hoyt's Express Company presented the bill of lading and receipted for all the whisky, and took away twelve cases, leaving ten cases in the freight shed of the railroad company, where they remained for six more days, when they were seized by the officer.

The question is a Federal one; but we do not find the Federal courts to have held that intoxicating liquors are under Federal protection so long as they remain upon the premises of the interstate carrier. In *Heyman v. Southern R. Co.* 203 U. S. 270, 276, 51 L. ed. 178, 180, 27 Sup. Ct. Rep. 104, 7 A. & E. Ann. Cas. 1130, the court was careful to say it did not decide that the Federal protection would not be lost where the consignee, after notice, designedly left the liquors in the hands of the carrier for an unreasonable time. The locality of the liquors is not made the test. All that the Federal courts seem to require is that the liquors shall once have been turned over to and accepted by the consignee. This may occur without any removal of the liquors themselves from the freight sheds of the carrier, and we think it did occur in this case. In *Knowles v. Atlantic & St. L. R. Co.* 38 Me. 55, 61 Am. Dec. 234, the merchandise had not even been unloaded from the cars; but the consignee was notified of its arrival and that it was at his risk. He acknowledged he had received it in good order, and requested it be allowed to remain on the cars for a time. Held that the transit was ended and the liability was at an end.

In *Whitney Mfg. Co. v. Richmond & D. R. Co.* 38 S. C. 365, 37 Am. St. Rep. 767, 17 S. E. 147, cotton had been transported by the railroad company, and the car containing it had been placed upon a side track for the convenience of the consignee, who delivered to the railroad company the waybill as a receipt, and removed part of the cotton. Held that all the cotton had been delivered. In *Kenny Co. v. Atlanta & W. P. R. Co.* 122 Ga. 365, 50 S. E. 132, the railroad company notified the

consignee of the arrival of the merchandise. Before it was unloaded from the car, the consignee's drayman went with the freight clerk to the car and signed a receipt for all the merchandise as checked by the clerk. He then hauled some of the merchandise away that day, but left some in the car. Held that all the merchandise had been completely delivered at the time of signing the receipt. In *Vaughn v. New York, N. H. & H. R. Co.* 27 R. I. 235, 61 Atl. 695, two cars containing oats, bran, and gluten, consigned to the plaintiff, arrived and were placed on a side track near the plaintiff's warehouse. He was duly notified of the arrival, and, with the permission of the company's agent, opened the cars, examined the contents, and removed part of them, leaving the remainder in the cars, where it was consumed by fire early the next morning. Held that all the consignment had been delivered. The court said: "But under the testimony we do not find that the defendant [the railroad company] was even a warehouseman. The property had been delivered on the spur track to the plaintiff. He had accepted it, sold and removed some of it, and had assumed full dominion over it; and the mere fact that it still remained in the defendant's cars was a mere matter of convenience for the plaintiff, but did not impose any liability on the defendant." The facts in the case at bar are manifestly different from those in the cases of *State v. Intoxicating Liquors*, 102 Me. 385, 120 Am. St. Rep. 504, 67 Atl. 312, and 104 Me. 463, 23 L.R.A. (N.S.) 1020, 72 Atl. 331, and our decision here is not in conflict with those cases, rightly read.

Of course, the final determination of this question is with the Supreme Court of the United States; but, not finding any decision of that court to the contrary upon facts like those in this case, we think, for the reasons above given, we should hold that the transit was ended, that the liquors had come into the possession of the consignee at the time of the seizure, and were then subject to seizure and forfeiture under the state law. We have therefore no occasion to consider questions raised under the "pure food act" of Congress. Having reached the consignee and being intended for unlawful sale, they must be declared forfeited.

Judgment of forfeiture against the liquors. Judgment against the claimant for costs of libellant. Liquors to be destroyed.

OKLAHOMA SUPREME COURT.

LEEPER, GRAVES, & COMPANY et al.,
Plffs. in Err.,
v.

FIRST NATIONAL BANK OF HOBART.

(— Okla. —, 110 Pac. 655.)

Replevin — bond — liability — technical defect — effect.

1. The obligors on a replevin bond given by the plaintiff, who has, by virtue thereof, received and retained the property, are estopped from questioning its validity on the ground of formal or technical defects.

Same — filing date.

2. The fact that the undertaking in replevin, provided for by § 5689, Comp. Laws Okla. 1909, was indorsed as filed at a date subsequent to the issuance of the writ, does not affect its validity, where the same was in fact signed at a prior date, and the writ itself recites that before its issuance an undertaking was filed.

Same — judgment for defendant — duty of plaintiff — liability for damages.

3. In an action of replevin, where there is an alternative judgment rendered against plaintiff for the return of the property taken or its value, it is the duty of plaintiff to

promptly and in good faith tender all of the same in as good condition as received, and a failure to do so will render his sureties liable on their undertaking for the full amount that defendant may be damaged thereby.

(a) In such a case, however, where plaintiff within a reasonable time makes a good faith tender of a substantial part of the property taken, it is the duty of the defendant to accept the same and recoup on plaintiff's bond for any damages suffered.

Same — substantial tender of property — duty of defendant.

4. Plaintiff took from defendant in an action of replevin eight steel bridges. The trial resulted in a judgment against plaintiff for the return thereof or their value. Within a reasonable time plaintiff in good faith tendered defendant all of the property shown to have been taken, with the exception of a small fraction thereof. It was not shown that plaintiff wilfully withheld the part not tendered, or that the same could not be readily supplied in the open market. Defendant rejected the tender, and the court rendered judgment for the value of the whole property. Held error, it being the duty of defendant to accept the property tendered and recoup damages on the bond.

Headnotes by DUNN, Ch. J.

(July 12, 1910.)

Note. — Defects of irregularities affecting bond as a defense to an action on a replevin bond which has served its purpose.

This note is limited strictly to cases where the action was on the bond, and does not include cases where the question of the sufficiency of the bond to bind the sureties was raised on a motion to dismiss the action of replevin.

As a general rule a replevin bond though irregular under the statute is not for that reason void. The reason for the rule is clearly stated by Parsons, J., in *Morse v. Hodsdon*, 5 Mass. 314. He said that although the condition of the bond in that case was variant from the statute, yet, as the statute did not prohibit the taking of a bond in any other form, or declare such bond void, and since the plaintiffs had obtained possession of the goods under color of the bond given, it would be unreasonable to allow the makers of the bond to dispute it after their principal has had the benefit of it.

Enforceable as a common-law bond.

Though invalid as a statutory bond, the replevin bond may be available and enforceable as a common-law bond, where it contains a valid and sufficient consideration. *Sewall v. Franklin*, 2 Port. (Ala.) 403; *Mitchell v. Ingram*, 38 Ala. 395; *Russell v. Locke*, 57 Ala. 420; *Holtz v. Bollman Bros.* Co. 47 Ill. App. 378; *Wolfe v. McClure*, 79 29 L.R.A. (N.S.)

Ill. 564; *Arnold v. Allen*, 8 Mass. 147; *Jones v. Hays*, 27 Tex. 1; *Hedderick v. Pontet*, 6 Mont. 345, 12 Pac. 765; *Cook v. Bank of Kentucky*, 5 J. J. Marsh. 163; *Goodell v. Bates*, 14 R. I. 65; *Stansfeld v. Hellawell*, 21 L. J. Exch. N. S. 148; *Henock v. Chaney*, 61 Mo. 129. And see *W. W. Kimball Co. v. Bleick*, 24 Or. 59, 32 Pac. 766; 24 Am. & Eng. Enc. Law, p. 533.

In *Nunn v. Goodlett*, 10 Ark. 89, it was said that unless the bond so departed from the statute as to defeat the object of the statute, it may still be good as a common-law bond.

So, where the officer takes an indemnifying bond instead of a regular statutory bond, he will be entitled to recover on it as an obligation at common law, where the statute does not forbid taking such a bond. *Wolfe v. McClure*, supra.

And a bond given to the sheriff of an adjoining county in which the action was pending, who delivered the property to the plaintiffs, although not in strict conformity to the statute, is binding as a common-law security. *Claggett v. Richards*, 45 N. H. 360.

And a bond given to prosecute a suit in replevin in another state, though not within the statute, is good and binding as a common-law security. *Livingston v. Superior Ct.* 10 Wend. 547.

But in *Burge v. Hinds*, 46 Tex. Civ. App. 134, 101 S. W. 855, it was held that there can be no recovery on a replevin bond made to the replevying officer, instead of the de-

ERROR to the District Court for Kiowa County to review a judgment in plaintiff's favor in an action brought to recover the amount alleged to be due on a certain replevin bond. Modified.

The facts are stated in the opinion.

Mr. E. E. Blake, for plaintiffs in error: The surety on a bond should not be held for the things done and performed prior to his execution of the bond.

Owens v. Tague, 3 Ind. App. 245, 29 N. E. 784.

The law will not increase or enlarge the terms of an undertaking to the prejudice of its signers, or create a liability against the sureties which they did not intend to incur, and which is not within the express undertaking or statute.

defendant in replevin, in a suit instituted in behalf of such defendant, where the statute requires that the bond be given to the defendant; as the adverse party is not in privity therewith.

And in *Purple v. Purple*, 5 Pick. 226, it was held that such a bond is not good at common law for the reason that a bond to the defendant was a condition upon which the lawfulness of the replevin depended.

In *Wooters v. Smith*, 56 Tex. 198, it was said that to sustain a bond not in compliance with the statute as a common-law bond, it must appear that the persons seeking to enforce it, or those persons with whom they are in privity, agreed and consented to the contract evidenced thereby with the makers, and that it was not sufficient where the pleadings failed to set forth such an agreement and the case was made to stand nakedly upon the agreement evidenced by the bond made to the officer executing the writ, as it was not such contract as the law had empowered the officer to make. To the same effect in *Frothingham v. Howard*, 1 Aik. (Vt.) 139.

Amount of the bond.

The obligors of a replevin bond are estopped to set up the fact that the penalty is less than double the value of the property, as required by statute. *Carver v. Carver*, 77 Ind. 498; *Trueblood v. Knox*, 73 Ind. 310; *Tuck v. Moses*, 54 Me. 115.

And in *Dale v. Heffner*, 4 Baxt. 217, it was held that the sureties were estopped to set up as a defense that the value of the property was not fixed in the bond.

Or to deny the value of the property as recited in the bond. *Capital Lumbering Co. v. Learned*, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454.

And it is no defense that the bond was taken for too large an amount. *Turley v. Owings*, *Sneed* (Ky.) 148.

But in *Wooters v. Smith*, supra, it was held that a bond taken in excess of the required amount could not be said to be a voluntary bond, and should be regarded, in the absence of explanatory facts, as evidence of

Henrie v. Buck, 39 Kan. 381, 18 Pac. 228; *Edwards v. Ellis*, 27 Kan. 344; *Hays v. Closson*, 20 Kan. 120; 12 Am. & Eng. Enc. Law, 2d ed. p. 136.

An absence of a portion of the property replevied does not justify a refusal of return of that which has been taken. The return must be accepted, according to the judgment of the court, for value, and the money recovered, being an alternative, can only be for the remainder.

1 *Cobbey*, Replevin, §§ 1318, 1350; *Larabee v. Cook*, 8 Kan. App. 776, 61 Pac. 815. *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947; *June v. Payne*, 107 Ind. 307, 7 N. E. 370, 8 N. E. 556.

The judgment upon which the execution

the fact of a refusal to deliver the property unless the bond was given, and that exacting a bond under such circumstances would, as to the maker, amount to coercion and oppression, which would invalidate it as a common-law bond.

In *Case v. Pettee*, 5 Gray, 27, it was held that no action will lie on a replevin bond. the penalty of which is "double the value of the property hereinafter mentioned to be replevied," which value is to be fixed by appraisers, but which is not stated in the bond; especially where the value of the property is afterwards agreed upon by the parties, and never fixed by appraisers as provided by the statute.

Defect in condition of bond.

The condition as prescribed by the statute need not as a general rule be strictly followed.

Omission of the condition for the return of the property by the plaintiff, as provided by statute, was held, in *Hicklin v. Nebraska City Nat. Bank*, 8 Neb. 463, 1 N. W. 135, to be no defense.

So, where there is an omission in the bond of the condition as to the payment of costs and damages for wrongfully suing out the replevin writ, as required by the statute, it is no defense to an action on the bond for a failure to return the property, as each condition is an independent obligation, and the failure to keep either is a ground of action. *Hotz v. Bollman Bros. Co.* supra.

In *Perse v. Watrous*, 30 Conn. 139, it was held that a bond conditioned to prosecute to effect before a certain justice of the peace, where the justice had no final jurisdiction, was not void as not complying with the statute which required a bond to prosecute to effect generally.

And an undertaking is sufficient which provides "for the prosecution of the action under a statute requiring the bond to be conditioned 'for the prosecution of the action without delay and with effect.'" *Parrott v. Scott*, 6 Mont. 340, 12 Pac. 702; *West v. Caldwell*, 23 N. J. L. 736.

was issued is the ordinary judgment in an action of replevin, for the return of the property sued for, or, in default thereof, for its value, and the defendant had a right to discharge it by a return of such property within a reasonable time, and he could not be compelled to pay its value unless a delivery could not be had.

Wells, Replevin, 778; 2 Freeman, Executions, 468; Etchepare v. Aguirre, 91 Cal. 288, 25 Am. St. Rep. 180, 27 Pac. 668; Meads v. Lasar, 92 Cal. 221, 28 Pac. 935; Carson v. Applegarth, 6 Nev. 187.

Plaintiff, having refused the tender, is estopped to bring action on the bond.

Harriman v. Meyer, 45 Ark. 40; Ohio & M. R. Co. v. McCarthy, 96 U. S. 258, 24 L. ed. 693; Gould v. Banks, 8 Wend.

562, 24 Am. Dec. 90; Holbrook v. Wight, 24 Wend. 169, 35 Am. Dec. 607; Everett v. Saltus, 15 Wend. 474; Duffy v. Donovan, 46 N. Y. 223; Winter v. Coit, 7 N. Y. 288, 57 Am. Dec. 522; Mooney v. Elder, 56 N. Y. 238; Meincke v. Falk, 61 Wis. 623, 50 Am. Rep. 157, 21 N. W. 785; Davis & R. Bldg. & Mfg. Co. v. Dix, 64 Fed. 411; Ballou v. Sherwood, 32 Neb. 689, 49 N. W. 790, 50 N. W. 1131; Harris v. Chipman, 9 Utah, 105, 33 Pac. 242; Frenzer v. Dufrene, 58 Neb. 436, 78 N. W. 719; Wallace v. Minneapolis & N. Elevator Co. 37 Minn. 465, 35 N. W. 208; Wyatt v. Henderson, 31 Or. 55, 48 Pac. 790; St. Louis v. St. Louis Gaslight Co. 5 Mo. App. 524; McDonald v. Hooker, 57 Ark. 638, 22 S. W. 656, 23 S. W. 678.

So, a condition to appear and prosecute the suit to effect, and to indemnify the sheriff, was held good, though the statutory condition was to prosecute the suit with effect and satisfy any judgment which should be given against the plaintiff in replevin. Lambden v. Conoway, 5 Harr. (Del.) 1. And see Martin v. Bolenbaugh, 42 Ohio St. 508.

In Rauh v. Waterman, 29 Ind. App. 344, 61 N. E. 743, 63 N. E. 42, under a statute providing that principal and sureties to a bond shall be bound to the full extent contemplated by the law requiring the same, though defective in form, it was held that the sureties on a replevin bond which omitted the statutory provision that the plaintiff shall prosecute his action with effect were liable, where the principal dismissed his action without a determination of the merits.

And it is no defense that the bond contained conditions in addition to those required by statute. Colorado City Nat. Bank v. Lester, 73 Tex. 542, 11 S. W. 626; Marian v. Lemaire (Tex. Civ. App.) 83 S. W. 215; Leverett v. Meeks, 29 Tex. Civ. App. 523, 68 S. W. 302.

Nor is a bond rendered void by the fact that it contains a clause authorizing a confession of judgment. Clark v. Moras, 142 Pa. 311, 21 Atl. 802; Hershey v. McLaughlin, 17 Pa. Super. Ct. 87.

And it is no objection to the validity of the bond that it contains a provision for the indemnity of the sheriff. Whitmore v. Jones, 5 N. H. 362; Lambden v. Conoway, supra. And see Martin v. Bolenbaugh, supra.

Omission of name.

In Titus v. Berry, 73 Me. 127, it was held that an action could not be maintained on a replevin bond which did not contain the name of the obligee, though it was annexed to the writ.

And in Matthews v. Storms, 72 Ill. 316, it was held that the omission of the name of the defendant in the replevin bond cannot be supplied by averments or proof. To the 29 L.R.A. (N.S.)

same effect is Arter v. People, 54 Ill. 228.

But the omission of the surety's name in the body of the bond does not affect its validity, where he signs and seals it. Affeld v. People, 12 Ill. App. 502.

So, a surety who signs a bond beneath the names of the obligors, as a compliance with an order of the court granting a continuance on conditions that the plaintiffs renew the sureties on the bond given on the institution of the suit, is bound by the bond, although his name is not mentioned in the body of it. Decker v. Judson, 16 N. Y. 439.

And this is so though the addition of his name to the bond without the knowledge or assent of the other sureties was such an alteration as discharged them from liability. Ibid.

Irregularities in execution of bond.

It is no defense available either to principal or surety that the bond was executed by the surety before service of the writ, and not by the principal until after the return of the writ and the entry of the judgment. Cady v. Eggleston, 11 Mass. 282.

And a bond executed after service of the writ is valid, though the statute requires the officer to take it before. Nunn v. Goodlett, 10 Ark. 89.

Nor does the fact that it was not executed before the officer and not attested by him as required by the statute vitiate it as a statutory bond. Prather v. Harlan, 6 Bush, 186. In that case the court said it is to the bond and not to the conduct of the officer in taking it that we should have recourse in ascertaining its deficiency.

And it is no defense that defendant's signature signed by making his mark to the bond was not attested by the officer, where it was made in his presence and approved by him: Hester v. Ballard, 96 Ala. 410, 11 So. 427.

And it is no defense that the recognizance was not entered into before the magistrate who signed the writ, as required by the statute. Douglass v. Unmack, 77 Conn. 181, 109 Am. St. Rep. 25, 58 Atl. 710.

Nor that the surety in the recognizance

Mr. L. M. Keys, for defendant in error: Defendants, having secured possession of the property by virtue of the replevin bond, are estopped to deny that it was not executed before the writ was issued.

Shinn, Replevin, §§ 821-824, pp. 730-732; Cady v. Eggleston, 11 Mass. 282; Central Nat. Bank v. Brasheisen, 65 Kan. 807, 70 Pac. 895; Hook v. Fenner, 18 Colo. 283, 36 Am. St. Rep. 277, 32 Pac. 614; Healy v. Newton, 96 Mich. 228, 55 N. W. 686; Richardson v. Penny, 10 Okla. 32, 61 Pac. 584; Gille v. Emmons, 61 Kan. 217, 59 Pac. 338.

The law does not require the successful litigant in replevin to accept a part only of an article taken from him by the replevin writ.

was the magistrate who afterward signed the writ. *Ibid*.

A surety who signs a bond beneath the names of other obligors, as a compliance with an order of the court granting a postponement of the trial on condition that the principal renew the sureties on the bond given on the institution of the suit, is estopped to deny the recitals in it that it was executed upon the institution of the replevin suit, and taken by the sheriff when it was lawful and proper to take the same. *Decker v. Judson, supra*.

—effect of principal's signing, or omission to sign, bond.

The fact that the plaintiff in the action did not sign the bond does not affect its validity. *Wood v. Forrest, 2 Cranch, C. C. 303, Fed. Cas. No. 17,945*.

And in *Re Cahill, 48 Mich. 616, 12 N. W. 877*, a replevin bond was held valid though signed by none but the sureties, under the statute which allowed it to be signed by someone in behalf of the plaintiff, even though the bond contained the principal's name, where it was signed and delivered by the surety with the intention that it should be effective without the principal's signature.

So, the fact that a bond reciting three persons as principals was executed by only one of the three will not invalidate it, where the person who executed it was the one who replevied the property, and it did not appear that the sureties signed the obligation upon condition that the others should execute it as principal before it should be binding on them. *McLeod Artesian Well Co. v. Craig (Tex. Civ. App.) 43 S. W. 934*.

And the fact that the bond was not signed by the principal, and it did not appear that it was taken in his behalf, as provided by the statute, will not invalidate it, as it will be presumed that the bond was taken in behalf of the plaintiff in replevin, and will be regarded as a statutory bond in the absence of proof to the contrary. *Howe v. Handley, 28 Me. 241*.
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Union Stove & Mach. Works v. Breidenstein, 50 Kan. 53, 31 Pac. 703; *Binkley v. Dewall, 9 Kan. App. 891, 58 Pac. 1028*; *Irvin v. Smith, 68 Wis. 220, 227, 31 N. W. 909, 912*; *Rennebaum v. Atkinson, 21 Ky. L. Rep. 587, 52 S. W. 828*; *Eickhoff v. Eikenbary, 52 Neb. 332, 72 N. W. 308*; *Pauls v. Mundine, 37 Tex. Civ. App. 60, 85 S. W. 43*; *Byrne v. Lynn, 18 Tex. Civ. App. 252, 44 S. W. 311, 544*; *Capital Lumbering Co. v. Learned, 32 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454*; *MacRae v. Kansas City Piano Co. 69 Kan. 457, 77 Pac. 94*; *Fair v. Citizens' State Bank, 69 Kan. 353, 105 Am. St. Rep. 168, 76 Pac. 847*; *2 A. & E. Ann. Cas. 960*; *Washington Ice Co. v. Webster, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947*; *Cobbey, Replevin,*

A redelivery bond signed by the defendants as principals and two other persons as sureties, though not in compliance with the statute which provides that the undertaking be executed only by the sureties, is good as a common-law bond. *Hedderick v. Pontet, 6 Mont. 345, 12 Pac. 765*.

—unauthorized signature.

In *Green v. Kindy, 43 Mich. 279, 5 N. W. 297*, it was held that the sureties will not be bound where the principal's signature was attached without his knowledge or consent, unless they signed with full knowledge of the fact.

But in *Arthur v. Sherman, 11 Wash. 234, 39 Pac. 670*, it was held that the sureties were bound though their principal's name was signed by his attorney without authority. The court said that by signing under what appeared to be the signature of the principal, the sureties, as against the obligee named in the bond, must be held to have adopted such signature and to estop themselves from questioning its genuineness.

And the fact that the signature of one of the sureties was a forgery did not for that reason render the bond void against the other sureties. *Bigelow v. Comegys, 5 Oas. St. 256*.

—number of sureties.

It is no defense that the replevin bond was signed by a less number of sureties than required by the statute. *Capital Lumbering Co. v. Learned, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454*; *Kittridge v. Bancroft, 1 Met. 508*; *Cady v. Eggleston, 11 Mass. 285*; *Shaw v. Tobias, 3 N. Y. Ess.* *Bigelow v. Comegys, supra*.

Or that it was signed by more than the number prescribed by the statute. *Saelster v. Ginther, 2 Miles (Pa.) 87*.

Signing or delivering on Sunday.

A statutory claim bond accepted by the sheriff on Sunday is within the statute declaring void all contracts made on Sunday.

§ 1182; Shinn, Replevin, § 812, pp. 712, 727; Arthur v. Sherman, 11 Wash, 254, 39 Pac. 670; Black v. Hilliker, 130 Cal. 190, 62 Pac. 481; Erreca v. Meyer, 142 Cal. 308, 75 Pac. 826.

Messrs. Ledbetter, Bell, & Stuart also for defendant in error.

Dunn, Ch. J., delivered the opinion of the court:

This case presents error from the district court of Kiowa county, and is an action to recover on an undertaking filed by the plaintiffs in error in an action of replevin. The facts out of which it grows are substantially as follows: On the 18th day of April, 1904, the First National Bank of Hobart, Oklahoma, was a pledgee in posses-

sion of eight steel-bridges of the value of \$4,855, held by it as a security for an indebtedness of \$6,000. Upon the day stated Leeper, Graves, & Company, a corporation, began an action to secure possession of this property, and a bond was executed and filed in the office of the clerk of the district court, signed by the plaintiff and D. S. Dill, J. G. Leeper, and John W. Graves. A writ of replevin was issued, and the property involved was taken from the possession of the bank and delivered to the plaintiff. On the trial of this action judgment was rendered in favor of the bank for the return of the property if it could be had, and if the same could not be returned, then for the sum of \$4,855, the value thereof, together with the cost of

Anderson v. Bellenger, 87 Ala. 334, 4 L.R.A. 680, 13 Am. St. Rep. 40, 6 So. 82; Link v. Clemmens, *infra*.

And a replevin bond executed on Sunday is void as being in violation of the statute which prohibits common labor on that day. Link v. Clemmens, 7 Blackf. 479.

But where it is delivered by the principal to the officer on another day, it is binding though signed by the sureties on Sunday. Prather v. Harlan, *supra*.

Delivery.

A delivery of the bond to the officer who serves the writ is a sufficient delivery thereof to the defendant, even though the officer neglects to make due return of it with the writ into court. Smith v. Whiting, 97 Mass. 316.

So, a bond delivered to an agent of the defendant is good, though the statute directs the officer executing the writ to take the bond in his own name, from the plaintiff. Bofil v. Russ, 3 Strobb. L. 98.

But it is a valid defense that, at the time of the delivery of the bond, the officer had no legal authority to coerce the amount by execution against the principal obligor. Cook v. Bank of Kentucky, 5 J. J. Marsh. 103. In such case it was said that the bond would not be valid either as a common-law or statutory bond. And see Henoch v. Chaney, 61 Mo. 129.

Acceptance and approval.

The sureties on a replevin bond are estopped to set up that the bond was not properly accepted and approved as provided by statute, after the property has been placed into the possession of the principal obligor upon the delivery of the bond. Hartlep v. Cole, 120 Ind. 247, 22 N. E. 130; Coverdale v. Alexander, 82 Ind. 503; Parker v. Young, 188 Mass. 600, 75 N. E. 98; Harrison v. Wilkin, 69 N. Y. 412.

Filing.

A supplemental bond under which property is taken given by the plaintiff upon the 29 L.R.A. (N.S.)

refusal of the sheriff to execute the writ because of insufficient security on the original bond, is valid as against the surety, though no order was made requiring it to be filed. Stafford v. Baker, 141 Mich. 44, 104 N. W. 321.

The makers are estopped to say that there was no order of the court requiring them to file the bond in suit, where it was filed in lieu of another without waiting for the court to pass upon the motion therefor. Treman v. Morris, 9 Ill. App. 237.

And the failure to file a redelivery bond with the clerk of the court, as required by statute, does not defeat the right to recover thereon. Hedderick v. Pontet, *supra*.

But in Green v. Kindy, 43 Mich. 279, 5 N. W. 297, it was held that the sheriff's return to the writ of replevin, which shows that the plaintiff failed to file the required bond within the time required by law, is conclusive upon all the parties to the replevin suit, and defeats an action on an alleged bond.

Failure of sureties to justify.

The fact that the sureties failed to justify after having been excepted to by the defendant is no defense to an action on the bond. Van Duyn v. Coope, 1 Hill, 557; Decker v. Anderson, 39 Barb. 346; Clark v. Hooper, 69 Hun, 445, 23 N. Y. Supp. 447.

But in Rinear v. Skinner, 20 Wash. 541, 56 Pac. 24, it was held that the failure of sureties to justify upon notice that an exception had been taken to the efficiency of the sureties exonerated them from any further liability on the bond, under a statute making it the duty of the officer to return property to the defendants, from whom it was taken, or at his peril retain it upon the failure of the sureties to justify.

Clerical errors.

Mere clerical errors will not defeat the efficiency of the bond, such as, *e. g.*,

—inserting the name of the plaintiff instead of defendant. Green v. Walker, 37 Me. 25;

—naming the officer who served the writ

the action. Thereafter, and on the 25th day of October, 1905, the bank, having neither received the property nor been paid the amount of the judgment rendered, brought this action in the same county to recover on the bond filed by plaintiff in the replevin action. Answers were filed by all the parties defendant, in which the rendition of the judgment above mentioned was admitted, with the averment that, within a reasonable time after the rendition of the said judgment, the defendant Leeper, Graves, & Company, paid all the cost of said action, and tendered to plaintiff the personal property involved, and that plaintiff then and there refused to accept it. The reply was a general denial, and the action

was tried to the court, which, after making special findings of fact and conclusions of law, rendered judgment in favor of the bank, and against the defendants, in the sum of \$4,855, with interest at the rate of 7 per cent per annum from the 28th day of April, 1904. To reverse this judgment, proceedings in error have been begun in this court.

It is first insisted on behalf of defendants in this action that no recovery could be had on the bond by reason of the fact that it appears not to have been filed in the office of the clerk of the district court until after the order of delivery had been issued by the clerk. On the question thus raised by counsel, the facts found by the trial court

as obligee and defendant to the action, after defendant had been named in the caption and in the recital of the bond. *Eickhoff v. Eikenbary*, 52 Neb. 332, 72 N. W. 308; —erroneous date. *Cook v. Bank of Kentucky*, supra; *Hotz v. Bollman Bros. Co.* 47 Ill. App. 378;

—twenty-four months in the time of payment instead of two years as directed by the statute. *Hopkins v. Chambers*, 7 T. B. Mon. 263;

—erroneous description of the court in which the action is pending. *Fuller v. Wright*, 59 Ind. 333; *Hotz v. Bollman Bros. Co.* supra.

So, a bond is not void because the action was described as returnable before a certain judge, where there was sufficient matter in the condition to show what court was intended. *Chadwick v. Badger*, 9 N. H. 450.

And a condition to prosecute the action at the county court, rightly describing the next term of the common pleas, must be held to intend the court of common pleas. *Arnold v. Allen*, 8 Mass. 147.

And it is of no moment that it is not under seal. *Edwin v. Cox*, 61 Ill. App. 507; *Henoch v. Chaney*, supra.

But a claim and delivery bond given by the defendant in replevin, conditioned for the delivery of the property to the sheriff instead of the plaintiff, as required by statute, will not authorize a summary judgment and execution thereon, though it may furnish a ground of action to the plaintiff, or be a good indemnity to the sheriff for failing to deliver the property to the plaintiff. *Wooldridge v. Quinn*, 49 Mo. 425.

Officers' assignment.

In *Green v. Kindy*, supra, it was held that a mere delivery of the replevin bond by the sheriff to the defendant's attorney, for defendant's use and benefit, is insufficient to entitle him to maintain an action thereon in his own name, where the bond is made to the sheriff, as required by the statute.

But it is not necessary that the assignment of the bond by the sheriff to the de-

fendant shall be made under the seal of the officer. *Nunn v. Goodlett*, supra.

Alteration of bond.

The alteration of the bond by adding the name of another surety as co-obligor does not discharge the other sureties, where the signature was secured by an officer who had no authority to do so. *Anderson v. Bellenger*, 87 Ala. 334, 4 L.R.A. 680, 15 Am. St. Rep. 46, 6 So. 82.

But a bond is rendered invalid against the sureties by the action of their principal in erasing his name from the bond, without their knowledge or consent and with the consent of the officer. *Martin v. Thomas*, 24 How. 315, 16 L. ed. 689.

The sureties cannot complain because the plaintiff, the party against whom they may have recourse, is added to the undertaking, since it does not increase or affect their liability in any way. *Buck v. Lewis*, 9 Minn. 314, Gil. 298.

Nor can the principal complain, as dismissal of the action on the undertaking would not affect his existing liability upon the judgment in replevin. *Ibid.*

Filing additional bond as release of sureties on original undertaking.

Where an additional bond is required, the surety in the first bond is not discharged. *Smith v. Whitten*, 117 N. C. 389, 23 S. E. 320.

So, the original defendant in replevin who has had the suit against him dismissed because of a defective bond, and has obtained his motion on an order for the return of the property, may, where such order is not complied with, avail himself of the bond, by virtue of which the service was made. *Tuck v. Moses*, 54 Me. 115. And see *Van Dwyne v. Coope*, 1 Hill, 559.

Effect of disability of one of the makers.

Obligors who are *sui juris* cannot be allowed to set up the disability of a co-obligor to defeat an action upon the bond. *Good v. Bates*, 14 R. I. 65; *Coverdale v. Alexander*, 82 Ind. 503.

in its second and third findings of fact are apparently supported by the record, and they are as follows:

Second. "At the time of filing the petition a replevin bond signed by Leeper, Graves, & Company and D. S. Dill was presented to the clerk of the court and subscribed and acknowledged, and thereupon a writ of replevin issued for the property sought to be recovered, which writ was never served, and was returned to the court unserved on April 26, 1904. In the meantime, and on the 25th day of April, 1904, J. G. Leeper and John W. Graves qualified as bondsmen on said replevin bond before the clerk of the district court of Oklahoma county, and upon oath stated in their qualification, each for himself, that he was the person who signed the bond in the case of Leeper, Graves, & Company, Plaintiff, v. First National Bank, Case No. 376. Afterwards, and on the 27th day of April, 1904, a second order of replevin was issued in said cause, upon which order the property sought to be recovered was, on the 28th day of April, 1904, taken from the possession of the First National Bank by the sheriff, who, after holding the same for twenty-four hours, delivered the property into the possession of one R. W. Shepherd, attorney for Leeper, Graves, & Company, as shown by the sheriff's return."

Third. "The court finds written at the foot of the replevin bond the following words: 'Subscribed and acknowledged before me this 28th day of April, 1904, by J. G. Leeper and John W. Graves. D. B. Shear, Clerk Third District, by W. H. Clark, Dep.' The court further finds said bond indorsed, 'Presented, approved, and filed, this 30th day of April, 1904,' and the court makes note of the fact that the figures '30th' are not the original figures indicating the day of the month upon which the bond was filed, for it clearly appears from the paper itself that the figures originally written there have been erased and the figures '30th' subsequently written. No oral testimony in the trial of the cause was addressed to the facts stated in the third and second findings of fact, touching the execution and delivery of said bond, except that which appears from the indorsements upon said bond; but the court concludes from the files that said replevin bond was executed by Leeper, Graves, & Company and D. S. Dill April 18, 1904, and afterwards by J. G. Leeper and John W. Graves on the 25th day of April, 1904, before the clerk of the district court of Oklahoma county, as shown by their affidavits in qualifying as such bondsmen, and that the order of replevin was not issued until they did so sign and execute said bond; that afterwards said

bond was sent back to the said clerk of Oklahoma county for an acknowledgment upon the instrument itself, and was then marked as having been acknowledged on the 28th day of April, instead of the 25th, as sworn to before the same clerk, and, having afterwards been returned to the district clerk at Hobart, the file mark was changed to April 30th." The objection which counsel make, as is seen, does not in any way affect the merits of the bond given, or change in any particular the liability which the parties thereto sought to incur. The bond was executed, and all things necessary to be done by the parties were performed, prior to the issuance of the replevin order. The end which was sought to be attained on their part was to secure the property, and this was accomplished, and the objection which is here made is of a technical character, which, after the benefits of the bond have been received, cannot be looked upon with favor. Wells, Replevin, § 436; Cobbey, Replevin, § 1288; Cook v. Bank of Kentucky, 5 J. J. Marsh. 163; Central Nat. Bank v. Brecheisen, 65 Kan. 807, 70 Pac. 895; Cady v. Eggleston, 11 Mass. 282; 24 Am. & Eng. Enc. Law, pp. 533, 534, and cases therein cited. The rule as declared in Wells on Replevin, supra, is as follows: "The general rule is well settled that the plaintiff in replevin who has had the property delivered to him on his writ cannot dispute the validity of the bond on any mere technical grounds or for any failure to comply with the statutory process as to the manner of its execution. The rule in all such cases seems to be based on the idea that the party who has obtained delivery of the property by virtue of his suit and by filing his bond has had all the benefit which would accrue if the bond had been formal, and is estopped from questioning its validity on the ground of formal or technical defects." In the case of Cady v. Eggleston, supra, it was contended that the bond was void because not completed until after the writ was served, which is substantially the contention of counsel for the company in this case. Speaking to this point, Chief Justice Parker, who prepared the opinion for the court, said: "It has been contended by the counsel for the defendants that the bond is void and of no effect, because, as the writ of replevin is by the terms, of it effectual only upon the giving of the bond by the plaintiff in the suit with sureties, and as no such bond was given until many days after the writ was served, the whole process was void. . . . Although the defendant in replevin might, by plea in abatement or by motion, have avoided the process, yet we are of opinion that the plaintiff in replevin cannot himself

set up this defense to defeat his own bond. He has availed himself of it, so far as to have a trial upon the question of property; and it would be strange imbecility in the law to permit him to set up his own fraud or negligence to discharge him from the proper consequences of the suit. He suffered his name to be made use of to take out of the custody of the law property which did not belong to him, permitted the action to proceed to trial, and claimed the property until judgment was rendered against him." Furthermore, § 5689 of the Compiled Laws of Oklahoma of 1909 provides that the order shall not be issued by the clerk until there has been executed in his office the undertaking required. In keeping with this statute, the order issued recited that Leeper, Graves, & Company had filed "its affidavit and undertaking as required by law, in the office of the clerk of said court, in order to obtain an order for the immediate delivery of said goods and chattels." The rule seems to be that under such a statute, where the undertaking is indorsed as having been filed at a date subsequent to the issuance of the writ, that this irregularity is immaterial where it was in fact executed at a prior date, and the writ itself recites that before its issuance an undertaking was filed. *Hook v. Fenner*, 18 Colo. 283, 36 Am. St. Rep. 277, 32 Pac. 614; *Baker v. Pope*, 49 Ala. 415. We therefore conclude that the bond filed by the parties in this case, on which the possession of the property was secured, having served at their instance the purpose for which it was intended, is not rendered void by reason of any irregularity in the time of its execution or filing.

The next proposition presented by counsel for the company is one of greater difficulty. The bond given is provided for by § 5689 of the statutes, supra, and binds the obligors that the plaintiff shall duly prosecute the action and pay all costs and damages which may be awarded against it, and, if the property be delivered to it, that it will return the same to the defendant if return be adjudged. On the trial of the replevin action, judgment was rendered for a return of the property, and, in the event the return thereof could not be had, then for the sum of \$4,855 in money, the value thereof. This judgment was rendered on the 21st day of September, 1905. On the 19th of October following, an agent for the company went to Hobart, called upon the cashier of the bank for the purpose of making a tender of the bridges. Although there appears to be some slight discrepancy in the testimony, we think it shows substantially that a tender was made, and that it was rejected on the part of the bank for two reasons: First, 29 L.R.A. (N.S.)

that the same was not made within a reasonable time; and, second, that it was desired on the part of the bank to check up the different parts of the property to ascertain whether or not it was all there. The court in reference to this matter finds as follows: "On the 19th of October, 1905, Leeper, Graves, & Company notified the bank that they would return the property, and for that purpose had a part of it loaded on wagons and hauled to the bank. The officer of the bank in charge at the time refused to receive it or any portion of it until the several bridges and their several parts could be invoiced, and the fact determined as to whether or not the complete structures were there. Two of the bridges involved were at that time at Snyder, a distance of 20 or 25 miles away, and another at the town of Gotebo, some 10 miles distant. The bridges were checked over and parts of them found to be missing. No tender of the missing parts was made." Upon this finding, the court came to the following conclusions of law: Second. "That it was necessary for the defendants herein, Leeper, Graves, & Company, in order to escape liability upon their replevin bond, to tender a return of the complete structures, or to have obligated themselves to have made the structures complete by supplying any necessary part found to be missing, and, having failed to do so, they are liable upon their bond in the amount of the plaintiff's interest therein, which is found to be \$4,855. Third. That the defendants, Leeper, Graves, & Company, took and received possession of said property under and by force of the bond sued on in this action, and are therefore, together with their sureties, liable to the plaintiff in the amount above stated." That the tender was made within a reasonable time we think there can be no doubt. Nor was the bank acting beyond its rights when, on being tendered the property, it asked either for time to consult with its attorneys, or to check over the property tendered to ascertain what it was receiving. *Hunt, Tender*, § 418. The property involved in this action consisted of eight steel bridges, five of which were in the town of Hobart, at which place was located the bank. The other three were in two other towns located in the same county. On the ground of the sufficiency of a tender of bulky articles, such as are here involved, the rule seems to be, as stated by the supreme court of Oregon in the case of *Capital Lumbering Co. v. Learned*, 36 Or. 544, 78 Am. St. Rep. 792, 59 Pac. 454, that "when a return of personal property is adjudged in an action for its recovery, it is the duty of the plaintiff, if he has secured possession

thereof pending the litigation, and would escape the penalty of his undertaking, to take active measures to redeliver it to the defendant, within a reasonable time, in the same condition as when taken. *Cobbey, Replevin*, § 1182; *Parker v. Simonds*, 8 Met. 205; *Berry v. Hoeffner*, 56 Me. 170. This rule imposes upon the plaintiff in such case the duty of seeking the defendant in the action, and tendering the property to him, if it be readily capable of manual delivery; but, if such a course is difficult by reason of its bulky character, an offer to redeliver it to the defendant is all that the law enjoins. Thus, in an action for the possession of a steam engine, boiler, engine house, office, and hay scales, it was adjudged that the property be returned to the sheriff, who had levied thereon, but had not removed it from the place where it was then situated. The plaintiff offered to return it at the place where it was seized, but the sheriff refused to accept it, and thereafter commenced an action to recover its value, whereupon he was perpetually enjoined from enforcing the alternative judgment; the court holding that the property was of such a cumbrous nature as to render its removal inconvenient, and that the plaintiff had done all that the law required of him in such cases. *Frey v. Drahos*, 10 Neb. 594, 7 N. W. 319. So, too, in *Gans v. Woolfolk*, 2 Mont. 458, a carpet containing 600 yards, tacked to a floor, and not removed by the sheriff who seized it, was adjudged to be returned to him; and it was held that the carpet was so bulky as to render it necessary that the parties entitled to it should designate some convenient place to receive it, and, in the absence of such designation, the plaintiff could select a proper place for its delivery. Mr. Justice Blake, speaking for the court, in rendering the decision, says: "The carpet was a bulky and cumbersome article, and the respondents were not required to tender it, like money, to the appellants wherever found. They were obliged to deliver the property at some particular place. If the appellants neglected or refused to appoint the place, the respondents had the right to select it, with a reasonable regard for the convenience of the appellants, and there deliver the goods." So that the company did all that was required of it in tendering the return of the bridges in this case as it did. On an offer being made to return or deliver personal property sufficient to constitute a valid tender, where the party who makes the tender is acting within his legal rights, it is the duty of the one to whom the tender is made to accept and receive the property, and, whether it is refused or accepted under such a condition, the title thereto vests at once in the obligee, 29 L.R.A. (N.S.)

and the obligation to the extent of the duty is thereby performed. *Hunt, Tender*, § 391; *Games v. Manning*, 2 G. Greene, 251. And this seems to be the rule obtaining where property is sought to be returned in accordance with a judgment in replevin. *Schrader v. Wolfen*, 21 Ind. 238. The tender made by the company was finally rejected by the bank immediately after checking the bridges over and ascertaining that certain parts were missing, and an action was begun within a few days on the bond. The court in its second conclusion finds, as we have seen, that, in order to escape liability upon the bond, it was necessary for the company to tender a return of the complete structures, or to have obligated itself to make them complete by supplying any necessary parts found to be missing. The return of the sheriff shows that, under the company's action, he received eight steel bridges, describing and specifying them only by setting out their lengths and dimensions. On the trial of this action the expert who checked the bridges over made a detailed, itemized invoice of each of the bridges. It appears that two of the bridges were 40, two of them 50, two of them 60, one 70, and one 80 feet in length. Neither the bridges nor the different portions thereof were itemized or valued on the trial. The value of the entire eight was fixed at one lump sum.

An expert called by the bank for the purpose of checking the bridges at the time of the tender, after detailing in full all of the different separate items, consisting of beams, posts, nuts, hangers, bolts, pins, etc., going to make up each of them, then gave the following testimony:

Q. What would you say, Mr. Hamson, as to the material that you have testified to finding there being the necessary parts to constitute a one 80-foot span 16-foot roadway bridge, one 70-foot span 16-foot roadway bridge, two 60-foot span 16-foot roadway bridges, two 50-foot span 16-foot roadway bridges, two 40-foot span 16-foot roadway bridges?

A. I would say it was incomplete.

Q. Go ahead, and in your own way state what parts were missing that would be necessary to make these five complete bridges.

A. There was a part of one counter rod,—one end of it was missing. It would be of no use whatever that way.

Q. What is a counter rod used for?

A. It is to help support the bridge so that it will not sag under a load.

Q. How many of such counter rods are essential to a span?

A. Well, they can't get along with less than four, and the number depends on the size of the span and the material used. Might use four in making one bridge, and in

a large and stronger bridge they would have to use eight of the same sized material.

Q. Were there any other such counter rods missing?

A. No, sir.

Q. What else was missing of the parts necessary to make up these five bridges?

A. There were fifty-two nuts short.

Q. Where was that?

A. Hobart.

Q. Anything else?

A. There were two floor beams short.

Q. These floor beams, what are they used for?

A. They run underneath the bridge from one truss to another to hold up the floor. The entire floor rests upon them.

Q. What else short?

A. I believe that is all I can figure out on Hobart.

Q. Did you find these missing parts either at Snyder or Gotebo?

A. There were, I think, some at Snyder.

Q. What did you find at Snyder that was missing at Hobart?

A. I do not think I found anything at Snyder that was missing at Hobart.

Q. Did you find any of these parts at Gotebo?

A. There was supposed to be two bridges at Snyder.

Q. What did you find missing there, if anything?

A. I found shortage of eight pins.

Q. What were those pins used for?

A. They were used to connect the bridges at the panel points.

Q. I will get you to explain what the panel is in the construction of a bridge.

A. A panel is a division of a bridge. All spans are divided into a certain number of parts, equal parts, and one of these parts is a panel, and, where it meets another panel, it must be connected. They are connected by bars lapping over pins passing through the eyes.

Q. Was there anything else missing at Snyder?

A. There was one post shoe missing.

Q. What is a post shoe?

A. A post shoe is a metal base that one corner of the bridge rests upon.

Q. There would be four post shoes to each span?

A. Yes, sir.

Q. And in the absence of one of these post shoes, could the bridge be put in place?

A. No, sir.

Q. What else was missing at Snyder?

A. Two diagonal rods.

Q. Explain what the diagonal rods are used for?

A. They run from the point in the principal

part of the bridge to a point in the lower part of the bridge diagonally opposite. Their vocation is that of a brace.

Q. Is there anything else?

A. Three lateral rods short.

Q. What is the purpose of a lateral rod?

A. A lateral rod is a brace that runs under the bridge from one panel point to another diagonally opposite, and they work in pairs, and there should always be an even number. Their office is to keep the sides of the bridge from swaying.

Q. Anything else?

A. Eight chord bars.

Q. Explain what a chord bar is?

A. A lower part of a bridge extending from one bar to another is called a chord, that is made of an equal number of divisions, and the parts that go to make up that division are called bars. They have an eye in each end.

Q. What is the office of a chord bar?

A. Well, it is simply to hold the bridge together. It would not exist without it. It is one of the main parts.

Q. Was there anything else missing at Snyder?

A. There was two sections of top chord missing.

Q. What is a top chord?

A. It is the second principal member and works in conjunction with the lower chord. It is the highest part of the bridge in the horizontal direction. I believe that is all I discovered wrong at Snyder.

Q. Was there a sufficient supply of nuts at Snyder?

A. Nine nuts missing at Snyder.

Q. Now, in your examination, did you find any of these missing parts either at Gotebo or Hobart?

A. I found two pieces top chord at Hobart short at Snyder.

Q. How many pieces were missing?

A. Two.

Q. That is to say there were two extra pieces of top chord at Hobart?

A. Yes, sir.

Q. What was the shortage at Gotebo, any?

A. There was short four lateral rods and no nuts for the lateral rods that were there; that is, four nuts short; twenty-four extra or keys.

Q. What are they?

A. They are spring metal cut to go through the hole in the pin to hold it in place after pin has been placed through the eye.

Q. Is there anything else missing at Gotebo?

A. That is all that was short there, I believe.

Q. Did you find any of those bridges

plete, so that it could be put in place if it was desired to be used?

A. No sir; I did not.

Q. You found them all lacking in some essential part?

A. Well, they were all lacking in some part.

Q. How many parts of them did you find lacking in essential or necessary parts?

A. I found three.

No contention is made that the company did not receive these missing articles in the replevin action, nor was there any evidence offered to show that they were withheld in bad faith, nor were not such that either of the parties could go into the open market and readily purchase and replace, as they would any other item of personal property. And, if the rule obtains that a plaintiff in an action of replevin, under a judgment requiring him to return the property taken, may return less than the whole when part is lost, then to our minds the bond which is given in such a case would be responsive to the requirement suggested by the court in its second conclusion, wherein it is held that the company should have obligated itself to have made the structures complete by supplying any necessary part found to be missing. On the question as to whether a plaintiff against whom a judgment has been rendered in replevin may return a portion of the property, and receive credit therefor, being liable for the unreturned portion on his bond, or whether he must tender all or none, the authorities are not entirely harmonious. The following cases hold that a partial return, with a monetary liability for the unreturned portion, is not permissible, and that a plaintiff under such a state of facts must return all, or pay the judgment for the entire amount of the property received. *Whetmore v. Rupe*, 65 Cal. 237, 3 Pac. 851; *Pauls v. Mundine*, 37 Tex. Civ. App. 601, 85 S. W. 43; *Kingsley v. Sauer*, 17 Misc. 544, 41 N. Y. Supp. 248; *Stevens v. Tuite*, 104 Mass. 328. However, by far the greater number of authorities, and in our judgment with the better reasoning, depending somewhat on the particular facts in each case, support the rule that in an action of replevin, where the plaintiff secures possession of the property, and on the trial a judgment is rendered requiring its return or the value thereof in case a return cannot be had, it is the duty of plaintiff in good faith to tender in as good condition as received all of the same within a reasonable time, and it is the duty of defendant to accept such a tender, and receive the property or a substantial part thereof, and recoup any damages suffered

on the replevin bond. See *Wells on Replevin*, § 422, and authorities therein cited; *Shinn, Replevin*, § 679; *Cobbey, Replevin*, § 1389; *Washington Ice Co. v. Webster*, 125 U. S. 426, 31 L. ed. 799, 8 Sup. Ct. Rep. 947; *Larabee v. Cook*, 8 Kan. App. 776, 61 Pac. 815; *Harts v. Wendell*, 26 Ill. App. 274; *Edwin v. Cox*, 61 Ill. App. 567; *Allen v. Fox*, 51 N. Y. 562, 10 Am. Rep. 641; *Yelton v. Slinkard*, 85 Ind. 190; *Archer v. Long*, 47 S. C. 556, 25 S. E. 84; *Reavis v. Horner*, 11 Neb. 479, 9 N. W. 643; *Johnson v. Mason*, 64 N. J. L. 258, 45 Atl. 618; *Pickett v. Bridges*, 10 Humph. 171; *Pabst's Brewing Co. v. Rapid Safety Filter Co.* 54 Misc. 305, 105 N. Y. Supp. 962. The underlying reason for the foregoing rule grows out of the fact that whatever right of ownership or tenure is held in property, either real or personal, is in consequence of and subject to the provisions of the law. All rights relating to property by which we hold, own, possess, or use it, are just such as the law gives us. A party claiming the right of ownership in and of immediate possession to personal property, and seeking to enforce such right, may bring replevin or detinue, or, if he elects, he may abandon the property to his adversary and sue in trover. In trover, however, it is not the property or its possession which he seeks, but damages sufficient to cover its value; while in replevin or detinue it is primarily the property which he is pursuing, and he takes a judgment for its value only in the absence of ability to secure the specific articles claimed. Hence the distinctive difference between the two proceedings helpful in determining the rule in either is that in the one it is money in lieu of property which is sought, and in the other it is possession of specific personal property, and not money which is the object of the action. The foregoing thought is expressed by the court of appeals of New York in the case of *Allen v. Fox*, supra, in the following language: "In the action of trover, the plaintiff does not seek to recover his property, but its value as a substitute for the property. He abandons the property to the defendant, preferring to pursue him for its value. He makes a kind of forced sale of it, without any expectation or intention of retaking it. Hence in such cases he can be expected at once to go into the market and supply himself with the same property at its market value if he desires it. But in the action of replevin, the plaintiff seeks to recover the property, and is in all stages of the case to final judgment in pursuit of that, and not its value. And during the whole time the defendant may have the possession and the use (if it can be used) of his property. At the termination of the

suit it is not optional with him to take the property or its value. If the defendant has the property, and will permit him to take it, he is obliged to take it." A party in good faith claiming personal property in the possession of another has a right to submit his claims to a court for judgment, and this without imminent danger of being compelled to buy or pay for the property, if it is afterward held he is not entitled to it. This is one of the burdens with which our tenure of personal property is encumbered by the law. We hold it subject to the exercise by others of this right, and replevin is primarily an action for property, and not money.

In the case at bar, as the parts of the different bridges which were not tendered constituted but a small fraction of the entire amount of the property taken, and there was no showing that the same could not be readily procured in the open market, or were within plaintiff's control, we can see no reason why a party in such a case should not be required to accept the great bulk of the property involved, and recoup on the bond given for such as was missing. Counsel for the bank in their brief ask if a wagon be replevied, and plaintiff be required to restore, could he tender the tail gate, and require its acceptance? To this we will say that we think not, but should the wagon be tendered entire with the exception of the tail gate, which it was not within the power of plaintiff to restore,—that is, was lost, and not wilfully withheld,—we believe that its acceptance would be required with an allowance of damages therefor. So it will be seen the conclusion to which we have come is that, by the bond given, the company had obligated itself to make the structures tendered complete as they were when they received them, or, to the same end, make the obligees whole for all loss or damages suffered. In the case of *George R. Barse Live Stock Commission Co. v. McKinster*, 10 Okla. 708, 64 Pac. 14, the trial court committed error in its instructions as to the amount of damages recoverable in an action of replevin brought for certain live stock. In the consideration of the case the supreme court of the territory of Oklahoma said: "The judgment as to the ownership of the animals is affirmed, and reversed as to the amount of damages assessed, and the cause is remanded to the district court with directions to set aside the judgment and verdict as to the value of the cattle, and re-submit the question of value and damages to a jury, unless a jury is waived, and try said issue in accordance with the views expressed in this opinion."

This practice commends itself to us, and in the case at bar the judgment of the trial 29 L.R.A. (N.S.)

court is affirmed in all things, with the exceptions of the second and third conclusions of law, and the cause is remanded to the trial court to enable plaintiffs to establish and recover damages in accordance with the rule laid down in this opinion.

Turner, Williams, Hayes, and Kane,
JJ., concur.

GEORGIA SUPREME COURT.

GLENNVILLE INVESTMENT COMPANY,
Plff. in Err.,
v.
B. H. GRACE.

(134 Ga. 572, 68 S. E. 301.)

Lottery — distribution of lots.

Where an owner of land divided it into a considerable number of lots varying widely in value, and made contracts purporting to sell a certain number of lots to various parties, without reference to what lots were to be sold to any particular person, this being left for determination later, and after a certain number of "applications" had been sold, at an appointed time, the names of purchasers were, by a committee of such purchasers, put into one box and the numbers of the lots placed in another, under rules prescribed by and at the direction of the seller, and names and numbers were drawn, the agreement being that the lots drawn in connection with the name of a purchaser should be conveyed to him by the seller, this was a lottery scheme, and illegal; and such an agreement was not enforceable by an equitable proceeding for specific performance, brought by one who drew certain lots.

(June 15, 1910.)

ERROR to the Superior Court for Tattall County to review a judgment overruling a demurrer to the petition in a suit to compel specific performance of a contract to convey a town lot. Reversed.

Headnote by LUMPKIN, J.

Note. — The question whether a distribution of parcels of land by chance is a lottery is treated in the note to *Burks v. Harriass*, 23 L.R.A. (N.S.) 626. Since the preparation of that note, the case of *McCleary v. Chipman*, 32 Ind. App. 489, 68 N. E. 320, there cited, has been followed in *Ginther v. Rochester Improv. Co.* (Ind. App.) 92 N. E. 698, it appearing that the corporation seeking to enforce contracts with the subscribers took no part in the distribution of the lots, but that the subscribers distributed the same under an arrangement agreed upon among themselves.

Statement by Lumpkin, J.:

B. H. Grace brought his equitable petition against the Glennville Investment Company, alleging as follows: On June 15, 1907, plaintiff bought from the defendant ten lots of land in the city of Glennville, Georgia, as evidenced by a written contract containing the following terms: "This is to certify that the Glennville Investment Company has received of B. H. Grace, county Toombs, state Georgia, \$100, the first instalment deposit on application of ten lots, stores, dwellings, or other buildings in Glennville, Tattnall county, Georgia. The deferred payment on same to be paid to the Glennville Bank either by registered letter, postoffice money order, express money order, or Savannah, Atlanta, or New York exchange, as follows: \$900 six months after this date. Said Glennville Bank will give receipts for all deferred payments by crediting the accepted drafts drawn on the applicant by this company; and when all deferred payments are made, said bank will deliver draft as paid in full, entitling applicant to warranty deed to ten lots, stores, dwellings, or other buildings on the day of opening, without further expense. The contract on the back hereof is to constitute a part of this receipt. Salesman No. 1 and name J. A. Wheeler. No. 10 lots." On back of contract: "It is hereby mutually agreed between Glennville Investment Company, the undersigned, and the other holders in this enterprise, as follows: First. You will have no taxes to pay until after 1907. Second. Each applicant holder certificate of final payment shall be entitled to a warranty deed to the lot or lots or parcels of land of which he may be the purchaser, immediately after the opening. Third. Where ten applications are sold in one town, the applicant must select one man to attend the opening, and all purchasers must be represented either in person or by proxy. Fourth. The opening and distribution of these lots and land will be conducted on a plan entirely in keeping with the law, and fair to all, and shall be agreed upon by a majority of the purchasers present. The company will furnish warranty deeds for them to distribute, divide, or dispose of their lots and lands in common in any lawful manner they may elect. Each application paid for in full will represent one unit interest in the whole number of lots, stores, dwellings, or other property, until the distribution and division. Fifth. Should any applicant make first deposit and fail or refuse to make final settlements, he will forfeit former deposits after ten days' grace, without notice, and the money paid by him shall be retained by the company as liquidated 29 L.R.A. (N.S.)

damages, time being of the essence of the within instrument in respect to said payments, and such payments shall be considered as payments for the option of buying said property, and therefore forfeited. Sixth. The Glennville Investment Company will not be responsible for any representation made by any salesman other [than] that found in their printed literature. Seventh. You will not be required to build on lots. Eighth. No application will be sold to negroes. No negroes now own any land in the corporate limits of Glennville. Ninth. Should any applicant die after having purchased four or less applications in this enterprise, and having paid 50 per cent or more of his deferred payments, then this company will donate the remaining part of his indebtedness to his family or legal representatives. Tenth. The opening day will not be later than February 1, 1908, but will be as much sooner as it is possible to make it." Signed by the company and the applicant.

The plaintiff paid the sum of \$100, and agreed to pay \$900 more in six months. The defendant drew a draft on him for that amount, which he accepted. The defendant deposited the draft in the Toombs County Bank, and drew upon it the full face value less discount. At the maturity of the draft, by reason of a panic, he was unable to meet it, and arranged with the bank to "carry him over for a short time." On February 4, 1908, he started to the town where the bank was located, in order to take up the draft, according to an arrangement which he had made with one of the directors of the bank for that purpose. On his way he learned that on that morning the defendant had paid the draft to the bank and taken possession of it. On December 12, 1907, he had requested the defendant to meet the draft for him, and the latter refused to do so. He then "arranged said draft with the said bank as above set out." On the day the draft fell due, he inquired at the Glennville Bank, the place designated for payment, for the draft. It was not there, and had not been since it was sold to the Toombs County Bank. "Your petitioner shows that the drawing of the lots of land under and by virtue of said contract, as shown by Exhibit A., was not to be later than February 1, 1908, for the opening day. Your petitioner shows that on the 3d day of February, 1908, the proper committee met and considered all applications for drawing as provided by said contracts and rules of the said company, your petitioner holding and owning said contract, marked Exhibit A. . . . Your petitioner shows that the said committee of five, at the

direction of the proper officer of the said defendant, placed the name of your petitioner in the box for drawing his said ten lots, so purchased and paid for. Your petitioner shows that he drew by said arrangement the following lots of land, to wit: [Naming by number and block eight lots.] Your petitioner shows that he drew the above-named eight lots at said drawing; that he endeavored to ascertain the other two lots he drew, and the said defendant refused to tell him the number of the other two lots he so drew. Your petitioner shows that he was eligible to draw lots until he drew lot No. 14 in block 104, on which lot of land there is located a first-class brick store worth, together with the said land, the sum of \$3,000; and after the drawing was completed, and it cropped out that your petitioner had good luck [and] incidentally ascertained the number of the above lot he so drew, the said defendant refused to tell the number of the other two lots, and also declared that your petitioner had no right to the lots he had drawn . . . Your petitioner shows that one other lot he drew is not valuable, in that he is to receive in cash \$250, or buildings erected thereon to that value. But your petitioner does not know which lot it is. Your petitioner further shows that he verily believes that the other two lots, the numbers not known to your petitioner, are valuable indeed, their value and location not known to your petitioner." On the day following the drawing, the defendant employed a lawyer, and caused him to hasten to the town where the bank which held the draft was located, and pay it off. This attorney arrived at the bank about two and one half hours before the plaintiff did. On February 8, 1908, the plaintiff's attorney tendered to the attorney of the defendant \$911.20, and also tendered to its secretary and treasurer the same amount, to pay the draft which the defendant had caused to be taken up. Both tenders were refused. The tender is continuous. The plaintiff prayed "that said defendant be required to disclose to your petitioner the numbers of the other two lots of land so drawn by your petitioner, and not known to your petitioner, which lots of land he is entitled to, and their location;" that the defendant be required to convey to plaintiff all the lots of land drawn by him (giving certain numbers), and also the other two lots at present not known to him; that defendant be required to pay to plaintiff reasonable rent for the lots, including improvements thereon, "with interest on the said \$250 to improve one of the said lots of land; also whatever the amount of rent may be due on the two lots of land not known to your petitioner;"

that the defendant be enjoined from selling or disposing of the lots, and for process. The plaintiff amended his petition by striking out from one of the paragraphs, which gave the number of the lots drawn by him, all of the numbers except that of one lot, described as having a brick store located upon it. The amendment then proceeded as follows: "Plaintiff further amends his petition so as to ask specific performance from the defendant as to lot 14 in block 104, being the brick store and lot; and plaintiff strikes from his petition all reference to all other lots mentioned in said petition. Plaintiff so amends his petition without prejudice as to his rights and title to said lots so stricken." The defendant's demurrer was overruled, and this was assigned as error.

Messrs. Kelley & Smith and E. C. Collins for plaintiff in error.

Messrs. Hines & Jordan and W. T. Burkhalter for defendant in error.

Lumpkin, J., delivered the opinion of the court:

The arrangement sought to be enforced was plainly a lottery scheme. The seller did not convey or contract to convey any particular lots or land to any certain purchasers. It received from proposed purchasers arbitrarily fixed amounts, without reference to the relative value of the lots into which it had divided its property. These varied very much in value. Whether a purchaser received lots of greater or less value for his money was not determined by contract, but by chance. A drawing was had, by which names were put in one box and number in another, and, upon the hazard of drawing out names and numbers, depended the determination of what lot a proposed purchaser should get for his money. The drawing was conducted by a committee of the proposed purchasers, under rules and regulations of the proposed seller. The plaintiff in the present case appears to have drawn the capital prize. He alleged that under his contract he was to pay \$1,000, for which he was to receive ten lots, and that one of them drawn by him was of the value of \$3,000, while others were of considerable, though less, value. The mere use in the written contract of such euphonious expressions as that the "opening and distribution of these lots and land will be conducted on a plan entirely in keeping with the law, and fair to all, and shall be agreed upon by a majority of the purchasers present," will not serve to conceal the real illegality of the scheme. The seller did not sell a tract of land to tenants in common, and leave them to divide it among themselves. It was to par-

ticipate in the "opening," and did so. It was only to convey such lots as were drawn. The opening was to take place when ten applications were sold in one town. Disregarding any mere device of words, what was actually contracted for by each so-called purchaser was evidently a right to have a certain number of lots conveyed to him by the seller, to be determined by chance, the various lots being widely different in value. A lucky draw would result in obtaining valuable lots for the amount paid by the purchaser. An unlucky draw would give him lots of much less value for his payment. The plaintiff alleges that, "after the drawing was completed, and it cropped out that your petitioner had good luck," the defendant refused to convey to him the lots drawn on his behalf; that he was absent at the time the drawing took place, and the defendant would not even disclose to him what lots were drawn in his favor, but that he had ascertained several of them, one of them being a store lot valued at \$3,000.

In his original petition he prayed discovery in order to find some of the lots he claimed to be entitled to, and also specific performance in regard to them. By amendment he confined his prayer for specific performance to the particular lot mentioned. The plaintiff's own allegations show how far this was from a bona fide sale of the land to him. Such schemes as this are illegal, and will not be enforced. A court of equity will not decree specific performance of a promise to pay a capital prize in a lottery or gift enterprise. Penal Code 1895, § 406; *Whitley v. McConnell*, 133 Ga. 738, 27 L. R. A. (N. S.) 287, 134 Am. St. Rep. 223, 66 S. E. 933; *Lynch v. Rosenthal*, 144 Ind. 86, 31 L.R.A. 835, 55 Am. St. Rep. 168, 42 N. E. 1103; *Guenther v. Dewein*, 11 Iowa, 133; *Den ex dem. Wooden v. Shotwell*, 24 N. J. L. 789; *Allebach v. Godshalk*, 116 Pa. 329, 9 Atl. 444; 19 Am. & Eng. Enc. Law, p. 591. The court erred in overruling the demurrer to the petition.

Judgment reversed.

All the Justices concur.

MAINE SUPREME JUDICIAL COURT.

AUGUSTA C. MATHER et al.

v.

EDWARD R. CUNNINGHAM et al.

(105 Me. 326, 74 Atl. 809.)

Probate — conflict of laws — foreign domicile — proof.

1. One seeking to distribute the estate of 29 L.R.A. (N.S.)

a former resident of a particular state, according to the laws of a foreign country in which he resides, must establish that he had acquired a domicile there in fact and in law.

Domicil — change — facts.

2. A change of domicile as matter of fact may be established by evidence that one left the state of his birth at an early age and returned only once to visit his parents, and finding that they had left the state again departed, leaving neither property nor relatives there, while for nearly forty years his residence and place of business was at a certain place in a foreign country.

Same — distribution of estate — jurisdiction.

3. A domicil of testacy or intestacy may be established by a citizen of one of the United States in that portion of China in which, by treaty, he is permitted to enjoy the laws of the United States, so that in case of his death his estate is subject to the jurisdiction of the consular court there located, and not to the courts of the state of his former domicil.

(April 15, 1909.)

REPORT by the Supreme Judicial Court for Waldo County for the opinion of the full bench of questions arising on appeal by *Augusta C. Mather et al.* from a decree of the Probate Court for Waldo County appointing *Albert W. Cunningham* administrator of the estate of *Henry H. Cunningham*, deceased. Decree reversed.

The facts are stated in the opinion.

Messrs. *Littlefield & Littlefield*, for appellants:

The "domicil" is the habitation fixed in any place without any present intention of removing therefrom.

Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502; *Parsons v. Bangor*, 61 Me. 457; *Stockton v. Staples*, 66 Me. 197.

Declarations of an intent to remain indefinitely in Shanghai as a place of residence were admissible.

Mutual L. Ins. Co. v. Hillmon, 145 U. S. 285, 36 L. ed. 706, 12 Sup. Ct. Rep. 909; *Deer Island v. Winterport*, 87 Me. 37, 32 Atl. 718; *Com. v. Trefethen*, 157 Mass. 180, 24 L.R.A. 235, 31 N. E. 961; *Kreitz v. Behrensmeyer*, 125 Ill. 141, 8 Am. St.

Note. — The very full discussion in the foregoing opinion of the possibility of an American citizen acquiring a domicile of choice in that part of a foreign country over which, by treaty, the United States is permitted to extend its own law so far as the property rights of its citizens are concerned, and the lack of judicial authority other than that there cited on the point, render annotation unnecessary.

Rep. 349, 17 N. E. 232; 12 Rose's Notes (U. S.) 212.

The home or residence is where *indicia* of home exists, and cannot be said to continue in a place where it previously existed, when all the surroundings which make a home have ceased to exist in that place; notwithstanding it is necessary that, for the distribution or descent of property at a person's death, there should always be somewhere a domicile.

Greene v. Windham, 13 Me. 228; Church v. Rowell, 49 Me. 367; Gilman v. Gilman, supra; North Yarmouth v. West Gardiner, 58 Me. 207, 4 Am. Rep. 279; Holmes v. Greene, 7 Gray, 299; Com. v. Trefethen, supra.

Messrs. Dunton & Morse and William Henry White, for appellees:

The domicile of origin of deceased is Waldo county, and this continues unless a domicile of choice has been acquired.

Guier v. O'Daniel, 1 Binn. 349, note; Prentiss v. Barton, 1 Brock. 393, Fed. Cas. No. 11,384; Udny v. Udny, L. R. 1 H. L. Sc. App. Cas. 441, 9 Eng. Rul. Cas. 782; King v. Foxwell, L. R. 3 Ch. Div. 518.

The facts do not show a Chinese domicile, even if it be possible for an American citizen to acquire one.

Re Tootal, L. R. 23 Ch. Div. 534; Maltass v. Maltass, 1 Rob. Eccl. Rep. 67; The Indian Chief, 3 C. Rob. 29; 1 Kent, Com. * * 74-80; Abd-ul-Messih v. Farra, L. R. 13 App. Cas. 488, 5 Eng. Rul. Cas. 772; Hall, Foreign Jurisdiction of British Crown, p. 182.

There is no such thing known to the law as an American-Chinese domicile for testamentary purposes.

Re Tootal, L. R. 23 Ch. Div. 532; Abd-ul-Messih v. Farra, supra.

Though the words "home" and "domicil" are applicable to any place whatever, yet the place obviously contemplated is a country or "territory subject to one system of law."

Dacey, Domicil, p. 55; Jacobs, Domicil, §§ 67, 69.

The court at Shanghai has no probate jurisdiction.

Dainese v. Hale, 91 U. S. 13, 15, 17, 23 L. ed. 190-192; McDernied v. McDernied, decided Mar. 18, 1907.

Every presumption is against one changing his national or quasi national domicile.

Jacobs, Domicil, §§ 121-124; Craigie v. Lewin, 3 Curt. Eccl. Rep. 435.

Spear, J., delivered the opinion of the court:

This is an appeal from the decree of the probate court for Waldo county, dated September 11, 1906, appointing Albert W. Cunningham

administrator of the estate of Henry H. Cunningham, deceased, and comes here on report. The agreed facts show that Henry H. Cunningham was born in 1838, in Swanville, county of Waldo, Maine, of parents who were citizens of the state of Maine and resident and domiciled in said county and state. His parents continued to reside in Waldo county, Maine, until 1865, when they removed to Manassas, Virginia. He resided with his parents in Waldo county, in this state, continuously from his birth until May 3, 1853, the last three years at Belfast, Maine. In Mar. 1853, at the age of fifteen, he went to sea. In 1854 he went to Australia. About 1857 he was for a time a pilot on the river at Shanghai, China. He was never married, and at the time of his death his only heirs and next of kin were two brothers and two sisters. He died at Shanghai, June 10, 1905, leaving an estate of personal property valued at over \$50,000. He left a will in which he undertook to dispose of his estate, executed in the presence of two witnesses. After his death proceedings were had before the United States consul at Shanghai, China, for the settlement and distribution of his estate, and the various legatees have received their distributive shares through the method usually observed there in the settlement and distribution of similar estates. The appellees, however, deny the right of the consular court at Shanghai to thus settle and distribute the estate of the decedent, upon the ground that he had never acquired a domicile in Shanghai; that his domicile continued, during all the years of his absence, to be in Waldo county; that his will was not executed in accordance with the laws of Maine, having but two witnesses; and that his estate should be administered here as intestate property. Consequently they applied to the probate court for the county of Waldo for the appointment of an administrator to settle the estate. The appointment was made from the decree of which the appeal before us was taken.

It therefore appears that but two issues, one of fact and one of law, are involved in the determination of this case. Each presents the same question: Did the decedent have a domicile in Shanghai at the date of his death (1) as a matter of fact; (2) as a matter of law? The burden is upon the appellants to establish the affirmative of both issues. Re Tootal, L. R. 23 Ch. Div. 532. We will first proceed to the issue of fact. Assuming, *arguendo*, that the decedent could acquire a legal domicile in Shanghai, do the necessary facts appear to support this conclusion? Domicil may be established in different ways, but two of

which are involved in this case,—domicil of origin and domicil of choice. It was conceded that the decedent had a domicil of origin in Waldo county. That domicil continued, whatever the wanderings of the decedent, until he acquired a new one in some other locality. In order to establish a domicil of choice, evidence of three important facts must appear: (1) Abandonment of domicil of origin; (2) selection of a new *locus*; (3) the *animus manendi*. Technically, proof of (2) and (3) necessarily establishes (1). Putting these facts in the form of a definition, Gilman v. Gilman, 52 Me. 165, 83 Am. Dec. 502, says: "Domicil is said to be the habitation fixed in any place, without any present intention of removing therefrom." While the term "domicil" seems to possess more or less elasticity, there can be but one domicil of testacy or intestacy. It is the latter sense in which it will be here treated.

We deem it unnecessary to consume much time in discussing the questions of fact. The evidence shows that the decedent was in Waldo county but once from the time he left it to the time of his death. In 1866 he returned to visit his father and mother, only to find that they had changed their residence to the state of Virginia. He had now neither property nor relatives left in this county. That he abandoned, and intended to abandon, his domicil of origin is too apparent to require comment. It is also established that he made his home, established his business, and had his headquarters, from 1869 to the date of his death, in Shanghai, China. In fact, the evidence in the case does not tend to show that during these years he permanently resided at any other place. We, therefore, find no trouble in determining that he selected Shanghai as his place of business and residence after 1869. While there is more or less conflict in the testimony respecting his intention to remain in Shanghai indefinitely, it cannot be reasonably declared upon the evidence that he had any present intention of removing from Shanghai or of coming back to the state of Maine. In other words, the court is of the opinion that, had Henry H. Cunningham resided in England, France, or any state in the Union, from the time he left Belfast until the date of his death, under precisely the same circumstances that are found in connection with his residence at Shanghai, it would clearly appear that he had acquired a domicil of choice in either one of these localities, where he had so resided. *Harvard College v. Gore*, 5 Pick. 370. The *animus et factum* concurred, and the *forum novum* was substituted for the *forum originis*.

The facts being sufficient to establish the
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domicil of the decedent upon the soil of any foreign country, including that part of China not affected by treaty relations, we now come to a new and more difficult problem: Can an American under any circumstances, whatever the facts, acquire, as a matter of law, a domicil in the province of Shanghai, China, a place where, by treaty, American law is substituted for the Chinese local laws? Although the decedent may have abandoned his domicil of origin, so far as his acts and intentions were concerned, yet it is conceded, if he was prevented by law from acquiring a domicil of choice, that his domicil of testacy or intestacy would continue from necessity to be that of origin. Therefore the case finally turns upon the question whether the decedent could, as a matter of law, acquire a domicil in Shanghai. This proposition raises two important questions: First, whether any good reason can be adduced from all the circumstances of the case why the usual law of a domicil should not be applied to the decedent's residence in Shanghai; second, whether any decision or rule of law, admitting all the facts of domicil, intervenes to inhibit the acquisition of such domicil. The first question involves, *in limine*, the effect upon the government and territory of Shanghai of the treaty relations between this country and China. These relations have been so clearly expressed in the English case, *Re Tootal*, that we adopt the following paragraph as a statement of their character: "The treaties do not contain any cession of territory so far as relates to Shanghai, and the effect of them is to confer in favor of British subjects special exemptions from the original territorial jurisdiction of the Emperor of China, and to permit them to enjoy their own laws at the specified places. Similar treaties exist in favor of other European governments and the United States." Of course, laws have been enacted by all the governments, including our own, to carry into effect upon the territory involved the treaty relations of the parties to the convention; but the broad fact that the treaty territory is exempt from local law, and under the rule of foreign law, raises all the questions that can affect the establishment of domicil upon treaty soil. We need not then inquire concerning the acts of Congress. To this situation is to be applied the law of domicil, its meaning, the reasons for it, its purpose.

To apply the law correctly, we must first determine precisely what we mean by the term "domicil." While it is asserted in some courts that there may be two or more domicils, it is yet true that there can be but one governing the settlement of estates.

We have already referred to the elements of domicile, the *animus et factum*, but have not determined whether they must concur with reference to a community, or with reference to a locality, in order to establish domicile; but we are clearly of the opinion that domicile in no case can be asserted independent of locality. It expresses but little relation to society or community. As was said in *Harvard College v. Gore*, supra: "The term inhabitant, as used in our laws and in this statute, means something more than a person having a domicile. It imports citizenship and municipal relations, whereas a man may have a domicile in a country to which he is alien, and where he has no political relations. As if an American citizen should go to London or Paris with an intention to remain there in business for the rest of his life, or if an English or French subject should come here with the same intention, they would respectively acquire a domicile in the country in which they should so live, but would have no political relation except that of local allegiance to such country." It was said in *Abd-ul-Messih v. Farra*, L. R. 13 App. Cas. 439, 5 Eng. Rul. Cas. 772: "The idea of domicile independent of locality, and arising simply from membership of a privileged society, is not reconcilable with any of the numerous definitions of domicile to be found in the books. In most, if not all, of these, from the Roman Code . . . to Story's Conflict, . . . domicile is defined as a locality,—as the place where a man has his principal establishment and true home. . . . But it is needless to pursue this topic farther. Their lordships are satisfied that there is neither principle nor authority for holding that there is such a thing as domicile arising from society, and not from connection with a locality." This conclusion is in full harmony with the well-settled doctrine in this country. That is, ordinarily speaking, if a person has left his domicile of origin, and selected another locality, whether in another state or a foreign country, in which his home is located and his business established, without any intention of leaving, that locality is his domicile. It therefore appears that "domicile" in its usual sense does not present a complex or difficult problem. Ordinarily, it is a pure question of fact, as was said in *Thorn-dike v. Boston*, 1 Met. 242: "No exact definition can be given of domicile. It depends upon no one fact or combination of circumstances, but, from the whole taken together, it must be determined in each particular case. It is a maxim that every man must have a domicile somewhere, and also that he can have but one. Of course, it follows that his existing domicile continues 29 L.R.A. (N.S.)

until he acquires another, and, *vice versa*, by acquiring a new domicile he relinquishes his former one. From this view it is manifest that very slight circumstances must often decide the question. It depends upon the preponderance of the evidence in favor of two or more places, and it may often occur that the evidence of facts tending to establish the domicile in one place would be entirely conclusive were it not for the existence of facts and circumstances of a still more conclusive and decisive character, which fix it beyond question in another." Therefore it is plain that it is the place, not the local laws, that becomes of paramount importance in determining the question of domicile; where, not under what laws, do the *animus et factum* concur.

There are now forty-seven states in the Union, nearly all differing in some respects with reference to the laws of descent, the right of inheritance, and the distribution of estates; but, in whatever state the decedent may be found, to determine his domicile, no inquiry is made as to what laws shall govern the settlement of his estate, but where did he have a permanent abode. The same is true of the laws of Great Britain. England, Scotland, Ireland, and Wales, each has its own peculiar laws governing the descent and distribution of property, yet these laws are never consulted upon the question of domicile. The place is the issue, as will appear by a reference to the *Dr. Munroe Case*, 5 Madd. Ch. 379.

Now, then, if the true legal meaning of domicile is to fix a locality, what is the reason for the law? Why may not an estate be settled wherever the owner happens to de-cease? The reason is manifest. It is to establish stability and certainty with respect to the place where estates are to be settled. Otherwise great confusion and numerous difficulties might follow an attempt to settle estates in distant localities in which the decedent might happen to temporarily reside. It has therefore from reason and necessity been declared that all estates must be referred to some locality. For the purpose of making the place definite and certain, it has been established as a rule of law that it shall be the soil where, at the time of decease, a person has a permanent abode, without any intention of removing therefrom. While the determination of domicile refers the settlement of an estate to a particular locality, it necessarily subjects it to the laws of that locality; but the underlying reason for the law of domicile is not to subject an estate to any particular law, but to fix its abode.

But it is forcibly urged that the term "domicile" necessarily implies subjection and obedience to the local laws, and that this

cannot be said to be true of a residence in Shanghai. The first part of the proposition is admitted, but the conclusion is not conceded. No good reason appears in support of it. What is meant by local laws? Undoubtedly that code of laws which governs the affairs of a certain prescribed jurisdiction. The laws of Maine are limited in authority to the territory of Maine. They have no force beyond the state line. They are strictly local. The same is true of the jurisdictional limitations of every foreign state; that is, the local laws are considered to be limited to the territory over which their jurisdiction extends. The ownership of the soil, therefore, controls the establishment of all local laws. Without consent of the owner, no extraterritorial law can be enacted within an independent jurisdiction, or extended to it. China is independent. It never released its ownership to the soil of Shanghai. Its sovereignty over its territory was retained. In *Re Tootal*, it is said: "The sovereignty over the soil at Shanghai remains vested in the Emperor of China with this exception: That he has by treaty bound himself to permit British subjects to reside at the place, for the purposes of commerce only, without interference on his part, and to permit the British Crown to exercise jurisdiction there over its own subjects, but over no other persons." This description applies equally to the American treaty. Therefore, whatever laws may have been extended by Congress to the province of Shanghai are operative, not upon American soil, but upon the territory of the Chinese Empire. How do these laws reach there? By treaty, permission of the Emperor.

Now it will probably be admitted that, had the Emperor extended by edict to this territory the identical enactments now governing Americans residing there, a Chinese domicile could be acquired under the laws thus promulgated. It is true that, instead of an edict declaring the law, the Emperor by consent permitted Congress to extend its statutes to the government of Americans in this treaty port. In other words, if the identical laws which now govern Americans upon this territory had been promulgated by edict, instead of permitted by treaty, the estate of the decedent would, without question, have been conceded a domicile in Shanghai. Now, then, as a practical question, what logical reason can be given for declaring the existence of domicile in the one case, and not in the other? The decedent would have lived under precisely the same laws and upon the same foreign soil. Although the Emperor had suspended some of the Chinese laws, and permitted the extension of American law to the territory, 29 L.R.A. (N.S.)

yet the source of the law was the Emperor, who had never released his sovereignty over the soil.

Upon this point we quote from an able article in the *Law Quarterly Review* (vol. 24, p. 444) by Professor Huberich of Stanford University. In his analysis of Mr. Justice Chitty's opinion in *Re Tootal*, he says: "It is quite immaterial that the Chinese law provides that persons of British nationality shall be governed by the rules of law prevailing in England, or by such laws as may be enacted and made applicable to them by the English authorities. The English law is operative in Shanghai as to certain persons and certain transactions only because it is permitted and adopted by the territorial sovereign."

The effect, also, of declaring domicile upon Chinese soil would be precisely the same whether the law governing the *locus* was Chinese or American. In either case, it would be the law that covered that particular locality with respect to Americans, and, as to them, would become the local law.

It would appear, then, that the only reason assigned for withholding from the decedent the right of Chinese domicile is that, while he lived upon Chinese soil, under Chinese sovereignty, he was subject to laws extended to the particular territory by treaty instead of by edict. We are able to discover neither logic nor reason for the distinction here suggested. The fundamental idea of domicile does not depend upon any distinction with respect to the source of the local law. A Chinese domicile gives the decedent's estate a fixed place of abode, and subjects it to the law governing the locality. Whether American law or Chinese law, it is, nevertheless, the law of the place, as to American citizens.

Professor Huberich states it this way: "Where the requisite *factum* and *animus* are shown to exist, there is no valid reason why an Englishman or an American should not be held to acquire a domicile in China. In respect of all matters which private international law refers to the law of the domicile, he would be governed by the Chinese law, the law of the territorial sovereign. The law to which he would be subject would be none the less the law of China because it provides that persons of British and American nationality shall be governed by such laws as their respective countries may enact to govern their nationals in China."

In the case before us, the effect of denying a Chinese domicile absolutely defeats the will of the testator, and diverts the transmission of his property into unintended and perhaps objectionable channels.

On the other hand, no inequitable result

can be reasonably predicated upon the declaration of such domicile. No injury can follow. The estate, if testate, is disposed of in accordance with the terms of the will, precisely as it would be here. That the will was attested by but two witnesses instead of three, as required in Maine, is immaterial to the issue. *Lyon v. Ogden*, 85 Me. 374, 27 Atl. 258. If intestate, the property of the estate is legally administered, as appears from the opinion of L. R. Wilfley, judge of the United States court for China, decided May 15, 1907, in the Matter of the Probate of the Will of John Pratt Roberts. In this connection it may be proper to add that the record shows that 108 estates, testate and intestate, have been administered through the consular court at Shanghai since 1865.

In fine, in considering the reasons why the American law of domicile should not apply to American nationals in Shanghai, under the circumstances of this case, the court is unable to discover any substantial objection, nor has any been pointed out in any cited case. *Jacobs on Domicil*, § 361, in a brief summary of his analysis of Justice Chitty's opinion (*Re Tootal*), pertinently suggests that no reasons are assigned even in this case, which, by *dictum*, squarely denies the right of Chinese domicile. Section 361 reads: "Here, then, we have, according to the uncontradicted evidence, (1) complete abandonment of the English domicile of origin; and (2) residence in China with intention to remain there permanently. If this case is to be accepted as an authority upon this point, therefore, something more is necessary for the establishment by an American or a European of his domicile in a country in which European civilization does not prevail than abandonment of his domicile of origin and mere residence with intention to remain permanently. What more is necessary has never been pointed out, although, doubtless, as Dr. Lushington intimates, a change of religion would be deemed sufficient."

The suggestion hinted at by the author, touching the effect of religion upon the domicile of American and European nationals in the East, is based upon a *dictum* in a passage found in the *Indian Chief*, 3 C. Rob. 22, in which Lord Stowell says: "In the western parts of the world alien merchants mix in the society of the natives, access and intermixture are permitted, and they become incorporated to almost the full extent; but in the East, from the oldest times, an immiscible character has been kept up. Foreigners are not admitted into the general body and mass of the society of the nation; they continue strangers and sojourners as all their fathers

were." *Dicta* of a similar import are found in *Maltass v. Maltass*, 1 Rob. Ecol. Rep. 67-80, and *Re Tootal*.

In the cases cited the doctrine of immiscibility applies both to presumptions of law and fact. Mr. Justice Chitty in *Re Tootal* defines the doctrine as follows: "The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicile." That is, an American may marry a Chinese woman, establish his business upon Chinese soil, accumulate a fortune there, raise a family, and declare his intentions of ever remaining, yet the influence of religion and customs of the community in which he has chosen to live and die is presumed to be so repugnant to the idea of western civilization as to rebut all evidence of intention, however conclusive. The opinion of the learned justice, however, concedes that if the strong presumption against intention could be overcome, a domicile of choice in China might be acquired. We think it can be overcome.

In this enlightened age the doctrine of immiscibility cannot be accorded such weight as to establish a legal presumption against all other evidence tending to prove *animus*. In American jurisprudence, at least, it should be allowed to slumber with Quaker persecution, Salem witchcraft, and other kindred dogmas. Since the *dictum* of immiscibility was first declared, the world has experienced a revolution touching the national, commercial, and trade relations between the nations of the East and those of the West. Our conclusion, therefore, upon the first proposition, is that no sound reason can be adduced against the practical application of the American law of domicile to Americans residing in China, when the *animus et factum* are found to concur.

This brings us to the second general proposition involved in the discussion: Is there any established principle of law which intervenes to prevent the practical application of the rules of American law of domicile to Americans residing in China? This precise point, so far as we are able to discover, has never been decided by any court of last resort. It has, however, been recently discussed and decided in the negative by L. R. Wilfley, judge of the United States court at Shanghai, China.

The leading authority upon this issue is the English case, *Re Tootal*, decided in 1881 in an opinion by Mr. Justice Chitty. It is, perhaps, fair to say that while the decision upon the point was pure *dictum*, nevertheless, in legal effect, denies the possibility of a domicile of choice by a British subject. The issue presented to the court

In this case involved the question of an Anglo-Chinese domicil. The real issue as stated by Mr. Justice Chitty is: "On principle, then, can an Anglo-Chinese domicil be established?" Following the analogy of the early English cases establishing an Anglo-Indian domicil for English subjects residing in India as members of the old East India Company, it was urged that an Anglo-Chinese domicil might be established for Tootal, an English subject who had lived in China with the *animus et factum* required to establish domicil; therefore the direct issue of Chinese domicil was not involved, and the case is not discussed by the learned justice from that standpoint, as appears from the following quotation from his opinion: "In these circumstances it was admitted by the petitioners' counsel that they could not contend that the testator's domicil was Chinese. This admission was rightly made. The difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil, and brings the case within the principles laid down by Lord Stowell in his celebrated judgment in the Indian Chief, 3 C. Rob. 29, and by Dr. Lushington in *Maltass v. Maltass*, 1 Rob. Ecl. Rep. 67, 80, 81." From this paragraph it will be observed that the question of Chinese domicil was, by express admission of counsel, eliminated from the case. The discussion after this admission was upon a question not in issue, and necessarily pure *dictum*, as it was not in any sense essential to the decision of the case. But the statement of Mr. Justice Chitty immediately following this admission is the remark upon which he has established the legal impossibility of acquiring a Chinese domicil, and is therefore founded upon *dictum*, and *dictum* alone.

In *The Indian Chief Case*, Lord Stowell was considering the question of the condemnation of a ship and cargo. The ship was charged with the offense of trading with the public enemy. The case involved the question of enemy character as determined by residence and protection. The determination of these questions did not in any sense involve the capacity of either party to acquire a residence in a foreign country. Yet upon these facts is based the opinion of Lord Stowell, in which he speaks of the "immiscibility" of character in the paragraph already quoted, as a reason why an eastern domicil cannot be acquired by a British subject, and to which Mr. Justice Chitty alludes as a precedent for his conclusion. In *Maltass v. Maltass*, decided by Dr. Lushington, the question was as to the rule that should govern the descent of the personal property of John Maltass, who

died in Smyrna. One of the questions discussed was whether the testator had acquired a residence in Smyrna, he having had a domicil of origin in Great Britain.

While this question was alluded to, it is apparent from a most cursory examination that the question of domicil was in no sense involved in the case. With reference to the question of domicil, the court summed up its conclusions as follows: "I wish to observe that I am desirous not to be supposed to have given an opinion upon any question not necessary to be decided in this case; my judgment, therefore, does not affect the question of domicil."

"I give no opinion, therefore, whether a British subject can or cannot acquire a Turkish domicil; but this I must say,—I think every presumption is against the intention of British Christian subjects voluntarily becoming domiciled in the dominions of the Porte." Yet the last part of this paragraph is the passage cited as a precedent.

It is obvious then that the extracts cited from these cases as precedents are themselves pure *dicta*. It as manifestly follows that Mr. Justice Chitty's discussion upon the question of Chinese domicil was not only *dictum* itself, but founded upon *dictum*. The cases, therefore, upon which he relies for his conclusion, by no means justify the statement that "the difference between the religion, laws, manners, and customs of the Chinese and of Englishmen is so great as to raise every presumption against such a domicil." and *Re Tootal* cannot be regarded as an authority for denying, as a presumption of law, the incompetency of acquiring a Chinese domicil.

We agree, however, with Mr. Justice Chitty upon the real issue before him for decision. An Anglo-Chinese domicil would certainly be of immiscible character. The Anglo-Indian domicil was so regarded by Mr. Justice Chitty himself, who says of the cases establishing the doctrine: "These authorities are generally admitted to be anomalous." While they may be regarded as anomalous in an attempt to establish a double domicil, a thing unknown to any rule of law and impossible in practice, they may be made, by a fair analysis, precedents in fact, if not in name, for a straight Indian domicil in the anomalous cases considered, and for a straight Chinese domicil in the case at bar.

In its practical application, what does Anglo-Indian mean? It is simply the invention of a name. No new feature except the name appeared in any of these cases that did not comport with all the general rules of acquiring a domicil in India. In alluding to this compound domicil, Baggeallay, L. J.,

in *Ex parte Cunningham*, L. R. 13 Q. B. Div. 418, remarks: "There are some anomalous cases in which a subject of the Queen had entered into the service of the Old East India Company, and it was held that he had acquired what was called an Anglo-Indian domicile." The phrase, "what was called an Anglo-Indian domicile," is significant, and disclosed that, in the mind of the learned justice, no such domicile could be legally said to exist. It appears, as already stated, that the Anglo-Indian domicile was declared upon the ground that the East India Company was a permanent institution in India, and that those persons who entered its employ were, *ipso facto*, presumed to have abandoned their domicile of origin, and to have become permanently located in India.

Cotton, L. J., in the same case, takes emphatic exception to the elements of fact which the old cases declare are capable of constituting an Anglo-Indian domicile. He says: "It is said that a Scotchman, by entering the service of the East India Company, acquired an Anglo-Indian domicile. I take exception to the expression 'by entering the service' of the East India Company. The ground of the decisions in those cases was that the officer was residing in India under circumstances which showed that he intended to abandon his domicile of origin, under circumstances which showed that he duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicile." This is really what was said by Wood, V. C., in *Forbes v. Forbes*, Kay, 356: "When an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo et facto* in India." In other words, the learned justice eliminates the East India Company, which made whatever domicile was acquired dependent, not upon the East India Company at all, but upon a permanent residence in India. But eliminating the East India Company eliminates the component "Anglo" from Anglo-American, and leaves the Indian domicile only. The logic of these cases is that Anglo-Indian was a misnomer, as duty cannot be considered superior to volition in power to fix intention.

On the other hand, the whole trend of modern authority is in opposition to the dictum advanced in *Re Tootal*. Judge Willfley, of the United States court for China, sitting at Shanghai in 1907, in *Re* 29 L.R.A. (N.S.)

Probate of the Will of Young J. Allen, announced a strong opinion in which he rejects the dictum in *Re Tootal*, and comes to a directly opposite conclusion. The facts in the case are very similar to those in the case at bar. After an elaborate and exhaustive review of the authorities and text writers, he comes to the conclusion: First. "That there is nothing in the theory or practical operation of the law of extraterritoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extraterritoriality."

Second. "That Dr. Young J. Allen, having lived in China for a period of forty-seven years, and having expressed his intention to live here permanently, thereby acquired an extraterritorial domicile in China; consequently this court, in the administration of his case, will be guided by the law which Congress has extended to Americans in China, which is the common law." We wish to say, however, that we do not agree with Judge Willfley in employing the name "extraterritorial domicile." It appears to be inconsistent with the fundamental idea of domicile, which, as we have endeavored to show, is a relation between an individual and a particular locality or country. The fact that the law governing the particular locality is extraterritorial does not make the domicile extraterritorial, since it is immaterial upon the question of domicile from what source the law is proclaimed, as before shown.

This same view is taken by Professor Huberich in the article already alluded to in which he says: "The choice of the words 'extraterritorial domicile' is unfortunate, in that it is likely to convey the idea of exemption from the laws of the territorial sovereign."

Sir Francis Piggott, chief justice of Hong Kong, in a recent work, expresses the opinion "that when the question is again raised, it will be found that the principles established by the most recent cases necessitate a reconsideration of the law laid down on the subject by Mr. Justice Chitty." As a result of his discussion he further concludes: "A man may set up his home in a foreign port; he may have banished forever the idea of returning to his native country; the *animus manendi* may be clear, without shadow of doubt; on the hypothesis, then, there is a body of law regulating the community. Why is it impossible, then, for the ordinary principles of the law to be applied, and for the personal relations of the permanent members of the community to be governed under that law permanently as the law of the domicile of their choice, of those who

are born members of the community as the law of the domicile of their origin?" Piggott, *Exterritoriality*, p. 150. Linking these two propositions together, it is suggested that the inevitable result is a modification of Lord Watson's interpretation of the law of domicile referred to above, on the following lines: The law which regulates a man's personal status must be that of the governing power in whose dominions his intention is permanently to reside, or must be so recognized and established by that governing power as to be in fact the law of the land. Lord Watson's interpretation was that domicile must be referred to locality, and not community.

Hall, a distinguished authority on international law, in his work on the Foreign Jurisdiction of the British Crown, also takes issue with the views expressed in *Re Tootal* upon the ground of expediency, and says: "It is perhaps to be regretted that a change in the law is not made, which a short order in council could easily effect. Anglo-Oriental domicile has its reasonable, it may almost be said its natural, place." This suggestion clearly shows that in the opinion of the learned author the doctrine of immiscibility, which has been made the fundamental objection to the possibility of an eastern domicile, should no longer be regarded as a potential reason for denying such domicile. He further says upon the question of expediency: "So long as persons have not identified themselves with the life of a new community, they must keep each his own law; but as soon as they have shown their wish and intention to cut themselves adrift from the association of birth, they prove their indifference to the personal law attendant on their domicile of origin. There is therefore no reason why simplicity and unity of law should not be gained for British subjects by attributing community in the laws of England to all of European blood. There is also every reason for avoiding very grave difficulties of another kind, which are opened through invariable preservation of the domicile of origin. English families, even in the present day, often remain through more than one generation in Oriental countries as their permanent place of abode. Formerly the history of persons whose domicile might become a matter of importance was generally known sufficiently well. Many are now of obscure antecedents, and of an origin uncertain among the numerous places from which British subjects can derive. As no domicile can be acquired in an Anglo-Oriental community, it becomes every year more probable that cases will occur in which the determination of the domicile of a father, perhaps of a grandfather, may become nec-

essary, and in which it may be equally impracticable to impute an English domicile or to attribute any other with fair probability. It would be a great advantage that in such cases there should be a fixed rule which should correspond with the obvious facts, and that the courts, instead of searching with infinite trouble and expense for an ancestral domicile, should be enabled to find that a domicile had been acquired in the eastern country, which carried with it the application of English law."

Professor Huberich upon this point says: "The English view, it is submitted, is based on erroneous conceptions of domicile and extraterritoriality. It is supported by the authority of a single case [*Re Tootal*], has been vigorously attacked, and may yet be repudiated, by courts not bound by the precedent."

In reviewing Judge Wilfey's opinion, he says: "The result of the case is correct."

Westlake, in his *Private International Law*, pp. 318, 319, takes the same view, and points out the inconsistency of the opinion "in which Mr. Justice Chitty declared: 'There is no authority that I am aware of in English law that an individual can become domiciled as a member of a community which is not the community possessing the supreme or sovereign territorial power,'"—having said in the same connection: "It may well be that a Hindoo or Mussulman settling in British India, and attaching himself to his own religious sect there, would acquire an Anglo-Indian domicile." Westlake says: "The Hindoos or Mussulmans are as little the supreme or sovereign territorial power in India as the English are such in China." This discrepancy serves to point out the complexities that arise in an attempt to deny or modify the application of the rational and established rules of law.

The theory of this opinion is in accordance with the application of the ordinary rules of law touching the question of domicile. We have found no difficulty, and discover no error, in referring the existence of domicile to locality. We allude to this matter for the purpose of avoiding any confusion which might arise in reading the text writers cited in connection with the opinion. While they all advocate the legal propriety of holding that an American national or an English national may acquire a domicile in a treaty port, they suggest, if we interpret them correctly, that such a domicile may be referred to community rather than locality. The reference of Sir Francis Piggott to "a modification of Lord Watson's interpretation of the law of domicile" relates to this precise point. We concur in the result of their conclusions, but not in the method of reaching it.

Upon both reason and authority, we are of the opinion that the domicile of the decedent, living in a country that granted extraterritorial privileges, should be determined by the same rules of law that apply to the acquisition of domicile in other countries. In support of this position we refer to the reasons cogently and comprehensively expressed in Judge Wilfley's opinion. In the language of Professor Huberich the result here reached, it is submitted, "preserves intact the theory that domicile is a legal relation between an individual and a particular country, and involves a certain submission to the laws of such country as the laws of the territorial sovereign. It upholds the doctrine that each state is supreme over all persons and things within the territorial boundaries. It does away with an anomaly in the law of domicile, and enables the courts to recognize the legal existence of a domicile where the facts and intent ordinarily requisite are present."

The court is of the opinion that Henry H. Cunningham, the decedent, at the time of his decease, had abandoned his domicile of origin in Waldo county, Maine, and had acquired a domicile of choice in Shanghai, China. Therefore, in accordance with the stipulations in the report, the entry must be:

• Appeal sustained.

Decree of the court below reversed.

MAINE SUPREME JUDICIAL COURT.

CITY OF BANGOR

v.

ANNA C. PEIRCE, Admr., etc., of Laura Hayford, Deceased.

(— Me. —, 76 Atl. 945.)

Special assessments — personal liability.

1. Personal liability may be imposed upon a property owner to make compensation for the increase in the value of his property caused by adjacent public improvements made at the public expense.

Same — liability of trustee.

2. One holding as trustee the legal title to real estate, with all the rights and liabilities of the owner except as to the *cestui que trust*, may be made personally liable for an assessment upon the property for public improvements.

Same — absence of provision for reimbursement.

3. That a statute under which a trustee may be made personally liable for a special assessment for benefits from a public improvement upon the trust property makes 29 L.R.A. (N.S.)

no provision for reimbursing him from the trust estate does not indicate that he is not to be so made liable, since he has a right to reimbursement under general rules of law.

Same — loss of opportunity for reimbursement.

4. Failure of the trustee to pay an assessment for benefits to the trust property by a public improvement, as required by statute, will render his estate liable therefor, although the trust ends at his death, so that there is no trust estate from which his estate can be reimbursed for the amount paid.

(June 7, 1910.)

REPORT by the Supreme Judicial Court for Penobscot County for the opinion of the full bench of an action brought to recover the amount of an assessment on certain property for public improvements. Judgment for plaintiff.

The facts are stated in the opinion.

Messrs. Donald F. Snow, Charles A. Bailey, and Taber D. Bailey, for plaintiff:

A personal liability is created against trustees taxable with real estate, whenever a personal action for the tax or assessment is authorized by statute.

Note. — Personal liability of property owner to pay assessments for local improvements.

This subject is covered in notes to *Irish v. Enterprise*, 35 L.R.A. 58, and *Brookings v. Natwick*, 18 L.R.A. (N.S.) 1239. Since the latter note, upon the authority of earlier Kentucky cases cited in that note, the court, in *Jackson v. McHargue*, 32 Ky. L. Rep. 564, 106 S. W. 871, declared that a proceeding under the Kentucky statutes to compel a lot owner to build a sidewalk, being strictly *in rem*, it is error to award a personal judgment.

And in *Clizer v. Krauss*, 57 Wash. 29, 106 Pac. 145, the holding in the early case of *Seattle v. Yesler*, 1 Wash. Terr. 571, that assessments for local improvements are not a personal charge against the owner of the property, even though the legislature has attempted to make them such, is cited with apparent approval.

It will be observed that the statute which is upheld in *BANGOR v. PEIRCE* does not contemplate a personal liability for a deficiency remaining after an assessment has been enforced against the property, but a personal judgment for the amount of the assessment as a substitute for its enforcement against the property. The distinction is obvious; and the case cannot, therefore, be regarded as authority for the constitutionality of a statute which makes the owner personally liable for any deficiency remaining after the enforcement of the assessment against the property. G. H. P.

Richardson v. Boston, 148 Mass. 503, 20 N. E. 166; Dunham v. Lowell, 200 Mass. 468, 86 N. E. 951; Miner v. Pingree, 110 Mass. 47; Lowell v. Hadley, 8 Met. 180; Brown v. Brown, 72 N. J. Eq. 667, 65 Atl. 739; State, Tindall, Prosecutor, v. Vanderbilt, 33 N. J. L. 38; Re Center Street, 115 Pa. 247, 8 Atl. 56; Franklin v. Hancock, 204 Pa. 115, 53 Atl. 644; Fairfield v. Woodman, 76 Me. 549; Dresden v. Bridge, 90 Me. 489, 38 Atl. 545; Eliot v. Prime, 98 Me. 52, 56 Atl. 207; Odd Fellows Hall Asso. v. McAllister, 153 Mass. 292, 11 L.R.A. 172, 26 N. E. 862; Shepard v. Creamer, 160 Mass. 496, 36 N. E. 475; Hussey v. Arnold, 185 Mass. 203, 70 N. E. 87; Bigelow v. Cambridge & C. Turnp. Corp. 7 Mass. 202; Mills v. Plymouth County, 16 Gray, 347; Bradford v. Storey, 189 Mass. 104, 75 N. E. 256; Dollar Sav. Bank v. United States, 19 Wall. 227, 22 L. ed. 80; Re Hun, 144 N. Y. 472, 39 N. E. 376; McKeesport v. Fidler, 147 Pa. 532, 23 Atl. 799; 8 Am. & Eng. Enc. Law, p. 996.

As Mrs. Hayford was personally liable while living for the assessments, they now constitute a charge against her estate.

2 Woerner, Am. Law of Administration, p. 791; 11 Am. & Eng. Enc. Law, p. 946; Brown v. Brown, supra; Seabury v. Bowen, 3 Bradf. 207; 18 Gyc. Law & Proc. p. 551.

The legislature can make a party against whom assessments for improvements are made personally liable.

Cooley, Taxn. 3d ed. p. 1292; Ivanhoe v. Enterprise, 29 Or. 245, 35 L.R.A. 58, 45 Pac. 771; Brookings v. Natwick (S. D.) 18 L.R.A.(N.S.) 1250, 117 N. W. 376; 25 Am. & Eng. Enc. Law, pp. 1237, 1238.

Mr. E. C. Ryder, for defendant:

Assessments for street improvements on land belonging to a testatrix's estate are not debts for which she is personally liable, and cannot properly be demanded of her administratrix with the will annexed. Such demands are enforceable only out of the property itself.

Hessig v. Hessig, 131 Ky. 514, 115 S. W. 748.

An administratrix is not bound to assume supervision of trust personal property or to be legally responsible for its administration.

Bowman v. Rainetaux, Hoffm. Ch. 150.

Statutes relating to any form of taxation are always to be construed strictly against the state.

East Livermore v. Livermore Falls Trust & Bkg. Co. 103 Me. 418, 15 L.R.A.(N.S.) 952, 69 Atl. 306, 13 A. & E. Ann. Cas. 631; Merriam v. Moody, 25 Iowa, 170.

The legislature cannot make the party against whom a special assessment is made personally liable for the payment thereof. 29 L.R.A.(N.S.)

Elliott, Roads & Streets, 2d ed. § 568; Davidson v. New Orleans, 96 U. S. 97, 24 L. ed. 616; Raleigh v. Peace, 110 N. C. 32, 17 L.R.A. 330, 14 S. E. 521; Cooley, Taxn. § 675; Higgins v. Ausmuss, 77 Mo. 351; Neenan v. Smith, 50 Mo. 525; Macon v. Patty, 57 Miss. 378, 34 Am. Rep. 451; Craw v. Tolono, 96 Ill. 255, 36 Am. Rep. 143; Gaffney v. Gough, 36 Cal. 104; Broadway Baptist Church v. McAtee, 8 Bush, 508, 8 Am. Rep. 480; Burlington v. Quick, 47 Iowa, 226; Green v. Ward, 82 Va. 324.

Emery, Ch. J., delivered the opinion of the court:

By statute (Rev. Stat. chap. 23, §§ 33-37, inclusive) provision for widening streets, etc., in cities, is made substantially as follows, viz.: When the city council widen any street and decide that damages should be allowed therefor, they may apportion a part or the whole of such damages, as to them seems fit, upon the lots adjacent to and bounded on such street. Before such apportionment or assessment is made, public notice is to be given to all persons interested. Any person not satisfied with the amount for which he is assessed can have the assessment upon his land determined by arbitrators. If the assessment finally fixed on any lot is not paid, the lots may be sold, etc. And by § 37, "if said assessments are not paid, and said city does not proceed to collect said assessments by a sale of the lots or parcels of land upon which such assessments are made, or does not collect, or is in any manner delayed or defeated in collecting such assessments by a sale of the real estate so assessed, then the said city, in the name of said city, may maintain an action against the party so assessed for the amount of said assessment, as for money paid, laid out, and expended, in any court competent to try the same, and in such action may recover the amount of such assessment, with 12 per cent interest on the same from the date of said assessment, and costs."

Acting under the above statute, the city council of Bangor duly widened Franklin street, allowed \$30,000 for damages caused thereby, and apportioned a part of said damages upon certain lots adjacent to and bounded on Franklin street. The lots so assessed had been conveyed to Laura Hayford by deed reciting that the consideration was "paid by Laura Hayford, of said Bangor, as she is trustee under the last will of William B. Hayford, late of said Bangor, deceased," and that the conveyance was made to "the said Laura Hayford, trustee, her successors in said trust, heirs, and assigns, forever," with habendum to "the said Laura Hayford, trustee, her successors in

said trust, heirs, and assigns, forever." There was in the deed no other suggestion that she was not to have the land in absolute fee simple. The assessment upon this land by the city council was made against "Laura Hayford, trustee," January 29, 1906. She did not appeal from the assessment, nor did she pay the assessment during her lifetime up to her death, March 20, 1907. The assessment not having been paid, nor any other measures to collect it having been taken, the city, on December 22, 1908, brought this suit therefor against her estate in the hands of Anna C. Peirce, administratrix thereof. Authority for the suit is claimed under § 37 of the statute above quoted.

No question is made of the regularity of the proceedings, nor of the validity of the assessment upon the lots. The only contention in the defense is that Laura Hayford was not in her lifetime personally liable for the assessment, and hence, of course, her individual estate is not liable after her death. Two propositions are urged in support of the contention: First, that the legislature has no power to impose upon the owner a personal liability for such assessment; second, that in fact this assessment was not upon her personally, but only upon her as trustee, and hence only the trust estate was made liable.

1. The constitutional question raised has received different answers in different states. The majority of the answers affirm the power. Many of the cases denying the power seem to be based on a theory that it is unjust to make the owner personally liable for what is only a benefit to a particular parcel of land. But the justice or injustice of the requirement is a question for the legislature, not for the court. The power is manifestly legislative in character, and hence must be upheld, unless clearly prohibited to the legislature by some section or clause of the state or Federal Constitution. No exercise of the legislative power is to be held thus prohibited, unless the prohibition is manifest, beyond a reasonable doubt, as has often been iterated in prior opinions of this court. We do not find in either Constitution any section or clause clearly forbidding the imposition of a personal liability upon the owner, to make compensation for the increase in the value of his property caused by adjacent public improvements made at the public expense. The imposition of a personal liability for special assessments is not under the power of eminent domain, but under the taxing power of the legislature,—almost, if not quite, its most extensive, least limited, power. *Dalrymple v. Milwaukie*, 53 Wis. 185, 10 N. W. 141; *White v. People*, 29 L.R.A. (N.S.)

94 Ill. 604; *Allen v. Drew*, 44 Vt. 175; *Warren v. Henly*, 31 Iowa, 31; *New Haven v. Fair Haven & W. R. Co.* 38 Conn. 422, 9 Am. Rep. 399; *Hagar v. Reclamation Dist.* No. 108, 111 U. S. 701, 28 L. ed. 569, 4 Sup. Ct. Rep. 663; *State, Agents, Prosecutor, v. Newark*, 35 N. J. L. 168; *Hill v. Higdon*, 5 Ohio St. 243, 67 Am. Dec. 289; *Litchfield v. Vernon*, 41 N. Y. 123. In this state *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817, was a case to enforce a personal liability upon an abutting owner for the sum assessed upon his abutting property under a statute identical with the § 37 in this case. The action was sustained; the court remarking (page 216 of 84 Me.): "The Constitution nowhere provides that the legislature shall not require private interests receiving a peculiar special advantage from a public work to contribute in a commensurate degree." In *Lowell v. Hadley*, 8 Met. 151, as early as 1844, there was sustained without question an action of assumpsit against the owner to recover the amount of an assessment for the expense of a sidewalk in front of his land. Statutes imposing personal liability to pay special assessments have long existed and been enforced in Maine and Massachusetts without question, and this acquiescence is strong argument for their constitutionality, if argument were needed.

II. The statute (§ 37) above held constitutional, expressly, in terms, authorizes "an action against the party so assessed for the amount of said assessment as for money paid, laid out, and expended." If the deed to Laura Hayford and the assessment had made no mention of her title being that of trustee, it would now need no argument to justify holding her personally liable under the statute. *Auburn v. Paul*, 84 Me. 212, 24 Atl. 817; *Lowell v. Hadley*, supra. The deed and the assessment, however, did describe her as "trustee," and it should be conceded that a trust in the land could have been enforced against her. Was she nevertheless personally liable for the assessment made upon the land which she held under the deed above recited?

She held the legal title, and, though holding it in trust, she was yet the legal owner, with all the legal rights, duties, and liabilities of owner, as to all the world except the *cestui que trust*. *Smith v. Portland (C. C.)* 30 Fed. 734; *Carey v. Brown*, 92 U. S. 171, at page 172, 23 L. ed. 407, 470, and cases there cited; *Den ex dem Obert v. Bordine*, 20 N. J. L. 394; *Perry*, Tr. 3d ed. § 32. She could have maintained real actions against disseisors and actions of forcible entry and detainer against tenants, and also actions for rents

injuries to the freehold, etc., in her own name, without describing herself as trustee. She would have been personally liable to others for injuries resulting from the condition of the property. *Shepard v. Creamer*, 160 Mass. 496, 36 N. E. 475. In actions against her concerning the property, it would not have been necessary to declare against her as trustee. *Odd Fellows Hall Asso. v. McAllister*, 153 Mass. 292, 297, 11 L.R.A. 172, 26 N. E. 862, 863. As said in that case: "The description of the defendants as trustees in the writ was surplusage. There is no provision by which judgments and executions against trustees run against the trust estate in their hands, as in the case of executors and administrators. Even when they are entitled to indemnity from the trust fund, the judgment in an action at law is against them as individuals, whatever may be the doctrine in equity."

That general taxes upon land held in trust may be assessed to the holder of the legal title, and that such holder is within the statutes imposing a personal liability therefor upon the person assessed is well settled, and, indeed, does not appear to have been questioned. *Baldwin v. Baldwin*, 37 Me. 369; *Tracy v. Reed* (C. C.) 2 L.R.A. 773, 13 Sawy. 622, 38 Fed. 69; *Miner v. Pingree*, 110 Mass. 47; *Richardson v. Boston*, 148 Mass. 508, 20 N. E. 166; *Knight v. Boston*, 159 Mass. 551, 35 N. E. 86; *Dunham v. Lowell*, 200 Mass. 468, 86 N. E. 951; *Latrobe v. Baltimore*, 19 Md. 13; *Perry, Tr. § 331*; *Beach, Trusts & Trustees*, § 415; *Lewin, Tr. 1st ed. p. 557*. On principle the trustee would seem to be as much within the statute as executors, administrators, guardians, etc., whose personal liability for taxes on property in their hands assessed to them is at least assumed in *Fairfield v. Woodman*, 76 Me. 549, 551, and *Dresden v. Bridge*, 90 Me. 489, 493, 38 Atl. 545, and is expressly held in *Payson v. Tufts*, 13 Mass. 493.

It is urged, however, that, even if Mrs. Hayford was personally liable for general taxes assessed upon the land in question, it does not follow that she was personally liable for special assessments like that in this case. That much may be conceded. The question of her personal liability in either case depends upon the statute in that case. In the case of special assessments the statute is comprehensive and explicit that an action for the amount of the assessment may be maintained "against the party so assessed." Mrs. Hayford was the party, and the only party, assessed. She was the proper person to be assessed, as she was the legal owner,—held the legal title. The taxing authorities were not required to go behind her title. The addition of the word

"trustee" to her name did not make her any the less the party assessed, any more than does the addition of the word "guardian" or "executor" or "administrator," in assessments against such persons. It did not exempt her from her obligation, as the holder of the legal title and the party properly assessed, to pay the assessment as required by the statute.

One argument strongly urged against the applicability of the statute to one who holds the legal title, not for himself, but in trust only for others, is that the statute does not provide that such person may be reimbursed from the trust estate. It is contended that for want of such a provision the statute must be held inoperative upon persons holding only the legal title without any beneficial interest, since otherwise it would be open to the constitutional objection that it would thus operate to take the property of one person for the benefit of another, without due process of law. The answer is that the trustee would have the right of reimbursement from the trust estate for what he is compelled by the statute to pay for its benefit, and it is not necessary the right should be expressed in the statute. Whenever any law, statutory or other, imposes a personal duty upon a guardian, executor, or trustee to pay money of his own for the benefit of the estate in his care, it follows under the general principles of jurisprudence, without special statutory provision, that the money so paid will be chargeable to the estate, and that in equity, at least, reimbursement will be enforced. *Perry, Tr. §§ 910, 913, 915*; *Perrine v. Newell*, 49 N. J. Eq. 57, 23 Atl. 492; *Woodruff v. New York, L. E. & W. R. Co.* 129 N. Y. 27, 29 N. E. 251; *Gisborn v. Charter Oak L. Ins. Co.* 142 U. S. 326, 35 L. ed. 1029, 12 Sup. Ct. Rep. 277. The principle is illustrated by analogous cases, where life tenants have been obliged to pay the whole assessment for street improvements benefiting the property. The duty to pay the whole may be imposed on life tenants, though the benefit is to the fee as well as the life estate, and when imposed and performed, the life tenant can compel the remainderman to contribute his equitable share. *Plympton v. Boston Dispensary*, 106 Mass. 544; *Reyburn v. Wallace*, 93 Mo. 326, 3 S. W. 482. So in the case of a tenant from year to year. *Hitner v. Ege*, 23 Pa. 305. No statute was invoked in those cases.

It is still further urged that, if there was a right of action against Mrs. Hayford personally, it should have been brought in her lifetime, since by its terms the trust ended with her death, and now there is no trust estate from which her estate can be reim-

bursed, if now compelled to pay. In the argument at bar there was some discussion whether a special assessment is a debt. Whether technically a debt or not, there was a personal duty to pay the assessment, not contractual to be sure, and only imposed by statute, but nevertheless a personal duty. Duties imposed by law are as much duties as those assumed by contract. 3 Bl. Com. 160. This duty she did not perform in her lifetime, as she might and should. Her estate must now answer for her default. *Bulkley v. Clark*, 2 Root, 60; *Wooten v. House* (Tenn.) 36 S. W. 936. The right of action was against her personally, and hence under modern law survives her death.

Judgment for the plaintiff for \$8,748.99, with interest at 12 per cent per annum from January 29, 1906, the date of the assessment.

MAINE SUPREME JUDICIAL COURT.

MARCIA A. HATCH et al.

v.

FREDERICK M. ROSE.

(— Me. —, 77 Atl. 716.)

Trespass — license — abandonment.

Municipal authorities who receive permission to enter upon property abutting on a street for the purpose of lowering the grade, constructing a sidewalk, building a retaining wall, and doing other work, do not become trespassers *ab initio* by abandoning the improvements before they are all completed according to the agreement.

(October 6, 1910.)

REPORT by the Supreme Judicial Court for York County for the opinion of the full bench of an action brought to recover damages for alleged trespass. Judgment for defendant.

The facts are stated in the opinion.

Messrs. Cleaves, Waterhouse, & Emery, for plaintiffs:

Where a license is given, and the licensee abuses it, he becomes a trespasser from the beginning.

Hunnell v. Hobart, 42 Me. 565.

Messrs. Robert B. Seidel, George F. Haley, and Leroy Haley for defendant.

Note.—As to whether subsequent wrongful act by one who enters premises under license of owner or occupier makes him a trespasser *ab initio*, see note to *Sheftall v. Zipperer*, 27 L.R.A. (N.S.) 442. 29 L.R.A. (N.S.)

Emery, Ch. J., delivered the opinion of the court:

After study of the somewhat indefinite and conflicting evidence, we find ourselves believing the following to be the facts in the case: The plaintiffs were the owners of dwelling houses and lot on the south-easterly side of Elm street, in Biddeford; Mr. Hatch being their agent, by whose contracts and stipulations concerning the property they were bound. The houses were situated a little back from the location line of the street, and upon a ledge several feet above the level of the traveled part of the street. The ledge projected into the street beyond the location line. Access to the houses was by steps leading from the street at the foot of the ledge up over the ledge to a landing connected with the houses. There was no sidewalk on that side of the street.

Such being the situation, the city undertook, through its officers and agents, to make improvements in the street by constructing a concrete sidewalk on that side, out to the location line and at the level of the traveled part of the street. To do this required cutting down to the street level the ledge in front of the plaintiffs' houses, and this would make necessary the building on the plaintiffs' land a retaining wall to take the place of the removed ledge as support to the land and houses. In a conference over the matter between the mayor of the city and Mr. Hatch, the agent of the plaintiffs, substantially the following was agreed to by them: The city was to construct a concrete sidewalk with curbing at the street level and out to the location line of the street, do the necessary blasting and excavating in the ledge on the plaintiffs' land for a retaining wall, build such wall next the street line, and, after completion, fill in behind the wall to its top, and leave the property in better shape than before. On the other hand, the plaintiffs were to pay to the city one half the expense of the sidewalk and curbing. There were no other specifications agreed on as to the wall or any other part of the work.

Under this stipulation the city entered upon the work. The ledge within the location line of the street was cut down to the street level, the concrete sidewalk and curbing constructed, the blasting and excavating done, and a retaining wall built on the plaintiffs' land next the street line. The plaintiffs were satisfied with sidewalk and curbing, and it does not appear that the retaining wall is insufficient. The plaintiffs, however, do complain, and did complain, that the city did not do all it should have done, and did some things contrary to their wishes, and they consequently brought

this action of trespass *quare clausum* against the defendant, Rose, the street commissioner, for his entry and acts upon their land, as above described. They contend: (1) That, by reason of the existence for forty years of the houses and steps, the line of the street had become fixed at the outer end of the steps; (2) that the city, not having complied with the conditions of the permission given to enter upon their land, forfeited that permission, and its street commissioner became a trespasser *ab initio*.

We have no occasion to consider the first contention, since our conclusion as to the second contention disposes of this case. Whatever conditions were imposed by the plaintiffs upon the permission given the city and the defendant to enter upon the land for the purposes named, they were all conditions subsequent. They could not be fulfilled till after the entry. If some of them were not fully performed, it does not follow that the defendant's original entry was unlawful. The doctrine of trespass *ab initio* applies only to entries *in invitum* under authority of law. It does not apply to entries by license from the owner. *Hunnell v. Hobart*, 42 Me. 565; *Dingley v. Buffum*, 57 Me. 379; *Perry v. Bailey*, 94 Me. 50, 46 Atl. 789. If the plaintiffs have suffered any legal injury from the acts or omissions of the defendant under the license given him to enter upon their land, they have mistaken their remedy. To maintain this action of trespass *quare clausum*, they were bound to show that the entry and acts of the defendant were without right at and from the time of the entry. This they have failed to do, since the evidence clearly shows a license from them to the city and the defendant to enter in the first instance, and does not show any acts excluded by the license.

Judgment for the defendant.

MARYLAND COURT OF APPEALS.

JOHN WILSON BROWN et al., Trustees,
etc., Appts.,
v.

WILLIAM S. KEACH et al., Admrs., etc.,
of Laura J. Koffman, Deceased.

(112 Md. 398, 76 Atl. 846.)

Annuity — death of annuitant — right to apportionment.

An annuity provided by a father for the widow of his son to be paid quarterly, which is not expressly stated to be for support and maintenance, is not apportionable, and therefore her administrators cannot require 29 L.R.A. (N.S.)

payment to them of the accrued amount in case she dies between two quarterly periods.

(Briscoe and Burke, JJ., dissent.)

(February 2, 1910.)

APPEAL by defendants from an order of the Circuit Court No. 2 of Baltimore City requiring them as trustees under the will of George Brown, deceased, to pay a certain sum on account of an annuity. Reversed.

The facts are stated in the opinion.

Messrs. W. Irvine Cross and Arthur George Brown, for appellants:

Annuities given by one who had a duty to maintain the donees, and who gave them by way of performing that duty, are distinguished from those created as a matter of bounty or personal favor.

Kearney v. Cruikshank, 117 N. Y. 97, 22 N. E. 580; *Nehls v. Sauer*, 119 Iowa, 442, 93 N. W. 346; *Chase v. Darby*, 110 Mich. 317, 64 Am. St. Rep. 347, 68 N. W. 159; *Gheen v. Osborn*, 17 Serg. & R. 171; *Re Lackawanna Iron & Coal Co.* 37 N. J. Eq. 26.

An annuity created for a wife by someone other than her husband is not apportionable.

Tracy v. Strong, 2 Conn. 604; *Kearney v. Cruikshank*, supra.

Mr. W. Gill Smith with Mr. Z. Howard Isaac, for appellees.

Thomas, J., delivered the opinion of the court:

Article 8 of the will of George Brown is as follows: "In case my son, Alexander D. Brown, shall leave a wife surviving him at the time of his decease, then and in

Note. — Apportionment of annuity.

The earlier cases upon this subject are collected and discussed in a note to *Henry v. Henderson*, 63 L.R.A. 616, and this note is supplementary thereto.

Upon the closely analogous subject, Apportionment of income upon death of life beneficiary between distribution periods, see note to *Welch v. Apthorp*, 27 L.R.A. (N.S.) 449. Reference is also made in the last-mentioned note to other notes on more or less analogous subjects.

As is shown in the earlier note, the general rule at common law, as well as in equity, is that an annuity is not apportionable in respect of time. It is said in *Nehls v. Sauer*, 119 Iowa, 440, 93 N. W. 346, that "the practically universal holding of the courts appears to be that an annuity will not be apportioned, and if the annuitant dies during the year,—even though it be on the last day before the payment falls due,—the right to demand the annuity dies

that event, I will, order, and direct that the trustees hereinbefore named in this my will, and their successors, shall pay out of the interest, rents, or net income thereafter arising from the two-fourteenths parts or shares of the aforesaid rest, residue, and remainder of my estate and property, given in trust for the use of my said son Alexander and his descendants, as particularly mentioned in the above article sixth of this, my will, to the wife or widow of my said son, so surviving him as aforesaid, the sum of \$6,000 a year during her life; said annuity to commence from the time of the death of my said son, and to be paid quarter-yearly. And in case my daughter, Grace Ann, shall leave a husband surviving her at the time of her decease, then and in that event, I will, order, and direct that the said trustees and their successors shall pay out of the interest, rents, or net income thereafter arising from the two-fourteenths parts or shares of the aforesaid rest, residue, and remainder of my estate and property, given in trust for the use of my said daughter, Grace Ann, and her descendants, as particularly mentioned in the aforesaid article sixth of my will, to the husband of my said daughter, so surviving her as aforesaid, the sum of \$6,000 a year during his life; said last-mentioned annuity to commence from the time of the death of my said daughter, and to be paid quarter-yearly. And in case my two grandchildren, Elizabeth Graham and George Brown Graham, shall both die before attaining the age of twenty-one years, and their father, William H. Graham, be then living, then and in that event, I will, order, and direct that the said trustees and their successors shall pay out of the interest,

rents, or net income thereafter arising from the two-fourteenths parts or shares of the aforesaid rest, residue, and remainder of my estate and property, given in trust for the use of my said two grandchildren, Elizabeth and George B. Graham, as particularly mentioned in the aforesaid article sixth of my will, to the said William H. Graham, the father of the said Elizabeth and George B. Graham, as aforesaid, the sum of \$6,000 a year during his life; said last-mentioned annuity to commence from the time of the death of the survivor of my said two grandchildren dying under the age of twenty-one years as aforesaid, and to be paid quarter-yearly."

Alexander D. Brown died on the 19th of March, 1892, leaving a widow, Laura J. Brown, who in 1907 married Charles H. Koffman, and died on the 17th of June, 1908. The annuity was paid to her by the trustees under George Brown's will and their successors up to the 19th of March, 1908, and this appeal is by the trustees from an order of the circuit court No. 2 of Baltimore city, passed on the petition of the administrators *pendente lite* of her estate, requiring them to pay to said administrators the sum of \$1,450 on account of said annuity from the 19th of March, 1908, to the time of her death on the 17th of June, 1908. The appellants rely upon the well-established rule that annuities are not apportionable, while the appellees contend, and the learned court below held, that it is evident from the provisions of the will that the testator intended the annuity as a provision for the support and maintenance of his son's widow and therefore intended it to be apportioned.

The will, so far as it is set out in the

with him, and his executor can recover no part of it."

But as is stated in *Lynch v. Houston*, 138 Mo. App. 167, 119 S. W. 994, there are well-recognized exceptions to this rule, which arise out of the nature and the object of the annuity itself. Thus, an annuity to be paid the widow in lieu of her life dower estate, or to minor children or others for support, may be apportioned, so that the proportionate amount for the year in which the annuitant may die may be claimed by his or her estate.

But the rule itself as stated is approved and emphasized in a practically unbroken line of cases, as is shown in the earlier note and also in the few reported cases decided since that note was prepared.

Thus, in *Green v. Bissell*, 79 Conn. 547, 8 L.R.A. (N.S.) 1011, 118 Am. St. Rep. 156, 65 Atl. 1056, 9 A. & E. Ann. Cas. 287, it was held that, under a trust to ascertain and divide the net income of an estate at yearly intervals, the estate of one dying before a division period is not entitled to an allotment when the period arrives.

So, in the *Lynch Case* the court said: "We deduce from the authorities on the question that the contract is looked upon as in effect engaging the grantor of the annuity to pay to the grantee a certain annual full sum on the day fixed if he be alive on that day; and that a payment of a part of that sum if he be dead has not entered into the agreement."

But the court further said that, although the court must follow the long-established rules of law, however harsh they may be, yet they should not overlook any provision in the contract itself which disclosed an intention that the annuity should be apportioned; and it was held that a deed conditioned upon the grantee's paying the grantor a certain sum per annum, "payable annually on the 1st day of March of each year, until the death of the grantor, "when all payments cease," showed that the intention was that the payments should continue to the day of the annuitant's death, and consequently the annuity was apportionable to the force of the contract itself.

W. M. G.

record, does not direct that the annuity shall be apportioned, or state that it is for the support and maintenance of the annuitant; but counsel for the appellees base their contention on the fact that in the case of his son George, to whom the testator gave a portion of his estate absolutely, no provision was made for his wife in case she survived him, while in the case of his son Alexander, whose share was left in trust for his use during life only, with remainders to his descendants, provision was made for his widow, as evidencing the intention of the testator to thereby provide for her support and maintenance, and that the annuity should be apportioned. Similar provisions were made for the surviving husband of the testator's daughter, and for the father of the testator's two grandchildren, in case they died before attaining the age of twenty-one years and he survived them, and, if the fact that the testator did not give to his son Alexander any part of his estate absolutely indicates that he intended the annuity to his widow to be apportioned, it would follow that he also intended the other annuities to be apportioned, as he did not give to his daughter or to his grandchildren absolute estates in their shares; yet to hold these annuities apportionable, in the absence of some clearer evidence that the testator intended them to be apportioned, would extend the exceptions to the rule beyond the limit to which any well-considered case has gone.

In the case of *Hay v. Palmer*, 2 P. Wms. 501, the annuity was expressly for the maintenance of the daughter of Sir Thomas Palmer until she became eighteen years of age or married, and the master of the rolls held that she was entitled to the annuity to the day she became of age, it being "for the daily support of the infant." In the case of *Reynish v. Martin*, 3 Atk. 331, Elizabeth Phillips by her will gave to her eldest daughter, Martha Phillips, all her real estate in fee, "subject to such charges that shall be hereinafter expressed," and then made the following provision for her daughter Mary: "And it is my will that my said daughter Martha shall pay unto my said daughter Mary the sum of £30 yearly during Mary's continuing sole and unmarried, by 15 each May day and All Saints' day." And the lord chancellor said: "Although this annuity, or half-yearly payment, is not expressly given for the maintenance of Mary, as in the case of *Hay v. Palmer*, supra, yet I am clear of opinion that it must be understood so, and therefore falls within the reason of that case." In the case of *Howell v. Lanforth*, 2 W. Bl. 1016, the annuity was provided by a husband for his wife, and the court said: "Though rents and common

annuities are not apportionable either by law or equity, yet in equity the maintenance of infants is always apportioned up to the day of their deaths, etc., because it would be difficult for them to find credit for necessities, if the payment depended on their living to the end of the quarter. This case depends on similar principles, the annuity being for a separate maintenance to a *feme covert*; and, as it appears that the quarterly payments were not originally forward payments, by way of maintenance for the ensuing quarter (which might make a difference), but payable at the end of each quarter, in order to discharge the expenses incurred in the three preceding months, we think it ought to be apportioned." In the case *Atty. Gen. v. Smythies*, 16 Beav. 383: "By letters patent of King James the First, a charitable corporation was created, having for its object the support and maintenance of a master and five poor persons. . . . The master was to receive the income and pay the poor persons £2, 12s. 0d. annually, by quarterly payments, for their support, relief, and maintenance. Mr. Smythies, the master, died on the 24th of March, 1852; and, a petition being presented by the new master for payment of the income, the executors of Mr. Smythies claimed an apportionment of the half-year's income ending on the 5th of July, 1852, upon a fund in court belonging to the charity." The master of the rolls (Sir John Romilly) said: "I am of opinion that there must be an apportionment. The question does not rest upon the general ground of cases not falling within the provisions of the apportionment acts, but comes within the principle of the rule in the cases of infants and married women, who have no other support. I think this must be so, from the language of the charter itself. Here is an eleemosynary establishment, the funds of which are directed by the statutes to be applied for the support, relief, and maintenance of five poor persons, which upon a proper construction of the letters patent must be *de die in diem*, for, if it were otherwise, the alms people might be unable to procure sufficient supplies for their support during portions of the year, in consequence of the risk which those who supplied them would run of not being repaid. For if they could not recover out of the fund what was owing for supplies, they would be deprived of payment altogether. The same principle, I think, applies to the master as to the five poor persons, and therefore there must be an apportionment of the dividends between the present and the representatives of the late master." Mr. Swanston, in an extensive note to *Ex parte Smyth*, 1 Swanst. 338, after stating the rule that rents and an-

nuities are not apportionable, says: "A remarkable exception to the general rule has been introduced in the instance of annuities for the maintenance of infants (*Hay v. Palmer and Reynish v. Martin*, supra) [*Sheppard v. Wilson*, 4 Hare, 395], or of married women living separate from their husbands (*Howell v. Hanforth*, supra; *Carew v. Johnston*, 2 Sch. & Lef. 303); an exception supported by the necessity of the case, and the consequent presumption of intention (2 W. Bl. 1017; 2 P. Wms. 503), and therefore not extending to an annuity for the separate use of a married woman living with her husband and maintained by him."

In the case of *Smith v. Wistar*, 5 Phila. 145, the testator devised certain ground rents, payable half yearly, to his wife for life, with remainder over to his sisters and their children, and the court said: "In *Gheen v. Osborn*, 17 Serg. & R. 171, the gift of an annuity to a widow in lieu of a dower was held to entitle her representatives to an apportionment of payments which had not fallen due, and which, in strict law, could never have become so. The equity here is quite as strong as it was there, because the act of April, 1833, makes every devise to a widow, accepted by her, a devise in lieu of dower. Bequests of money payable periodically are said, in *Earp's Will*, Pars. Sel. Eq. Cas. 453, 468, to be apportionable when given for maintenance or to someone whom it is the duty of the testator to provide or maintain. It seems to be conceded that a gift to a child is within this exception, and the rule should be the same in case of a widow. Both may be presumed to stand equally near the affections of the testator, and the position of the widow is obviously preferable when she has accepted the legacy in lieu or bar of dower, and claims as a purchaser, and not merely as a volunteer." In the case of *Blight v. Blight*, 51 Pa. 425, the annuity was payable quarterly in lieu of dower, and the court held that "the annuity was in lieu of dower, and lasted as long as dower would have lasted, and dower runs to the last day of life." In *Re Lackawanna Iron & Coal Co.* 37 N. J. Eq. 26, John Stinson and wife conveyed his farm to Nelson Vliet, the husband of their granddaughter, in consideration of an agreement on the part of the grantee (the performance of which was secured by his bond and mortgage of the property) to pay Stinson \$250 yearly, on the 1st April, during the lifetime of Stinson, and, if Stinson's wife should survive him, to pay, or cause to be paid, to her yearly the sum of \$200 during the term of her natural life. Mrs. Stinson survived her husband, and died on September 19, 1881. The annuity was

paid up to April 1st of that year, and her personal representatives claimed a proportionate part of the annuity to the day of her death. The chancellor said: "There is no doubt that the general rule is that when an annuity is payable on a fixed day during life, and the annuitant dies before the day, his representative is not entitled to a proportionate part of the annuity for the time which has elapsed since the last day of payment. . . . But the rule as to annuities has established exceptions in the case where an annuity is given for maintenance of a wife living separate from her husband, or for the support of minor children, . . . and the exception has been extended to the apportionment of the income of a fund belonging to a charitable corporation having for its object the support of poor persons. . . . And also where an annuity has been given in lieu of dower. . . . The conveyance in consideration of which the agreement to pay the annuity was made was evidently a family arrangement, and the only consideration of the conveyance of the farm to Mr. Vliet was the agreement to pay the annuities. It would seem, too, that the object of Stinson in making the arrangement was to secure the payment of the annuity to him for life, and to his wife in case she should survive, for their support. She joined in the conveyance to bar her dower, and part of the consideration of her release was the agreement to pay the annuity to her for her life in case she should outlive her husband. The principle of the cases which constitute the exceptions to the general rule is applicable here." In the case of *Parker v. Seeley*, 56 N. J. Eq. 110, 38 Atl. 280, the annuity was declared by the testator to be in lieu of dower, and the court held that the widow was entitled to it to the time of her death. In *Re Cushing*, 54 Vt. 393, 5 Atl. 186, the testator bequeathed to his wife "the whole interest and income of \$6,000 to be paid to her each and every year during her life; the first payment to be made at the close of one year after my decease, and so on annually thereafter as long as she shall live. And if said interest or income shall at any time prove insufficient to support her in a manner becoming her station and condition in life, and in such manner as shall make her comfortable, and meet all necessary expenses of a reasonably prudent course of life, then it is my will that so much of the said \$6,000 shall be taken as shall be necessary to effect the object aforesaid." The court held that she was entitled to the interest on the \$6,000 to the time of her death, and said: "Treating this as an annuity, the proposition is sound that 'annuities are not in their nature apportionable, either in law or in equity'."

ty.' 2 Williams, Exrs. 835. But there are exceptions to the rule, and the same author says: 'With respect to interest,—interest, being due *de die in diem*, is not one entire thing, but an aggregate of many distinct things,' and may be apportioned. The language last quoted was evidently borrowed from the note to Clun's Case, 10 Coke, 128a. The note is by Fraser, wherein he says, after the remark adopted by Williams: 'It is obvious, therefore, that the representatives of a party dying before the day at which interest was usually payable would be entitled to interest up to the time of the party's death.' . . . In Perry on Trusts, § 556, the author says: 'But where an annuity is given to a widow in lieu of dower, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant.' . . . And he says further: 'But interest money upon notes, mortgages, and similar securities accrues from day to day, although it is not payable until a fixed day. It is therefore apportionable, and trustees must pay the proportion accruing during the life of the tenant for life to his representatives.'"

These cases fairly illustrate the utmost limit to which the English and American decisions have gone in establishing the well-defined exceptions to the general rule, while the courts of other states have adhered more closely to the common-law rule. In 2 Perry on Trusts, 5th ed. § 556, the author says: "At common law rent could not be apportioned; and, if a tenant for life died near the end of a quarter, his representatives could receive no part of the rent for the term." And after stating that the statutes in many of the states have made rent apportionable, says: "But an annuity to a tenant for life is not apportionable, and, if the tenant dies within three days of the day of payment, his representatives are not entitled to any proportion of the annuity. But where an annuity is given to a widow in lieu of dower, or for maintenance of an infant, or for the separate maintenance of a married woman, an apportionment is made on the ground that such annuity is necessary for support till the death of the annuitant." The rule and the exceptions to it are stated in 2 Cyc. Law & Proc. p. 468, as follows: "It was the uniform and unbending rule of the common law, recognized both by courts of law and equity, that annuities, whether created *inter vivos* or by will, were not apportionable in respect of time. The rigor of the common-law rule has been to some extent ameliorated in modern times by the recognition of certain well-defined exceptions, as in cases where an

annuity is given in lieu of dower, or for the separate maintenance of married women, or for the support of children, or where it consists of interest or of other sums accruing, and therefore payable, *de die in diem*." See also 1 Am. & Eng. Enc. of Law, p. 595; 1 Story, Eq. §§ 479, 480; 2 Williams, Exrs. 49, note.

In the case of Heizer v. Heizer, 71 Ind. 526, 36 Am. Rep. 202, a son agreed in writing, for a valuable consideration, to pay his father \$100 annually on the 6th day of October, for his maintenance and support during his life, and the court held that the annuity was not apportionable. In the case of Wiggin v. Swett, 6 Met. 194, 39 Am. Dec. 716, a testator, among other bequests to his wife, gave her an annuity of \$800, during the full term of her life, to be paid to her quarter-yearly, and payments were accordingly made to her for several years, and she died three days before the expiration of a quarter, and Shaw, Ch. J., said: "The general rule, both of law and equity, is, and is admitted by the appellee's counsel to be, that where an annuity is payable on fixed days during life, and the annuitant dies before the day, the personal representative is not entitled to a proportionable part of the annuity. . . . The same rule prevails in regard to rents and other payments at particular days. . . . As Mrs. Swett died August 22, 1840, that proportion of the annuity which is supposed to have accrued from May 25th to August 22d, and which would have been payable had she lived till the 25th of August, cannot be allowed. It falls within the general rule already stated, and not within the exceptions to that rule which were made in the cases cited by the appellee." In the case of Dexter v. Phillips, 121 Mass. 180, 23 Am. Rep. 261, Gray, Ch. J., said: "It is a general rule of the common law, followed in chancery, that sums of money payable periodically at fixed times are not apportionable during the intervening periods. It is accordingly well settled, both at law and in equity, except when otherwise provided by statute, that a contract for the payment of rent at the end of each quarter or month is not apportionable in respect of time. . . . Thus annuities, except where clearly intended for the daily support of the beneficiary, as in the case of a child or of the separate maintenance of a wife, are within the rule." In the case of Kearney v. Cruikshank, 117 N. Y. 95, 22 N. E. 580, the testator directed his executors, "out of the residue and remainder of said net income of my estate, to pay to Sarah Louisa Reed, wife of David L. Reed, of the city of New York, it being my intention as a daughter to adopt her, the sum of \$2,000 a year during her natural life, on her sole

and separate receipt, as if she were a *feme sole*, free from the control, interference, or debts of her present or any future husband;" and the court said: "We are not at liberty to decide the question in this case upon our notions of natural equity and justice provided the settled rule of law fixes the rights of the respective parties and determines the question presented. At common law, annuities were not apportionable, subject, however, to two exceptions, viz., where the annuity was given by a parent to an infant child (*Hay v. Palmer*, 2 P. Wms. 501; *Reynish v. Martin*, 3 Atk. 330), or by husband to his wife living separate and apart from him (*Howell v. Hanforth*, 2 W. Bl. 1016). These exceptions were founded on reasons of necessity, and the presumption that such annuities are intended for maintenance, and are given in view of the legal obligation of a parent to support his infant children, and of a husband to maintain the wife. But with these exceptions it was the uniform and unbending rule of the common law, recognized both by courts of law and equity, that annuities, whether created *inter vivos* or by will, were not apportionable in respect of time." In the case of *Henry v. Richardson*, 81 Miss. 743, 63 L.R.A. 610, 33 So. 960, Mrs. L. H. Henry by her will provided for the payment of annuity to Mrs. D. W. Henry during the life of the husband of the testatrix, and Chief Judge Whitfield, after a very careful review of all the authorities, held that the annuity was not apportionable. In the case of *Mower v. Sanford*, decided in 1904, and reported in 76 Conn. 504, 63 L.R.A. 625, 100 Am. St. Rep. 1008, 57 Atl. 119, the supreme court of Connecticut held that an annuity is not apportionable, even when given to a widow in lieu of dower.

As we have seen, the same general rule applies to both rents and annuities, and in the case of *Martin v. Martin*, 7 Md. 368, 61 Am. Dec. 364, Judge Tuck said: "The principles of apportionment, particularly as applicable to rent, are discussed, and the authorities collected, in the notes to *Ex parte Smyth*, 1 Swanst. 337. We consider the rule established that, with the exception of cases arising under the statute of George, rent cannot be apportioned as to time, and that the person entitled to the estate when the rent falls due must have the entire amount payable at that time." The rule as applied to rents was again recognized and enforced in the case of *Getzandaffer v. Caylor*, 38 Md. 280.

It would seem apparent, from the authorities cited, that the annuity in the case at bar cannot be regarded as coming within any of the well-defined exceptions to the common-law rule. It was not expressly

given for support and maintenance; it is not a provision by a husband for the separate maintenance of his wife or for his widow in lieu of dower, or by a parent for the maintenance of his child; but a gift by one who was under no obligation to provide for the support of the annuitant. He may have been induced to make her the recipient of his bounty by the fact that he did not give her husband any part of his estate absolutely; but we have no reason to suppose that he intended to do more than the plain language of his will indicates. The testatrix left a large and valuable estate, and his will, which was said in *Graham v. Whitridge*, 99 Md. 269, 66 L.R.A. 408, 57 Atl. 609, 35 Atl. 36, to be very voluminous, covering over twenty-one pages of the printed record in that case, was carefully prepared. We must assume that he was familiar with a rule so uniformly recognized in England and in America prior to the enactment of statutes changing the common-law rule, and that, if he had intended the annuities given by the eighth article of his will to be apportioned, he would have so directed with the clearness that characterizes the provisions of his will. It is far safer to adhere to settled rules of construction, than to venture upon a strained interpretation of provisions that, in the light of the rule, are wholly free from uncertainty or ambiguity. It may require courts, at times, as in the case of *Kearney v. Cruikshank*, supra, to surrender their notions of natural equity; but it will tend to secure greater certainty in the administration of justice, and avoid the risk of giving to instruments an effect not contemplated by the makers.

Being unable to concur in the conclusion reached by the learned court below, we must reverse the order appealed from.

Order reversed, and petition dismissed; the costs in this court and in the court below to be paid by the appellees.

Briscoe and Burke, JJ., dissent.

NEW YORK COURT OF APPEALS.

RE ESTATE OF PAUL AUGUSTE EL
EONORE MAJOT, Deceased.

ANNE PICAT MAJOT, Admrx., etc., App.

(199 N. Y. 29, 92 N. E. 402.)

Inheritance tax — community right of wife.

1. The inheritance tax law of a state applies to property acquired there by one who died there, although he was married in foreign country by whose law his wife is entitled to a community interest in it.

Evidence — presumption — antenuptial agreement.

2. An antenuptial agreement to hold acquired property in common will not be presumed from the fact that a marriage took place in a country where the community law prevails, so as to be enforced in a state where no such agreement is valid unless in writing.

(June 7, 1910.)

A PPEAL by Anne Picat Majot, Administratrix, etc., of Paul Auguste Eleonore Majot, deceased, from an order of the Appellate Division of the Supreme Court, First Department, reversing an order of the Surrogate's Court for New York County which reversed an order entered upon the report

Note. — Conflict of laws as to matrimonial property.

This note is supplementary to one upon the same subject in connection with the case of *Rush v. Landers*, 57 L.R.A. 353. Both notes are confined to property rights dependent upon laws relating specifically to marital rights, and neither covers rights under statutes of descent and distribution.

As to enforcement of wife's liability under a statute of another state for a debt contracted by her husband, see note to *Mandell Bros. v. Fogg*, 17 L.R.A. (N.S.) 426.

As to widow's right to exemption or allowance for support out of the personal assets of the estate of a deceased husband, although a nonresident, see note to *Jones v. Layne*, 11 L.R.A. (N.S.) 361.

As to law governing capacity of married woman to contract, see notes to *Union Nat. Bank v. Chapman*, 57 L.R.A. 513, and *Mayer v. Roche*, 26 L.R.A. (N.S.) 763, and *International Harvester Co. v. McAdam*, 26 L.R.A. (N.S.) 774.

Real property.

The general principle that the *lex rei sitæ* governs as to real property is, of course, applicable to the respective rights of husband and wife, or their privies, in real property, and hence the law of the place where the real property is situated in general prevails over the law of the matrimonial domicile in this respect. It is important in the application of this principle, however, to observe that the results of the application of the *lex rei sitæ* may be affected by the fact that the marital domicile, past or present, is in another state or country. Thus, in a state where property acquired by either spouse during the marital relation ordinarily becomes community property, that result may be prevented, even in respect of land within that state, by the fact that it was purchased with the proceeds of property which, by the law of another state or country in which the matrimonial domicile was established at the time of its acquisition, was the separate property of one of the

of an appraiser assessing a transfer tax upon the decedent's estate. Affirmed.

The facts are stated in the opinion.

Messrs. Paul Fuller, Frederic R. Couderd, and Paul Fuller, Jr., for appellant:

An inheritance tax is not a tax upon property, but upon succession to property, which, being a privilege conferred by law, is subject to any condition which the lawmaker may impose upon its enjoyment.

Magoun v. Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. ed. 1037, 18 Sup. Ct. Rep. 594; *Knowlton v. Moore*, 178 U. S. 41, 44 L. ed. 969, 20 Sup. Ct. Rep. 747; *Plummer v. Coler*, 178 U. S. 115, 44 L. ed. 998, 20 Sup. Ct. Rep. 829; *Murdock v. Ward*, 178 U. S. 139, 44 L. ed. 1009, 20 Sup. Ct. Rep.

spouses, notwithstanding that such property acquired under the same circumstances by parties domiciled in the state where the land is situated would itself have constituted community property. In other words, the separate estate enjoyed by one of the spouses by virtue of the law of the domicile at the time the property was acquired is not lost by its investment in real property in another jurisdiction where a different law prevails. *Re Burrows*, 136 Cal. 113, 68 Pac. 488; *Ellington v. Harris*, 127 Ga. 85, 119 Am. St. Rep. 320, 56 S. E. 134; *Thayer v. Clarke* (Tex. Civ. App.) 77 S. W. 1050, affirmed in (Tex.) 81 S. W. 1274; *Blethen v. Bonner*, 30 Tex. Civ. App. 585, 71 S. W. 290; *Brookman v. Durkee*, 46 Wash. 578, 12 L.R.A. (N.S.) 921, 123 Am. St. Rep. 944, 90 Pac. 914, 13 A. & E. Ann. Cas. 839; *Witherill v. Fraunfelder*, 46 Wash. 699, 91 Pac. 1086; *Elliott v. Hawley*, 34 Wash. 585, 101 Am. St. Rep. 1016, 78 Pac. 93 (*obiter*).

And the doctrine applies even where the land was purchased by the husband with the proceeds of personal property owned by the wife which, by the common-law rule prevailing at the original matrimonial domicile, became the absolute property of the husband. *McDaniel v. Harley* (Tex. Civ. App.) 42 S. W. 323.

Nor is the result affected by the fact that the matrimonial domicile at the time the land was acquired was in the state where the land is situated, if the property with which it was purchased was acquired while the domicile was in another state or country by the law of which it was the separate property of one of the spouses. *Ellington v. Harris* and *McDaniel v. Harley*, *supra*.

In *Colpe v. Lindblom*, 57 Wash. 106, 106 Pac. 634, it was held that real property in Washington was community property, even upon the assumption that it was purchased with money earned by the husband while domiciled elsewhere; but this was upon the presumption, in the absence of proof, that the law of the domicile upon the subject was the same as the law of Washington. (The question as to the proper presumption to be indulged in the absence of proof of the

775; *Re Harbeck*, 161 N. Y. 211, 55 N. E. 850.

The tacit contract by adoption of the matrimonial law of the domicile is equivalent in its effect to an express contract, and a change of domicile does not alter or modify the rights acquired by the contract of marriage.

Bonati v. Welsch, 24 N. Y. 157; *Harteau v. Harteau*, 14 Pick. 181, 25 Am. Dec. 372; *Dixon v. Dixon*, 4 La. 188, 23 Am. Dec. 480; *Berard de Bonniere v. Petit, Sirey*, 1866, pt. 1, p. 217; *Crosby v. Berger*, 3 Edw. Ch. 547; *Depas v. Mayo*, 11 Mo. 314, 49 Am. Dec. 88; *DeNicols v. Curlier* [1900] A. C. 21; *Foubert v. Turst*, Bro. P. C. 129.

Rights acquired under a marriage contract can be enforced against property in a

country other than where the contract was made, and such a contract is not contrary to public policy. Such contracts, even when altering the rule of the common law, are not repugnant to our policy and laws, and have been enforced.

Decouche v. Savetier, 3 Johns. Ch. 190, 5 Am. Dec. 478; *Bradish v. Gibbs*, 3 Johns. Ch. 523; *Le Breton v. Miles*, 8 Paige. 261; *Potter v. Brown*, 5 East, 124; *Spears v. Shropshire*, 11 La. Ann. 559, 66 Am. D. 206; *Blanchard v. Blood*, 2 Barb. 352; *Beardsley v. Hotchkiss*, 96 N. Y. 201; *Strong v. Skinner*, 4 Barb. 546; *Young v. Hicks*, 92 N. Y. 235; *DeBarante v. Gott*, 6 Barb. 492; *Sterry v. Arden*, 1 Johns. Ch. 271; 2 Story, Eq. § 986, pp. 496, 497; *De Pierres v. Thorn*, 4 Bosw. 266; *Peck v. Van*

foreign law is not within the scope of this note. See on that subject note in 67 L.R.A. 33).

Of course, the community law of one state does not operate on real property in another state or country. *Nott v. Nott*, 111 La. 1028, 36 So. 109. Apparently the parties were domiciled in Louisiana, although it is not so stated.

Personal property.

As shown in the earlier note, the general principle, when unchanged by statute or contract, is that the respective rights of husband and wife and their privies in personal property are governed by the law of the matrimonial domicile at the time the property is acquired, and are not affected by the subsequent removal of the matrimonial domicile to another state where a different law prevails; but property subsequently acquired is governed by the law of the new domicile. To the same effect is *McClain v. Abshire*, 72 Mo. App. 390.

So, goods purchased in Washington by a wife with money which she had accumulated in another state by the law of which it was her separate property is not community property, nor subject to her husband's debts. *Freeburger v. Gazzam*, 5 Wash. 772, 32 Pac. 732. Although it is not expressly so stated it is implied that the matrimonial domicile was in Kansas at the time the money was acquired there, and that the domicile was subsequently established in Washington.

In *Cooke v. Fidelity Trust & S. V. Co.* 104 Ky. 473, 47 S. W. 325, the court said that under the Texas statute the husband had the right at any time during his life, without the consent of the wife, to convey Texas lands, and that the purchase price of such sale, either in money or notes, or both, by reason of the domicile in Kentucky, would have become the absolute property of the husband, as the law of the domicile of the husband fixes the extent of his wife's interest in his personal estate and of the husband's rights in the personal estate of his wife. This was apparently upon the assumption

that the Texas land was community property, but the statement on the point does not seem to have been necessary to a decision of the case.

In *Locke v. McPherson*, 163 Mo. 493, 51 L.R.A. 420, 85 Am. St. Rep. 546, 63 S. W. 726, however, where a woman previously domiciled in Missouri married a man domiciled in New York, the intention to take up their residence in the latter state having been defeated by the death of the wife within a month after the marriage and before she had left Missouri,—the court refused to apply to personal property of the wife in Missouri, the law of New York, by which the husband, in the event of the death of the wife without descendants, takes the personal property. The court seems to have assumed that the technical matrimonial domicile was in New York; and the decision is upon the ground that under the New York law the husband in such case takes the estate, not as distributee or under the statute of distributions, but under the title vested in him at his marriage, by the common law, to all his wife's personal property; the married woman's acts in that state being construed only to suspend the husband's common-law marital rights during the life of the wife. In this view of the New York law, the court said that it did not find within the Missouri statute providing that personal property in the state, of the inhabitants of another state, will be distributed according to the law of the latter state. The court, however, does not explain how the case was taken out of the operation of the rule that the respective rights of husband and wife, i. e., their marital rights are governed by the law of the matrimonial domicile, and not by the law of the place where the property is found. Under the principle, the New York law, even regarded as one relating to the marital right of the parties as distinguished from a statute of distribution, would seem to be the governing law, assuming that the matrimonial domicile was in New York. Perhaps in view of the hardship of the case and the technical character of the New York domicile.

demark, 99 N. Y. 20, 1 N. E. 41; 2 Kent, Com. p. 461; Story Conf. L. § 526, p. 184, note; Johnston v. Spicer, 107 N. Y. 185, 13 N. E. 753; DeNicols v. Curlier [1900] 2 Ch. 410.

Mr. Millard H. Ellison, for respondent:
No express contract having been executed by the parties, the rule governs that the law of the country where the deceased was domiciled at the time of his death regulates the succession of his personality in the case of intestacy.

Moultrie v. Hunt, 23 N. Y. 394; Dupuy v. Wurtz, 53 N. Y. 556; Despard v. Churchill, 53 N. Y. 192; Minor, Conf. L. p. 328; Edgerly v. Bush, 81 N. Y. 199.

As the parties voluntarily changed their domicile from France to the state of New

York, their rights are governed by the laws of the state of New York.

Boulhier, Cout. de Bourg, chap. 22, §§ 63-72; Story, Conf. L. 8th ed. 252-256, 267; Le Brun, Traite de la Communante Liv. 1 chap. 2, §§ 55, 56, p. 20; Merlin, Repertoire Communante de Biens, § 1, p. 111; 1 Boullenois, Obs. 29, pp. 736, 741, 750, 754; Lashley v. Hogg, Robertson, App. Cas. 4, 1 Burge, Col. & For. Law, pt. 1, chap. 7, § 8 pp. 623-625; Saul v. His Creditors, 5 Mart. N. S. 509, 16 Am. Dec. 212; Gale v. Davis, 4 Mart. (La.) 645.

The law of the situs absolutely governs in regard to all rights, interests, titles, succession, and right to succession, to real estate.

Gerard Titles to Real Estate, 5th ed.

court might have regarded it as contrary to public policy to enforce the law of New York, as a matter of comity and in the absence of an express local statute like domiciliary statutes of distribution.

As shown in the earlier note, the rule which refers the respective rights of a husband and wife in personal property to the *lex domicilii* applies to choses in action as well as to tangible property, though the law of the forum may affect the right of either to bring an action without joining the other. To the cases cited on that point should be added Texas & P. R. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747, 21 Sup. Ct. Rep. 526, holding that the Arkansas statute permitting a married woman to sue in her own name for personal injuries extends to a married woman injured in Arkansas but domiciled in Louisiana, where the damages claimed would constitute community property. The court, however, does not decide that the damages recovered in the action would not be community property in accordance with the *lex domicilii*.

Whether the husband, or his next of kin in the event of his death before that of his wife, take choses in action of the latter which he had not reduced to possession during his life, depends upon the law of the matrimonial domicile. Re Negus, 27 Misc. 165, 58 N. Y. Supp. 377.

In Dempster v. Stephen, 63 Ill. App. 126, upon the presumption that the common law by which a husband takes the rent from his wife's real property prevailed in Canada, where the land was situated, it was held that the wife could not maintain an action in Illinois in her own name for the rents.

To entitle a wife to a tacit lien or mortgage for the repayment of property brought by her into the marriage community, it must have arisen from the law of their domicile at the date of their marriage. Re Myer, 14 N. M. 45, 89 Pac. 246.

Antenuptial agreements.

As shown in the earlier note, the rules for ascertaining the governing law may be supplanted by an antenuptial agreement 29 L.R.A. (N.S.)

which by its own terms defines the respective rights of the parties or indicates the particular law for reference to which those rights are to be ascertained. In this connection, however, a difficulty is frequently encountered in determining whether particular property is within the scope of the agreement. Assuming that there is no objection, arising from the statutes or public policy of the forum, to the enforcement of the agreement, the question as to what property is within its scope is primarily one as to the intention of the parties gathered from the instrument in the light of the surrounding circumstances. From the nature of the question it depends very largely upon the terms of the particular agreement and the conditions existing at the time of its execution.

In Kleb v. Kleb, 70 N. J. Eq. 305, 62 Atl. 396 (affirmed in 71 N. J. Eq. 787, 65 Atl. 1118) the court, recognizing that the intention of the parties was the criterion, held that an antenuptial agreement, executed in 1861 by parties domiciled in the then electorate of Hesse Cassel, providing that in case of the death of either spouse without issue the "surviving spouse shall be the sole heir of the predeceased spouse," applied to real property in New Jersey subsequently acquired in the husband's name after the removal of the domicile to that state. The cases of Besse v. Pellochoux, 73 Ill. 285, 24 Am. Rep. 242; Long v. Hess, 154 Ill. 482, 27 L.R.A. 791, 45 Am. St. Rep. 143, 40 N. E. 335; Castro v. Illies, 22 Tex. 479, 73 Am. Dec. 277, and Fuss v. Fuss, 24 Wis. 256, 1 Am. Rep. 180 (all cited in the previous note), were distinguished by the fact that in each of them the spouses, at the time of making the contract, possessed property, and the phraseology in the contract was such as to indicate that all the property to which their provisions were designed to apply was to continue subject to the law of the matrimonial domicile, whereas in the case at bar the parties had no property at the time of the agreement and must therefore have intended the agreement to operate upon after-acquired property, and the phrases "death without issue," "marriage contract,"

p. 111; *White v. Howard*, 46 N. Y. 144; *Deyo v. Morss*, 30 App. Div. 56, 51 N. Y. Supp. 785; *Bonati v. Welsch*, 24 N. Y. 157; *Wharton*, Conf. L. 3d ed. p. 405; *Ordroneaux v. Rey*, 2 Sandf. Ch. 33; *Nott v. Nott*, 111 La. 1028, 36 So. 109; *Dohan v. Murdock*, 40 La. Ann. 376, 4 So. 338; *Kelly*, French Law of Marriage, p. 76.

Antenuptial contracts to be enforceable must be in writing. *Lamb v. Lamb*, 18 App. Div. 250, 46 N. Y. Supp. 219; *Schneider v. Schneider*, 122 App. Div. 774, 107 N. Y. Supp. 792; *Brown v. Conger*, 8 Hun, 625.

Effect will not be given to foreign laws which conflict with the policy of our state relating to property within its borders, especially when they are repugnant to our laws.

Dearing v. McKinnon Dash & Hardware Co. 165 N. Y. 78, 80 Am. St. Rep. 708, 58 N. E. 773; *Marshall v. Sherman*, 148 N. Y. 9, 34 L.R.A. 757, 51 Am. St. Rep. 654, 42 N. E. 419.

Personal property of a resident decedent, wherever situate, is subject to the transfer tax.

Re Swift, 137 N. Y. 77, 18 L.R.A. 709, 32 N. E. 1096; *Re Dingman*, 66 App. Div. 228, 72 N. Y. Supp. 624; *Re James*, 144 N. Y. 6, 38 N. E. 961.

"The surviving spouse shall be the sole heir of the predeceased spouse," used in reference to their future acquisitions, were of universal application, and contained within themselves no implication that they were to be limited to Hesse Cassel. The fact that immigration from Germany to this country was common at the time of the agreement in question was also regarded as a circumstance tending to negative an intention to confine the agreement to property that might be acquired during the continuance of the original domicile; and even more significant of such an intention was the circumstance that the territory embraced in Hesse Cassel, then an independent principality, was very restricted rendering it improbable that the parties intended to limit the effect of their agreement to land within those confines. The court said that if it was the intention that the agreement should operate beyond the principality there was no theory on which it could be said that it was to operate in some foreign states, and not in others.

In *Mueller v. Mueller*, 127 Ala. 356, 28 So. 465, it was held that the equitable separate estate of a wife by virtue of an antenuptial contract, executed with reference to the matrimonial domicile where the common law presumably prevailed, in property of which the husband took possession, did not become a legal estate by virtue of their subsequent acquisition of a domicile in Alabama where by a statute (passed before the antenuptial contract in question) a wife is in effect given a legal estate in such proper-

Haight, J., delivered the opinion of the court:

Paul Auguste Eleonore Majot was a citizen and resident of France and as such married Anne Picat on the 30th day of June, 1885, at Paris, France. Shortly after such marriage they emigrated to this state and became residents thereof, and subsequently acquired both real and personal property in this state, of which Paul Auguste Eleonore Majot died seised and possessed on the 7th day of December, 1907. No express antenuptial contract existed between them. He left no will, and his widow has been duly appointed administratrix of his estate.

Under the French Code a wife is given a community interest in whatever property, real or personal, her husband had at the time of the marriage and such as he shall acquire thereafter, and that, by reason thereof, it is now claimed on behalf of the widow of the decedent that no transfer tax can be imposed under our statute as to her half interest in the estate, for the reason that there has been no transfer upon his death and that she merely enters into possession of her community interest as it previously existed. Ordinarily, the law of the place of the domicile of the owner controls

ty. It was accordingly held that the provision of the Alabama statute that, in computing dower and distributive share of the wife in the estate of her husband, the value of "her separate estate" shall be deducted, did not apply, since the provision refers to the estate created by the statute and Constitution, and not to an equitable separate estate.

A contract by which a wife agrees never to claim any interest in or to the estate of her husband, though valid by the law of Illinois, where it was executed (and where the parties seem to have been domiciled at that time), will not prevent her from claiming her distributive share in the estate of her husband, who died domiciled in Iowa, since the statute of the latter state to that effect that neither husband nor wife has such interest in the other property that it may be the subject of contract between them is a statute of distribution and therefore governs. *Caruth v. Caruth*, 128 Iowa 121, 103 N. W. 103.

In *Stewart v. Kleinschmidt*, 51 Wash. 97 Pac. 1105, where the wife claimed the land in Washington was governed by the law of Ohio because the parties made a contract there in relation to land while, as claimed, they were domiciled there, the court held that the rights of the parties were governed by the law of Washington; but the decision was upon the ground that the parties retained their domicile in that state so that their temporary residence in Ohio did not give them a domicile there.

G. H. P.

with reference to the distribution of his personal property upon his decease, and the law of the place in which his real estate is situate controls with reference to its descent; and, in the absence of an express antenuptial contract otherwise providing, the foregoing rule prevails with reference to the disposition of property of married people upon the death of either. If two or more persons should each be the owner of an undivided interest in a specific article of personal property and they should remove to this state, bringing such property with them, their ownership therein would remain unchanged by our law, and, in case of the death of either, the undivided shares of the others would remain unaffected. As to whether the community interest of a wife in the property of her husband under the French law is such as to constitute her the present and continuing owner during their married life of an undivided one-half interest in his personal property acquired during his residence in France we do not now deem it necessary to determine; for, as we understand, all of the decedent's property, both real and personal, of which he died seised or possessed, was acquired after the removal of himself and wife to this state. While it must be conceded that some conflict exists in the decision of courts in foreign jurisdictions, we have no hesitancy in reaching the conclusion that, as to the property acquired by the decedent here during his residence with his wife in this state, it is controlled by our laws, and upon his death it is transferred within the meaning of our tax laws.

In Rodgers on Domestic Relations, § 316, it is said: "In a sense the laws of those states where the rule of community property is in force have no extraterritorial effect; that is, the rights, privileges, and liabilities incident to the law of this species of property are for those only who marry within the state where the law is in force, or come into it after marriage in good faith, for the purpose of taking up their abode and yielding fealty to its laws. If the marriage takes place in another state, and the parties never live in the state where the law of community property is recognized, the property rights of the parties must be governed by the laws of the state of their domicile, though they may have property in the state where the rule of community is in force. It is held in Texas, however, that the rights of the parties, so far as realty situated within that state is concerned, will be governed by the rule of community property in force in that state, though their residence and domicile are in a state where such laws are not recognized. It is held in Louisiana that where parties

are married in France, by the laws of which country there is no community of acquets and gains, and thereafter move to Louisiana, where such laws are effective, with the bona fide intention of taking up their abode there, the laws of that state will then govern their rights of property within its bounds. And this ruling is no doubt correct."

In *Gale v. Davis*, 4 Mart. (La.) 645, 649, the court says: "It seems now to be a settled principle that, when a married couple emigrate from the country where their marriage was contracted into another the laws of which are different, the property which they acquired in the place where they have moved is governed by the laws of that place."

Story in his work on Conflict of Laws, 8th ed., at page 267, after referring to many decisions upon the subject in this and other countries, and especially the Louisiana cases, proceeds to give his opinion as to the law of the United States with reference to the question under consideration, as follows: "In general, the doctrines thus maintained in Louisiana will most probably form the basis of the American jurisprudence on this subject. They have much to commend them in their intrinsic convenience and certainty, as well as in their equity; and they seem best to harmonize with the known principles of the common law in other cases. . . . The following propositions may be laid down as those which, although not universally established or recognized in America, have much of domestic authority for their support, and have none in opposition to them. . . . Where there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present property in that place, and as to all personal property everywhere, upon the principle that movables have no situs, or rather that they accompany the person everywhere. As to immovable property the law *rei sitæ* will prevail. . . . Where there is no change of domicile, the same rule will apply to future acquisitions as to present property. . . . But, where there is a change of domicile, the law of the actual domicile, and not of the matrimonial domicile, will govern as to all future acquisitions of movable property; and, as to all immovable property, the law *rei sitæ*. . . . And here also, as in cases of express contract, the exception is to be understood that the laws of the place where the rights are sought to be enforced do not prohibit such arrangements; for, if they do, as every nation has a right to prescribe rules for the government of all persons and property within its own territorial limits, its own law in a case of conflict ought to prevail."

Our attention has been called to no case in this state in which our courts have considered the question now presented. Most of our cases have reference to the descent or distribution of property under express antenuptial contracts, and none of them have reference to the power of the state to impose a tax upon such descent or distribution. *De Barante v. Gott*, 6 Barb. 492; *Crosby v. Berger*, 3 Edw. Ch. 538; *Le Breton v. Miles*, 8 Paige, 261; *Decouche v. Savetier*, 3 Johns. Ch. 190, 8 Am. Dec. 478. The appellant, however, calls our attention to *Bonati v. Welsch*, 24 N. Y. 157, and claims that it sustains her contention. In that case the plaintiff and her husband were residents of France, and were married and lived together as husband and wife. Upon the death of her mother the plaintiff became the owner of certain real estate in France, which she sold, and the proceeds thereof were appropriated by her husband, who then abandoned her and removed to the United States, where he continued to reside until his decease. Under the French law the right of the wife as a creditor of her husband in case of abandonment continued and attached to the property of her husband. It was accordingly held by our court here that, the husband having appropriated the proceeds of the real estate of his wife which she had inherited from her mother, that she as a creditor was entitled to have her claim paid. In that case no question arose between the creditors. The question was as between the wife, who had had her money appropriated by her husband and brought to this country, and his legatees here. We find nothing in that case that is in conflict with the conclusion which we have reached in this case.

It is now contended that, while there was no express antenuptial contract, there was a tacit contract, or a contract to be presumed from the fact that the parties entered into a contract of marriage, and that such tacit contract is deemed to be in accordance with the community law in force in France where the marriage contract was consummated. As we have seen, every government has the right to prescribe laws for the control and distribution of property within its own territorial limits, and while we recognize the validity of contracts made in foreign jurisdictions, if a conflict arises with reference thereto, our own laws must prevail instead of those of a foreign jurisdiction. Under our statute every agreement made in consideration of marriage is void unless it be in writing, except a mutual promise to marry. Personal Property Law, § 31; *Hunt v. Hunt*, 171 N. Y. 396, 59 L.R.A. 306, 64 N. E. 169. It is thus apparent that we cannot recognize tacit antenuptial contracts. 29 L.R.A. (N.S.)

But we do not understand that our statute differs materially from that of the French law in this regard; for, under the French Civil Code relating to community, article 1387 provides that the law regulates conjugal associations in respect of property only in default of express agreement which the parties may make as they think fit, provided it is not contrary to morality and subject to the following restrictions. Article 1395 provides that matrimonial agreements may not be altered after the celebration of the marriage. It is thus apparent that under the French Code tacit antenuptial agreements are not recognized, but they must be express agreements which cannot be changed after the celebration of the marriage.

Finally, the power of every government over property within its jurisdiction and territorial limits extends to reasonable taxation for governmental support. *De la Lande v. Louisiana*, 18 How. 192, 15 L. ed. 350. In this state a tax is imposed upon the transfer of property, real and personal, of the value of \$10,000 or more, at the rate of 1 per cent upon the clear market value of such property when it passes by such transfer to or for the use of any father, mother, husband, wife, child, etc., when the transfer is by will or by the intestate laws of the state; or when the transfer is made by a resident or by a nonresident, when the property is within this state, by deed, grant, bargain, sale, or gift made in contemplation of the death of the grantor, vendor, or donor, intended to take effect in possession or enjoyment at or after such death. This statute (Consol. Laws, chap. 60, §§ 220-245) was in force at the time of the death of the decedent, and we think is binding upon his widow.

The order of the Appellate Division should be affirmed, with costs.

Cullen, Ch. J., and Gray, Vann, Werner, and Hiscock, JJ., concur.

OKLAHOMA SUPREME COURT.

H. S. EMMERSON, Admr., etc., of Joseph D. Morris, Deceased, Plff. in Err.,
v.

MARY A. BOTKIN.

(— Okla. —, 109 Pac. 531.)

Pleading — petition — demurrer.

1. A general demurrer to a petition which attempts to state several causes of action should be overruled, if any of the statements of causes of action contained in said petition are good.

Headnotes by DUNN, Ch. J.

Same — construction — failure to amend — presumption.

2. In a case where a pleading is challenged before trial by demurrer, its language, where doubtful, will be construed against the pleader upon the ground that, as he selects the language, he should make his meaning clear, and where in such a case a demurrer is sustained on account of the insufficiency of a pleading, and no application for amendment is made, it will be presumed that the facts to justify it do not exist.

Same — facts — manner of statement.

3. Essential facts necessary to be shown in order to entitle a party to the relief demanded, and to which he supposes himself entitled, should be stated in the pleadings by allegation or averment, and not by way of recital.

Note. — Right to recover for household services rendered while parties were living in illicit relations.

There seems to be some conflict among the authorities upon the general question as to the right to recover for services rendered as a housekeeper where the parties have sustained illicit relations. This question naturally presents two different aspects, viz., (1) Right to recover where there is an express contract; (2) whether there can be a recovery upon an implied contract to pay. The latter question, as will hereafter appear, may be affected by the fact whether the parties were consciously sustaining illicit relations or were cohabiting under a void marriage.

Express contract.

In accord with *EMMERSON v. BOTKIN*, the general rule seems to be that an express contract to render services as a housekeeper is valid and enforceable, although the parties live together in a state of concubinage during the time the services are being rendered, unless the contract was made in contemplation of such illicit relationship. *Lytle v. Newell*, 24 Ky. L. Rep. 188, 68 S. W. 118; *Rhodes v. Stone*, 44 N. Y. S. R. 17, 17 N. Y. Supp. 561 (which is set out at length in *EMMERSON v. BOTKIN*). And see *Vincent v. Moriarty*, 31 App. Div. 484, 52 N. Y. Supp. 519; *Hill v. Freeman*, 73 Ala. 200, 49 Am. Rep. 48; 15 Am. & Eng. Enc. Law, p. 960.

But where a woman lives with a man as his mistress, and performs only such services as are incidental to such relation, she cannot recover compensation therefor, though she alleges an express contract. *Sackstaeder v. Kast*, 31 Ky. L. Rep. 1304, 105 S. W. 435.

So, where part of the consideration of the contract was a continuance of the illicit relations, the contract was for that reason wholly void and unenforceable. *McLane v. Dixon*, 30 Ky. L. Rep. 683, 99 S. W. 601; *Walker v. Gregory*, 36 Ala. 180; *Winebrinner v. Weisiger*, 3 T. B. Mon. 32, 29 L.R.A. (N.S.)

Master — contract for services — illicit relation — effect.

4. An express contract for services to be rendered by a woman for a man as housekeeper and servant is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are being rendered, unless the contract was made in contemplation of such illicit relationship; and in a case where the claim for compensation is based on a contract and grows out of the lawful services actually rendered, and no part of the same has reference to the meretricious relationship existing between the parties, the same is enforceable.

(May 10, 1910.)

Implied contract.

The majority of the cases hold that there can be no recovery as upon an implied contract to pay for services rendered as housekeeper, where the parties were living in a state of concubinage. *Swires v. Parsons*, 5 Watts & S. 357; *McDonald v. Fleming*, 12 B. Mon. 286; *Vincent v. Moriarty*, supra; *Walraven v. Jones*, 1 Houst. (Del.) 355 (this case is fully set out in *EMMERSON v. BOTKIN*); and see *Rhodes v. Stone*, supra; 15 Am. & Eng. Enc. Law, p. 961.

So, in *Brown v. Tuttle*, 80 Me. 162, 13 Atl. 583, it was held that there could be no recovery upon the implied contract to pay for services rendered as housekeeper, where the parties mutually agreed to live together as husband and wife without being married, as the services were rendered in furtherance and for the continuation of the unlawful relation. To the same effect is *Vincent v. Moriarty*, supra.

And so, also, in *Stringer v. Mathis*, 41 La. Ann. 985, 7 So. 229, it was held that no recovery would be permitted upon an implied contract to pay for services rendered as housekeeper, where it was clear that the concubinage had been pre-existing and was the motive of the parties coming together.

Or where the claim for services as housekeeper is so interwoven and blended with the remuneration as a concubine that it is indistinguishable. *Simpson v. Normand*, 51 La. Ann. 1355, 26 So. 266.

But in *Viens v. Brickle*, 8 Mart. (La.) 11, it was held that recovery upon an implied contract to pay for such services will be allowed where it does not appear that the concubinage was the motive of the parties coming together.

And so, also, in *Pereuilhet's Succession*, 23 La. Ann. 294, 8 Am. Rep. 595, it was held that the mere fact that a nurse and housekeeper lived with the man she was nursing and taking care of as his concubine did not impair her right to recover wages upon the implied contract, where it was not alleged or shown that concubinage was the motive and the cause of their living together in the first instance, and that the

ERROR to the District Court for Lincoln County to review a judgment in plaintiff's favor in an action brought to recover compensation alleged to be due her under an employment contract. Affirmed.

The facts are stated in the opinion.

Messrs. Malcolm D. Owen and George A. Neeley, for plaintiff in error:

An agreement which involves the doing of anything which is a crime or an indictable offense at common law is illegal and void.

9 Cyc. Law & Proc. pp. 466, 481; Chateau v. Singla, 114 Cal. 91, 33 L.R.A. 750, 55 Am. St. Rep. 63, 45 Pac. 1015; Brooks v. Cooper, 50 N. J. Eq. 761, 21 L.R.A. 617, 35 Am. St. Rep. 793, 26 Atl. 973.

As plaintiff was living with deceased as his housekeeper and mistress, she was not entitled to recover, because the law will not imply any promise to pay for services rendered him as housekeeper and mistress.

Walraven v. Jones, 1 Houst. (Del.) 355; McDonald v. Fleming, 12 B. Mon. 285.

Messrs. Hoffman & Robertson for defendant in error.

Dunn, Ch. J., delivered the opinion of the court:

This case presents error from the district court of Lincoln county. Defendant in error, who will hereafter be denominated "plaintiff," filed her action against H. S. Emmerson, as administrator of the estate of Joseph D. Morris, deceased, to recover on two causes of action, in the first of which she alleges that Joseph D. Morris, deceased, during his lifetime, was indebted to her for personal services as housekeeper and servant, beginning November 1, 1887, and terminating on his death, March 6, 1906; that said services consisted of general housework, farm work, nursing, and caring for him during his various sicknesses, and were reasonably worth the sum of \$3 per

services rendered were merely incidental to that relation.

—living together under void marriage.

A majority of the cases hold that a woman deceived into the belief that she is married cannot sustain an action for services rendered by her as housekeeper for her supposed husband while she was living with him as his wife. Robbins v. Potter, 11 Allen, 588, and see same case 98 Mass. 532; Cooper v. Cooper, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892, cited with approval in Ogden v. McHugh, 167 Mass. 279, 57 Am. St. Rep. 456, 45 N. E. 731; Cropsey v. Sweeney, 27 Barb. 310.

The reason for this view is that it cannot be presumed that the domestic and house-

work, or \$2,859. The petition then recites the death of said Morris, the appointment of Emerson as administrator, the submission to and the allowance by him of plaintiff's claim in the sum of \$1,400, and the rejection of said claim by the probate court. The second cause of action relates to certain services which plaintiff alleges she performed in caring for and protecting the estate of decedent, for which she prays a judgment of \$100. To this petition defendant filed a general demurrer, which was by the court overruled, to which exception was saved. Counsel insist that this demurrer should have been sustained, at least to the second cause of action. The rule in reference to demurrers of this character, where there is more than one count in a petition, is stated in the case of Hanenkratt v. Hamil, 10 Okla. 219, 61 Pac. 1050, wherein the supreme court of the territory held: "A general demurrer to the whole of a petition which contains several statements of causes of action should be overruled, if any of the statements of causes of action contained in said petition are good."

Counsel does not contend that the first cause of action is not well stated; hence no error was committed by the court in overruling the demurrer. To this petition defendant then filed answer: First, a general denial, and, second, a plea of the statute of limitations; and in a supplemental answer stated, in substance: (2) That Mary A. Botkin, plaintiff below, formerly resided on a farm in the state of Iowa, and in a residence near the place and upon the same farm where Joseph D. Morris and his wife and family resided. That the two residences were only a short distance apart, and that the plaintiff and decedent, Morris, became intimate with each other, and for several years sustained criminal relations, each with the other, at that place. (3) That the friendly and criminal relations of the

hold work and services of a wife for a husband are performed with the view to receive pay as a servant or laborer.

But in Higgins v. Breen, 9 Mo. 497, it was held that the law will imply a promise to pay for services performed by a woman who was induced to marry one who represented himself to be a widower, when in fact he had a wife living, and that an action therefor could be maintained against the administrator of the supposed husband. To the same effect is Fox v. Dawson, 8 Mart. (La.) 94.

In some of the cases taking the opposite view, it is pointed out that the remedy in such case would be an action for damages for the deceit, and not an action upon the implied contract for services.

A. L. R.

plaintiff and the deceased became so notorious as to impel Morris and his wife to separate; Morris's wife going to Illinois, where she resided upon property owned by Morris until the time of her death shortly thereafter. That the notorious relations between the plaintiff and the deceased occasioned a separation of Mrs. Botkin and her husband, whose whereabouts is unknown.

(4) That Morris disposed of his farm in Iowa, and, together with the plaintiff and her two children, removed to Oklahoma, and purchased a farm near the town of Sparks, in Lincoln county, which is now a part of the estate of the deceased, of which plaintiff in error is administrator; and that afterwards the deceased purchased a residence in the town of Sparks, in said county and state, and that from the time of the removal of the plaintiff and the deceased from the state of Iowa, until the recent death of said Morris, said plaintiff and deceased lived and cohabited together unlawfully, and in contravention of the laws of the land and the statute in such cases made and provided. That no children were begotten and born of this immoral relation. (5) The administrator alleges a set-off against the plaintiff, by claiming that Joseph D. Morris maintained and supported her for a period of eighteen years, and did pay for and provide the sustenance and education of her two children for a period of eighteen years, and during all the said time the said Joseph D. Morris, prior to the commencement of the aforesaid action, did provide for said Mary A. Botkin and her two children all the necessities of food and clothing and comforts of life consistent with said Morris's means and station in life, in the amount of, to wit, \$300 per annum, during said eighteen years, aggregating in all \$5,400. (6) That plaintiff and deceased continued to reside together and cohabit unlawfully until the death of the said Joseph D. Morris, on the 6th day of March, 1906, at which time he died in his residence in Sparks. (7) That any contract or agreement made between the plaintiff and the said Joseph D. Morris, wherein and whereby he was to pay her, or expend on her account, any money, funds, or emoluments whatsoever in consideration of the immoral relation set forth in her petition, is invalid and void, as contrary to law and against public policy.

To the supplemental answer thus filed, the plaintiff filed a demurrer, which was by the court sustained, except to that portion contained in paragraph 5, relating to the alleged indebtedness of plaintiff for the care, education, and the maintenance of herself and children. To this ruling defendant excepted. A reply was then filed, 29 L.R.A. (N.S.)

whereupon defendant filed an affidavit for a continuance, which was by the court denied and to which exception was saved. Trial was then had to a jury, which resulted in a verdict for the plaintiff in the amount of \$1,400, and the case has been brought to this court for review.

The principal assignment relied on in this court is that the trial court erred in sustaining the plaintiff's demurrer to paragraphs 2, 3, 4, and 6 of the supplemental answer. It will be noted that plaintiff's first cause of action avers that Morris was indebted to her for services as housekeeper and servant, extending over the period named, and that the specific services rendered were general housework, farm work, and nursing and caring for the defendant during his various illnesses. The general denial filed by the defendant necessarily put in issue all of the material allegations of the petition essential for plaintiff to establish in order that she might recover. Considering this denial in conjunction with the statements contained in the answer which were stricken out, defendant probably intended to plead that the relationship existing between plaintiff and the deceased was not that of master and servant, but was an immoral relationship, and that the contract which it is alleged was entered into was for this purpose, and not for the lawful one pleaded. Counsel for defendant in his brief argues the case on the assumption that this is the effect of that portion of the supplemental answer which was stricken out. Our statute provides (Comp. Laws Okla. 1909, § 5655), that, "in the construction of any pleading for the purpose of determining its effect, its allegations shall be liberally construed with a view to substantial justice between the parties." While under this the actual allegations and averments of all pleadings must be so construed that substantial justice may be done between the parties, yet this cannot be held to require that essential averments lacking in a pleading shall be construed into it, or that a necessary averment be supplied on inferences drawn from other facts alleged, unless such averment must logically and necessarily be so inferred therefrom. *Reddick v. Webb*, 6 Okla. 392, 50 Pac. 363. The supreme court of Kansas, with this same statute before it, has held that within it, where a pleading is challenged before trial by demurrer, its language, if doubtful, is construed against the pleader, upon the ground that, as he selects the language, he it is who should make his meaning clear. *Beadle v. Kansas City, Ft. S. & M. R. Co.* 48 Kan. 379, 29 Pac. 696; *Draper v. Cowles*, 27 Kan. 484. It is reasonable to presume that, when a pleading is challenged by a

demurrer which is sustained, on account of its insufficiency, if the pleader's case will admit of a further statement, he will make it, and, where he does not, that the facts to justify it do not exist. See cases cited under the following declaration in volume 4 Enc. Pl. & Pr. p. 746: "In the construction of a pleading nothing will be assumed in favor of the pleader which has not been averred, as the law does not presume that a party's pleadings are less strong than the facts of the case will warrant."

Paragraph 7 of the answer referred to contains no averment that the contract or agreement made between the parties, on which plaintiff relies in her petition, was in consideration of the immoral relation referred to, or that it was an incident thereto, or grew out of it, but contains merely a recital based upon an assumption not justified by any statement made either previously or in the paragraph itself, and the rule in such cases is that essential facts necessary to be shown in order to entitle a party to the relief demanded, and to which he supposes himself entitled, should be stated in pleadings by allegation or averment, and not by way of recital. *Blass*, Code Pl. 2d ed. § 318.

Taking the entire stricken portion of the answer together, nothing more is contained therein than a statement of a number of facts showing that, during the time covered by the services for which plaintiff seeks compensation, the deceased and plaintiff were living in a state of adultery, or, as counsel puts it in their brief, plaintiff was living with deceased as his housekeeper and mistress, and that she is not entitled to recover, because the law will not imply any promise to pay for services of one living as housekeeper and mistress of a party. While this statement of the law is correct, yet it does not follow that the law will not enforce an express contract for services so rendered, notwithstanding the fact that outside the contract the parties were living as stated. Plaintiff's petition contained no statement as to the unlawful relationship contended for, and was sufficient in its terms to admit evidence of the express contract which was proved on the trial. To sustain their contention, reliance is placed by counsel upon two cases. *Walraven v. Jones*, 1 *Houst.* (Del.) 355, and *McDonald v. Fleming*, 12 *B. Mon.* 285. The plaintiff in the case of *Walraven v. Jones*, as in the one at bar, claimed compensation for work and labor as a domestic servant, covering a period of twenty-seven years, at the rate of \$3 per week. The man for whom she claimed to have worked died, and his administrator was made defendant. The plaintiff proved that she had performed the services

alleged in decedent's family during the whole period mentioned, and that deceased had declared a short time before his death that he had provided for her in his will; but no will was discovered after his death. The defense to the action was that, at the time when plaintiff entered the services of deceased, if she ever was in his employ as a domestic servant, he was a married man, and his wife and several children were living with him as his family; that an improper intimacy existed between him and the plaintiff, on account of which his wife left him; and that this improper relationship continued until the time of his death. Under these facts, the court held that an express contract was proved and that under the circumstances the law would imply no contract or promise to pay for her services. The case of *McDonald v. Fleming*, supra, is similar to a number of other cases found in investigating this question, but it is not in point, as in that case the plaintiff and defendant had for a number of years lived together and cohabited as husband and wife, and the rule in such cases was announced by the court that "as she (the plaintiff) occupied the attitude of a wife, without having been one, the services she performed in acting as housekeeper resulted from the position in which she had placed herself, and do not in law entitle her to any compensation."

Another similar case arose in the state of Massachusetts, *Robbins v. Potter*, 11 *Allen*, 588. In that case the woman offered to prove that, although she lived with defendant as his wife, the marriage was void because she had a former husband living. She sued for compensation for services which she had rendered while so living with the defendant, and the supreme court held that "her offer to prove that the marriage was void, because she had a former husband living at the time, and that he knew it, had no tendency to prove an agreement by him to pay for the services rendered in his family while living with him as his wife. That the pretense of being his wife was a mere cover for her adultery and bigamy, and that he was equally guilty with her, did not make the value of the services which she rendered in that relation a debt from him to her. The facts negated the implication of a contract. The offer to prove that the labor was performed without any reference to their cohabitation, and that the cohabitation did not form any part of the consideration for the labor, was unavailing, because she had already admitted that it was for the work done in his family while thus living with him." This same case was again before the

supreme court of Massachusetts and is reported in 98 Mass. 532, and in passing on the same the court held: "There is no contract implied by law to pay for services rendered between parties living together as husband and wife." The same principle was also enunciated in the case of *Cooper v. Cooper*, 147 Mass. 370, 9 Am. St. Rep. 721, 17 N. E. 892.

The court, having eliminated from the answer all reference to the alleged unlawful cohabitation and living together between the parties, likewise excluded all evidence in reference to it. Evidence was admitted, however, which established an express contract between the decedent and plaintiff to pay her for such services as she was required to render, and the rule in such cases appears to be that such a contract is valid and enforceable, although the parties entering into it live together in a state of concubinage during the time the services are rendered, unless the contract was made in contemplation of such illicit relationship. In other words, if the claim for compensation arises and grows solely out of the lawful services actually rendered, and no part of the same depends on or has reference to the meretricious relationship existing between the parties, the same is enforceable; but if the relationship between the parties is brought about and exists for the purpose of unlawful and immoral association, then the fact that services are also rendered will afford no ground for recovery for their value. This rule appears to be supported by the only authorities we have found on the subject, among which we note the following: *Lytle v. Newell* 24 Ky. L. Rep. 188, 68 S. W. 118; *Rhodes v. Stone*, 63 Hun, 624, 44 N. Y. S. R. 17, 17 N. Y. Supp. 561. The foregoing are declarative of the common law and support the rule we have announced, but under the civil law it seems a contract will even be implied to sustain a claim for such services. See the following cases from Louisiana: *Simpson v. Normand*, 51 La. Ann. 1355, 26 So. 286; *Pereuilhet's Succession*, 23 La. Ann. 294, 8 Am. Rep. 595; *Viens v. Brickley*, 8 Mart. (La.) 11.

The syllabus to the case of *Lytle v. Newell*, supra, is as follows: "A contract between plaintiff and defendant, by which plaintiff undertook to render services as defendant's housekeeper for a stipulated money consideration, is valid and enforceable, though the parties lived together in a state of concubinage during much of the time the services were being rendered, unless the contract was made in contemplation of such illicit relationship."

In the case from the supreme court of 29 L.R.A. (N.S.),

New York (Rhodes v. Stone, supra), the plaintiff brought action against the administrator of the estate of a man for whom she claimed to have worked for over thirty years. The court allowed recovery, notwithstanding the fact that the parties had lived and cohabited together apparently as husband and wife, and were known and recognized as such by their neighbors and acquaintances, on the theory that the relationship existing between them did not preclude an express contract to pay for the services rendered, but placed the burden upon her to prove that such a contract existed, holding that "where a woman cohabits with a man, keeps house for him, and assists on the farm, in order to recover for the work and labor done, she must prove an express contract." In the consideration of the case the court said: "The respondent cannot rely upon an implied agreement to pay for her labor. Unless the evidence proves an express promise of the intestate to pay her, the verdict cannot be sustained; and if the illicit commerce between the parties was any part of the basis of the promise to pay for respondent's labor, the agreement was void. The relations of the parties did not necessarily forbid an express contract between them that the intestate would pay respondent for her labor. *Cooper v. Cooper*, 147 Mass. 372, 9 Am. St. Rep. 721, 17 N. E. 892. There is no suggestion in the evidence that the illicit relations were to form any part of the consideration of the contract. Notwithstanding the improper manner of her life with the intestate, she was at liberty to make an agreement with the intestate to perform labor for him for pay. There was sufficient evidence of such an agreement to sustain the verdict of the jury."

In holding that opponent was entitled to recover, notwithstanding the fact showed she lived with decedent as his mistress, the supreme court of Louisiana, in the case of *Pereuilhet's Succession*, supra, said: "An employer cannot pay off a female employee by robbing her of her virtue. Such a method of extinguishing an obligation is not known to the law. If concubinage had been alleged, and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living, our conclusion might have been different; but such is not the allegation, much less the proof; and we certainly will not presume that such was the fact."

The evidence in the record unobjected to shows that plaintiff began her services for the deceased as his servant, but that they had never had a settlement, and it is stipu-

lated by the parties that, just prior to his death, deceased requested a deed conveying to her the farm upon which they then lived and certain other property which he owned in the town of Sparks should be made and delivered to her, but that his near approach to death was such that the notary declined to have him sign and execute the instrument. She testifies that she and her husband went to work for deceased by the week, in November, 1887; that the decedent's wife left him some time in the previous June; that all parties were at that time living in Iowa. She states that the exact amount she was to receive was not agreed upon, but that decedent said that whatever she and her husband charged he would pay. They remained in Iowa for five years, moving to Oklahoma in December, 1892; she bringing with her a son and daughter. In March, 1893, they moved to a farm, where she did general housework and made garden, did the cooking, washing, sewing, ironing, scrubbing, milking, churning, and everything belonging to a farm. When she came she brought with her about \$300 which her husband gave her, which was used on the place; Morris investing some of it for her. During the last three or four years prior to his death, the deceased was feeble, and about eighteen months before he died had a stroke of paralysis, and during all of his illness she nursed and took care of him to the day of his death, at the age of seventy-one years.

There was no objection to, or denial of, the evidence given by plaintiff that her original contract with the deceased was to serve him as a domestic for such wages as she charged and as might be agreed upon between them, and, under these facts, plaintiff was entitled to recover the compensation to which she could show under her contract she was entitled. The mere fact that she may also have lived with deceased in a state condemned by law gives no license to those who are justly in her debt to deny her just deserts. Her earnings and accumulations lawfully provided for between herself and her employer are as sacredly her own, notwithstanding the alleged illicit association, even if it be true, as if she were as pure and as virtuous as any, and the estate against which she is proceeding should not be gratuitously enriched to her detriment and spoliation except in response to a legal edict, clear and certain. The application for a continuance was addressed to the sound discretion of the trial court, and, as it related to evidence calculated to support the rejected portions of the answer, its denial was not error.

29 L.R.A. (N.S.)

The judgment of the trial court is therefore accordingly affirmed.

Turner, Williams, Kane, and Hayes, JJ., concur.

PENNSYLVANIA SUPREME COURT.

JAMES W. DICKSON, Sheriff, Appt,
v.

J. H. McCARTNEY et al.

(226 Pa. 552, 75 Atl. 735.)

Sheriff — action — termination of term — recovering bid.

1. A sheriff whose term of office has expired may maintain an action against defaulting bidders at a sale made by him pending his term, and recover from them the difference between their bid and an amount realized at a subsequent sale of the property.

Execution sale — defect of title.

2. A bidder at an execution sale cannot refuse to comply with his bid because the title of the execution debtor proves to be defective.

Same — relief of bidder.

3. The court may relieve a bidder at an execution sale who has been misled or deceived if direct application is made to it for relief.

(January 3, 1910.)

Note. — Right of former sheriff to maintain action in respect of a sale made by him while in office.

In *Trustees' Exrs. & Secur. Ins. Corp. v. Bowling*, 2 Kan. App. 770, 44 Pac. 42, the court in upholding an action by a former sheriff to recover from the defaulting purchaser, where he had been held liable to the judgment creditor, used the following language: "So far as there is a right to sue to recover a bid made and accepted at a judicial sale which the purchaser failed to pay, it is a right growing out of the contract relation existing between the officer and such bidder. By returning a sale as made, without having demanded and received payment of the bid, and by permitting the sale to be confirmed on such return, the sheriff became liable to a judgment creditor interested in the proceeds of the sale, the same as if the bid had been paid. In such proceedings against the officer he may not, as a rule, contradict his return. . . . This, however, does not affect the previous contract of sale as between the officer and the purchaser. The officer becomes liable to the judgment creditor, because it is his duty to demand and receive the purchase money at the time of the sale; and the law does not permit him, when called to account for such off-

APPEAL by plaintiff from an order of the Court of Common Pleas for Allegheny County discharging a rule for judgment for want of a sufficient affidavit of defense in an action brought to recover the difference between defendants' bid at a sheriff's sale upon which they defaulted and the amount realized by a subsequent sale of the property. Reversed.

The facts are stated in the opinion.

Mr. George H. Quail for appellant.

Messrs. W. H. S. Thomson, Frank Thomson, and Donaldson Brothers for appellees.

Potter, J., delivered the opinion of the court:

This is an appeal by plaintiff from an order discharging a rule for judgment for want of a sufficient affidavit of defense. The action was assumptit, and was brought in the name of James W. Dickson, sheriff, to recover from the defendants, who were defaulting bidders at a sheriff's sale, the difference between their bid and the amount realized at a subsequent sale of the property. The defendants question the right of a sheriff whose term of office has expired to maintain an action against a defaulting bidder, to recover the amount of his bid at a sale held by the sheriff during his term of office. In looking through our cases for light upon this point it appears that in *Emley v. Drum*, 36 Pa. 123, the suit was by "Abram Drum, late sheriff of Luzerne county," to recover for the use of the plaintiff the amount of the defend-

ant's bid at a sheriff's sale. The question of the right of the plaintiff to maintain the action after the expiration of his term does not seem to have been directly raised, but, at any rate, the action was sustained. In *Peck v. Whitaker*, 103 Pa. 207, suit was brought by "Aaron Whitaker, late sheriff of Luzerne county," against a defaulting bidder to recover the difference between his bid and the price realized at a subsequent sale of the property. The court below instructed the jury that the plaintiff was entitled to recover, and judgment in favor of the plaintiff was affirmed by this court. In the case of *Fife v. Bohlen* (U. S. C. C. W. D. Pa.) 22 Fed. 878, a suit against the defaulting purchaser was brought by a sheriff after his term of office had expired. It was there held that the suit could be maintained; Judge Acheson in his opinion saying (page 880): "The action was commenced more than two years after Fife's official term as sheriff expired, and this, it is claimed, is an obstacle to the maintenance of the suit. But it cannot be doubted that an ex-sheriff may sustain such action, especially in a case like the present, where he sues for the use of lien creditors of the defendant in the execution under which he made the sales in question." There is no doubt but that the sheriff continues to be liable after the expiration of his term, for his official acts, and that he and his sureties may be sued after he is out of office. Act March 28, 1803 (4 Smith's Laws, p. 48) § 4, and act April 3, 1860 (P. L. 650) §§ 1, 2. It would only

be a special act, to contradict his solemn return showing the performance of duty, for the purpose of shielding himself behind a failure to perform such duty. In making a judicial sale, the officer, in a sense, stands between the several parties as a representative of all, and an accepted bid is regarded as so far a personal contract between the purchaser and the officer that the latter may enforce it in his own name. . . . The right to enforce such contract does not go to the successor in office of the sheriff. His successor could not in any way be held responsible for the nonpayment of the bid, and has no interest, officially or otherwise, in the indemnity to his predecessor on account of the payment of the money to a judgment creditor. The sheriff's official connection with the matter has terminated by payment. Any proceeding he may thereafter institute against the delinquent bidder is for the purpose of securing a personal indemnity to himself, and is not dependent upon the continuance of his official character."

In *Underwood v. Jacobs*, 3 M'Cord, L. 447, holding that there was no privity between the purchaser at a sale and the successor of the sheriff who made it, and that 29 L.R.A. (N.S.)

therefore the successor could not sue the purchaser for difference between the amount of his bid and a lesser sum realized upon a second sale—the court said it was unnecessary to decide whether the former sheriff could have maintained the action.

It seems, however, that where the sheriff dies during his term, his successor, and not his personal representative, is the proper person to sue for the proceeds of the property levied on and transferred by him before his death. *Bradley v. Frelsen*, 10 La. Ann. 310.

And it is also the rule in Louisiana that where the sheriff resigns after the sale of property, his successor is the proper person to sue on bonds proceeding from the sale, although they were made payable to the former, or his executors, administrators, or assigns, but not to his successor in office. *Buisson v. Hyde*, 17 La. 22.

But it has been held that one who as deputy sheriff attached property and left it in the possession of the judgment defendant was entitled to sue for the conversion thereof notwithstanding he had resigned since the property was converted. *Polley v. Lenox Iron Works*, 4 Allen, 329.

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be reasonable, therefore, that he should have the power to maintain a suit where the cause of action accrued during his term. In *Adams v. Adams*, 4 Watts, 160, Justice Kennedy, in speaking of the sheriff, said: "He is considered the principal himself in such cases, and the legal as well as real party making the contract of sale. . . . He alone has the right to receive the money arising therefrom, and is responsible for the legal appropriation of it, unless it is brought by him into court for that purpose." The responsibility thus placed upon an outgoing sheriff to receive the proceeds of a sale and distribute them according to law would seem necessarily to carry with it the right to sue for the collection of such proceeds. As a matter of sound principle, we have no doubt that an ex-sheriff may maintain such an action as this. The sheriff is merely the legal plaintiff, and the suit is solely for the benefit of the lien creditors entitled to the fund.

As to the second question raised by this appeal, we are equally clear. It is well settled that a bidder at a sheriff's sale cannot refuse to pay his bid and take the property, on the ground that the sale will convey no title. In the late case of *Pepper v. Deakyne*, 212 Pa. 181, 185, 61 Atl. 805, 807, Chief Justice Mitchell said: "A defaulting bidder is liable for the loss occasioned by his failure to comply with the terms of the sale, and it is equally well settled that the measure of damages is the difference of price on a resale fairly conducted upon terms not less advantageous to the purchaser than the first." In *Smith v. Painter*, 5 Serg. & R. 223, 225, 9 Am. Dec. 344, Justice Duncan said: "The sale by sheriff excludes all warranty. The purchaser takes all risks. He buys on his own knowledge and judgment. *Caveat emptor* applies in all its force to him. If this were not the law, an execution, which is the end of the law, would only be the commencement of a new controversy; the creditor kept at bay during a series of suits, before he could reap the fruits of his judgment and execution." In *Wells v. Van Dyke*, 108 Pa. 111, Justice Paxson said (page 115): "It is no answer to say that the plaintiff bought a worthless title. That is begging the question. The execution issued upon the bond was a valid execution against the husband, and the sale thereunder passed any title there may have been in him. . . . A man who buys a worthless title at a sheriff's sale, and pays for it, or is allowed a credit on his lien, which

is substantially the same thing, has no standing to repudiate the transaction subsequently."

It may be that the enforcement of the rule which requires a bidder to make good his bid at a sheriff's sale will work hardship upon the defendants in this case. But, if so, they have themselves to blame. They admit that between the time when they made the bid and the date of the resale they learned the facts relating to the title, which caused them to reject it; yet they made no application to the court for relief. If they were misled or deceived, or had any good reason why they should not have been required to make payment of the purchase money, their remedy was to apply to the proper court to have the sale set aside. As Chief Justice Mitchell said, in *Pepper v. Deakyne*, 212 Pa. 181, 187, 61 Atl. 805, 807, sheriffs' sales "belong to the class of legal problems in which to have a fixed rule by which all parties may clearly and readily know their rights and responsibilities is more important than the theoretical perfection of the rule itself." Nor was it necessary for the sheriff to tender the deed to the purchaser in order to hold him to his bid. In *Allen v. Gault*, 27 Pa. 473, 479, 67 Am. Dec. 485, Chief Justice Lewis said: "It is the duty of the purchaser to pay his money to the officer of the law according to the conditions of the sale. The sheriff is not bound, like an individual, to tender a deed before he demands the money. The court will see that justice is done to the purchaser." In *Hartman v. Pemberton*, 24 Pa. Super. Ct. 222, a case in which the superior court, in an action like the present one, reversed the order of the court below, refusing judgment for want of a sufficient affidavit of defense, Henderson, J., said (page 228): "The averment that the sheriff was bound to tender a deed to the defendant and demand payment of the balance of the purchase money cannot be maintained."

There is no suggestion or pretense that the resale was not made in exact accordance with the published conditions, made known to the defendants at the time of the first sale.

The judgment is reversed, and the record is remitted to the court below, with direction to enter judgment against the defendants for want of a sufficient affidavit of defense, unless other legal or equitable cause be shown why such judgment should not be entered.

RHODE ISLAND SUPREME COURT.

M. M. STONE & COMPANY

v.

POSTAL-TELEGRAPH COMPANY.

(— R. I. —, 76 Atl. 762.)

Telegraph — time for presenting claim — duty of sendee.

1. A rule of a telegraph company that notice of a claim for damages for delay in transmission and delivery of a message must be given within sixty days from the date of the message is reasonable and binding on the addressee, where it appears upon the blank on which the message is delivered, although there is no contractual relation between him and the company.

Same — limitation of liability for uninsured messages.

2. A rule of a telegraph company, printed upon the blank upon which messages are delivered, limiting the liability of the company for mistake or delay in transmission of an unrepeatable message to the transmission fee, and limiting the liability for all messages unless they are expressly insured, for which an additional charge is made, is reasonable and binding upon the addressee, to whom a message is delivered on such blank.

Conflict of laws — negligent transmission of telegram.

3. The liability of a telegraph company in tort for error in the transmission of a message is governed by the law of the state where the message originated.

(July 13, 1910.)

CERTIFICATION by the Superior Court for Providence and Bristol Counties for the opinion of the Supreme Court of questions arising on demurrers to special pleas filed in an action brought to recover damages for alleged negligent failure

promptly to deliver certain telegrams. Questions answered, and decision certified to the trial court.

The facts are stated in the opinion.

Mr. William J. Brown for plaintiff.

Messrs. Edwards & Angell, Carver, Wardner, & Goodwin, G. Philip Wardner, and Clifford H. Walker for defendant.

Sweetland, J., delivered the opinion of the court:

The case is here upon questions of law certified to this court from the superior court, under the provisions of chapter 298, § 5, Gen. Laws 1909. The action is one of trespass on the case for negligence, brought by the plaintiff against the defendant to recover damages for losses sustained by reason of the alleged negligent failure of the defendant to deliver with reasonable promptness certain telegrams addressed to the plaintiff.

The first question certified to us is as follows: Is the addressee of a telegram sent in reply to a communication from him requesting a reply by telegraph, and addressed to him at a point within this state, from a point outside this state, barred from maintaining a tort action for loss arising from negligent delay occurring in this state in the delivery of such telegram, by reason of failure to file written notice of his claim within sixty days from the date the telegram was filed with the telegraph company for transmission, where there is a rule or regulation printed on the back of all blank forms furnished by said telegraph company to its customers, including the blank on which the message delivered to him was written, providing that the "company will not be liable for damages or statutory penalties in any case where the claim is not

Note. — Law governing liability of telegraph company.

But one case in point other than *STONE v. POSTAL-TELEGRAPH COMPANY*, has appeared since the preparation of the note on this subject in connection with the case of *Fox v. Postal Telegr. Cable Co.* 28 L.R.A.(N.S.) 490. In that case, *Heath v. Postal Telegr. Cable Co.* (S. C.) 69 S. E. 293 (an action by the sender), the South Carolina supreme court held that while an action against a telegraph company for nondelivery, delayed delivery, or delivery of an erroneous message, is an action *ex delicto*, and a cause of action always arises at the place where the message is to be delivered, and sometimes elsewhere, yet it is equally true that in actions *ex delicto* arising out of contract, all questions affecting the nature, validity, and interpretation of the contract are to be governed by the law of the state in which the contract

was made and is to be performed, in whole or in part. It was accordingly held that the telegram in that case, having been sent from a point in New York to a point in South Carolina, the law of New York governed,—the question apparently being as to the right to recover special damages, not, however, damages for mental anguish. The court relied on *Brown v. Western U. Telegr. Co.* (S. C.) 67 S. E. 146 (cited in the note in 28 L.R.A.(N.S.) 490), and while recognizing that the views there expressed were in conflict with the cases of *Harrison v. Western U. Telegr. Co.* 71 S. C. 386, 51 S. E. 119 (see note, 5 L.R.A.(N.S.) 753), and *Balderston v. Western U. Telegr. Co.* 70 S. C. 160, 60 S. E. 435 (see notes 23 L.R.A.(N.S.) 651 and 28 L.R.A.(N.S.) 491), said that in neither of those cases was the foreign law pleaded, and the question at issue in the present case was not squarely presented in those cases.

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presented in writing within sixty days after the message is filed with the company for transmission," and where the addressee has knowledge of the delay in ample season to file a claim in writing with the telegraph company before the expiration of the sixty days?

This regulation, printed on the back of the blank forms and quoted in the question, in the circumstances of the defendant's business, is a reasonable one. The argument of the defendant's counsel in that regard appears to the court to be sound. The number of messages received by a telegraph company daily for transmission is so great, particularly in the large cities, that it is impracticable to keep them on file for a long time, so as to have them accessible for examination in case of a complaint regarding service. It is necessary for each office to destroy all original messages after a brief period to avoid encroachment upon its limited working space. Indeed, even if all messages were kept, it would soon become a difficult task to find a particular message after the lapse of many months. Furthermore, the production of the original message would not give full information about the service. Many of the facts are dependent upon the memory of operators and other witnesses, and the passing of time quickly obscures evidence so founded. A rule that provides that, if a customer intends to hold the company responsible for a fault in the service, he must give it notice of his claim within a period sufficiently short to allow the facts to be investigated while fresh and capable of accurate knowledge, is a reasonable rule. Without it the company would suffer from the presentation of stale and fictitious claims, against which it would be unable to defend itself.

The plaintiff admits that, in suits by the sender against a telegraph company for delay in transmitting messages, the weight of authority supports the validity of such a provision as the one printed on the back of the blank form furnished by the defendant to the sender of the message, and incorporated in the question now before us. The plaintiff contends, however, that the regulation has no application in this suit, brought by the addressee of the message, against the defendant, for, as between the addressee and the company, there was no contractual relation; that the receiver of the message had no notice of the printed condition until after the message was delivered to him, and therefore could not have agreed to this condition in advance. The plaintiff, however, did have notice of this condition, and that it was a part of the contract which was the basis of the 29 L.R.A. (N.S.)

whole transaction, as soon as the message was delivered to him. He then had notice that the company would not be liable in damages in any case where the claim for damages was not presented to it, in writing, within sixty days after the company received the message for transmission. This notice was given to him in as effective a manner as the company could reasonably be required to give it; a printed copy of the contract was attached to the message when it was delivered to the plaintiff. According to the terms of the question certified to us, the plaintiff received this notice in ample season to enable him to file his written claim for damages within the sixty days prescribed. It is quite immaterial that the plaintiff had no opportunity to agree to this condition before the message was sent. It was a valid condition, which the defendant might impose upon the contract with the sender; and it was only upon this condition that the defendant would agree to transmit the message. Any rights which the plaintiff may have are based upon and limited by the terms of the contract for transmission. The claim of the plaintiff that he has rights in the matter independent of this contract has no basis in reason. The defendant's duty in the premises must be regulated by its contract; not only its duty to the sender, but to this plaintiff. The American cases permit the plaintiff, as the receiver of the telegram, to come in and avail himself of the defendant's express and implied obligations arising under the contract; but the plaintiff's rights can be no greater than those of the party to the contract.

In *Russell v. Western U. Teleg. Co.* 57 Kan. 230, 45 Pac. 598, the court said: "Just how a liability to perform that service can arise independently of any contract with the sender of the message we are unable to perceive. A telegraph company certainly is under no obligation to transmit messages except when employed by some person to do so. Perhaps, because of the public nature of its business, it may refuse the employment, nor impose unreasonable conditions for undertaking it; but can it be doubted that, whenever it receives a message for transmission, there is either an express or implied contract on its part that it will transmit and deliver it . . . We are satisfied with the rule heretofore maintained by this court, and, under it, the liability of the defendant must be determined by the contract made with the sender of the message, of which contract the plaintiff was entitled to the benefit."

In *Frazier v. Western U. Teleg. Co.* 4 Or. 414, 67 L.R.A. 319, 78 Pac. 330, 2 A. & E. Ann. Cas. 396, the following language

appears: "The right of an addressee to recover is necessarily grounded upon the contract between the company and the sender, whether the action be in form technically for a breach of contract, or one sounding in tort. Without the contract under which the message was forwarded as a foundation for the cause of action, no recovery whatever could be had."

In *Broom v. Western U. Teleg. Co.* 71 S. C. 508, 51 S. E. 259, 4 A. & E. Ann. Cas. 611, the court says: "The sendee of a telegraphic message has no cause of action unless the defendant has breached some duty owing to him. The duty which a telegraph company owes by law to the sendee of a message is precisely the same duty which it owes to the sender; that is, to promptly transmit and deliver the message. This duty springs from the relation created by the contract. The contract, to the extent that it is reasonable, and not contrary to law, limits, qualifies, molds the duty which the law imposes, upon the carrier in its relation to the public."

In *Findlay v. Western U. Teleg. Co.* (C. C.) 64 Fed. 459, the court said: "The plaintiff thus claims the benefit of this contract of transmission, and avers that he has been damaged by a breach of it; claims the benefit of its obligations, makes himself a party to its provisions, placing himself in this relation to it, and demanding a strict enforcement of his own rights under it. It cannot be successfully contended that he is exempt from the operation of certain provisions of the contract to be complied with on his part before he can successfully assert his rights to the benefits accruing under it, or a redress of wrongs growing out of its violation. The contract is an agreement between the sender and the telegraph company that, for a stipulated price, the company shall carry a message from the sender, and deliver the same to the receiver. It is the same contract when delivered to the receiver that it was when it came from the hands of the sender. He takes it with all the rights that accrued to the sender, and he assumes all the obligations that it imposes on the sender when he comes to assert his rights under it."

In answer to the first question certified, we say that the plaintiff is barred from maintaining an action of the nature set out in the question by reason of his failure to comply with the rule or regulation quoted in the question, and said question is answered in the affirmative.

The second question is as follows: Is the addressee's knowledge or ignorance of such rule or regulation material in determining his right to recover?

This question should be answered in the

negative, if the question refers to a knowledge or ignorance of the rule before the message was delivered to the plaintiff. As we have said, *supra*, it is immaterial that the plaintiff did not have an opportunity to assent to this regulation before the message was sent. He must be presumed to have had knowledge of the regulation as soon as the message was delivered to him, and then for the first time was there any reason for him to act upon such knowledge. The plaintiff knew of the rule, and he knew of the delay of which he complains, before the expiration of the sixty days after the message was received by the company from the sender, with ample time for him to have complied with the requirement.

The third question certified is as follows: Is a rule or regulation printed on the back of all blank forms furnished by a telegraph company to its customers, including those upon which the messages as delivered are written, providing that "to guard against mistakes or delays, the sender of a message should order it repeated; that is, telegraphed back to the originating office for comparison. For this one half the regular rate is charged in addition. It is agreed between the sender of the message written on the face hereof and the Postal-Telegraph Company, that said company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeat message, beyond the amount received for sending the same; nor for mistakes or delays in the transmission or delivery, or for nondelivery, of any repeated message beyond fifty times the sum received for sending the same, unless specially insured, nor in any case for delays arising from unavoidable interruption in the working of its lines, or for errors in cipher or obscure messages. And this company is hereby made the agent of the sender, without liability, to forward any message over the lines of any other company when necessary to reach its destination. Correctness in the transmission of messages to any point on the lines of the company can be insured by contract in writing, stating agreed amount of risk, and payment of premium thereon, at the following rates, in addition to the usual charge for repeated messages; *viz.*, 1 per cent for any distance not exceeding 1,000 miles, and 2 per cent for any greater distance,"—a reasonable regulation,—and is it a bar in a tort action to recovery beyond such amount by the addressee of a message sent from a point outside this state to a point within this state, in reply to a communication from him requesting a reply by telegraph, for a loss arising from a negligent delay, occurring

in this state, in the delivery of such message?

We are of the opinion that the regulation set out in this question is a reasonable one. The provision seems primarily intended to limit the liability of the company for mistakes in transmission rather than for delay, though the rule includes a limitation of the company's liability for delay in transmission. The liability of the company under this agreement is graded in accordance with the compensation received for transmitting the message. Correctness in transmission, which, from a consideration of the whole rule, appears to include promptness in delivery, may be insured by a contract and the payment of an additional fee. All these provisions in the contract of sending appear to be reasonable and within the right of the company to impose. As is urged in the argument of the defendant's counsel, the sender is fully aware how important the prompt delivery of his message is; the message as delivered to the company ordinarily gives no indication of its importance. If the sender desires to have special care expended upon it, it is not unreasonable to ask him to pay for such particular attention. Some messages may be of trivial importance, others of great importance. By negligence in the transmission or delivery of one message the damages incurred may amount to no more than the cost of sending the message. In respect to another message, the damages might amount to a large sum. These facts are unknown to the telegraph company, but they are within the knowledge of the sender. In these circumstances, therefore, it is fair to allow the telegraph company to enter into some agreement with the sender for liquidating or ascertaining the damages which it may be called upon to pay, and grading its charges for the service in accordance therewith. If the company is to be held to a very small liability, as for the bare amount of the tolls, it can afford to transmit the message for a very small sum; but if it may be held liable for large damages, it must, for its own protection, charge more for the service.

The situation is analogous to the case of a carrier entering into an agreement with the shipper as to the value of the goods shipped, and limiting the carrier's liability. This court has said, in *Ballou v. Earle*, 17 R. I. 441, 14 L.R.A. 433, 33 Am. St. Rep. 881, 22 Atl. 1113: "We have come to the conclusion that the decided weight of the authorities, as well as the better reason, favors the rule that a common carrier may, to a great extent, at least, contract in limitation of his common-law lia-

bility, 'provided,' as stated in *Southern Exp. Co. v. Caldwell*, 21 Wall. 264, 22 L. ed. 556, 'the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy.' The shipper and the common carrier are thus authorized to enter into an express agreement, within certain limits, as to the terms upon which the latter will transport and convey for the former a certain article of personal property of an agreed value, to a designated place, for an agreed price. We fail to see that the recognition of the validity of such an agreement is violative of any sound rule of public policy. Indeed, it seems to us that public policy requires the upholding of such an agreement, as tending to the honest disclosure of value on the part of the shipper, and the exercise of that degree of diligence on the part of the carrier which is commensurate with the value of the particular article conveyed, and the price paid for such conveyance."

As we have already said in answer to the first question, the rights of the plaintiff are limited by the reasonable provisions of the contract between the company and the sender of the message. This question is answered in the affirmative.

The fourth question certified is as follows: Is the addressee's knowledge or ignorance of such rule or regulation material in determining his right to recover?

This question is answered in the negative, and reference is made to the answer to the second question certified.

The fifth question certified is as follows: Are the validity and effect of the above-mentioned rules or regulations, so far as concerns the addressee's right to recover in an action of tort for loss arising from negligent delay in delivery of the message after reaching its terminal station, governed by the law of the state where the message originated, or by the law of the state where it was delivered to the addressee?

The plaintiff's action, though in tort, can only be maintained because he is able to show the violation of some duty which the company owed to him, arising out of the contract between the company and the sender of the message. His action is founded upon and limited by that contract. We are of the opinion that the questions as to the validity and effect of these regulations in the contract, as concerns the plaintiff's right to recover, are governed by the law of the state where the message originated.

The questions having been severally answered as aforesaid, the papers in the case with our decision certified thereon, are submitted to the Superior Court for further proceedings.

TEXAS SUPREME COURT.

TEXAS MIDLAND RAILROAD COMPANY, Plff. in Err.,
v.

F. A. GERALDON.

(— Tex. —, 128 S. W. 611.)

Carrier — ejection of passenger from station — liability.

1. A railroad company is liable for injury to a woman who has gone to its depot to take passage on a train, by the act of its agent in turning her out into a storm, with notice that she is in no condition to encounter it, although the reasonable time fixed by the company for closing the building has arrived.

Same — sufficiency of notice.

2. Notice to a railroad station agent that a woman is in no condition to face a storm is sufficient to place on the company the risk of injury in forcing her to do so, although the nature of her indisposition is not stated.

(May 25, 1910.)

Note. — Liability of carrier for turning a waiting passenger out of depot.

This note is confined to cases involving the liability of a carrier for turning passengers out of the waiting room or depot where the purpose is to close the room or depot, and cases in which a person was ejected for alleged disorderly conduct, or because he was not entitled to the rights of a passenger, are not included. Such cases usually turn upon the question whether the carrier's agent used undue force in ejecting the person, and, of course, are no authority upon the subject presented by the title to this note.

The question as to what is a reasonable time for keeping a railroad station open and lighted and heated is discussed in *Abbot v. Oregon R. & Nav. Co.* 1 L.R.A. (N.S.) 851.

The general rule is that a railroad must keep its station open, heated, and lighted for a reasonable time before and after the arrival and departure of trains, for the accommodation of passengers who desire to make use of it. The foregoing case presents an additional question, as to the liability of the railroad company for injuries due to a passenger being turned out of the station to which he has gone to await a coming train.

Although there are but few cases involving this particular question, it would seem that a general rule might be deduced from these cases, to the effect that, if a passenger is detained at the station through any cause for which the railroad company itself is responsible, then the railroad company is liable for any injuries received by reason of the passenger being turned out; but if the person comes to the station merely for his own convenience, at an unreasonable

ERROR to the Court of Civil Appeals to review a judgment affirming a judgment of the District Court for Hunt County in plaintiff's favor in an action brought to recover damages for the alleged unlawful ejection of plaintiff's wife from defendant's passenger station. Affirmed.

The facts are stated in the opinion.

Messrs. Ogden, Brooks, & Napier and A. H. Dashiell for plaintiff in error.

Messrs. Mulkey & Hamilton and Looney & Clark for defendant in error.

Brown, J., delivered the opinion of the court:

The defendant in error, with his wife and child, accompanied by another man and his wife, not necessary to be mentioned hereafter, went to Enloe, a small village in Delta county, on plaintiff in error's road, for the purpose to take the train on that road to the town of Commerce. They arrived at Enloe between 5 and 6 o'clock in the afternoon, but the train on which they expected to take passage had already passed,

able time before the departure of the train, then the company may enforce its rules, and turn the passenger out without incurring liability for damages received in consequence thereof.

Thus, in *St. Louis Southwestern R. Co. v. Foster* (Tex. Civ. App.) 112 S. W. 797, it was held that a through passenger, while stopping at an intermediate station for a necessary change of cars, has the legal right during the interval to occupy the waiting room of the depot belonging to the railroad upon whose line he holds a through ticket and upon which he is intending to begin his journey; and if he is expelled from the waiting room during the time he is entitled to its occupancy, the carrier is just as much liable for damages resulting from that ejection as if he had been ejected from the train itself.

And in *Riley v. Wrightsville & T. R. Co.* 133 Ga. 413, 24 L.R.A. (N.S.) 379, 65 S. E. 890, a petition was held good on a general demurrer, which alleged substantially that the plaintiff had purchased a through ticket between two points on connecting lines of two railway companies, and, while at the junction point, she, at the direction of the agents of both companies, entered a waiting room to wait for several hours for the connecting train; and while so waiting the employee in charge of the waiting room refused to allow her to remain until the connecting train arrived, and ordered and forced her to leave the waiting room at night, with her husband and two children, who accompanied her, whereby she was made sick and caused pain and suffering.

So, a railroad company was held liable in *Coleman v. Southern R. Co.* 138 N. C. 351, 50 S. E. 690, for any injuries received by the plaintiff in being put out of the depot into the cold, after having missed his

and defendant in error placed his wife and child in the depot, and went out upon the platform of the depot building, and went to work boxing his goods, in order to have them ready for shipment on the next train, which would pass the station about 5 o'clock the next morning. After the goods were boxed, about 9 o'clock that night, defendant in error and the other members of the party concluded to remain in the depot until the train should arrive the next morning. The defendant's agent had seen them in and about the waiting room of the depot that afternoon and evening, but no objection was made to their remaining therein. About 10 o'clock that night a train passed on defendant's road, going in the opposite direction to that which the party wished to go, after which the agent came into the room and spoke to them, asking, "Where are you folks going?" to which defendant in error replied that they were going to Commerce, whereupon the agent said in a rough manner, "Well, you will have to get out, for I am going to close up this house." It was then raining, and defendant in error said to the agent that he did not want to go out into the rain, that his wife was "in no condition to go out into the rain," to which the agent replied, "Well, you will have to go out all the same." Geraldton replied, "Well, you will have to put me out;" whereupon the agent called to the marshal of the town, who was standing near by, and told him to put them out of the depot. This alarmed Mrs. Geraldton, and she became excited, and defendant in error said, "Before I will be arrested, I will go out," and he with his wife and the other members of the party went to seek a lodging house, which they found at a distance variously estimated at from 150 to 300 yards from the station. It was raining at the time the party left the station, so that by the time Mrs. Geraldton reached the

lodging house she was wet to the skin, and had no clothes for a change. Her monthly sickness was on at the time, and the wetting caused it to stop, which produced sickness and suffering on her part not necessary to be more particularly described. On the next morning Geraldton, his wife, child, and party returned to the depot for the purpose of taking the train to Commerce, and, having bought tickets of the agent of plaintiff in error, the party took their seats in the depot room to await the arrival of the train, after which an officer entered the room and approached the window at which the agent was standing and where he had sold the tickets, asking of the agent, "Which is the man that has the gun?" The agent pointed over to Geraldton and said, "There he sits over there," and the officer came over to where Geraldton was, and asked him if he had a gun, to which Geraldton replied that he had not, and the officer said he would have to search him, and he did so, finding no gun on his person, but a hammer with which he had boxed his goods the evening before. Persons who were present in the room laughed at Geraldton at being searched, which caused him mortification.

This suit was instituted by defendant in error in the district court of Hunt county to recover damages for the injury to his wife, and also for the damage done himself and his wife by the mortification of being threatened with arrest and being searched for a gun the next morning. The case was tried before a jury, and the trial court was requested by the defendant to give to the jury a charge which practically directed them to return a verdict for the defendant. The court refused to give the charge, which is assigned as error in this court.

The plaintiff in error having prepared a waiting room in its depot building at Elloe, for persons desiring to take passage on the train, Geraldton and his wife, who ex-

train through misinformation given him by the company's agent. The court said: "Further, when the agent had knowledge that the plaintiff had thus missed his train, the plaintiff had a right to remain in the station and be kept comfortable till the next train left."

And in *Phillips v. Southern R. Co.* 124 N. C. 123, 45 L.R.A. 163, 32 S. E. 388, it was held that a rule for closing a railroad waiting room after the departure of a train until thirty minutes before the departure of the next train is a reasonable one, as applied to a person who has come to the station at 8 P. M. to wait for a train at 1:30 A. M., and is driven out of the room, although the night is cold, to wait several hours, until the regular time of reopening the room. The court went on to say, however, that the rule would probably be dif-

ferent in the case of through passengers and in the case of delayed trains.

In *Beeson v. Chicago, R. I. & P. R. Co.* 62 Iowa, 173, 17 N. W. 448, it was held that a woman of ill repute who had secured admittance in some way to the defendant's waiting room during a time when, by the rules of the company, the depot was closed, and who claimed to be waiting for a train not due for at least two hours, was entitled at the most to only nominal damages for being removed from the waiting room by the police at the direction of the defendant's agents, after she had refused to go of her own accord at their request. The decision, however, appears to turn rather upon the character of the plaintiff than upon the question of the duty of the carrier to keep its waiting room open.

W. M. G.

tered that waiting room, were not trespassers; they came with the purpose of taking passage on one of the defendant's trains, and, being too late, they had the right to remain in the waiting room until the next train should arrive upon which they could go to the place of their destination, subject, however, to the right of the railroad company to close its building at such hour as its reasonable rules might require. The agent of the railroad company had the lawful right to close the waiting room and to require the occupants of it to retire at the hour shown by the testimony. But in executing the orders and the rules of the company, the agent was required to use ordinary care to not place any occupant of the said room in a position which would probably endanger health or life.

We must assume, in deference to the verdict of the jury, that the agent of the railroad company knew that the condition of Mrs. Geraldton was such that for her to go out into the rain at night would endanger her health, and we must assume that it was raining to that extent that made it reasonably certain to the agent that injury to her health might result from putting her out of the depot into such a rain as was then falling. Under such circumstances it was not lawful for the agent of the railroad company to force Mrs. Geraldton out of the room and into the rain, whereby her health might be impaired; and it appearing from the evidence that the agent of plaintiff in error having thus knowingly forced Mrs. Geraldton out of the room and into the rain, which caused her to suffer physical pain, the railroad company was properly held responsible for the results. *Ploof v. Putnam*, 81 Vt. 471, 20 L.R.A. (N.S.) 152, 130 Am. St. Rep. 1072, 71 Atl. 188, 15 A. & E. Ann. Cas. 1151, s. c. 26 L.R.A. (N.S.) 251, 75 Atl. 277; *Texas & P. R. Co. v. Mother*, 5 Tex. Civ. App. 87, 24 S. W. 79; *Johnson v. Chicago, R. I. & P. R. Co.* 58 Iowa, 348, 12 N. W. 329; *Louisville & N. R. Co. v. Ellis*, 97 Ky. 330, 30 S. W. 979; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Weymire v. Wolfe*, 52 Iowa, 533, 3 N. W. 541.

The trial court did not err in submitting the issues involved in the above-stated proposition to the jury upon the evidence before that court. It is claimed by the plaintiff in error that there was no evidence sufficient to notify the agent of the condition of Mrs. Geraldton. It was not necessary that he should know what was the particular disease with which she was then afflicted; it was sufficient, to notify a man of ordinary intelligence and ordinary prudence, that the information given him with regard to her condition was that it was such

as to make it unsafe for her to be subjected to such weather as then prevailed. The information given was sufficient to convey such notice to the agent. It is known to all men of any experience and intelligence that women are almost universally subject to menstrual periods, and it is a matter of common knowledge that references to this delicate subject are usually vague insinuations.

The relative rights and duties of the railroad company and Geraldton and his wife on this occasion are analogous to those existing between persons improperly upon moving trains, when it becomes the duty of the conductor to remove them from the train. His right to remove them under such conditions is not questioned, but it is beyond all controversy his duty to see that he does not, in so doing, expose the persons to danger of health or of life, either on account of the character of the place at which he may expel them from the train, or the conditions that surround them as to the weather, or other facts which would make it dangerous for such persons to be so left. We deem it unnecessary to comment upon the different cases cited as authority herein. We call attention, however, to the case of *Weymire v. Wolfe*, cited above. In that case Wolfe was the keeper of a saloon at which one Dunn was in the habit of drinking and becoming intoxicated. On the occasion in question the weather was inclement, and Dunn, having become intoxicated, remained in the building until a late hour at night. He was intoxicated to such degree as to be incapable of taking care of himself or of being conscious of danger. At a late hour in the night Wolfe expelled Dunn from his saloon building, exposing him to inclement weather in his unconscious and helpless condition, from the effects of which he died. The court held that Wolfe was liable for wrongfully expelling the man, known to be incapable of taking care of himself, and thus exposing him to the cold. The foundation of liability in such case is not a want of authority over one's premises, nor a want of authority to expel an intruder therefrom, but it rests upon the fact that the person expelled is known to be in a condition which renders him incapable of taking measures for his own safety. Common humanity forbids that one should, under such conditions, exercise a legal right so as to produce serious injury to a fellow man. Geraldton and his wife only wished the agent to permit them to remain until the rain should cease, which, in all probability, would have been but a short time. They had been invited by the railroad company to enter the room, and were there to

secure passage upon the company's train, for which they must wait; that room was provided for such conditions. The evidence justifies a conclusion that the agent acted arbitrarily in ejecting Mrs. Geraldton. There are many cases in which the right of the railroad company to expel trespassers from its trains have been passed upon, and uniformly it has been held that such right must be exercised with due regard to safety of life and health of the person to be removed, whether he be an actual trespasser, or whether he be one who has been misled into his attitude towards the company. If the facts testified to by the witnesses be true, they presented such conditions as called for the exercise of ordinary care on the part of the agent towards Geraldton and his wife, and, if the evidence of the witnesses be true, it is unquestionably a fact that the agent did not conduct himself as a man of ordinary prudence would under similar circumstances.

In the course of human events conditions arise which require that one shall forbear to exact an observance of his legal rights, and which will justify the other party in disregarding such right to prevent injury to health or the loss of life. This proposition is well illustrated by the facts and decision of the court in *Ploof v. Putnam*, 81 Vt. 471, 20 L.R.A.(N.S.) 152, 130 Am. St. Rep. 1072, 71 Atl. 188, 15 A. & E. Ann. Cas. 1151, by the supreme court of Vermont. Putnam owned an island in Lake Champlain, with a dock for mooring his boats. He instructed his servant in charge to prevent any other person to moor a boat at the dock. Ploof was on the lake in a boat with his wife and child. A storm arose, and in the fear of loss of his boat and the lives of his wife and child, Ploof ran his boat to the dock and fastened it to Putnam's mooring. The servant loosened Ploof's boat, whereby it was put at the mercy of the storm and was driven ashore, from which the damage ensued. The supreme court of Vermont assumed that Putnam had a right to the exclusive use of his dock, and said: "There are many cases in the books which hold that necessity and an inability to control movements inaugurated in the proper exercise of a strict right will justify entries upon land and interferences with personal property that would otherwise have been trespasses. . . . This doctrine of necessity applies with special force to the preservation of human life. One assaulted and in peril of his life may run through the close of another to escape from his assailant. 37 Hen. VII. pl. 26. One may sacrifice the personal property of another to save his life or the lives of his fellows." The agent of the railroad

company had no right to eject plaintiff's wife from the waiting room of the station under the circumstances.

We have examined all assignments of error, and find no reason for disturbing the judgment of the District Court. It is ordered that the judgments of the District Court and Court of Civil Appeals be affirmed.

UNITED STATES SUPREME COURT.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, Plff. in Err.,
v.

STATE OF ARKANSAS.

(217 U. S. 136, 54 L. ed. 698, 30 Sup. Ct. Rep. 476.)

Error to state court — Federal question — decision on non-Federal ground.

1. The ruling of a state court that the

Note. — For other cases as to state regulations requiring carriers to furnish cars to shippers as interference with interstate commerce, see *Patterson v. Missouri P. Coal Co.* 15 L.R.A.(N.S.) 733, and *Southern R. Co. v. Com.* 17 L.R.A.(N.S.) 304, and notes. In a subsequent case, *Southern R. Co. v. Melton*, 133 Ga. 277, 65 S. E. 665, it is held that a rule of the railroad commission of Georgia (adopted under act of 1905) requiring railroad companies to furnish cars within four days after application by shipper is not, upon its face, as applied to an intrastate shipment, void as imposing a burden upon interstate commerce. The grounds upon which the rule was attacked were (1) that it had the effect of withdrawing equipments necessary to take care of the company's interstate business; and (2) it was void because of the general terms employed, which might be broad enough to embrace all cars, whether for interstate or intrastate shipment. The court, however, said that it was not a question as to the validity of the rule as applied to interstate shipments; and that the arguments of possible inconvenience, possible need for cars elsewhere, etc., could not prevail. "Intrastate commerce cannot be regulated by the Federal government. If it cannot be regulated by the state authorities, because of fear or possibility of some hypothetical inconvenience in regard to the interstate business of the carrier, then the intrastate business of a railroad which traverses two or more states is practically free from any regulation." The case of *Houston & T. C. R. Co. v. Mayes*, 201 U. S. 329, 50 L. ed. 775, 26 Sup. Ct. Rep. 491, was distinguished upon the grounds that it referred to interstate shipments, and the Texas act there under review expressly limited the defenses which could be made in a suit based on it, while the Georgia act contains no such provision.

power to penalize a railway company for failure to furnish cars on demand arose from a state statute instead of from a rule adopted by the railroad commission, which was challenged as repugnant to the Federal Constitution, does not eliminate the Federal questions from the case, so as to require the dismissal of a writ of error from the Federal Supreme Court, where the constitutional defenses asserted by the pleadings and embraced in the instructions asked and refused were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the pleadings.

Commerce — state regulation — carrier's duty to furnish cars.

2. Interstate commerce is unconstitutionally regulated by Kirby's Ark. Dig. §§ 6803, 6804, making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving interstate commerce, because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute.

(Mr. Chief Justice Fuller dissents.)

(April 4, 1910.)

ERROR to the Arkansas Supreme Court to review a judgment affirming a judgment of the Circuit Court for Arkansas County imposing a penalty on defendant for its refusal to furnish cars to a shipper on demand. Reversed.

The facts are stated in the opinion.

Messrs. Roy F. Britton, Nicholas J. Gantt, Jr., William T. Wooldridge, Frank G. Bridges, and Samuel H. West, for plaintiff in error:

A regulation of the instrumentalities of interstate commerce is a regulation of that commerce, and is repugnant to the commerce clause of the United States Constitution.

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 29 L. ed. 158, 1 Inters. Com. Rep. 382, 5 Sup. Ct. Rep. 826; *United States v. E. C. Knight Co.* 156 U. S. 1, 39 L. ed. 325, 15 Sup. Ct. Rep. 249; *Johnson v. Southern P. Co.* 196 U. S. 1, 49 L. ed. 363, 25 Sup. Ct. Rep. 158; *Cooley v. Port Wardens*, 12 How. 299, 13 L. ed. 996; *Hall v. DeCuir*, 95 U. S. 485, 24 L. ed. 547; *Covington & C. Bridge Co. v. Kentucky*, 154 U. S. 204, 38 L. ed. 962, 4 Inters. Com. Rep. 649, 14 Sup. Ct. Rep. 1087; *Louisville & N. R. Co. v.* 29 L.R.A. (N.S.)

Central Stock Yards Co. 212 U. S. 132, 53 L. ed. 441, 29 Sup. Ct. Rep. 246; *New Mexico ex rel. McLean v. Denver & R. G. R. Co.* 203 U. S. 38, 51 L. ed. 78, 27 Sup. Ct. Rep. 1; *Mississippi R. Commission v. Illinois C. R. Co.* 203 U. S. 335, 51 L. ed. 209, 27 Sup. Ct. Rep. 90; *Adams Exp. Co. v. Kentucky*, 214 U. S. 218, 53 L. ed. 972, 29 Sup. Ct. Rep. 633; *Rhodes v. Iowa*, 170 U. S. 412, 42 L. ed. 1088, 18 Sup. Ct. Rep. 664; *Central Stock Yards Co. v. Louisville & N. R. Co.* 63 L.R.A. 213, 55 C. C. A. 63, 118 Fed. 113; *Smith v. Alabama*, 124 U. S. 465, 31 L. ed. 508, 1 Inters. Com. Rep. 804, 8 Sup. Ct. Rep. 564; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 32 L. ed. 352, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28; *Hennington v. Georgia*, 163 U. S. 299, 41 L. ed. 166, 16 Sup. Ct. Rep. 1086; *New York, N. H. & H. R. Co. v. New York*, 165 U. S. 628, 41 L. ed. 853, 17 Sup. Ct. Rep. 418.

The order of the railroad commission and the statutes of Arkansas, as applied to the facts in this case, impose a direct burden on interstate commerce.

Houston & T. C. R. Co. v. Mayes, 201 U. S. 321, 50 L. ed. 772, 26 Sup. Ct. Rep. 491; *McNeill v. Southern R. Co.* 202 U. S. 543, 50 L. ed. 1142, 26 Sup. Ct. Rep. 722; *United States v. E. C. Knight Co.* supra; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557, 30 L. ed. 244, 1 Inters. Com. Rep. 31, 7 Sup. Ct. Rep. 4; *Southern R. Co. v. Com.* 107 Va. 771, 17 L.R.A. (N.S.) 364, 60 S. E. 70; *Minnesota v. Barber*, 136 U. S. 313, 34 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Brimmer v. Rebman*, 138 U. S. 78, 34 L. ed. 862, 3 Inters. Com. Rep. 485, 11 Sup. Ct. Rep. 213; *Voight v. Wright*, 141 U. S. 62, 35 L. ed. 638, 11 Sup. Ct. Rep. 855.

The order and statutes are void, because Congress has legislated with respect to their subject-matter in the act to regulate commerce, approved February 4, 1887, and amendments thereto.

Pennsylvania R. Co. v. Hughes, 191 U. S. 477, 48 L. ed. 268, 24 Sup. Ct. Rep. 132; *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 39 L. ed. 910, 15 Sup. Ct. Rep. 802.

Both because of its indirect and necessary effect upon interstate commerce, and because it approves of a regulation of the instrumentalities of interstate commerce, the decision of the Arkansas supreme court is an invalid encroachment upon the power of Congress to regulate commerce among the states.

Gibbons v. Ogden, 9 Wheat. 210, 6 L. ed. 73; *Hall v. DeCuir*, supra; *Walling v. Michigan*, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; *Interstate Commerce Commission v. Illinois C. R. Co.* 215 U. S. 452, 54 L. ed. 280, 30 Sup. Ct. Rep. 155; *Baltimore & O. R. Co. v. United States*,

215 U. S. 481, 54 L. ed. 292, 30 Sup. Ct. Rep. 164; Interstate Commerce Commission v. Chicago & A. R. Co. 215 U. S. 479, 54 L. ed. 291, 30 Sup. Ct. Rep. 163; United States v. Colorado & N. W. R. Co. 15 L.R.A. (N.S.) 167, 85 C. C. A. 27, 157 Fed. 321, 13 A. & E. Ann. Cas. 893.

Messrs. Hal L. Norwood, F. E. Brown, and Pettit & Pettit, for defendant in error:

The law of Arkansas recognizes and establishes the common-law excuses for failure to furnish sufficient shipping facilities.

St. Louis Southwestern R. Co. v. Clay County Gin Co. 77 Ark. 362, 92 S. W. 531.

The law of Arkansas, which is simply declaratory of the common law, requiring railroads to furnish cars, subject to reasonable excuses, is not a burden on interstate commerce.

Calvert, Regulation of Commerce, p. 5; Richmond Elevator Co. v. Pere Marquette R. Co. 10 Inters. Com. Rep. 636; Kentucky & I. Bridge Co. v. Louisville & N. R. Co. 2 Inters. Com. Rep. 118; United States ex rel. Coffman v. Norfolk & W. R. Co. 109 Fed. 831.

Mr. Justice White delivered the opinion of the court:

Prior to October, 1905, the railroad commission of Arkansas promulgated a rule by which, within five days after written application by a shipper, it was made the duty of a railway company, under the conditions prescribed in the rule, to deliver freight cars

to such shipper, for the purpose of enabling him to load freight. The rule in question, known as order No. 305, is in the margin.

Complaint was made by Philip Reinsch before the commission, charging the St. Louis Southwestern Railway Company with having violated this rule, in that it was fifty-one freight cars short in complying with written applications made at various times in October, November, and December, 1905, and January, 1906, for the delivery at a station called Stuttgart, of a much larger number of freight cars. The commission found that the railway company was short in the delivery of cars, as alleged, and that its failures in that respect not only violated order No. 305, previously referred to, but also § 10 of an act of March 11, 1890, embodied in Kirby's Digest as § 6800. It also declared that by these violations of the statute and rule of the commission the railway company had become subject to penalties in favor of the state of Arkansas, as provided in § 18 of the act of 1890, being § 6813 of Kirby's Digest, which penalties were to be enforced as therein provided. Conformably to the section in question, the prosecuting attorney for the proper county commenced this action in the name of the state against the railway company, to recover penalties to the amount of \$1,950. Rule No. 305 of the commission was recited, the proceedings before the commission were detailed, and the order made by the commission, finding the defaults on the part of the railway company, was set out, and

It is ordered by the commission that its rules be so amended that when a shipper makes written application to a railroad company for a car or cars, to be loaded with any kind of freight embraced in the tariff of said company, stating in said application the character of the freight, and its final destination, the railroad company shall furnish same within five days from 7 o'clock A. M. the day following such application. Provided, that when a shipper orders a car or cars and does not use the same, he shall pay demurrage for such time as he holds the car or cars, at the rate of \$1 per car per day, dating from 7 o'clock A. M. after the car or cars are placed.

Or, when the shipper making such application specifies a future day on which he desires to make a shipment, giving not less than five days' notice thereof, computing from 7 o'clock A. M. the day following such application, the railroad company shall furnish such car or cars on the day specified in the application.

When freight in car loads or less is tendered to a railroad company, and correct shipping instructions given, the railroad agent must immediately receive the same for shipment, and issue bills of lading therefor; and whenever such shipments have

been so received by any railroad company they must be carried forward at the rate of not less than 50 miles per day of twenty-four hours, computing from 7 o'clock A. M. the second day following the receipt of shipment. Provided, that in computing the time of freight in transit there shall be allowed twenty-four hours at each point where transferring from one railroad to another, or rehandling freight, is involved.

The period during which the movement of freight is suspended on account of accident, or any cause not within the power of the railroad company to prevent, shall be added to the free time allowed in the rule, and counted as additional free time.

The commission reserves the right, on its own motion, to suspend the operation of these rules, or any one or more of them, whole or in part, whenever it shall appear that justice demands such action, and the commission will, upon complaint, hear and act upon application for a like suspension.

Nothing in these rules shall apply to the shipment of live stock and perishable freight where the rules of this commission, or the laws of the state require the prompt furnishing of cars or movement of freight than provided for by these rules.

upon these considerations the prayer for the statutory penalty was based.

A demurrer having been overruled, an answer was filed on behalf of the railway company. By that answer it was alleged that the company was engaged in the transportation of interstate shipments of freight over its line of railroad in the states of Arkansas, Illinois, Louisiana, and Missouri, and that its equipment of freight cars for the transaction of its business, both interstate and state, was ample. That, anticipating the possible increase of business, both interstate and state, and as a precautionary measure, the company had, prior to the autumn of 1905, endeavored to contract for the construction of a large number of additional freight cars, but failed to do so, because the car manufacturers had such a press of work that they were unable to take the order. That thereupon, in an effort to provide for every future contingency, the corporation had, at a very large expense, commenced the construction of a plant of large capacity to enable it to manufacture its own cars, and was pressing the same to completion in the shortest possible time. It was alleged that at the time of the alleged defaults there was an extraordinary demand for cars, both for the movement of interstate and local traffic; and when, as the result of this condition, the shortage developed, the company had equally distributed its cars to the shippers along its line, giving no preference to interstate over local shippers, or to local over those desiring cars for interstate shipments. It was alleged that it would have been impossible for the company to comply with rule No. 305 without discriminating against its interstate commerce shippers, and therefore obedience to the rule would have resulted in a direct burden upon interstate commerce. Referring to the interstate commerce business of the company, which it was alleged moved over its own line through the states of Arkansas, Illinois, Louisiana, and Missouri, and thence by connecting roads throughout the United States and Canada, it was charged the burden imposed upon the company to deliver cars to local shippers without reference to the effect and operation of such delivery upon the interstate commerce business of the company would be a direct burden upon interstate commerce, and therefore repugnant to the Constitution of the United States, and that the same result would flow from enforcing the command of the commission as embodied in its rule No. 305. The rule, moreover, was especially assailed as being repugnant not only to the commerce clause, but to the 14th Amendment, both because of the inherent nature of the duty which the rule

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sought to impose, and also because of the unreasonable conditions which were expressed therein.

There was a trial to a jury. Without going into detail it suffices to say that specific instructions were asked, in reiterated form, by the defendant company, concerning its asserted defenses under the Constitution of the United States; that is, the repugnancy to the Constitution of the rule of the commission and of the statute imposing penalties upon it for its failure to furnish cars. After verdict against the company for \$1,350, and judgment thereon, the cause was taken to the supreme court of the state of Arkansas, and from the action of that court in affirming the judgment (85 Ark. 311, 122 Am. St. Rep. 33, 107 S. W. 1180) this writ of error is prosecuted.

The question for decision will be simplified by analyzing the action of the court below,—that is, by stating the facts which it deemed were established, and by precisely fixing the issues and principles governing the same which the court stated and applied. Clearing the way to consider the proposition which it conceived the case involved in its fundamental aspect, the supreme court of Arkansas at once disposed of the contention that the commission was without power to adopt rule No. 305 by the statement that the power to do so was expressly conferred by statutes of the state. The court did not pass on the contentions concerning the alleged conflict between the rule and the Constitution of the United States, because it was expressly declared that it was not at all necessary to do so. This was based upon the conclusion that the duty to furnish the cars which had been demanded arose from statutory provisions (Kirby's Dig. §§ 6803, 6804) which were but expressive of the common law, and that the liability for the penalty which was imposed by the judgment below equally resulted, considering the default as alone arising from violations of the statutory duty.

The statutory duty to supply cars on application having been thus ascertained, and the failure of the company to furnish after demand not being disputed, the court was brought to consider what it declared to be the only question in the case; that is, "Whether the undisputed evidence introduced by appellant presented a sufficient excuse for the failure to furnish the cars." In so far as adequate excuse could arise from the complete discharge by the company of the duty to equip its road with a sufficient number of cars, it was recognized that the proof was ample; indeed, the court said:

"In fact, the appellant was shown to have a larger car equipment than the average freight-carrying road, and the failure to

furnish cars was wholly due to an inability to regain its cars which were sent to other roads carrying freight from its own line."

Coming, then, to state the facts concerning the cause which the court expressly found was wholly responsible for the failure to deliver all the cars asked for, it was pointed out:

"The appellant is an originating line, originating about 70 per cent of its traffic and receiving about 30 per cent. To illustrate its situation, during the month of November, 1905, it had in revenue service 9,517 cars, of which it averaged daily 3,982 in use on its own lines, 5,525 off its line, and 2,519 foreign cars in use. In other words, a daily balance of exchange of 1,473 cars was against it, and its shortage in cars was only about 650 per day."

Directing attention to the fact that the preponderant originating business of the road led to a preponderance of interstate over domestic or local traffic, and that such interstate traffic would be greatly impeded, if not paralyzed, by breaking bulk at the state line and refusing to give continuous transportation, by not allowing its cars, when loaded, to move beyond its line to the roads of connecting carriers, the court was brought to consider whether thus permitting the cars to move for the purpose of continuous interstate commerce traffic was, in and of itself, a fault entailing legal responsibility under the statute for a refusal to deliver cars for local traffic when requested. In holding the negative of this proposition the court said:

"The evidence indisputably establishes that it is a benefit to the shipping public to interchange cars, and not to refuse to send cars off the line. . . . It is unquestionably good for the public that the railroads of the United States have a system of interchange of cars, instead of each road hauling to its termini only, and thereby force reloading and reshipment. The inconvenience and expense of such a system would at once condemn it as failing to meet public requirements. It is unquestionably the policy of both state and Federal legislation to facilitate, if not require, an interchange of cars. The most recent illustration of this policy is found in § 17 of the act of April 19, 1907 (Acts 1907, p. 463). For one railroad company to be an Ishmaelite among its associates would operate disastrously to its shippers. The shippers of Arkansas expect the public carriers to put their cotton to the spinners in New England, and their fruit to the North and their lumber and coal to the four quarters of the Union, without change from consignor to consignee."

Thus deciding that the mere delivery of cars for through transportation was not a

factor in determining whether there was legal fault, the court came to consider whether there was anything in the arrangement by which the cars in question were permitted to go off the line, which in and of itself constituted fault and consequent responsibility for failure to furnish all the cars required in time of shortage. Reviewing the evidence on this subject, it was found that the company was a member of an association known as the American Railway Association, which had adopted rules governing the interchange of cars from one road to another, with provisions for the return thereof and for compensation therefor, the association embracing and its rules governing 90 per cent of the railroads of the United States. Fixing thus the system which controlled the company in the interchange of its cars, it was determined that the mere formation of an association for such purpose was not repugnant to the laws against combinations in restraint of trade, the court, after referring to various state decisions to that effect, saying:

"The result of these and other decisions, as summed up in an excellent text-book, is that these associations are lawful, and their rules and regulations, when reasonable, will be upheld. 2 Hutchinson, Carr. 3d ed. § 861. Mr. Elliott says that such associations formed for the purpose of making and enforcing reasonable regulations to facilitate business and secure the prompt loading, unloading, and return of cars, cannot be held illegal, upon the ground that the constituent companies, by becoming members, surrender their corporate functions and control to the association. 4 Elliott, Railroads, § 1568."

Having thus sustained the right of the road to deliver its cars for the purpose of continuous transportation beyond its line to interstate commerce, and sanctioned the general method by which it was sought to regulate and control the transmission and return of such cars, that is, by membership in the American Railway Association, the nature and character of the rules of the association were considered. Without going into detail, or following the statements of the court on the subject, it suffices to say that, analyzing the rules of the association, the court concluded that the regulations were inefficient in many respects, did not provide sufficient penalties to secure the prompt return of cars by roads which might receive the same, but, on the contrary, afforded a temptation in time of car shortage inducing a road having the cars of another road to retain and use them, paying the penalty, as to do so would afford it an advantage. Pointing out that the general result of the operation of the rules of the American Railway Association for the interstate

change of cars had proven ineffective in the past, it was held that the company was at fault for delivering its cars to other roads for the movement of interstate commerce subject to the regulations of the American Railway Association, and therefore the penalty imposed in the judgment was rightly assessed.

As the penalty, which the court sustained, was enforced solely because of its conclusion as to the inefficiency of the rules and regulations of the American Railway Association, which governed 90 per cent of the railroads in the United States, the court was evidently not unmindful that the carrier before it was powerless, of its own motion, to change the rules thus generally prevailing, and therefore was necessarily either compelled to desist from the interchange of cars with connecting carriers for the purpose of the movement of interstate commerce, or to conduct such business with the certainty of being subjected to the penalties which the state statute provided for. We say this, since the court said: "It may be better for the appellant to suffer these ills than to sail under a black flag, and refuse to send its cars beyond its line. That is not a question for the court. Until the appellant carrier shows reasonable rules and regulations for the interchange of cars, it cannot avail itself of these rules of interchange as causing and excusing its default to the public, for the rules here shown have proved unreasonable and inefficient before this default occurred." And the gravity of the ban on interstate commerce which it was thus recognized would result from the ruling made cannot be more vividly portrayed than by once again quoting the statement of the court on the subject, saying: "For one railroad company to be an Ishmaelite among its associates would be disastrous to its shippers." If the railroad company, compelled to be a law unto itself because of its inability to change, by its own isolated will, the rules of the American Railway Association, should prefer to subject itself to the penalties inflicted by the state statute rather than bring disaster to its shippers, the seriousness of the burden to which interstate commerce would be subjected cannot be better illustrated than by saying that, by the provisions of the state statute, the penalty upon the carrier for each violation of the act or of the rules and regulations of the commission was not less than five hundred nor more than three thousand dollars.

When, by thus following the careful analysis made by the court below, the contentions which the case presents are circumscribed and the issues to which all the controversies are reducible are accurately

defined, we think no serious difficulty is involved in their solution. In the first place, it is suggested by the defendant in error that no Federal question arises for decision, and therefore the writ of error should be dismissed. This rests upon the theory that, as the court below put the rule of the commission, No. 305, out of view, and declared in its statement of the case that no extraordinary or unusual rush of business on the line of the defendant company occasioned the car shortage, therefore no ground of Federal cognizance remained; as, in other respects, the action of the court below was, in effect, placed purely upon matters of local concern broad enough to sustain its judgment. The contention is plainly without merit. It is to be conceded that the ruling of the court as to the irrelevancy of the rule adopted by the commission eliminates from consideration so much of the answer and of the instructions asked by the company and refused, relating to the repugnancy of the order to the commerce clause of the Constitution, both on account of its inherent operation and because of unreasonable provisions, which, it was alleged, it contained. But the constitutional defenses which were asserted by the answer, and which were embraced in the instructions asked and refused, were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the answer. And the ruling of the court, that the asserted power arose from the statute instead of from the rule adopted by the commission, but changed the form without in any way minimizing or obscuring the completeness of the Federal defense which was made in the pleading and necessarily passed upon by the court below.

Coming to the merits, we think it needs but statement to demonstrate that the ruling of the court below involved necessarily the assertion of power in the state to absolutely forbid the efficacious carrying on of interstate commerce, or, what is equivalent thereto, to cause the right to efficiently conduct such commerce to depend upon the willingness of the company to be subjected to enormous pecuniary penalties as a condition of the exercise of the right. It is to be observed that there is no question here of a regulation of a state forbidding an unequal distribution of cars by a carrier for the benefit of interstate to the detriment of local commerce. This is the clear result of the finding below as to the proportion of the originating traffic of the road, and the extent of the cars retained and those permitted to go beyond the line of the road for the purposes of interstate commerce. If it

be that the court below was right in its assumption that the rules of the American Railway Association, governing, as was conceded by the court, 90 per cent of the railroads, and hence a vast proportion of the interstate commerce of the country, are inefficient to secure just dealing as to cars moved by the carriers engaged in interstate commerce, that fact affords no ground for conceding that such subject was within the final cognizance of the court below, and could by it be made the basis of prohibiting interstate commerce or unlawfully burdening the right to carry it on. In the nature of things, as the rules and regulations of the association concern matters of interstate commerce inherently within Federal control, the power to determine their sufficiency, we think, was primarily vested in the body upon whom Congress has conferred authority in that regard.

The judgment of the Supreme Court of the State of Arkansas is reversed, and the case remanded for further proceedings not inconsistent with this opinion.

Mr. Chief Justice Fuller dissents.

KANSAS SUPREME COURT.

ELARANDA A. J. BROWN et al., Appts.,
v.
UNION PACIFIC RAILROAD COMPANY.

(81 Kan. 701, 106 Pac. 1001.)

Carrier — injury to passenger — negligence — burden of proof.

To sustain an action for damages occasioned by the alleged negligence of another, it is necessary for the claimant not only to show that the injury occurred, but to produce sufficient evidence to show *prima facie*

Headnote by SMITH, J.

Note. — Presumption of negligence from injury to passenger.

This note is supplementary to the note in 13 L.R.A.(N.S.) 601, and contains only the cases upon that subject since the time of that note.

The rule—in general.

It seems to be the general rule that, while mere proof of an injury to a passenger raises no presumption of negligence on the part of the carrier, proof of such injury as the result of an accident to any of the carrier's appliances, such as a derailment or collision, or from some cause exclusively under the carrier's control, does afford presumptive evidence of negligence, which, if unexplained, entitles the passenger to recover.

"If an injury to a passenger is caused by 29 L.R.A.(N.S.)

that such injury occurred through the fault of the other. It is not sufficient to show circumstances which would indicate that the other party might have been guilty of negligence, especially when the evidence furnished suggests, with equal force, that the injury might have resulted without fault on the part of the other party.

(February 12, 1910.)

APPEAL by plaintiffs from a judgment of the District Court for Dickinson County in defendant's favor in an action brought to recover damages for the alleged negligent killing of John Brown. Affirmed. The facts are stated in the opinion.

Mr. E. C. Little for appellants.

Messrs. R. W. Blair, H. A. Scandrett, and B. W. Scandrett for appellee.

Smith, J., delivered the opinion of the court:

This action was brought by the appellants as next of kin to recover from the appellee damages for the alleged killing of John Brown, who was the husband of Elaranda A. J. Brown and father of the other appellant. The petition of the appellants sufficiently alleged negligence as the proximate cause of the death. The appellee answered by a general denial and an allegation of contributory negligence. At the trial a jury was impaneled and the appellants introduced their evidence. The appellee demurred to the evidence as insufficient to sustain a cause of action, and this demurrer was sustained, and judgment rendered against the appellants for costs.

Some other questions are argued, but the only real question in the case is the sufficiency of the evidence, construed in the light most favorable to the appellants to sustain a cause of action. The evidence is

apparatus wholly under the control of the carrier, and furnished and applied by it, or by some defect in machinery, cars, or track, and the accident is of such a character as does not ordinarily occur if due care is used, the law comes to the aid of the plaintiff and raises a presumption of negligence. The presumption arises, however, from the nature of the accident and the circumstances, and not from the mere fact of the accident itself." *Barnes v. Danville Street R. & Light Co.* 235 Ill. 566, 128 Am. St. Rep. 237, 85 N. E. 921.

Other cases laying down this general rule, in substance, are: *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336, 26 L.R.A.(N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1005; *Bonneau v. North Shore R. Co.* 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106; *Kehan v. Washington R. & Electric Co.* 28 App. D. C. 108; *Dieckmann v. Chicago & N. W. R. Co. (Iowa)* 121 N. W. 676, reversing on rehearing 105 N. W. 526.

troduced shows prima facie that the deceased was a passenger on the appellee's railroad from Kansas City, Missouri, to Abilene, Kansas. Nothing unusual in his demeanor is shown. The train arrived at Abilene and stopped at that station about 11 o'clock at night, and a few minutes after it had passed on to the westward the deceased was found 200 or 300 feet east of the depot, lying close to the north rail of the main track, the dis severed legs between the rails, and many bruises and wounds on the other parts of the body. The surface of the cinders and the blood on the rails indicated that the body had been dragged 25 or 30 feet to the position where it was found. Death occurred early the following morning.

So far as is shown, no one saw the deceased leave the coach in which he was riding, no one saw him fall, and nothing is shown in regard to the occurrence, except as before stated. The train was a vestibule train, consisting of two or three day coaches, one of which was used as a smoker, in which, so far as shown, the deceased rode. There were also two or three sleeping cars. It is alleged in the petition that the employees of the appellee negligently opened the vestibule to one of the coaches before the train arrived at the depot, and, by inference at least, invited the passengers to assemble in the vestibule, so that they might alight as quickly as possible upon the stopping of the train; that the train was running unreasonably fast just before

Price v. Metropolitan Street R. Co. 220 Mo. 435, 132 Am. St. Rep. 588, 119 S. W. 932; Todd v. Missouri P. R. Co. 126 Mo. App. 684, 105 S. W. 671; Mitchell v. Chicago & A. R. Co. 132 Mo. App. 143, 112 S. W. 291; Williford v. Southern R. Co. (S. C.) 67 S. E. 302; Shelton v. Southern R. Co. (S. C.) 67 S. E. 899; Sullivan v. Charleston & W. C. R. Co. (S. C.) 67 S. E. 905; Sutton v. Southern R. Co. 82 S. C. 345, 64 S. E. 401.

But negligence is presumed only where the occurrence would not happen in the ordinary course, except by negligence on the part of the carrier, and not where it may have happened through the negligence of a third party. Elliott v. Brooklyn Heights R. Co. 127 App. Div. 300, 111 N. Y. Supp. 358.

And there is no presumption of negligence from an injury to a passenger, unless it is caused by some happening not ordinarily incident to the prosecution of the carrier's business in the customary manner, or by such an accident as does not usually occur without negligence on the part of the carrier. DeYoe v. Seattle Electric Co. 53 Wash. 588, 102 Pac. 446, affirmed on rehearing in 53 Wash. 593, 104 Pac. 647, 1133.

"It is not the law . . . that the mere fact that a passenger is injured while aboard a car, or while alighting therefrom, creates a presumption that the injury was caused by want of care on the part of the defendant operating such car. It must first be shown that the injury came from the movement of the car by those in charge of it, or from something connected therewith or in the control of the defendant. When this is done, the law then presumes, prima facie, that the particular thing thus shown to have caused the injury was due to the defendant's negligence, and the burden is thrown upon the defendant to disprove the prima facie case thus made. Such negligence is presumed because such accidents do not ordinarily happen if due care is used, and because the defendant is usually better able than the plaintiff to show the actual truth of the matter." Wyatt v. 29 L.R.A. (N.S.)

Pacific Electric R. Co. 156 Cal. 170, 103 Pac. 802.

Sufficiency of averments or proof—in general.

No presumption of negligence on the part of a carrier arises from the mere fact that a passenger is injured, but the plaintiff must allege and prove that the injury was caused by some person or thing connected with the carrier's railroad or business of transportation. Pennsylvania R. Co. v. McCaffrey, 79 C. C. A. 224, 149 Fed. 404; Smithers v. Wilmington City R. Co. 6 Penn. (Del.) 422, 67 Atl. 167; Elliott v. Wilmington City R. Co. 6 Penn. (Del.) 570, 73 Atl. 1040; Benson v. Wilmington City R. Co. (Del.) 75 Atl. 793; Knuckey v. Butte E. R. Co. (Mont.) 109 Pac. 979; Rhea v. Minneapolis Street R. Co. (Minn.) 126 N. W. 823; Brown v. Atlantic Coast Line R. Co. 83 S. C. 53, 64 S. E. 1012; Paul v. Salt Lake City R. Co. 34 Utah, 1, 95 Pac. 363; Foden v. Brooklyn Heights R. Co. 136 App. Div. 765, 121 N. Y. Supp. 420.

Where a passenger is killed by falling or being thrown from a moving train, there is no presumption of negligence of the carrier until the cause of the accident is shown, and shown to be something under the control of the carrier or its servants. Paris & G. N. R. Co. v. Robinson (Tex. Civ. App.) 114 S. W. 658.

No presumption of negligence on the part of the carrier arises from proof merely that a passenger was missed from the train on which he was riding at night, that one of the vestibule doors was open, and that his mangled body was found next morning at the side of the track, without any evidence tending to show in some way the carrier's responsibility for his death. Hart v. St. Louis & S. F. R. Co. 80 Kan. 699, 102 Pac. 1101.

And there is no presumption of negligence against the carrier where a passenger, while attempting to reach the platform of an elevated railroad, pushed against the glass panel of a swinging door which was

reaching the depot, and, as the deceased was waiting in the vestibule preparatory to alighting, the train was stopped with unnecessary and unusual suddenness, and thus jerked and threw the deceased out of the vestibule, and under the wheels of the car. As before said, there is no evidence to support these allegations. We have the question squarely presented whether negligence on the part of the railroad company is to be inferred from the bare facts that a passenger was riding upon a vestibule passenger train which arrived at the station of his destination, and immediately after it had departed therefrom he was found mangled beside the rail in such manner that it is evident that his injuries were received by his being run over by the wheels of the

train. Many authorities are cited to the effect that where a train or coach in which a passenger is riding is derailed, or where some other accident happens to the train occasioned by defects in the appliances thereof or in the track, and injury to a passenger occurs by reason thereof, negligence on the part of the railroad company is to be presumed. In all such cases the presumption is founded upon proof of facts sufficient to account for the injuries sustained, and, in the absence of proof of any other cause for the injury, the natural presumption is that it occurred through the negligence of the railroad company: special emphasis being given to the great degree of care and precaution required of

locked, and broke the glass and was injured, without evidence that the door was improperly constructed, or lacked sufficient strength to resist ordinary pressure if it had been unlocked. *McCormack v. Interborough Rapid Transit Co.* 132 App. Div. 703, 117 N. Y. Supp. 532, reversing 61 Misc. 601, 113 N. Y. Supp. 1006.

There is no presumption of negligence from mere injury to a passenger, where nothing happened to the car on which he was riding, and there was no injury to it, nor collision nor breakage of anything. *Levin v. Philadelphia & R. R. Co.* 228 Pa. 266, 77 Atl. 456.

Evidence that a passenger compelled to stand next the guard rail on a crowded open car was thrown by a lurch of the car against one passing in the opposite direction, and injured, is insufficient to raise a presumption of negligence against the carrier. *Cline v. Pittsburgh R. Co.* 226 Pa. 586, 27 L.R.A. (N.S.) 936, 75 Atl. 850.

Where a passenger was injured by reason of her falling on a station platform constructed, presumably to meet the requirements of traffic, in such a way that one portion of it was lower than another, but the difference of level was not greater than the height of an ordinary step, negligence on the part of the carrier is not presumed, but must be proved by showing that the platform is of a design which a reasonably careful judgment would disapprove, as being likely to cause accident to persons using it as a way to and from trains. *Feil v. West Jersey & S. R. Co.* 77 N. J. L. 502, 72 Atl. 362.

Negligence is not presumed from the mere fact that a car door slammed shut, catching and crushing the hand of a passenger who, while attempting to pass through it, rested his hand on the door jamb. *Christensen v. Oregon Short Line R. Co.* 35 Utah, 137, 20 L.R.A. (N.S.) 255, 99 Pac. 676.

Negligence of the carrier, however, is held, in *Louisville & N. R. Co. v. Church*, 155 Ala. 329, 130 Am. St. Rep. 29, 46 So. 457, to have been sufficiently set out, as against a demurrer, by a complaint alleging that while plaintiff was a passenger, and 29 L.R.A. (N.S.)

was being carried by defendant as such, on a train, her hand was caught between a table on the train and the wall of the car, and was injured, and that the injuries were occasioned as a proximate consequence of the negligence of defendant in and about carrying plaintiff as a passenger.

And an allegation of negligence is sustained in an action for an injury to a cable car passenger by reason of his falling from the car, by proof that the car was started with a jerk of sufficient force to throw plaintiff down on the street. *Setzler v. Metropolitan Street R. Co.* 227 Mo. 454, 27 S. W. 1.

Cause within carrier's control.

—in general.

It is the general rule that where a passenger is injured through some cause within the carrier's control, negligence is presumed on the part of the latter, unless such cause is one of the usual and necessary incidents of the carrier's operations.

The following cases show circumstances which, resulting in injury to a passenger, have been held, under this rule, to raise a presumption of negligence on the part of the carrier:

—the wreck of a train on which plaintiff was a passenger. *St. Louis & S. F. R. Co. v. Savage*, 163 Ala. 55, 50 So. 113;

—passenger standing on a station platform waiting for his train, struck and injured by a mail sack thrown from a swiftly passing train. *Huddleston v. St. Louis, I. M. & S. R. Co.* 90 Ark. 378, 119 S. W. 280;

—fender of a street car becoming detached and thrown so as to strike an intending passenger. *McDonnell v. Chicago City R. Co.* 131 Ill. App. 227;

—giving way of a bridge over which a street car was passing. *Elgin, A. & S. Traction Co. v. Hench*, 132 Ill. App. 535.

—street car leaving its tracks, overturning, and landing on its side, at a curve. *McGrew v. Chicago & M. Electric R. Co.* 142 Ill. App. 210;

—controller on a street car taking in

railroad companies in the transportation of passengers for their safety.

The circumstances in this case necessarily indicate that some one of the vestibules of the train was opened at least 300 or 400 feet before the train stopped at the station. The evidence of the appellants shows that the deceased was somewhat accustomed to traveling upon trains, especially the trains of the appellee, in shipping stock to Kansas City and returning on its trains; and it is not a long drawn presumption that men accustomed to traveling upon vestibule trains know how to open the vestibules. It is a very simple matter, as detailed by the evidence, and the method of opening is apparent to any man of mature age and experience. Nor does it require

any great physical exertion. Whether a porter or some employee of the appellee opened a vestibule out of which the deceased must have fallen, or whether he opened it himself, is a matter simply of conjecture. However the vestibule may have been opened, it is also a matter simply of conjecture how he happened to fall. There is no evidence of anything unusual either in the speed of the train or in the manner of its stopping. It is not a necessary or even a usual incident for a person who happens to be in a vestibule that is open to fall out of it. The presumption is that the deceased was in the exercise of due care for his own safety, and it is probably also a fair presumption that he was in the possession of his usual faculties, and able to care

and burning out. *Louisville & S. I. Traction Co. v. Worrell* (Ind. App.) 86 N. E. 78;

—falling of a car window, caused by a weak, broken, or defective catch, where the carrier has made no effort to discover or repair the defect. *Cleveland, C. C. & St. L. R. Co. v. Hadley*, 170 Ind. 204, 16 L.R.A. (N.S.) 527, 82 N. E. 1025, 16 A. & E. Ann. Cas. 1, rehearing denied in 170 Ind. 217, 16 L.R.A. (N.S.) 535, 84 N. E. 13, 16 A. & E. Ann. Cas. 6;

—breaking of an axle on a car in a train, derailling that car and wrecking the car in which plaintiff was riding. *Morgan v. Chesapeake & O. R. Co.* 127 Ky. 433, 15 L.R.A. (N.S.) 790, 105 S. W. 961, 16 A. & E. Ann. Cas. 608;

—defect in a station platform. *McClanahan v. St. Louis & S. F. R. Co.* (Mo. App.) 126 S. W. 535;

—passenger struck by a broken door of a freight train moving in the opposite direction. *Kuttner v. Central R. Co.* (N. J. L.) 77 Atl. 470;

—flying up of a trapdoor in the floor of a trolley car. *Baum v. New York & Q. C. R. Co.* 124 App. Div. 12, 108 N. Y. Supp. 265.

—manila rope cable operating an inclined railway broke, the safety appliance did not work, the device on the car did not hold it, but also broke, and the car fell to the bottom of the incline. *Burke v. State*, 64 Misc. 558, 119 N. Y. Supp. 1089;

—giving way of back of car seat, letting passenger fall backwards, as he was in the act of sitting down. *Sullivan v. Charleston & W. C. R. Co.* (S. C.) 67 S. E. 905;

—failure of train to stop at a flag station to which a passenger had paid his fare. *Davis v. Atlantic & C. Air Line R. Co.* 83 S. C. 66, 64 S. E. 1015;

—violent and unusual movement of a coach standing in a yard and occupied by passengers. *Missouri, K. & T. R. Co. v. Stone* (Tex. Civ. App.) 25 S. W. 587;

—breaking of a brake chain. *Dearden v. San Pedro, L. A. & S. L. R. Co.* 33 Utah, 147, 93 Pac. 271;

—collapsing of a carrier's bridge under a 29 L.R.A. (N.S.)

street car. *Roanoke R. & Electric Co. v. Sterrett*, 108 Va. 533, 19 L.R.A. (N.S.) 316, 128 Am. St. Rep. 971, 62 S. E. 385, on second appeal, after new trial, 68 S. E. 998;

—breaking of an axle under the tender, and the partial derailling of a coach. *Pate v. Columbia & P. S. R. Co.* 52 Wash. 100, 100 Pac. 324.

—derailments.

"Because the carrier as a rule is in a position more easily to explain and account for a derailment of one of its trains than the passenger is, it is generally held that proof by the passenger of the derailment of the car, and of an injury as a consequence suffered by him, raises a presumption that the carrier was negligent." *Texas & P. R. Co. v. Mosley* (Tex. Civ. App.) 124 S. W. 485.

The following cases hold that a presumption of negligence arises when an injury to a passenger results from a derailment: *SOUTHERN P. Co. v. HOGAN*; *Sloan v. Little Rock R. & Electric Co.* 89 Ark. 574, 117 S. W. 551; *Bonneau v. North Shore R. Co.* 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106; *St. Louis & S. R. Co. v. Homer*, 137 Ill. App. 548; *Hickey v. Chicago City R. Co.* 148 Ill. App. 197; *Mitchell v. Chicago, R. I. & P. R. Co.* 138 Iowa, 283, 114 N. W. 622; *Chicago, R. I. & P. R. Co. v. Brandon*, 77 Kan. 612, 95 Pac. 573; *Reems v. New Orleans G. N. R. Co.* (La.) 528, 681; *Macdonald v. Metropolitan Street R. Co.* 219 Mo. 468, 118 S. W. 78, 16 A. & E. Ann. Cas. 810; *Shelton v. Southern R. Co.* (S. C.) 67 S. E. 899; *Houston & T. C. R. Co. v. Lindsey* (Tex. Civ. App.) 110 S. W. 995; *Houston & T. C. R. Co. v. Cheatham* (Tex. Civ. App.) 113 S. W. 777; *Freeman v. Davis* (Tex. Civ. App.) 117 S. W. 186; *Southern P. Co. v. Blake* (Tex. Civ. App.) 128 S. W. 668.

A presumption of negligence of the carrier arises where a passenger is injured by reason of the derailment of cars in the train, resulting from the defective condition of the track or from defective equipment or

for himself. It is also a fair presumption, there being no evidence to the contrary, that the vestibule was fairly well lighted in the usual way. All these presumptions, being indulged, do not account for the accident. On the other hand, they indicate that no such accident could have occurred. But an accident did occur, which resulted in the death of a passenger. What was the proximate cause of the accident, and who was in fault? The evidence affords no answer to these questions. Nor does any presumption afford any answer thereto.

The appellants, unable to find in the evidence any specific answer to these questions, invoke the doctrine of *res ipsa loquitur*, which simply means, "the thing or the circumstances speak for themselves." If a passenger be found dead in a wrecked train immediately or soon after the wreck occurred, the passenger having been seen sitting in a seat of a coach therein shortly before the accident happened, and there is nothing else shown to account for the death, the doctrine invoked would apply. It applies in this case to the cause of the injury. The deceased having been found mangled by the side of the rail, with the legs on the other side of the rail crushed and dismembered from the body, the circumstances speak for themselves that the injury occurred by the train passing over the body. The circumstances do not, however, indicate how the person happened to fall under the train, or whose fault occasioned the fall, if it be the fault of any-

one. In this case the vestibule from which the fall occurred may have been negligently left open by the employees of the appellee, the vestibule may have, from some unknown cause, become darkened, and the deceased may have passed into the vestibule, moved by the natural impulse of reaching home as soon as possible, and, unable to see that the doors of the vestibule were already opened, may have advanced to open them, and fallen to his destruction through the fault of the employees, and without any fault on his part. Again, the deceased may have been suffering from vertigo in the smoking car, and passed into the vestibule and opened it for himself, and from dizziness may have fallen out of it without any fault on his part or on the part of any employee of the appellee. As before said, it is all conjecture. To sustain an action for the alleged negligence of another, it devolves upon the party asserting negligence to produce sufficient evidence at least to make a prima facie case that his alleged damages occurred through the neglect of some duty which the other party owed to him, and, until he has done so, he has failed to produce evidence sufficient to sustain a cause of action. *Hart v. St. Louis & S. F. R. Co.* 80 Kan. 699, 102 Pac. 1101.

We are compelled to hold with the court below that the appellants in this case failed to offer such proof, and the judgment of the trial court therefore is affirmed.

All the Justices concur.

negligent operation or handling of the train. *Arkansas Midland R. Co. v. Rambo*, 90 Ark. 108, 117 S. W. 784.

In *Carroll v. Boston Elev. R. Co.* 200 Mass. 527, 86 N. E. 793, a presumption of negligence, on injury from a derailment, was assumed, but held to be only part of the evidence necessary for the plaintiff to offer, under his burden of proof of negligence, where the defendant carrier gave evidence from which the jury could find that it had used due care in the construction, equipment, and maintenance of the railway.

—collisions.

—in general.

Proof of a collision and injury to a passenger raises a presumption of negligence against the carrier. *Central R. Co. v. Geopp*, 153 Ala. 108, 45 So. 65; *Birmingham R. Light & P. Co. v. Sawyer*, 156 Ala. 199, 19 L.R.A. (N.S.) 717, 47 So. 67 (*dictum*); *St. Louis, I. M. & S. R. Co. v. Osborne* (Ark.) 129 S. W. 537; *Wood v. Philadelphia, B. & W. R. Co.* (Del.) 76 Atl. 613; *Pennsylvania Co. v. Purvis*, 128 Ill. App. 367; *Illinois C. R. Co. v. Roths* 29 L.R.A. (N.S.)

child, 134 Ill. App. 504; *Chicago City R. Co. v. Greinke*, 136 Ill. App. 77, affirmed in 234 Ill. 564, 85 N. E. 327; *Fahs v. Chicago City R. Co.* 144 Ill. App. 521, affirmed in 239 Ill. 548, 88 N. E. 221; *Wilson v. Chicago City R. Co.* 144 Ill. App. 694; *Mitchell v. Chicago, R. I. & P. R. Co.* 135 Iowa, 283, 114 N. W. 622; *Southern R. Co. v. Brewer*, 32 Ky. L. Rep. 1374, 103 S. W. 936; *Sewell v. Detroit United R. Co.* 135 Mich. 407, 123 N. W. 2; *Chlanda v. St. Louis Transit Co.* 213 Mo. 244, 112 S. W. 249; *Price v. Metropolitan Street R. Co.* 220 Mo. 435, 132 Am. St. Rep. 588, 119 S. W. 932; *Dempster v. Oregon Short Line R. Co.* 37 Mont. 335, 96 Pac. 717; *Murphy v. Southern P. Co.* 31 Nev. 120, 101 Pac. 522; *Briggs v. Durham Traction Co.* 147 N. C. 389, 61 S. E. 373; *Curtis v. Southern R. Co.* 151 N. C. 523, 66 S. E. 599; *Parsons v. Rhode Island Co.* (R. I.) 72 Atl. 867; *Sutton v. Southern R. Co.* 82 S. C. 345, 64 S. E. 401; *Reeves v. Chicago, M. & St. P. R. Co.* (S. D.) 123 N. W. 498; *Ft. Worth & D. C. R. Co. v. Day*, 50 Tex. Civ. App. 407, 111 S. W. 663; *Waters v. Seattle R. & S. P. Co.* 48 Wash. 233, 24 L.R.A. (N. S.) 758, 97 Pac. 419; *Harris v. Puget Sound Electric R. Co.* 52 Wash. 289, 100 Pac. 838.

ARIZONA SUPREME COURT.

SOUTHERN PACIFIC COMPANY, Appt.,

v.

KATHERINE HOGAN.

(— Ariz. —, 108 Pac. 240.)

Carrier — overturning coach — presumption of negligence.

1. Negligence on the part of a railroad company is presumed from the fact that a passenger coach was derailed, overturned, and dragged on its side, to the injury of a passenger.

Pleading — complaint — sufficiency — allegation of negligence.

2. A complaint in an action to hold a carrier liable for injuries to a passenger need not distinctly allege negligence, if it

alleges that the coach in which plaintiff was riding was derailed, overturned, and dragged on its side, to plaintiff's injury.

Trial — jury — evidence of care — presumption of negligence.

3. Whether or not evidence of good condition of track and careful handling of train is sufficient to overcome the presumption of negligence arising from the derailment and overturning of a passenger coach to the injury of a passenger is a question for the jury.

Appeal — denial of new trial — excessive damages.

4. Denial of a new trial for excessive allowance of damages will not be reversed on appeal, if one new trial was awarded on such ground, and the same judge, after careful consideration, refused to interfere with the second verdict.

Negligence on the part of the carrier is presumed where a street car passenger is injured in a collision between a car and a metal tower erected in a public square, near the track. *Volven v. Springfield Traction Co.* 143 Mo. App. 643, 128 S. W. 512.

But it is held in *Eaton v. Wilmington City R. Co.* (Del.) 75 Atl. 369, that there is no presumption of negligence from the mere fact that a street car passenger is injured as the result of a collision; but if the accident is of such character that it could not ordinarily happen if the carrier used reasonable care, the happening of the accident is some evidence of negligence, in the absence of explanation, subject to rebuttal by negating the negligence alleged.

— —with car of another company.

Where a street car passenger was injured in a collision between the car on which he was riding and the car of another street railroad, at a crossing, no presumption of negligence on the part of the latter arose from the mere fact of the collision. *Kimic v. San Jose-Los Gatos Interurban R. Co.* 156 Cal. 379, 104 Pac. 986.

But negligence on the part of the carrying company is presumed where a passenger is injured by the car on which he was riding being struck by an engine of another company, which was crossing the carrier's track at a point on its line of railway. *Asher v. East St. Louis & Suburban R. Co.* 140 Ill. App. 220.

The mere fact that a street car collides with the car of another company, injuring a passenger on the first car, raises a presumption of negligence on the part of the carrying company; but there is no presumption that the other company was negligent. *Stanbridge v. Nassau Electric Co.* 117 N. Y. Supp. 94, modified in 135 App. Div. 38, 119 N. Y. Supp. 668.

Where a street car passenger is injured by reason of the car on which he is riding running into a car owned and operated by another company, a presumption of negligence on the part of the carrying company arises, which calls upon it for an explanation, —although "quite a different question might be presented if a car owned by another company had struck the rear of this car." *Levine v. Brooklyn, Q. C. & S. R. Co.* 134 App. Div. 606, 119 N. Y. Supp. 315.

And negligence on the part of a defendant carrier is not presumed where a street car passenger is injured in and by a rear-end collision suffered by the car on which he is riding, on a track used by another company, and there is no evidence that the defendant carrier owned and operated the car which came up in the rear. *Elliott v. Brooklyn Heights R. Co.* 127 App. Div. 300, 111 N. Y. Supp. 358.

— —with vehicles.

In the following cases, negligence on the part of the carrier was presumed:

—where a street car passenger was injured by reason of the rear trucks of the car turning onto a switch as they passed over it, bringing the rear part of the car into collision with a wagon. *Eagan v. Old Colony Street R. Co.* 195 Mass. 159, 80 N. E. 696;

—where a street car passenger was injured in and by a collision between the car in which he was riding, which stopped in the middle of a street crossing, and a city fire department hose wagon proceeding to a fire at high speed. *Williamson v. St. Louis & M. R. Co.* 133 Mo. App. 375, 113 S. W. 239;

—where a passenger was injured in and by a collision between a street car on which he was riding and a truck, and it was shown that the car was proceeding rapidly at the time, and that its speed was not checked until after the collision. *Vogel v. Bahr*, 130 App. Div. 732, 115 N. Y. Supp. 284;

—where a street car passenger was injured by a collision between the car on which he was riding and an approaching team, and it appeared that the car was approaching a street crossing at such a high rate of speed as to render it dangerous and to put the car beyond the proper control of the motorman, and was driven over the

Same — refused instruction.

5. Refusal of an instruction the substance of which has been given is not error.

Same — conflicting evidence.

6. The appellate court will not set aside a verdict because it differs from the jury as to the relative weight or effect of conflicting evidence.

(April 2, 1910.)

APPEAL by defendant from a judgment of the District Court for Pima County in plaintiff's favor, and from an order denying a new trial, in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

crossing without reducing the speed. *Bamberg v. International R. Co.* 53 Misc. 403, 103 N. Y. Supp. 297, reversed on error in refusing charge on another point, in 121 App. Div. 1, 105 N. Y. Supp. 621.

But in *Blew v. Philadelphia Rapid Transit Co.* 227 Pa. 319, 76 Atl. 17, it was held that there is no presumption of negligence in favor of a passenger and against a street car company, where the former was injured by a collision between the side of the car while on its own track and a wagon not under the control of the street railway company.

—sudden starts.

Where a passenger fell while entering a train, by reason of the running or moving thereof, and was injured thereby, negligence of the carrier is presumed to be the cause of such injury, provided the passenger was not guilty of contributory negligence. *St. Louis, I. M. & S. R. Co. v. Stell*, 87 Ark. 308, 112 S. W. 878.

The sudden starting of a street car from which a passenger is in the act of alighting, in such a manner as to throw him to the pavement, raises a presumption of negligence on the part of the carrier. *Paducah Traction Co. v. Baker*, 130 Ky. 360, 18 L.R.A.(N.S.) 1185, 113 S. W. 449.

Negligence is presumed from proof that an elderly lady passenger in an enfeebled condition, whom the conductor had watched board the car, was injured by the sudden starting of the car with a jerk before she had time to be seated, where the conductor knew that when the car was to be started unusual force would have to be applied to it, and should have known that the starting of the car before the passenger was seated would likely injure her. *Brady v. Springfield Traction Co.* 140 Mo. App. 421, 124 S. W. 1070.

—sudden stops.

Negligence on the part of the carrier is presumed where a passenger is injured by being thrown from a scenic railway, by the

Messrs. Frank Cox and Francis M. Hartman, for appellant:

The burden of proof is not upon the defendant, and if the evidence upon the issue of negligence does not preponderate on either side, the defendant is entitled to a verdict.

Mexican C. R. Co. v. Lauricella, 87 Tex. 277, 47 Am. St. Rep. 103, 28 S. W. 277.

Although the derailment of the train may have been sufficient to raise the presumption of negligence, yet it did not devolve upon the defendant the duty of showing, by evidence of a preponderating weight, that the accident was not the result of its negligence.

Clark v. Hills, 67 Tex. 148, 2 S. W. 356;

sudden slowing or stopping of the car in which he was riding, accompanied by a sound as if something beneath the car interfered with it. *O'Callaghan v. Dellwood Park Co.* 242 Ill. 336, 26 L.R.A.(N.S.) 1054, 134 Am. St. Rep. 331, 89 N. E. 1005.

So, also, when a passenger is injured by the sudden and violent stopping of a train, telescoping the two cars of which it was composed. *Chicago Union Traction Co. v. Berks*, 136 Ill. App. 105.

And by a violent and unusual stop of a cable car, so that the glass in the windows was shattered and the passenger thrown against a stove. *Briscoe v. Metropolitan Street R. Co.* 222 Mo. 104, 120 S. W. 1162.

Negligence on the part of the carrier is presumed, in the absence of explanation by it, where a passenger is injured by being thrown against one of the seats in a car, by a sudden stoppage of the train. *Todd v. Missouri P. R. Co.* 128 Mo. App. 684, 105 S. W. 671.

But in *Hawk v. Chicago, B. & Q. R. Co.* 130 Mo. App. 658, 108 S. W. 1119, it is held that negligence is not presumed from an injury to a passenger thrown from his seat by the sudden stopping of a freight train on which he was riding, unless it is shown that the jolt to which the injury was due was extraordinarily violent, as a passenger assumes such jolts and jars as are necessarily incident to the handling of such trains.

—jerks.

No presumption of negligence arises against the carrier, where a passenger is injured by reason of a lurch or jerk no more violent than the lurching or jerking of trains commonly known to be a necessary incident to their rapid movement when operated with due care. *Central R. Co. v. Brown* (Ala.) 51 So. 565; *DeYoe v. Seattle Electric Co.* 53 Wash. 588, 102 Pac. 446, 104 Pac. 647, 1133; *Beatty v. Metropolitan West Side Elev. R. Co.* 141 Ill. App. 92.

And there is no presumption of the carrier's negligence from the mere fact that a passenger, in attempting to board a moving

4 Elliott, Railroads, ¶ 1634; Goss v. Northern P. R. Co. 48 Or. 439, 87 Pac. 149.

Mr. Owen T. Rouse, for appellee:

The mere fact of a train running off the track is, *prima facie*, evidence of negligence.

2 Shearm. & Redf. Neg. 4th ed. § 516; Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 562, 47 Am. Rep. 75; Texas & St. L. R. Co. v. Suggs, 62 Tex. 323; Pittsburgh, C. & St. L. R. Co. v. Williams, 74 Ind. 462; Louisville, N. A. & C. R. Co. v. Jones, 108 Ind. 551, 9 N. E. 476; Feital v. Middlesex R. Co. 109 Mass. 398, 12 Am. Rep. 720.

The fact that the car ran off the track and was dragged along the ground made a *prima facie* case of negligence against the defendant.

freight train, is thrown off by a jerk of the train. Ray v. Chicago, B. & Q. R. Co. (Mo. App.) 126 S. W. 543.

But a showing that plaintiff's intestate was injured by reason of a sudden jerk of a train which she was then attempting to board as a passenger raises a presumption of negligence of the carrier. Miles v. St. Louis, I. M. & S. R. Co. 90 Ark. 485, 119 S. W. 837.

And where a street car passenger was injured by a fall from a car as she was attempting to alight, alleged to have been caused by a sudden jerk forward of the car after it had stopped, it was held, in Kehan v. Washington R. & Electric Co. 28 App. D. C. 108, that proof of the accident causing the injury raises a presumption of negligence on the part of the carrier, and casts the burden upon it of explaining the circumstances of the accident so as to relieve itself from liability.

So, negligence is presumed against the carrier, where a passenger about to alight from a train is injured by the slamming of the car door upon his fingers, caused by a sudden jerk or stop of the train. Lake Erie & W. R. Co. v. Cotton (Ind. App.) 91 N. E. 253.

A few Missouri cases seem to make a distinction in cases of injury from sudden jerks, between freight trains and passenger trains. So, in Tickell v. St. Louis, I. M. & S. R. Co. (Mo. App.) 129 S. W. 727, it is held that where a passenger on a freight train is injured as a result of a sudden jerk, the doctrine of *res ipsa loquitur* does not obtain, so as to require the carrier to acquit itself of negligence, in the absence of proof that the jerk was extraordinary and unusual, as a passenger who elects to ride on a freight train assumes all the risks which usually attend the ordinary jerks and inconveniences incident to such mode of conveyance.

In Mitchell v. Chicago & A. R. Co. 132 Mo. App. 143, 112 S. W. 291, it is said that, though a passenger on a freight train assumes such risks and hazards as are ordinarily incident to the operation of such trains, actionable negligence on the part of

Peoria, P. & J. R. Co. v. Reynolds, 88 Ill. 418; Mitchell v. Chicago & G. T. R. Co. 51 Mich. 236, 38 Am. Rep. 566, 16 N. W. 388; Louisville, N. A. & C. R. Co. v. Pedigo, 108 Ind. 481, 8 N. E. 627; Lemon v. Chauslor, 68 Mo. 340, 30 Am. Rep. 799.

A plaintiff is not required to show or allege what particular acts or misconduct of defendant caused the injury.

Iron R. Co. v. Mowery, 36 Ohio St. 419, 38 Am. Rep. 597; 2 Shearm. & Redf. Neg. 4th ed. § 516.

When damage or injury happens to the passenger by the breaking down or overturning of the vehicle, the presumption *prima facie* is that it occurred by the negligence of the carrier, and the *onus probandi* is on the carrier that there was no

the carrier is presumed where a passenger on a freight train is injured by being thrown from a trunk on which he was sitting in the caboose, through a side door, to the ground, by an extraordinary and unusual jerk given the train on a coupling of cars.

—curves.

Negligence is not presumed from an injury to a passenger caused by his being thrown down while standing in a train without holding on to anything, by reason merely of a rocking or lurching of the train in passing over a curve at moderate speed, being such a motion as is necessarily incident to the movement of trains. Norfolk & W. R. Co. v. Rhodes, 109 Va. 176, 63 S. E. 445.

—explosions.

Negligence is presumed where a passenger is injured by an explosion or burst of flame from the controller on a street car in which she is riding. Beattie v. Boston Elev. R. Co. 201 Mass. 3, 86 N. E. 920.

Proof of the explosion of the controller of a street car, resulting in injury to a passenger, is *prima facie* proof of the carrier's negligence, which, however, is fully met and overcome by proof that the controller might have acted as it did without any negligence on the part of the carrier. Gay v. Milwaukee Electric R. & Light Co. 138 Wis. 348, 120 N. W. 283.

—ordinary operations.

No negligence on the part of the carrier is presumed where a person goes to a flag station after dark, intending to flag an approaching train with burning paper, to become a passenger on it, and, having failed to light the paper soon enough to permit the train to stop, is struck by it in passing. Bruff v. Illinois C. R. Co. (Ky.) 24 L.R.A. (N.S.) 740, 121 S. W. 475.

Where a passenger is injured by falling into a space between a car and the platform, while attempting to board the car

negligence whatever on its part, and that the damage or injury was occasioned by inevitable casualty, or by some cause which human care and foresight could not prevent

Lemon v. Chanslor, supra; *McKinney v. Neil*, 1 McLean, 540, Fed. Cas. No. 8,865; *Meier v. Pennsylvania R. Co.* 64 Pa. 225, 3 Am. Rep. 581; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115.

Doan, J., delivered the opinion of the court:

This is an appeal from a judgment for \$3,250, rendered upon a verdict of a jury for that amount in a suit brought in the district court of Pima county by the appellee herein against the appellant. On June 14, 1905, Katherine Hogan was a passenger in a car that was part of a train on a railroad of the defendant company, en route from Tucson, Arizona, to Kansas City, Missouri. While a passenger on that train, the car in which Miss Hogan was

riding was (with some others of the train) derailed at a switch about 35 miles east of Tucson. The plaintiff was bruised on the left hip, and otherwise injured. She brought an action for damages because of these injuries, against the appellant company in May, 1906. The action was tried to a jury, and a verdict for \$3,000 was set aside by the judge of the trial court, and a new trial granted. The case was again tried to a jury on the 8th day of June, 1908, and a verdict returned against the company for \$3,250, on which judgment was rendered, and a motion by the defendant for a new trial was denied. From this judgment and the denial of the motion for a new trial, the defendant has prosecuted this appeal.

The defendant filed a general demurrer to the complaint of the plaintiff, and, while the record does not clearly disclose whether this demurrer was urged by the defendant, the same legal question is presented under objection by defendant to testimony

at a subway station, the carrier is not negligent as a matter of law for failure to bridge the space thus existing, or liable to exist, if not more than 10 inches under any circumstances, and 3 inches is the minimum clearance space necessary. *Anshen v. Boston Elev. R. Co.* 205 Mass. 32, 91 N. E. 157.

There is no presumption of the carrier's negligence from proof that a little girl passenger on a street car, wishing to get off at the next crossing, went to the rear platform and stood near the edge thereof, holding loosely with one hand some part of the car; that the car slowed down for the stop, and ran into a turnout just before reaching the crossing; and that, by reason of the motion caused by the car entering the turnout, the child fell from the platform. *Pascell v. North Jersey Street R. Co.* 75 N. J. L. 836, 60 Atl. 171.

No negligence on the part of the carrier can be inferred from the mere fact that a trolley pole slipped off the wire, causing the rope attached to it to catch and injure a passenger riding on the rear bumper of a crowded street car. *Feldheim v. Brooklyn, Q. C. & Suburban R. Co.* 122 App. Div. 883, 107 N. Y. Supp. 413.

Cause of injury not within carrier's control.

Where an injury to a passenger is caused by something not within the carrier's control,—something in no way connected with the appliances or machinery used in the operation of the road, or the acts of the employees in the conduct of the train, or with the construction of the road,—there is clearly no presumption of negligence on the part of the carrier therefrom.

Accordingly, where a street car passenger is struck and injured by some object

entering through an open window near which he is sitting, he must prove both the injury and the negligence which caused it. *Casper v. New Orleans R. & Light Co.* 12 La. 603, 46 So. 666.

And there is no presumption of the carrier's negligence from an injury to a passenger entering a car, by reason of his falling over parcels negligently left in the doorway by another passenger, unless it is shown that the carrier had notice of the obstruction, or that it had existed for such a length of time that it should have known thereof. *Lyons v. Boston Elev. R. Co.* 204 Mass. 227, 90 N. E. 419.

So, where a passenger sitting at a closed window on a train is injured by the sudden breaking of the window pane by a missile from outside, the nature of which is unknown, whereby his eyes were cut by particles of glass. *Ginn v. Pennsylvania R. Co.* 220 Pa. 552, 69 Atl. 992.

And there is no presumption of negligence on the part of the carrier, where a passenger is injured by reason of the act of a fellow passenger is tossing through an open window an empty bottle, the accident breaking of such bottle against a car upon another track, and the return of a fragment of glass through the open window, injuring the passenger. *Barlick v. Baltimore & O. R. Co.* 41 Pa. Super. Ct. 87.

Elevators.

Operators of elevators carrying passengers are held to be common carriers of passengers, and subject to the same rule as to the presumption of negligence from an injury to a passenger as in the case of street or steam railroad companies.

The fact that an elevator falls when passengers are being carried thereon, where they are injured, is evidence that the

being admitted under the complaint, on the ground that the complaint did not state fact sufficient to constitute a cause of action. It is urged by the appellant that the complaint does not state a cause of action, and is therefore insufficient to authorize the introduction of testimony, because of its failure to charge negligence on the part of the company. The only part of the complaint that alleges or tends to allege negligence reads as follows: "That while plaintiff was such a passenger on the said train, in the said car, on the day aforesaid, at a point in said Arizona, . . . the said car of the said train in which plaintiff was then seated was thrown from the track, and thrown onto its side, and dragged along on its side a great distance; that by reason of said throwing of said car, and the dragging along on the ground as aforesaid, plaintiff was thrown about said car, and against the sides thereof, and was greatly bruised and injured." As a common carrier of passengers, the

railroad is bound to exercise the highest degree of care practicable under the circumstances. *Clerc v. Morgan's L. & T. R. & S. S. Co.* 107 La. 370, 90 Am. St. Rep. 319, 31 So. 886; *Stokes v. Saltonstall*, 13 Pet. 181, 10 L. ed. 115; *New Jersey R. Co. v. Pollard*, 22 Wall. 341, 22 L. ed. 877; *Bonneau v. North Shore R. Co.* 152 Cal. 406, 125 Am. St. Rep. 68, 93 Pac. 106. The authorities nearly all agree that when a passenger is injured by the derailing of a train or by its wreck, or by a collision with some other train or agency, there is a presumption of negligence on the part of the road operating said train, that requires an introduction of evidence on the part of defendant to overcome or rebut. *Denver S. P. & P. R. Co. v. Woodward*, 4 Colo. 1; *Peoria P. & J. R. Co. v. Reynolds*, 88 Ill. 418; *Pittsburgh, C. & St. L. R. Co. v. Williams*, 74 Ind. 462; *Seybolt v. New York L. E. & W. R. Co.* 95 N. Y. 562, 47 Am. Rep. 75; *Bergen County Traction Co. v. Demarest*, 62 N. J. L. 755, 72 Am. St.

vator was mismanaged, was out of repair, or of faulty construction. *Steiskal v. Marshall Field & Co.* 238 Ill. 92, 87 N. E. 117, affirming 142 Ill. App. 154.

Where a passenger is injured through the falling of an elevator, evidence tending to prove that defendants were operating the elevator and were common carriers of passengers, together with proof of the accident and attending circumstances and plaintiff's injuries, raises a presumption of negligence upon the part of the defendants, which casts upon them the burden of disproving all negligence, and upon which plaintiff is entitled to go to the jury. *Orcutt v. Century Bldg. Co.* 214 Mo. 35, 112 S. W. 532.

Decisions under statutes.

Under Kirby's Dig. § 6607, providing that, where a person is injured because of the negligence of railway employees to keep a lookout for persons, the company shall be liable, and the burden of proof shall devolve upon it, to establish the fact that it performed its duty, it is held, in *St. Louis, I. M. & S. R. Co. v. Fambro*, 88 Ark. 12, 114 S. W. 230, that where a passenger boards a train which the ticket agent told him was for the desired destination, and is injured while alighting therefrom after being told by a brakeman that the train did not go to such destination, and while the train was in motion, a finding that he was a passenger and was injured, and that the injuries were caused by a moving train, establishes a prima facie case of negligence of the carrier.

Seaboard Air Line R. Co. v. Thompson, 57 Fla. 155, 48 So. 750, following *Atlantic Coast Line R. Co. v. Crosby*, 53 Fla. 400, 43 So. 318, as to the extent of the statutory presumption of negligence cast upon rail-

roads by the statute of Florida, in cases of personal injuries caused by the operation of a railroad, holds that such presumption only casts upon the carrier the burden of affirmatively showing that its agents exercised all ordinary and reasonable care and diligence, and there ceases.

Under the Georgia statute (Civil Code 1895, §§ 2321 and 2266, construed together), where a passenger is injured by the running of a car, the carrier is liable for the injury, unless it shows that its agents had exercised all extraordinary and reasonable care and diligence in connection with those things charged by the passenger to be negligent. *Georgia R. & Electric Co. v. Gilleland*, 133 Ga. 621, 66 S. E. 944.

A presumption of negligence does not arise under the Georgia statute, from an injury to a passenger, until it appears that the proximate cause of the injury was occasioned through the operation of its "locomotives, cars, or other machinery," or by the act or misfeasance of some person in its employment and service; and does not arise upon proof merely that the plaintiff was injured by the explosion of a torpedo run over by an engine. *Smith v. Atlantic Coast Line R. Co.* 5 Ga. App. 219, 62 S. E. 1020.

Under a statutory count for the death of a passenger "by reason of the negligence and carelessness of the defendant and the unfitness and gross carelessness of its servants and agents while engaged in its business," that an explosion occurs in the controller box of a street car which, up to the time of the explosion was running smoothly, is not, under the doctrine of *res ipsa loquitur*, a showing of "gross negligence" on the part of the operatives of the car. *Martin v. Boston & N. Street R. Co.* 205 Mass. 16, 91 N. E. 159.

A. C. W.

Rep. 685, 42 Atl. 729. Numerous authorities supporting the above rule are collated in a valuable note to *Overcash v. Charlotte Electric R. Light & P. Co.* 12 A. & E. Ann. Cas. 1040.

Under this general rule, it would appear that, if the allegations in the complaint in this case are equivalent to an allegation of derailment or wreck, they would be sufficient to raise the presumption of negligence, which, with the other allegations in the complaint, would be sufficient to constitute a cause of action. In line with these authorities, the United States Supreme Court, in the case of *Stokes v. Saltonstall*, supra, held with reference to a stagecoach, a common carrier of passengers at that time, that the fact that the coach was upset was prima facie evidence of negligence and carelessness. This case was afterwards approved and followed by the same court in *New Jersey R. Co. v. Pollard*, supra, and the court there applied the same rule to a railroad train. The above rule is predicated upon the theory that "when a railway car is thrown from the track, and a passenger is thereby injured, the presumption is that the accident resulted either from the fact that the track was out of order or the train badly managed, or both combined, and the burden is on the company to show that it was not negligent in any respect." The complaint in the case at bar has charged facts that raise a presumption of negligence which would suffice to put the defendant upon answer and proof, and are therefore sufficient to bring it within the foregoing rule. The appellant cites the case of *Valente v. Sierra R. Co.* 151 Cal. 534, 91 Pac. 481, in support of this assignment. This is an interesting case, but does not sustain the position of the appellant on this issue. The court in that case cites the rule set forth in *Shearman & Redfield on Negligence*, ¶ 59: "When a thing which causes injury is shown to be under the management of the defendant, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from a want of care;" and says: "In accord with this doctrine, it is the rule in this state that when such an accident is shown by the plaintiff or admitted by the pleadings, for there can be no difference in effect between the establishment of the fact by evidence on the trial and the admission of that fact by the pleadings, a prima facie case of negligence on the part of the defendant is made, which is sufficient to call upon the defendant to show the exercise of 20 L.R.A. (N.S.)

the requisite care, and thus offset the presumption of negligence arising from the happening of the accident." This case is cited and approved by the same court in *Bonneau v. North Shore R. Co.* supra.

The appellant urges that "the court erred in refusing to set aside the verdict of the jury, for the reason that the said verdict was contrary to the evidence, and not sustained thereby, for the reason that there was no proof of negligence on the part of the defendant, and the presumption of negligence was rebutted by the defendant." The record discloses no proof of negligence by the plaintiff other than the proof of the derailment and wreck. The testimony of several witnesses was introduced by the defendant to establish the good condition of the track, and the careful handling of the train, but whether the testimony of these witnesses was sufficient to rebut the presumption of negligence arising from the facts proven was a question of fact for the jury, and would depend upon the weight given by the jury to the testimony of the witnesses, the effect, as considered by the jury, of facts and circumstances surrounding or attending the derailment of the train; and on this issue the jury has found against the appellant.

It is next urged by the appellant that "the court erred in refusing to set aside the verdict of the jury, for the reason that the amount of damages assessed by the jury was and is excessive; that the amount of damages awarded to the plaintiff was not warranted by the evidence in the case, and indicates that the same was rendered by the jury under the influence of passion or prejudice." We would from the evidence feel inclined to that view of the case were it not that the record discloses that the trial court set aside on this ground a verdict for \$3,000 rendered one year prior thereto, and that on this occasion the same judge presided, heard the testimony, saw the plaintiff, and an opportunity to form an opinion as to the probable permanent result of the injury, took the motion for a new trial on these grounds under advisement, and, after a careful consideration of the case, denied the motion. We think that he was thoroughly advised in the premises, and had opportunities for arriving at a proper conclusion of which we cannot avail ourselves, and we therefore decline to overrule his determination of this question.

It is next argued that the court erred in refusing to instruct the jury, at the request of the defendant, as follows: "You are instructed that negligence is the gist of the plaintiff's action in this case, and that the plaintiff has a burden on her

part of proving negligence by the preponderance of the evidence." The refusal to so instruct the jury in this case would be reversible error if the same, or an equivalent, instruction had not been elsewhere given, but the court elsewhere charged the jury, "the jury is instructed, as a matter of law, that the defendant is not required to show want of negligence by a preponderance of evidence. . . . The plaintiff must establish her case by a preponderance of the evidence, and, unless the plaintiff has shown by a preponderance of the evidence that she was injured by the negligence of the defendant, then your verdict should be for the defendant." It is not prejudicial error to refuse a requested instruction when the court has elsewhere correctly given substantially the declaration of the law thus requested. *Title Guaranty & S. Co. v. Nichols* (Ariz.) 100 Pac. 825.

It is next urged that the court erred in adding to its instruction on the preponderance of evidence the following: "In considering the last sentence, that the plaintiff must establish her case by a preponderance of the evidence, you should, of course, keep in mind that rule that I have given you of the presumption of negligence from the evidence showing that an accident occurred." We find that the court followed the language cited with the words: "The jury are bound to put the facts and circumstances proved by the defendant into the scale against the presumption upon which the plaintiff relies, and, in determining the weight to be given to the former as against the latter, you are bound to apply the rules, as a matter of law, that the burden of proof is upon the plaintiff, and if, on the whole, the scale does not preponderate in favor of the presumption, and against the defendant's proof, the plaintiff has not made out her case, and your verdict should be for the defendant." This language in the connection in which it was used seems to protect the defendant against any prejudicial effect of the language complained of.

The instructions in the case, taken as a whole, appear to present the law correctly to the jury, and to have been as favorable to the defendant as it could require. This is apparent from the last assignment of error, wherein it is urged that "the court erred in refusing to set aside the verdict and to grant the defendant a new trial, for the reason that said verdict was contrary to the instructions of the court." This position could only be maintained by conceding the construction placed by the appellant upon the evidence in the case. The court properly instructed the jury relative to the manner of considering the evi-

dence, but it could not instruct the jury in regard to the weight they should give any part of the evidence offered by the witnesses for either the plaintiff or the defendant, and it was because of the difference between the jurors and the defendant in regard to the weight of certain testimony, or the legitimate effect of certain facts or circumstances established by undisputed testimony, that a verdict was found by the jury that was unsatisfactory to the appellant. The jury returned a verdict that they had evidently agreed upon, because they either failed to credit entirely the oral testimony of the witnesses, or declined to believe the effect of the facts established by such testimony to be such as witnesses or appellant claimed. This was their province, and, while the court may differ with the jury as to the relative weight or effect of conflicting evidence, it will never set aside a verdict of a jury when there is any substantial evidence in the record to support the jury's findings. There being substantial evidence in the record to support the finding of the jury, this court will not pass upon the weight of the evidence or the credibility of the witnesses.

There appears in the record no reversible error, and the judgment of the lower court is affirmed.

Kent, Ch. J., and Lewis and Doe, JJ., concur.

Petition for rehearing denied May 21, 1910.

ALABAMA SUPREME COURT.

IRMA H. SINGER

v.

PARRIE LOU SINGER, Appt.

(— Ala. —, 51 So. 755.)

Divorce — multifariousness — property rights.

A bill for divorce is not rendered multifarious by joining therein a prayer for a conveyance by the husband to the wife of lands paid for with her funds the title to which was taken in his name.

(January 18, 1910.)

Note. — Right to join prayer for return of plaintiff's property with prayer for divorce.

Whether such a uniting of prayers is open to the objection of multifariousness seems to depend upon whether the property rights asserted grow out of the marriage relation. If they do, as for instance where

APPEAL by defendant from a decree of the Chancery Court for Chambers County overruling a demurrer to a bill filed for a divorce and to compel the transfer by the defendant to plaintiff of certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. Strother, Hines, & Fuller for appellant.

Messrs. E. C. Oliver and O. S. Moon for appellee.

Simpson, J., delivered the opinion of the court:

The bill in this case was filed by the appellee against the appellant, praying a divorce *a vinculo*; and also that the defendant be required to convey to her certain lands which had been paid for with funds belonging to the complainant, or that the court will divest the legal title to said lands out of the respondent, and vest the same in complainant. This appeal is from a decree overruling a demurrer to the bill.

The question of multifariousness in bills in equity has been perplexing to courts and text writers; so much so that it has some-

times been said that no general rules can be made applicable to every case, but the circumstances of each case must largely govern the discretion of the court. We have recently considered the subject at some length, and referred to the general rules suggested by eminent text writers. *Bentley v. Barnes*, 155 Ala. 659, 663, 47 So. 152. The question comes up more frequently where there are several parties, variously interested in the matters of litigation, although it is a rule that, even where there is but one defendant, a bill is multifarious which seeks relief as to two distinct subjects having no connection with or dependence on each other. In our own case of *Heinz v. White*, 105 Ala. 670, 17 So. 153, the bill was held to be multifarious, because the facts averred were inconsistent, and the rights of the complainant under the two phases of the bill were inconsistent with each other, and the relief prayed was wholly different. In the case of *Truss v. Miller*, 116 Ala. 505, 22 So. 886, we said that, while multifariousness is not capable of accurate definition, "it is described generally as the joinder of distinct and inde-

the plaintiff claims relief in respect of community property, the uniting of a prayer for such relief with a prayer for divorce is generally held not to constitute a misjoinder.

Thus, the right to demand a division of the common property in a divorce proceeding was upheld in *Kashaw v. Kashaw*, 3 Cal. 312, where the court said: "The act in relation to husband and wife declares that in case of the dissolution of the marriage by a court of competent jurisdiction, the common property shall be equally divided between the parties; and the court granting the decree shall make such order for the division of the common property. . . . It seems, from this, to be beyond dispute, that a partition of the common property is one of the direct results of a decree for divorce, and is part and parcel of the decree to be rendered, and consequently is necessarily one of the proper subjects of the action. How, then, can its introduction render the bill subject to the charge of multifariousness? The bill would really not be perfect without it, for the purpose of obtaining the decree of division, as contemplated by the law. All pleading is to be taken most strongly against the pleader, and, in the absence of an allegation that there is common property, the presumption would be that there was none. So it is exceedingly proper for the information of the court, and for its proper action, to disclose specifically, if possible, in what the common property consists, its nature, and value; and as the one half of it is equitably the right of the plaintiff, and to be so determined in this action, she may well make a party of anyone claiming an interest in it, in order

that she may obtain a complete determination."

But the California court held in *Cummings v. Cummings* (Cal.) 14 Pac. 562, that an action for divorce was improperly united with an action to set aside for fraud the husband's conveyance of alleged community property, the transferees having been joined as defendants, remarking that such actions did not come within any one of the several classes prescribed in the statute relating to the joinder of actions. The court also invoked the California rule that an action to avoid, for fraud, the husband's conveyance of community property cannot be maintained by the wife while the marriage bond exists, saying that therefore the remedy was by additional proceedings after the granting of the divorce.

In the light of Code provisions that "separation from bed and board carries with it separation of goods and effects," and that it "puts an end to their conjugal cohabitation and to the common concerns which existed between them," and that pending a suit for separation the wife may require an inventory of community property, and any alienation by the husband shall be null— it was held in *Williams v. Goss*, 43 La. Ann. 868, 9 So. 750, that a demand for partition of community property could be cumulated with a demand for separation from bed and board.

It was held in *Hodecker v. Hodecker*, 3 Misc. 641, 46 N. Y. Supp. 1073, affirmed 25 App. Div. 632, 50 N. Y. Supp. 1128, that a wife's complaint for separation was not demurrable upon the ground that it stated more than one cause of action, where it contained allegations concerning the husband's

pendent matters, thereby confounding them; or the uniting, in one bill, of several matters perfectly distinct and unconnected against one defendant." In that case this court held that a bill which sought contribution from one joint maker of a note secured by a mortgage, and also that a portion of the land be declared subject to a vendor's lien, etc., was not multifarious.

The only case referred to in the brief of the appellant is that of *Prickett v. Prickett*, 147 Ala. 494, 42 So. 408, and it is probably nearer to this case, in facts, than any case we have. The bill in that case "sought to enforce a resulting trust in land, and, at the same time, on independent averments, sought to have alimony decreed to complainant out of the estate of the respondent." This court said: "These were distinct and separate subjects, and in no way connected the one with the other. The relief prayed for is likewise separate and distinct. The bill, therefore, was demurrable for multifariousness." That was not a bill for divorce, but sought to have the resulting trust declared in the land, and also to compel the husband to provide for the maintenance and support of his wife.

band's deceitful conduct in obtaining a release of dower, and a prayer that he be restrained from conveying away his property to defeat her dower.

On the other hand, where the property rights asserted do not arise from the marriage relation, it is generally held that a cause of action in respect thereof cannot be joined with a cause of action for divorce.

It was held in *Fritz v. Fritz*, 23 Ind. 388, that such prayers may be joined unless the union constitutes a misjoinder, in which case objection must be raised by way of demurrer.

A misjoinder occurs where an action to annul a marriage upon the ground that at the time it was solemnized, the plaintiff had a husband living, is united with an action to quiet title to her separate estate, in which the defendant falsely claims an interest. *Uhl v. Uhl*, 52 Cal. 250.

And citing *Uhl v. Uhl*, the court in *Peck v. Peck*, 66 Mich. 586, 33 N.W. 803, held that a divorce suit was not a proper proceeding in which to demand an accounting by the husband for the wife's separate property. It was remarked that such property did not grow out of the marriage relation, that it was subject to her entire control independent of her husband, and that its recovery therefore had no relation to the divorce suit, and should have been sought in an independent suit.

So, a husband's bill for divorce containing a prayer for quieting his title to property purchased with his money, but taken in the wife's name, is demurrable for misjoinder. *Reed v. Reed*, 70 Neb. 775, 98 N.W. 76. So, also, where he unites a prayer 29 L.R.A. (N.S.)

In the case of *People ex rel. Pierce v. Morrill*, 26 Cal. 336, the bill prayed that a patent (from the state) be canceled, that one of the defendants be enjoined from prosecuting certain suits for taking asphaltum from the land, and from removing asphaltum. The court said that the objection of multifariousness "is in many cases a matter of discretion, and no general rule can be laid down on the subject. . . . The parties are all interested in the principal question raised by the complaint; the issues tendered are simple, and foreshadow no embarrassment to a convenient and orderly trial; and by the joinder objected to a multiplicity of suits has been avoided." Page 361. The bill was consequently held not multifarious.

In a case in the New Jersey chancery court, where it was sought to prosecute in the same action a claim against the executor and against the estate, the court said: "No general rule defining what causes of action may be properly joined, and what cannot, can be laid down. The question is always one of convenience in conducting a suit, and not of principle, and is addressed to the sound discretion of the court [citing

that she be declared a trustee of such property for his benefit. *Reed v. Reed*, 70 Neb. 779, 98 N.W. 73.

On the other hand, it was held in *Armstrong v. Armstrong*, 32 Miss. 279, that a wife suing for a divorce could include in the bill a demand for her separate estate, which had been appropriated by the husband to his own use. Here the court said that she could not assert her claim at law, because she was incapable of suing her husband at law, and that, the remedy being equitable, its joinder with the bill for a divorce could be justified under the rule relating to the prevention of a multiplicity of suits.

The case of *Dunbar v. Dunbar*, 4 Ohio Dec. Reprint, 237, has been referred to as deciding that a suit for the reconveyance to the husband of property conveyed by him to the wife in reliance upon an agreement to make mutual wills cannot be joined with his action for divorce upon the ground of gross neglect of duty in getting possession of such property, and then attempting to drive him from their home. It should be noted, however, that the court said that the petition was demurrable because the facts stated did not show such gross neglect of duty as constituted ground for a divorce, and then merely added that the equitable relief sought could not be granted in that proceeding. Whether, if sufficient facts had been stated to warrant a divorce, the petition would have been regarded as multifarious is a question that does not seem really to have been decided, for the demurrer was put upon the ground that the petition did not state facts sufficient to constitute a cause of action. L. A. W.

cases]. If it appears that the causes of action or claims are so dissimilar or distinct in their nature that they cannot be heard and determined together, but must be heard piecemeal,—first one and then the other,—a clear case of fatal misjoinder is presented; but where a complainant has two good causes of action, each furnishing the foundation of a separate suit, one the natural outgrowth of the other or growing out of the same subject-matter, . . . and the suit has a single object, they may be properly joined, and the objection of multifariousness or misjoinder will not be sustained,”—citing authorities. *Ferry v. Laible*, 27 N. J. Eq. 146, 150.

In another case, in the same court, in which the widow set up an equitable estate in the lands of her husband's estate, and prayer also, in the alternative, that dower be assigned for her in the same, the court said: “But the court not only may, but must of necessity, inquire of what estate the husband died seised, and this involves an inquiry into the nature and character of the husband's right to the estate. . . . An objection to a bill on the ground of multifariousness frequently resolves itself into a question of expediency. On the one hand, the bill should be sufficiently extensive to answer the purposes of complete justice; on the other hand, distinct and independent matters are not to be united in the same bill. The matters in this bill are not so distinct and independent as technically to constitute the vice of multifariousness.” *Rockwell v. Morgan*, 13 N. J. Eq. 384-386.

It is stated that “the rule in equity has always been that property shall be restored to the wife, upon a dissolution of the marriage, because of the husband's misconduct, which belonged to her at the time of the marriage, and which the husband had secured by unfair means to be vested in him” (14 Cyc. Law & Proc. p. 790); also, that “ordinarily an application for a restoration or division of property may be made separately or be included in the petition for divorce” (14 Cyc. Law & Proc. pp. 792, 793).

Some of the cases referred to in the text cited seem to rest upon a statute (*Meehan v. Meehan*, 2 Barb. 377; *Holmes v. Holmes*, 4 Barb. 295); but in the case last cited the point was made that the statute provided only for the case of a divorce *a vinculo*, and was not applicable to a cause of divorce *a mensa*, and the court says: “I understand that courts of equity, in cases of divorce or separation, independent of the statute referred to, have the power of restoring to the wife the whole or a portion of her property, and of restraining the husband from

receiving gifts or legacies to her after such divorce or separation.” Pages 297, 298.

The supreme court of Mississippi held that on a divorce *a vinculo* “the property which he obtained by the marriage will be decreed to the wife” (*Tewksbury v. Tewksbury*, 4 How. [Miss.] 109, 113); but the case upon which this case is based seems to be incomplete in the book, and does not decide the point.

The supreme court of Texas holds that in granting a divorce the court may make a division of the community property; but that seems to be based on a statute, and probably results from the law in regard to community property in that state. *Trimble v. Trimble*, 15 Tex. 18.

The supreme court of Wisconsin seems to take it as a matter of course that, in granting a decree for divorce, the court will render a judgment for the return to the wife of her separate money and property. *Pauly v. Pauly*, 69 Wis. 420, 424, 34 N. W. 512.

The supreme court of Tennessee decreed a divorce, and that the wife's property (which the husband had promised to settle on her, but had not) be restored to her. *Sharp v. Sharp*, 2 Sneed, 496, 500.

One of the grounds of equitable jurisdiction is to avoid a multiplicity of suits, and where the only two parties interested are before the court, and there is no repugnancy, and no mixing of incongruous subjects, there seems to be no reason why it should be necessary to have two suits. In fact, in the present case, there is no question about the right to provide for alimony, and, in order to act intelligently on that question, it is necessary that the court ascertain what property the husband has and what property the wife has, and if the point is raised that certain property, standing in his name, really belongs to her, it seems that this is the most convenient and appropriate time and way to settle that matter, in order that complete justice may be accomplished.

The decree of the chancellor is affirmed.

Dowdell, Ch. J., and McClellan and Mayfield, JJ., concur.

MINNESOTA SUPREME COURT.

E. M. NEIDHARDT, Resp't.,

CITY OF MINNEAPOLIS, Appt.

(— Minn. —, 127 N. W. 494.)

Municipal corporation — rural way — care required.

1. A municipality is not required to ex-

Headnotes by O'BREX, J.

ercise the same care in grading and constructing a rural way as when improving a street in the populous portions of the city.

Same — grade — width.

2. In improving and maintaining such roadways, the city is not required to grade or improve to the entire width of the highway.

Same — covered culvert.

3. A covered culvert extending across a rural driveway, and ending abruptly 7½ feet beyond the line of the way improved for travel, ordinarily would not be held negligent construction.

Same — negligence — question for jury.

4. In this instance the culvert was placed at a part of the driveway which was crossed by a substantial bridge. This and other circumstances surrounding the place made defendant's negligence a question for the jury.

Proximate cause — defective highway — injury to pedestrian.

5. Where one upon a highway is forced off to the side of the traveled way by a rapidly approaching vehicle, and is injured by falling into an opening upon the

side of the traveled way, the negligence, if found, in leaving the opening unguarded, was the proximate cause of the injury.

Negligence — pedestrian on left side of street.

6. It is not, as between a pedestrian and the municipality, negligence as a matter of law to walk upon the left side of a street or driveway, nor, for the purpose of avoiding a rapidly approaching vehicle, to turn to the left.

(August 10, 1910.)

A PPEAL by defendant from an order of the District Court for Hennepin County denying a new trial after verdict for plaintiff in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Affirmed.

The facts are stated in the opinion.

Messrs. Frank Healy, A. C. Finney, and Clyde R. White, for appellant:

With respect to country roads within the city limits, if a portion of the width of the road is kept in a smooth condition and

Note. — Duty of municipality as to condition of rural highway within city or village limits.

Cases are omitted which merely discuss the duty of a municipality to open new streets in the suburbs to meet the increasing demands of the public; the note being limited to the duty of the municipality after the streets are opened.

It is the duty of municipal corporations to exercise ordinary care and prudence to keep all its streets, roads, and sidewalks in a reasonably safe condition for travel. For illustrations of this proposition, see, *inter alia*, *Flora v. Naney*, 136 Ill. 45, 26 N. E. 645; *Bunker Hill v. Pearson*, 46 Ill. App. 47; *South Omaha v. Powell*, 50 Neb. 798, 70 N. W. 391.

Their obligations in this regard are not lessened by the peculiarities of the location or the extent of the use. *Flora v. Naney*, supra; *Decatur v. Besten*, 169 Ill. 340, 48 N. E. 186 (sidewalk); *McLeansboro v. Lay*, 29 Ill. App. 478 (sidewalk); *Vandalia v. Ropp*, 39 Ill. App. 344 (cross walk) *Bunker Hill v. Pearson*, supra (cross walk); *South Omaha v. Powell*, supra (bridge); *Wall v. Pittsburg*, 205 Pa. 48, 54 Atl. 497.

Hence, they must use ordinary care to keep their roads, streets, and sidewalks in a reasonably safe condition, even though located in the sparsely settled suburbs or outskirts of the city, but within its corporate limits, though not so much in use as in the more frequented parts of the city, and though rural in character. *Seward v. Wilmington*, 2 Marv. (Del.) 189, 42 Atl. 451 (dirt footpath); *Flora v. Naney* (sidewalk); *Decatur v. Besten*; and *McLeansboro v. Lay* (sidewalk),—supra; *Bunker* 29 L.R.A. (N.S.)

Hill v. Pearson, supra (cross walk); *Mt. Morris v. Kanode*, 98 Ill. App. 373 (hole washed in side of traveled way of road, causing vehicle to break and injury to traveler) *South Omaha v. Powell*, supra.

Thus in *Seward v. Wilmington*, supra, where plaintiff was injured by stepping into a hole, some 10 or 12 inches deep, in an unpaved footway near the outskirts of the city, the court in charging the jury said: "If the city allow and throw open to use a footway used by the public, it is not necessary that it should be paved, but the city is as much bound to keep such a passage-way safe in the outskirts of the city, and fronting on lots not built upon, as in the crowded thoroughfares. It is true that greater care would be required in most frequented streets, but a commensurate degree of care and diligence must be used in all parts of the city, in order to insure the safety of the traveling public."

In *Rockford v. Hollenbeck*, 34 Ill. App. 40, the court said: "Appellant insists, however, that even if the sidewalk was not in such repair as would make it reasonably safe for persons using proper care, still in this case the city is not liable, because the sidewalk was just on the extreme limits of the city, near the open prairie, where but few persons lived and used it. It is true the walk was somewhat remote from the center of the city, and that no great amount of travel went over it; and it is also true that cities are not bound to use the same degree of care over such remote walks, that are used but little, as they are those nearer the center and which are constantly used; but it is not true as a matter of law that cities may entirely or substantially ignore their outside walks, and give them little or no attention. If

safe and convenient for travel, the city discharges its duty.

Thomp. Neg. §§ 6008, 6009; *Tarras v. Winona*, 71 Minn. 22, 23 N. W. 505; *King v. Ft. Ann*, 180 N. Y. 496, 73 N. E. 481; *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128; *Howard v. North Bridgewater*, 16 Pick. 189; *Zettler v. Atlanta*, 66 Ga. 195; *Nelson v. Spokane*, 45 Wash. 31, 8 L.R.A. (N.S.) 636, 122 Am. St. Rep. 881, 87 Pac. 1048, 13 A. & E. Ann. Cas. 280; *Monongahela City v. Fischer*, 111 Pa. 9, 56 Am. Rep. 241, 2 Atl. 87; *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168; *Rankin v. Smith*, 63 Ill. App. 522; *Butler v. Oxford*, 69 Miss. 618, 13 So. 626; *Herndon v. Salt Lake City*, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646.

A city is not ordinarily bound to make repairs nor to erect barriers outside the traveled path, its duty in that respect is generally accomplished by making and keeping a sufficient breadth of the located road in a condition reasonably smooth and safe for travel.

there be travel enough to justify the building of a sidewalk, then the city cannot allow it to become a trap or go into decay, so that a misstep will trip the unwary pedestrian. While there is no precise rule to gauge the different degrees of care required for different walks, depending on their locality and amount of use, cities must still be held to a reasonable degree of care and watchfulness over all their walks wherever they may be. If a city would avoid responsibility for accidents happening upon walks little used, or not needed, they should take them up; otherwise they must watch them, and not allow them to become dangerous."

A city having full powers of taxation cannot be excused for failure to repair a dangerous place in a street, although it was but little used by the public, by the fact that it had expended all its available funds on streets in a more populous part of the city. *Whitfield v. Meridian*, 66 Miss. 570, 4 L.R.A. 834, 14 Am. St. Rep. 596, 6 So. 244.

But what will constitute ordinary care in keeping roads, streets, and walks in repair will depend to some extent on their location and the extent of their use. *Miller v. Mullan*, 17 Idaho, 28, 104 Pac. 660; *Bunker Hill v. Pearson*, supra; *Fitz v. Boston*, 4 Cush. 365 (road through unsettled and unfrequented part of city); *Tarras v. Winona*, 71 Minn. 22, 73 N. W. 505 (road through unsettled part of city, leading into country); *Monongahela City v. Fischer*, 111 Pa. 9, 56 Am. Rep. 241, 2 Atl. 87; *Chambers v. Braddock*, 34 Pa. Super. Ct. 407; *Nelson v. Spokane*, 45 Wash. 31, 8 L.R.A. (N.S.) 636, 122 Am. St. Rep. 881, 87 Pac. 1048, 13 A. & E. Ann. Cas. 280.
29 L.R.A. (N.S.)

Thomp. Neg. § 6009; *Macomber v. Taunton*, 100 Mass. 255; *Farrell v. Oldtown*, 69 Me. 72; *Hall v. Unity*, 57 Me. 529; *Marshall v. Ipswich*, 110 Mass. 522.

There is no duty on the part of a municipality to erect barriers to keep people from straying from the highway.

Dill. Mun. Corp. § 1005; *Thomp. Neg.* § 6058; *Spencer v. Mayfield*, 43 Ind. App. 134, 85 N. E. 23; *Ray v. St. Paul*, 40 Minn. 459, 42 N. W. 297; *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5; *Tarras v. Winona*, 71 Minn. 23, 73 N. W. 505; *Herndon v. Salt Lake City*, supra; *Sparhawk v. Salem*, 1 Allen, 30, 79 Am. Dec. 700; *Daily v. Worcester*, 131 Mass. 452; *Hudson v. Malborough*, 154 Mass. 218, 28 N. E. 147.

The foregoing rules apply, except where there are excavations, chasms, precipices, or obstructions outside the traveled path and so near thereto that, combined with the ordinary accidents of travel, they are liable to result in injury to travelers, especially in the nighttime.

Thomp. Neg. § 6055; *Hannibal v. Campbell*, 30 C. C. A. 63, 57 U. S. App. 484, 66 Fed. 297; *Denver v. Johnson*, 8 Colo. App.

And this is usually a question for the jury. *Bunker Hill v. Pearson*, supra; *Forker v. Sandy Lake*, 130 Pa. 123, 18 Atl. 609; *Wall v. Pittsburg*, supra.

It was said in *Fitz v. Boston*, supra: "The question is, What is safe and convenient?—and this may depend on the quantity and variety of travel."

The court in *Miller v. Mullan*, supra, said: "While it is true that the duty to keep sidewalks and crossings in a reasonably safe condition is imperative upon the municipal authorities, with reference to walks in the outskirts of a town as well as in the busiest portion, still the place where the injury occurs often has an important bearing on the question of implied notice and consequent negligence. What would constitute reasonable care and precaution with reference to the repair and safety of a walk in a remote part of a town, where it is but little used, would not in every case amount to reasonable care and prudence with reference to a walk or crossing in the heart of the town where the entire population pass over it daily."

It was held as a matter of law in *Tarras v. Winona*, supra, that a city was not guilty of negligence in not protecting with a railing a road leading from the city into the country, which, in passing through the outskirts of the city, crossed a low track of land on an embankment 33 feet wide and 7 feet high, and which was otherwise in good condition. A like decision under a somewhat similar state of facts was made in *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5.

A municipality was held not negligent in permitting a difference of 18 to 24 inches

384, 46 Pac. 621; *Wiggin v. St. Louis*, 135 Mo. 558, 37 S. W. 528; *Keyes v. Marcellus*, 50 Mich. 439, 45 Am. Rep. 52, 15 N. W. 542.

Where two or more causes of an injury exist, and one of them is active in producing the injury, and the others are passive and inactive, the active cause will be deemed the proximate cause.

La Londe v. Peake, 82 Minn. 124, 84 N. W. 726; *Scofield v. Poughkeepsie*, 122 App. Div. 808, 107 N. Y. Supp. 767; *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 753, 17 Atl. 860; *Bell v. Wayne*, 123 Mich. 386, 48 L.R.A. 644, 81 Am. St. Rep. 204, 82 N. W. 215; *De Camp v. Sioux City*, 74 Iowa, 392, 37 N. W. 971; *Peall v. Athens Twp.* 81 Mich. 536, 45 N. W. 1014.

Messrs. Larrabee & Davis, for respondent:

A city is liable on account of a defect outside of a highway the same as though the defect were in the highway, provided that the defect is so near to it that it renders travel upon the highway dangerous.

5 *Thomp. Neg.* ¶ 6055; 15 *Am. & Eng. Enc. Law*, 2d ed. pp. 452, 455; *Angell, High-*

ways, 3d ed. ¶ 202; *Elliott, Roads & Streets*, p. 453; 3 *Abbott, Mun. Corp.* ¶ 1009; *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253; *Wakeham v. St. Clair Twp.* 91 Mich. 15, 51 N. W. 696; *Cobb v. Standish*, 14 Me. 198; *Coggswell v. Lexington*, 4 Cush. 307; *Hayden v. Attleborough*, 7 Gray, 338; *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 409; *Wheeler v. Westport*, 30 Wis. 392; *Houfe v. Fulton*, 29 Wis. 296, 9 Am. Rep. 508; *Cremer v. Portland*, 36 Wis. 92; *Cartright v. Belmont*, 58 Wis. 370, 17 N. W. 237; *Slivitski v. Wien*, 93 Wis. 460, 67 N. W. 730; *Boltz v. Sullivan*, 101 Wis. 608, 77 N. W. 870; *Ray v. St. Paul*, 40 Minn. 458, 42 N. W. 207; *Hall v. Manson*, 99 Iowa, 698, 34 L.R.A. 207, 68 N. W. 922; *Alger v. Lowell*, 3 Allen, 402, 81 Am. Dec. 670; *Tarraa v. Winona*, 71 Minn. 22, 73 N. W. 505; *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5; *Halpin v. Kansas City*, 76 Mo. 335; *Drew v. Sutton*, 55 Vt. 586, 45 Am. Rep. 644; *Zettler v. Atlanta*, 66 Ga. 195; *Delphi v. Lowery*, 74 Ind. 520, 39 Am. Rep. 98.

The negligence of the city was the proxi-

to exist between the level of two wagon tracks only a few feet apart, which had been made by public travel within the city limits, but not improved as a city street, so as to render it liable for injuries caused by the overturning of a wagon in attempting to cross from one track to the other. *Nelson v. Spokane*, *supra*.

But the contrary was held as a matter of law in *Prideaux v. Mineral Point*, 43 Wis. 513, 28 Am. Rep. 558, where the difference of level was about 6 feet and was artificial, and there was a precipitous slope from one road to the other without barrier or railing, although each road was safe by itself.

Width.

Municipalities are under no obligation to keep the entire width of their streets and highways, located in sparsely settled portions or in the outskirts of their territorial limits, in safe condition for vehicles; but it is sufficient if they keep in reasonable repair a sufficient width to answer all necessary demands, having due regard to the extent of their actual occupation and use for residence or business purposes. *Hannibal v. Campbell*, 30 C. C. A. 63, 57 U. S. App. 484, 86 Fed. 297; *Rankin v. Smith*, 63 Ill. App. 522 (road essentially rural in character in outskirts of village); *Fulliam v. Muscatine*, 70 Iowa, 436, 30 N. W. 861 (semble) (upsetting of buggy owing to washout on road); *Fitz v. Boston*, *supra*; *Keyes v. Marcellus*, 50 Mich. 439, 45 Am. Rep. 52, 15 N. W. 542 (stump in side of village road leading into country); *Ely v. St. Louis*, 181 Mo. 723, 81 S. W. 168 (wide road in suburbs graded sufficiently 29 L.R.A. (N.S.)

for wagons, and balance used for agricultural purposes); *Ruppenthal v. St. Louis*, 190 Mo. 213, 88 S. W. 612; *King v. Ft. Ann*, 180 N. Y. 496, 73 N. E. 481; *Monongahela City v. Fischer*, *supra*; *Herndon v. Salt Lake City*, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646; *Nelson v. Spokane*, *supra*.

Thus, a city is not liable for injury to a traveler on foot on a road rural in character and improved only in the center for vehicles, from a hole in a sidewalk made by private parties and never adopted by the city, which latter fact was obvious from the character of the road. *Ruppenthal v. St. Louis*, *supra*.

So, also, a village is not liable for injury to a traveler caused by his driving in a hole in a ditch by the side of the road, caused by surface water, where the road was rural in character, the center was well graded and separated from the ditch by a grass plat 7 feet wide. *King v. Ft. Ann*, *supra*.

Mere use by the public of a portion of a street that has never been prepared for use by the public authorities, and which the traveling public have never been thereby impliedly invited to use, cannot cast upon the municipality the duty of keeping such portion of the street in repair. *Ruppenthal v. St. Louis*, *supra*.

Cases like *Wellington v. Gregson*, 31 Kan. 99, 47 Am. Rep. 482, 1 Pac. 253, where it did not appear that the road in question was rural in character nor was in a sparsely settled part of the city, are omitted, though the duty of the municipality to keep open the whole width of the street or road was discussed.

R. A. E.

mate cause of the plaintiff's injury, unless no reasonable person could have foreseen that footmen in the dark might be required, in the exercise of reasonable care for their own safety, to step aside a few feet to avoid being hit by a passing vehicle, such as an automobile.

1 Thomp. Neg. ¶¶ 50, 51, et seq.; McMahon v. Davidson, 12 Minn. 357, Gil. 232; Griggs v. Fleckenstein, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199; Campbell v. Stillwater, 32 Minn. 308, 50 Am. Rep. 507, 20 N. W. 320; Schumaker v. St. Paul & D. R. Co. 46 Minn. 39, 12 L.R.A. 257, 48 N. W. 559; Christianson v. Chicago, St. P. M. & O. R. Co. 67 Minn. 94, 69 N. W. 640.

O'Brien, J., delivered the opinion of the court:

Plaintiff had a verdict because of personal injuries sustained upon a public driveway in Minneapolis under the following circumstances: Minnehaha boulevard, of the park system of the city, intersects Nicollet avenue at right angles. The park driveway, following the windings of Minnehaha creek, crosses Nicollet avenue under a substantial bridge 25 feet high, which forms the continuation of the avenue. The water from the street is conducted to a drain beneath the bridge, and by the drain to a culvert crossing the park driveway beneath its surface, and thence to the creek. The drain is midway between the lines of Nicollet avenue, and is formed of concrete or masonry, open from the bridge abutments upon the north to a point from 4 to 7½ feet north of the north line of the driveway, where it is sung to a catch-basin, where the covered culvert begins, and is so built that it constitutes no obstruction in the boulevard. Two concrete piers of the bridge are just north of the catch-basin, one on each side of the drain. The length of the covered portion of the culvert is 33 feet. It is 3½ feet wide at its north end. The distance from the top of the culvert to the bottom of the open drain, where the catch-basin is located, is 22 inches. The driveway is through a strip of land known as Minnehaha parkway. The parkway is much wider than the road, which the testimony shows to be from 22 to 25 feet wide. Most of the road is bordered by grass; but at the intersection of the streets, where the culvert is situated, there are no grass borders to the driveway. Plaintiff, with some companions, was walking after nightfall upon the driveway. She was going eastwardly upon the north, and therefore to her left side of the road, and intended to reach Nicollet avenue by a flight of steps upon the east side of the bridge. When upon or at the culvert, an automobile traveling westwardly, and there-

fore properly upon the same side of the driveway as the plaintiff, approached at a high rate of speed, and, plaintiff claims, swerved directly toward her. To avoid the machine plaintiff stepped, or perhaps sprang, to the north, and fell into the open drain just at the edge of the covered culvert, where the catch-basin is located, and received serious injuries.

1. The first question presented is as to any negligence by defendant. It is entirely true, as claimed by counsel, that in constructing this park driveway the city was not required to finish it with care and detail necessary in constructing a street in a built-up and populous portion of the city, but neither can it be held to be an ordinary country road. Ordinarily it would not be negligent to locate and leave unguarded a culvert of this character crossing a rural driveway and extending beyond the sides of the road the distance shown here; but the catch-basin into which plaintiff fell, while outside the line of the driveway, was within the lines of Nicollet avenue. The surface of the soil covering the culvert for its entire length, judging from the photograph presented, particularly defendant's Exhibit 4, was flush with the ground upon each side. The grass borders to the driveway did not extend under the bridge. One might well anticipate that no such condition existed at this particular place, and, even if plaintiff had fallen without any sudden danger or emergency confronting her, we feel the question of defendant's negligence would have been for the jury.

The authorities cited by counsel for defendant are not, as we read them, in conflict with this holding. In King v. Ft. Ann, 180 N. Y. 496, 500, 73 N. E. 481, 482 it appeared the plaintiff, without any cause shown, left the roadway and allowed his team to travel for 100 feet upon the side of the road. In holding there was no liability for the subsequent accident which occurred, the court said: "The drain, ditch, or gutter where the accident happened was separated from the roadway by a space of between 6 and 7½ feet wide. There was a grass plot between the ditch and the roadway, and a good traveled track 18 feet wide in perfect condition, so that, as we think, danger was not reasonably to be expected." Howard v. North Bridgewater, 16 Pick. 189, was a case in which plaintiff sought damages for injuries to his horse which ran upon some large stones within the lines of the highway, but outside of the graded roadway, and between which and the roadway was the gutter. These and other cases cited are authority for holding that it is not necessary to grade such roadway to their entire width, and that ordinary

one who voluntarily leaves the beaten path and is injured cannot recover; and, again, where there is no hidden danger, nor any peculiar situation which rendered the construction dangerous, one who mistakenly leaves or by some emergency is forced from the beaten track cannot recover. *Sutphen v. North Hempstead*, 80 Hun, 409, 30 N. Y. Supp. 128; *Zettler v. Atlanta*, 66 Ga. 195; *Nelson v. Spokane*, 45 Wash. 31, 8 L.R.A. (N.S.) 636, 122 Am. St. Rep. 881, 87 Pac. 1048, 13 A. & E. Ann. Cas. 280; *Monongahela City v. Fischer*, 111 Pa. 9, 56 Am. Rep. 241, 2 Atl. 87; *Macomber v. Taunton*, 100 Mass. 255. These cases are in harmony with the rule in this state as announced in *Tarras v. Winona*, 71 Minn. 22, 73 N. W. 505, where it was held that the city was not guilty of negligence in failing to maintain railings or other barriers along the sides of the embankments of a public road leading from the city; the embankment being 7 feet high, 33 feet wide, and the entire width of the highway 66 feet. The same general principles were recognized in *McHugh v. St. Paul*, 67 Minn. 441, 70 N. W. 5.

The case of *Ray v. St. Paul*, 40 Minn. 458, 42 N. W. 297, is, we think, nearer to the case at bar. While the general rules spoken of were accepted in the *Ray* Case, it was held on demurrer that the city might be liable where refuse was permitted to be deposited at the end of a street, upon the river bank, giving it the appearance of a prolongation and part of the street, and was dangerous to anyone stepping upon it. The rule as to liability for accidents caused by excavation or obstructions contiguous to a street or well-defined road is, as claimed by counsel, that ordinarily the municipality is not liable if the way itself is properly constructed; but there must be no hidden danger, and no construction which would lead a traveler from the beaten path into a pitfall or other dangerous place. *Zettler v. Atlanta*, supra; *Herndon v. Salt Lake City*, 34 Utah, 65, 131 Am. St. Rep. 827, 95 Pac. 646, 15 Am. & Eng. Enc. Law, 2d ed. p. 453; 3 Abbott, Mun. Corp. § 1009; *Jewhurst v. Syracuse*, 108 N. Y. 303, 15 N. E. 400; *Wheeler v. Westport*, 30 Wis. 392. This again tends to the conclusion that under all the circumstances of this case defendant's negligence was for the jury.

2. The charter of Minneapolis contains this provision: "Nor shall any such action be maintained for any defect in any street until the same shall have been graded; nor for any insufficiency of the ground where sidewalks are usually constructed, when no sidewalk is built." The place where this accident occurred is not within either of the exceptions in the above paragraph. The negligence claimed was not for failing to

grade or improve the way; but, if there was negligence, it was affirmatively so by reason of improper construction.

3. It is urged that the defect complained of was not the proximate cause of plaintiff's injury. It was, it is said, the reckless driving of the automobile which forced plaintiff from the beaten path and caused her to fall. It must, we think, be assumed that the machine was driven at very high speed, and that it swerved to the north as approaching plaintiff, and probably held to the extreme northern boundary of the traveled and beaten way. Aside from plaintiff's testimony, such would be the natural position of the machine at the curve, especially if moving rapidly; but the machine was rightfully upon the boulevard, and irrespective of its speed, or the notice plaintiff had of its approach, she would have been compelled to step out of its way. It seems to us that the meeting of the machine and stepping aside were no more than ordinary incidents of travel upon the boulevard. If so, and because of the situation plaintiff was justified in believing, if she had thought about the matter at all, that the place she went to was safe, while in fact it was unsafe through defendant's negligence, the proximate cause of her injury was the negligence of defendant.

It is urged that *La Londe v. Peake*, 82 Minn. 124, 84 N. W. 726, is controlling upon this question. In that case the defendants in excavating a cellar had constructed a driveway from the cellar to the surface of the ground, which was reached at a point about 12 feet out in the street. Plaintiff was riding a horse, which for some unknown reason became frightened and unmanageable, and backed into the driveway. Plaintiff jumped or was thrown from the horse, and the horse, continuing unmanageable, forced plaintiff into the excavation. It was held that the defendants were not liable, for the reason that the proximate cause of the accident was the frightening of the horse, for which the defendants were not responsible. An examination of the authorities directly cited in support of the decision in the *La Londe* Case satisfies us that the doctrine of that case should not be extended to the instant one. *Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. ed. 250, was an action to recover compensation for the destruction by fire of the plaintiff's sawmill and a quantity of lumber; the fire having been communicated from an elevator, which had been set on fire by defendant's steamboat. A verdict for the plaintiff was sustained, notwithstanding the claim that the proximate cause of the burning of the mill and lumber was the communication of the fire from the elevator,

and not the burning of the elevator by fire from the boat. The court discussed proximate cause, and concluded its opinion as follows: (page 476 of 94 U. S.): "The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff."

In *Hubbell v. Yonkers*, 104 N. Y. 434, 58 Am. Rep. 522, 10 N. E. 858, the following statement appears in the syllabus: "Plaintiff was riding along one of defendant's streets, the roadbed of which was 30 feet wide, macadamized, and in good condition. On one side, where the street was graded up about 12 feet, there was a sidewalk 10 feet wide, separated from the roadbed by a curbstone 8 inches high. There was no fence, wall, or other obstruction to guard the outer edge of the sidewalk." A horse attached to a buggy in which plaintiff was riding became frightened and stepped over an embankment, and plaintiff was injured. Under the almost unanimous authorities there was no negligence upon the part of the defendant in that case. The same statement may be applied to *Heister v. Fawn Twp.* 189 Pa. 253, 42 Atl. 121.

Upon the other hand, we have the comparatively recent decision of this court in *McDowell v. Preston*, 104 Minn. 263, 18 L.R.A. (N.S.) 190, 116 N. W. 470. In the syllabus of that case it is said: "Where a horse takes fright, without fault of the driver, at something for which the municipality is not responsible, and gets beyond the control of the driver, runs away, and comes in contact with some obstruction or defect in the street, which is there by the negligence of the municipality, it is liable for the resulting injury, if it would not have been sustained except for such negligence."

It would seem that the proper rule is that where a defect exists in or adjacent to a public way, of such character that its existence establishes negligence upon the part of the municipality, and where, because of some misadventure caused by an incident which, although unusual, is not so extraordinary or unknown as to be without the range of possibilities which may reasonably be anticipated, and because of such incident and the negligence of the municipality one lawfully upon the street is injured, the liability of the municipality follows, and to that extent the negligence of the municipality must be considered the proximate cause of the injury. This seems to have been the holding of this court in the 29 L.R.A. (N.S.)

McDowell Case; and, while some of the authorities cited by counsel go further in relieving the municipality than we consider proper, we think most, if not all, of such cases can be distinguished from the one at bar. *Scofield v. Poughkeepsie*, 122 App. Div. 868, 107 N. Y. Supp. 767; *Mahogany v. Ward*, 16 R. I. 479, 27 Am. St. Rep. 755, 17 Atl. 860; *Bell v. Wayne*, 123 Mich. 395, 48 L.R.A. 644, 81 Am. St. Rep. 204, 82 N. W. 215; *De Camp v. Sioux City*, 74 Iowa. 392, 37 N. W. 971; *Beall v. Athens, Twp.* 81 Mich. 536, 45 N. W. 1014.

4. Plaintiff was walking upon the driveway to her left side of the road, and when met by the automobile turned to the left. Defendant claims this to have been negligence contributing to the accident, and in violation of section 14, chap. 259, Laws 1909 (Rev. Laws Supp. 1909, § 1278—14). That section, while requiring persons or vehicles, when meeting, to turn to the right, requires vehicles only while traveling to keep to the right of the center of the street. The section was intended to regulate the conduct of travelers with reference to each other, and has no reference to persons using the street except in relation to others also using it. We cannot agree that plaintiff was, as a matter of law, guilty of negligence in walking upon the left side of the roadway, or in leaving the roadway to the left when confronted with the danger described in her testimony; and conclude that the court correctly instructed the jury that her location upon the street was a matter which they might properly consider in determining whether or not the plaintiff was reasonably careful at the time or immediately preceding the accident.

5. Defendant has assigned as error four other portions of the charge. In effect the instructions were that it was the duty of the municipality to make a roadway reasonably safe from injuries occurring from defects immediately outside of the roadway, and submitted to the jury plaintiff's claim that she did not know she was stepping off the part of the road that was prepared for travel, but in the dark assumed that she was still in the road, and submitted to the jury whether or not the city was negligent in the matter of the construction and maintenance of this culvert under the roadway without guards, and whether that was the cause of the injury to plaintiff. We think we have already fully discussed the propositions involved in these assignments. The examination of the entire charge leads us to the conclusion that the jury was fully and fairly instructed.

Order affirmed.

UNITED STATES CIRCUIT COURT
OF APPEALS, SECOND CIRCUIT.

UNITED STATES OF AMERICA, Appt.,
v.
HENRIETTA COHEN.

(— C. C. A. —, 179 Fed. 834.)

Citizenship — naturalization — alien
wife.

An alien wife of an alien, both of whom
are residing in this country, is not entitled
to naturalization.

(June 14, 1910.)

APPEAL by the United States from an
order of the Circuit Court of the United
States for the Southern District of New
York admitting Henrietta Cohen to United
States citizenship. Reversed.

The facts are stated in the opinion.

Argued before Coxe and Ward, Circuit
Judges, and Hazel, District Judge.

Mr. A. S. Pratt for the United States.

Coxe, Circuit Judge, delivered the opin-
ion of the court:

The United States appeals from an order
of the circuit court for the southern district
of New York admitting Henrietta Cohen to
citizenship. The appellee is sixty years of
age, was born in Germany, arrived in this
country in October, 1869, and has resided
in New York since that date. She filed
her declaration of intention in July, 1907,
and her petition for naturalization on Au-
gust 6, 1909. In or about the year 1870,
she was married to Tobias Cohen, who was,
and still is, a subject of the Emperor of
Russia. They are still living together as
husband and wife, and during their married
life six children have been born to them.

The record presents the single question,—
whether the alien wife of an alien man,
both having resided in this country as hus-
band and wife for over thirty years, can
become a citizen? We are unable to find
a decision of the Supreme Court or of a
circuit court of appeals upon the precise
question here in issue, but there is attached

*Note. — Right of alien wife of alien to
naturalization.*

But two additional cases have been found,
and they support the view that the alien
wife of an alien is not entitled to be nat-
uralized.

On all fours with UNITED STATES v.
COHEN is Re Rionda, 164 Fed. 368, in
which it is held that the alien wife of an
alien, although dwelling in this country
and otherwise qualified, cannot be natural-
ized under our laws. Here the court laid
considerable stress upon § 3 of the ex-
29 L.R.A.(N.S.)

to the brief of the district-attorney an un-
reported decision of Judge Adams, of this
circuit, denying an application based upon
substantially identical facts. The question
is interesting, and is, by no means, free
from doubt, but we incline to the opinion
that both on principle and authority it
should be answered in the negative.

The admission to American citizenship
is a high privilege which should not be
granted upon a doubtful interpretation of
the law. It must be conceded that there is
no specific provision of the statutes which
permits the naturalization of the alien wife
of an alien husband. On the contrary, as
was pointed out by Judge Henry B. Brown
in *Pequignot v. Detroit*, 16 Fed. 211, the
general trend of legislation has been con-
stantly toward the recognition of the propo-
sition that the husband is the head of the
family, and that his wife and minor chil-
dren take his citizenship, it being incon-
sistent with the theory of our laws that the
wife shall be a citizen and the husband an
alien, and *vice versa*.

The expatriation act of March 2, 1907
(Act March 2, 1907, chap. 2534, 34 Stat.
at L. 1228, U. S. Comp. Stat. Supp. 1909, p.
438), provides as follows: "Sec. 2. That
any American citizen shall be deemed to
have expatriated himself when he has been
naturalized in any foreign state in con-
formity with its laws, or when he has taken
an oath of allegiance to any foreign state.

"Sec. 3. That any American woman who
marries a foreigner shall take the nation-
ality of her husband. At the termination
of the matrimonial relation, she may re-
sume her American citizenship, if abroad,
by registering as an American citizen with-
in one year with a consul of the United
States, or by returning to reside in the
United States, or, if residing in the Unit-
ed States at the termination of the mar-
ital relation, by continuing to reside there-
in."

It is plain that Congress here intends
that the wife shall assume the nationality
of her husband, even to the extent of ex-
patriation in the case of an American wo-

patriation act, which is set out in the
COHEN CASE.

In a note by the court to *Re Langtry*,
31 Fed. 879, it was said: "It is stated in
the public journals that Mrs. Langtry is
not a *feme sole*, and that her husband is
living in England and a subject of the
Queen. If this be so, the question will
arise, on her application for final natural-
ization papers, whether she can be natural-
ized in this country. No person can be a
citizen of two countries; and a wife is
by law a citizen of her husband's country."

L. A. W.

man. Though an American citizen prior to her marriage, she cannot resume that citizenship while the marriage relation continues. It seems wholly inconsistent with the spirit of this legislation to permit an alien to acquire rights which are denied to a citizen. If an American woman had married Cohen, she would immediately have become a Russian citizen and would be such to-day, with no power to change her citizenship until the matrimonial relation is terminated by death or otherwise. And yet it is argued that the appellee, who was an alien when she came to this country, and who married an alien while here, and has during her entire life owed allegiance either to the Emperor of Germany or the Emperor of Russia, may do what she could not have done had she been born an American citizen. We cannot think that the law makers intended so anomalous a situation.

The order is reversed, and the case is remanded to the Circuit Court, with instructions to cancel the certificate of naturalization.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

v.

WILLIAM HOGG, alias HALL, Appt.

(126 La. 1053, 53 So. 225.)

Contempt — person on trial for crime — remark of court — effect.

1. A person on trial for a crime may be guilty of contempt of court, and, where he is already in actual custody, it is no invasion of his rights for the trial judge to say to him: "If you were not already in jail, I would send you there for contempt."

Embezzlement — conflicting defenses.

2. Where a person charged with embezzlement reserves one bill, based on the theory of his being the partner (in business) of the prosecutrix, and others on the theory of his being married to her, there is manifest conflict between the different grounds of objection, since one cannot, under our law, be the husband and the partner in business of the same woman.

Same — partnership funds — appeal — instruction — harmless error.

4. In a prosecution for embezzlement, in which evidence is adduced tending to show that the property alleged to have been embezzled belonged to a partnership of which the accused was a member, it would be reversible error for the judge to refuse to charge the jury that, if they find that such property did in fact belong to the partnership, they should acquit the accused: but where there is no such evidence, such

refusal, coupled with a charge given to the jury, in effect, that a partner may be guilty of embezzling the funds of the partnership, operates no injury to the accused, and the verdict will not be set aside on that account.

Same — wife's property by husband.

4. A husband may be guilty of embezzling the property of the wife; though whether the same is true of the wife, with regard to the property of the husband, is a question which is not here decided.

Criminal law — indictment — objection — waiver.

5. It is too late for a party who has been convicted of a crime to make the objection on motion for new trial that he was prosecuted under the wrong name.

Same — motion in arrest — inquiry — scope.

6. Matters that are covered by the verdict will not be inquired into on a motion in arrest of judgment.

Same — indictment — objection — waiver.

7. Where an indictment is signed by the district attorney, properly identified as the work of the grand jury by the indorsement "A true bill," followed by the official signature of the foreman of the grand jury, and is shown to have been returned into court by the grand jury, the objection that it was not read "in open court in the presence of the jury" comes too late, in a motion in arrest of judgment.

(June 30, 1910.)

Note. — Larceny or embezzlement by one spouse of the other's property.

On the principle of the unity of husband and wife, certain offenses, such as larceny and embezzlement, could not at common law be committed by one spouse against the other.

Rule as to husband.

At common law a husband could not commit larceny in respect to the chattels of his wife, for the reason that the chattel property of a woman vested on her marriage in her husband. 18 Am. & Eng. Enc. Law, p. 512; Overton v. State, 43 Tex. 616; Watkins v. State, 60 Miss. 323.

In Overton v. State, supra, it was held that a husband could not be convicted of theft of his wife's property, unless there had been a distinct and definite separation and the husband had abandoned possession of the wife's property and recognized her right to its exclusive possession.

There is some conflict among the cases as to the effect of the married woman's property acts. Some cases hold that these statutes, giving the wife exclusive control and authority over her personal property, were not intended to sever the unity of person and community of property existing between a husband and wife, and do not

A PPEAL by defendant from a judgment of the Judicial District Court for the Parish of Caddo convicting him of embezzlement. Affirmed.

The facts are stated in the opinion.

Mr. John B. Files for appellant.

Mr. R. G. Pleasant, with Messrs. Walter Gulon, Attorney General, and J. M. Foster, for appellee:

In motions in arrest of judgment, only those questions can be brought before the court which are patent on the face of the record.

Marr, Jur. p. 864.

The judge's remark that he would put the defendant in jail for contempt were he not already there was not prejudicial.

State v. Habb, 105 La. 230, 29 So. 725.

Partnership property may be embezzled by one of the partners.

State v. Kusnick, 45 Ohio St. 535, 4 Am.

change the common-law rule that the taking of the wife's property by the husband is not larceny. State v. Parker, 3 Ohio Dec. Reprint, 551; Thomas v. Thomas, 51 Ill. 162. And see Walker v. Reamy, 36 Pa. 410.

But in *Beasley v. State*, 138 Ind. 552, 46 Am. St. Rep. 418, 38 N. E. 35, it was held that the effect of the statutes giving the wife exclusive control and authority over her personal property was to sever the unity of person and community of the property existing between them. The court pointed out that, by virtue of the statutes, a wife could contract with her husband, and could recover from him for a breach of contract or for cheating her, and said that it would seem reasonable to conclude that he could steal from her also, where the circumstances attending the wrongful act were such that if performed by another it would constitute a felonious asportation.

And in *Hunt v. State*, 72 Ark. 241, 65 L.R.A. 71, 105 Am. St. Rep. 34, 79 S. W. 769, 2 A. & E. Ann. Cas. 33, it was held that a man may be guilty of larceny of property which the Constitution makes the sole and separate property of the wife. In that case the man obtained the money from the woman with intent to convert it to his own use, by means of a well-laid scheme which included the performance of a marriage ceremony with her, and fraudulent representations that, in case she intrusted him with the money, he would invest it for her benefit; and he was properly convicted of larceny.

As opposed to the rule announced in *State v. Hogg*, it was held, in *Golden v. State*, 22 Tex. App. 1, 2 S. W. 531, that money belonging to a wife was not subject to embezzlement by the husband.

Rule as to wife.

Conversion by a married woman is not at common law larceny, because in con- 29 L.R.A. (N.S.)

St. Rep. 564, 15 N. E. 481; *Leacock v. State*, 136 Ind. 217, 36 N. E. 137.

Monroe, J., delivered the opinion of the court:

Defendant appeals from a conviction of embezzlement and sentence thereon. His first bill shows that the judge asked him several times (he being, as we understand, a witness in his own behalf) whether he had ever obtained a license to be married to the prosecutrix, whose money he is charged with having embezzled, and that he refused to answer, whereupon the judge told him, if he were not in jail already, he would send him there for contempt, to which remark there was objection and the bill. The objection was not good. Defendant, as a witness, was subject to cross-examination, and, though on trial, was capable of committing contempt of court, and was liable

temptation of law she is one person with her husband, and also because she has an interest in her husband's goods. 18 Am. & Eng. Enc. Law, p. 512; *R. v. Glassie*, 7 Cox. C. C. 1; *R. v. Tolfree*, 1 Moody, C. C. 243; *R. v. Kenny*, L. R. 2 Q. B. Div. 307, 3 Am. Crim. Rep. 448; *State v. Banks*, 48 Ind. 197; *Lamphier v. State*, 70 Ind. 317. And see *R. v. Tollett*, Car. & M. 112; *R. v. Avery*, 7 Week. Rep. 431.

In *Thomas v. Thomas*, supra, it was held that the common-law rule that the wife could not be guilty of larceny for taking her husband's property was not changed by the married woman's property acts, since it did not so far destroy the relation of husband and wife as to render either guilty of larceny.

And the rule is not affected by adultery of the wife. *R. v. Kenny*, supra.

Even while eloping with an adulterer, a wife cannot commit larceny in taking her husband's goods. *R. v. Glassie*, supra.

But under the English married women's property act of 1882 (45 & 46 Vict. chap. 75) §§ 12, 16, the stealing by the wife of the goods of her husband, when about to leave or desert him, is larceny. *R. v. Brittleton*, 15 Cox, C. C. 431; *R. v. James* [1902] 1 K. B. 540.

And it is not necessary that the indictment under the above statute should contain averments that the wife took the goods in question when leaving or deserting, or about to leave or desert, her husband. *R. v. James*, supra.

In *R. v. Willis*, 1 Moody, C. C. 375, it was held that the taking by the wife of society funds in the possession of the husband was not larceny.

In *Com. v. Hartnett*, 3 Gray, 450, it was held that a wife who committed a theft in a building owned by her husband was not liable to the punishment prescribed by a statute for larceny "in any building."

A. L. R.

to punishment therefor. Being in actual custody, however, it was no invasion of his rights for the judge to make the remark complained of. Bills 2, 3, and 4 show (2) that defendant requested the judge to charge the jury, "If you find that the check represented partnership funds, then, and in that event, he is not guilty of embezzlement," (3) that he objected to the testimony of Lizzie Hall on the ground that she was his wife; (4) that he objected to the refusal of the judge to charge, "If you find that William Hall and Lizzie Hall were married, then he is not guilty." Following the objection to the testimony of Lizzie Hall, bill 3 proceeds: "The agreed state of facts is as follows, tending to show marital relations: The evidence showed that the man and woman had lived, as many negroes do, as man and wife, but had never been married, and that, while she referred to him as her husband, no marriage had ever been executed. They had lived together for several years, and he left her and was gone nearly a year and returned, and had been back for about three weeks, and left her again, with her property and against her will. Whereupon the court overruled the objection, for the following reasons as above stated. And thereupon counsel for defendant took this their bill of exception, and, having submitted the same to the counsel for the state and the court, prayed the judge to sign the same."

And the bill was signed accordingly. There is manifest conflict between the position taken by defendant in bill 2 and that taken in bills 3 and 4; for, if Lizzie Hall was his wife, she could not, under our law, be his business partner. His counsel says in his brief that, if there had been an agreement such as that referred to in bill 3, it ought to be in the record and speak for itself; and we concur in that view. We take it, however, that the trial judge concluded from the testimony, or lack of testimony, on the subject, that it was either actually or virtually conceded that there had been no marriage between the defendant and the prosecuting witness, and that conclusion finds support in bill 5, in which defendant himself recapitulates the testimony from his point of view. On the other hand, as we have observed, the theory of a partnership propounded in bill 2 is irreconcilable with that of marriage propounded in the other bills. Beyond that, the trial judge dealt with the matters as though the question of partnership *vel non* and marriage *vel non* were both presented by the evidence for the consideration of the jury, since, having refused to give the special charges recited in bills 2 and 4, he instructed the jury: "(2) That partnership funds could

be embezzled; that it all depended upon the facts connected with the transaction. If the funds had been intrusted to a partner for a specific purpose, and were appropriated for the taker's use to defraud another, it would be embezzlement."

"(4) That a husband or wife would embezzle the separate funds of another, where they had been intrusted for another purpose, and where it was not under the control of the one appropriating the same to his or her use, and was done to defraud the other."

Considering the ruling presented by bill 2, and the charge therein recited, we make the following excerpts from Mr. Bishop's New Criminal Law, 8th ed. vol. 2, pp. 186 et seq., to wit: "(4) This chapter—wherein it is assumed that the reader has before him his own statutory laws—will seek to point out the leading interpretations, but not to supersede the looking and thinking, which is the duty of the reader. And he is cautioned that what an English court or that of a sister state has held under a provision differently expressed is not, as of course, to be accepted as a rule for his own tribunal.

"Sec. 325. . . . This offense being statutory, and the statutes varying in their terms, there can be no one definition of embezzlement applicable to all the statutes. In a general way the wrong may be described as the embezzling of property designated in the particular statutes, by the persons and under the circumstances specified therein. . . . Looking for such a definition as the nature of the subject permits, to be applied to diverse and unknown statutes, some extending the offense to greater numbers of classes of fiduciary persons and to more kinds of property than others, and some requiring different circumstances of possession from others, the following may be helpful: Embezzlement is the fraudulent misappropriation by a servant or other person within the terms of the statute of embezzlement, of such property as the statute makes the subject of it, under the circumstances designated therein, to the use of the embezzler, or otherwise to the injury of the owner thereof. . . .

"Sec. 330. . . . The doctrine of this subtitle is that, since embezzlement is a purely statutory offense, only persons within the statutory terms can be guilty of it. But one within those terms—for example, an agent—need not be such *de jure*. A mere *de facto* relationship suffices. . . .

"Sec. 348. Between 'servant or clerk' and 'agent' the books disclose a distinction demanding careful attention. Thus, as already observed, it has been held that a person employed on commission to get orders

for goods and receive payment for them is not the employer's 'servant or clerk,' if at liberty to get the orders and receive the money where and when he thinks proper. 'To constitute the relation of master and servant,' said Erle, Ch. J., 'the inferior must be under more control than is implied by having the option of getting orders, with the right to receive a commission thereon.' Yet such a person is undoubtedly an agent."

"Sec. 343. . . . One cannot be a servant to himself. Therefore, if a company whereof he is one owns the business he is employed in, he cannot be its agent, servant, or clerk. . . .

"Sec. 345. . . . (2) . . . One cannot be the servant of a firm whereof he is a member, since thus he would be a servant to himself," etc.

The present English statute (24 & 25 Vict. chap. 96, § 68, quoted in the volume above referred to, at page 185, § 323) reads, in part, as follows: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant," etc.

Our statute is much broader, and includes many other classes of persons in its grasp than clerks and servants. It reads in part:

"Sec. 905 [Rev. Stat.]. Any servant, clerk, broker, agent, consignee, trustee, attorney, mandatary, depository, common carrier, bailee, curator, administrator, tutor, or any person holding any office or trust under the executive or judicial authority of this state, or in the service of any public or private corporation or company, who shall wrongfully use, dispose of, conceal or otherwise embezzle, any money, . . . or any other property which he shall have received for another, or for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which shall have been intrusted to his care, keeping, or possession by another, or by his employer, principal, or bailor, or by any court, corporation, or company, upon conviction thereof, or having aided or abetted . . . shall suffer imprisonment," etc.

According to the established and well-nigh universal jurisprudence, when the foregoing statute was adopted and since, a partner could not be guilty of embezzling the property of the firm of which he was a member, for two reasons (the merits of which we will not now inquire into), to wit, that he could not be the agent, clerk, or servant of such firm, and that, as to him, the property of the firm is not the property of another in the sense of the law. In 1838 the general assembly passed an act (No. 31) purporting to amend and re-enact § 905 of the Revised Statutes, but which re-enacts the section without amending it, so far as

we can see. It is true that no case seems to have arisen in this state, in which the question here at issue has been presented, but we imagine that it is because it has been so well settled that a partner cannot embezzle partnership property (under a statute relating to an agent, clerk, mandatary, etc., misappropriating, etc., property received "for his employer, principal, or bailor, or by virtue of his office, trust, or employment, or which shall have been intrusted to his care . . . by another," or by his employer, etc.) that no prosecutions for such supposed offenses have been instituted. In some states, where the intention was to include partners dealing with partnership property, it has been so expressly provided, and we are of opinion that such a course would have been pursued by the general assembly of this state, if it had had the purpose mentioned in view. As the matter stands, we should feel rather as if we were amending and enlarging the scope of the statute than construing it, if we were to give it the application contended for by the state. We therefore conclude that there was error in refusing the requested charge as recited in the bill 2 and in the charge given; but we fail to find that defendant was prejudiced thereby, since his position with regard to his marriage is irreconcilable with the idea of a partnership, and there is nothing in the record to indicate that there was any evidence offered tending to show a partnership between him and the prosecutrix. On the other hand, we think the trial judge ruled correctly in refusing the charge recited in bill 4, and that there was no error, to the prejudice of the defendant, in the charge given, to the effect that a husband or wife may embezzle one another's funds, though, in view of the presumptions of our law in regard to the dominating influence of the husband, we prefer to reserve for future consideration the question whether the wife can be guilty of embezzling the property of the husband. Defendant's bill No. 5 was reserved to the overruling of a motion in arrest of judgment. It begins as follows: "Be it remembered that in the trial of the motion for new trial, and later, on the motion in arrest of judgment, counsel called to the attention of the court the evidence in the case, which was as follows [and then follows a recapitulation of the evidence, after which, the bill proceeds]. Counsel urges upon the court that under the above facts the verdict was not responsive to the evidence, and there was no embezzlement on the part of defendant, and that he placed the check made out in his favor in the bank for collection, which in law and under the charge of the court he had a right to do."

The court overruled the motion for new trial, and later the motion in arrest, for the following reasons, to wit: "Because the court felt satisfied that the verdict was correct and borne out by the evidence. Whereupon counsel took this, his bill," etc.

As we have no jurisdiction of the facts, this bill brings up nothing that we can review. The motion for new trial sets up that the verdict was contrary to law and the evidence, and that "defendant was being tried under the name of William Hogg whereas, his true name is William Hall, and that it convicts him of going under an assumed name."

The first point presents nothing for the consideration of this court; and the second is without merit in a motion for new trial. The motion in arrest of judgment sets up several alleged defects or irregularities, which, if they existed, were cured by the verdict. It also alleges that the minutes of the court do not show that the indictment was a "true bill." The indictment is signed by the district attorney, and has indorsed upon it the title and number of the case, and the words and signatures: "Embezzlement. A true bill. W. E. Glassell, Foreman of the Grand Jury," together with the date of the filing in court, and the return of the clerk, showing its service on the defendant. Also, the verdict of the petit jury reading:

We, the jury, find the prisoner guilty of embezzling the amount of one hundred and twenty two 25 0/100 dollars (\$122.25).

E. R. Bernstein, Foreman.

The minutes of the court read: "And now comes the grand jury to make this partial report, and, with leave of the court, presents to the court the following bills of indictment, which the court ordered filed and made of record, and the sheriff is authorized to take bond in each case, as fixed by the court: State of Louisiana v. William Hogg, alias Hall, Embezzlement."

Which minute entry corresponds in date with that of the filing of the indictment. In State v. Logan, 104 La. 254, 28 So. 912, to which counsel for defendant refers, the verdict was set aside because the words, "a true bill," followed by the signature of the foreman of the grand jury, were not indorsed on the back of it. It is true that it was remarked in the opinion as additionally showing that the indictment in question was not sufficiently identified as the work of the grand jury, that the minutes did not show that either the indictment or the indorsement thereon was read in open court in presence of the jury, and that they did show that there was a discrepancy between 29 L.R.A. (N.S.)

the minute entries of the indorsements and the indorsements themselves as they appeared on the indictment. In the instant case, the indictment is properly identified by the signature of the foreman as the work of the grand jury, and is shown to have been properly and regularly returned into court and made of record. Defendant was thereafter arraigned and pleaded, and later was tried and convicted, and throughout the proceedings made no complaint that the indictment was not read in the presence of the jury. Such complaint came too late in a motion in arrest of judgment.

Finding no reversible error therein, the judgment appealed from is affirmed.

MICHIGAN SUPREME COURT.

GEORGE FRAAM

v.

GRAND RAPIDS & INDIANA RAILWAY COMPANY, Plff. in Err.

(161 Mich. 556, 126 N. W. 851.)

Carrier — parcel stand — liability.

1. That a railroad company charges only

Note. — Liability of carrier for loss of property in a check room.

Terry v. Southern R. Co. 81 S. C. 279, 14 L.R.A. (N.S.) 295, 62 S. E. 249, appears to be the only other American case which passes squarely upon the liability of a carrier for loss of property from a check room maintained by it. In that case it was held that the owner of property lost while in a railroad check room is not bound to show negligence on the part of the railroad company to be entitled to hold it liable for the loss; but the provision on the check issued by the company limiting its liability for each article lost was held binding on the patron.

Where goods are left at a station to be kept for the owner either until he proceeds on his journey, or until he calls for them, without his paying for such service or without the goods being checked as baggage, then either the transaction is merely a personal one between the owner and the agent with whom the goods are left, or the company is merely a naked depository or gratuitous bailee, and in either case the company is merely a naked depository or gross negligence. Little Rock & Ft. S. R. Co. v. Hunter, 42 Ark. 200; Georgia R. & Bkg. Co. v. Thompson, 86 Ga. 327, 12 S. E. 640; Southern R. Co. v. Rosenheim, 1 Ga. App. 766, 58 S. E. 81; Van Gilder v. Chicago & N. W. R. Co. 44 Iowa, 548; Louisville, C. & L. R. Co. v. Mahan, 8 Bus. 184; Mattison v. New York C. R. Co. 57 N. Y. 552; Minor v. Chicago & N. W. R. Co. 19 Wis. 41, 88 Am. Dec. 670; Hodgkinson v. London & N. W. R. Co. L. R. 14 Q. B. Div. 228.

W. M. G.

a nominal fee for checking parcels of intending passengers for safe-keeping until called for does not render it a mere gratuitous bailee, but it is bound to exercise ordinary care, and is liable for ordinary negligence.

Trial — negligence of carrier — question for jury.

2. The question of the negligence of a carrier from whose check room a parcel disappears so that it cannot be found is for the jury, where it appears that the check room was left unattended at different times whenever the attendant's services were required at trains.

Bailee — notice of value — sufficiency.

3. Notice to a carrier when a parcel is left at its check room, to be very careful of it, as it contains lots of goods, is sufficient to warn the bailee that the articles are of considerable value.

Same — negligence of bailor — failure to inquire.

4. One checking a parcel at a carrier's check room is not negligent in failing to make inquiry for it for about four hours, and then making the inquiry at another station and asking to have the parcel forwarded to him.

(June 6, 1910.)

ERROR to the Circuit Court for Kent County to review a judgment in plaintiff's favor in an action brought to recover damages for loss of an article committed to defendant for safe-keeping. Affirmed.

Statement by Brooke, J.:

On September 26, 1908, at about 2 o'clock *a. m.*, plaintiff, who was engaged in selling mental goods which he carried from place to place in a large suit case, entered defendant's station at Kalamazoo, intending to take defendant's train to Grand Rapids. On inquiry, he found that the next train could take would not leave until 4:20 *p.*

Thereupon, he took his suit case to the baggage room in defendant's station, and asked if he might leave it there until his train left. He was told by the attendant that he would have to check it, which he did, paying 5 cents, and receiving in return a parcel check. He then left the depot, and spent the intervening time visiting with fellow countrymen near the Michigan Central Depot. Defendant's train coming into the depot, plaintiff boarded it there for Grand Rapids, leaving his suit case at the Grand Rapids & Indiana parcel room. Upon his arrival at Grand Rapids at 5:45 *p.*, plaintiff went to the baggage man, showed his parcel check, and asked if the suit case would be forwarded to him at Grand Rapids. He was assured it would be the next morning. It was not forwarded the next morning, nor at any time thereafter. L.R.A. (N.S.)

Plaintiff then went to Kalamazoo and made a demand for the suit case, but did not receive it. Defendant caused a careful search to be made, but the article could not be found, and has never been returned to its owner.

Plaintiff testifies that at the time he deposited his suit case with defendant's employee, he said to the baggage man: "Be very careful, there is lots of goods here in that suit case." He said, "Well, did you have it checked?" I said, "Yes." "Well," he said, "You can have the company responsible for the suit case, don't you care; don't you be afraid." Defendant, at the trial, admitted the receipt of the property and offered no evidence tending to show what had become of it, except that it could not be found. Plaintiff, having recovered a judgment in a suit in trover, defendant has removed the case to this court by writ of error.

Mr. James H. Campbell for plaintiff in error.

Messrs. Powers & Eardley for defendant in error.

Brooke, J., delivered the opinion of the court:

It is contended by defendant that, in assuming to take charge of plaintiff's suit case, it acted solely for the convenience of the plaintiff, and became bailee of his property for accommodation, and not for hire. That, therefore, defendant would not be liable except for wilful conversion or gross negligence.

We cannot agree with this view of the relations between the parties. It may be true, as urged by defendant, that the fee charged (5 cents) for the services performed is not much in excess of the value of the check attached to the article, but we are, nevertheless, of the opinion that the insignificant amount of the charge cannot control the status of the parties. Defendant held itself out to plaintiff as willing to take charge of his property, and to redeliver it to him on presentation of the check. It demanded a certain compensation, which plaintiff paid. That this compensation was small is of no consequence. Its adequacy was a matter for the determination of the parties, and, they having agreed, the courts will not interfere. *Newhall v. Paige*, 10 Gray, 366. Moreover, the small fee charged may not be the only consideration moving from plaintiff to defendant. Railways commonly maintain parcel rooms at their depots in considerable cities, where passengers and others may for a nominal charge have their belongings cared for. This service is performed not only for the accommodation of the person using it or the immediate profit

arising therefrom, but may, and probably does, result in increased patronage of and profit to the road, because of the knowledge of the traveling public that such service is afforded. This service is not rendered by the railroad company in its capacity as a common carrier, for the articles are not checked for transportation, but for safe-keeping and redelivered at the place of deposit. In this phase of its activity, the company acts rather in the capacity of a warehouseman, who, for compensation, receives and stores the goods of another.

The contract of bailment here under consideration is one for the mutual benefit of the parties, and the bailee thereunder was bound to exercise ordinary care of the subject-matter of the bailment, and is liable for ordinary negligence. Ordinary care means such care as ordinarily prudent men, as a class, would exercise in caring for their own property under the like circumstances, and whether it is exercised or not is a question of fact for the determination of the jury, under proper instructions. *Hofer v. Hodge*, 52 Mich. 372, 50 Am. Rep. 256, 18 N. W. 112; *Ruggles v. Fay*, 31 Mich. 141; 3 Am. & Eng. Enc. Law, p. 744.

Defendant's fourth request to charge is as follows: "It having been shown that the goods were stolen, the burden was thereby placed upon the plaintiff to prove want of due care by the defendant. There being no proof of want of such due care by the defendant, your verdict must be, 'No cause of action'" (citing *Knights v. Piella*, 111 Mich. 9, 66 Am. St. Rep. 375, 69 N. W. 92. This instruction was properly refused. The record is absolutely barren of evidence tending to show a theft of the suit case, unless the fact that it could not be found is to be treated as such. In *Baehr v. Downey*, 133 Mich. 163, 103 Am. St. Rep. 444, 94 N. W. 750, this court said: "Under these circumstances, plaintiffs made out a prima facie case by showing the property in the defendant's possession, and refusal or neglect to return on demand. The onus of exoneration was then on the defendants. 3 Am. & Eng. Enc. Law, 2d ed. p. 750. The rule as there stated is that, when the chattels are not returned at all, the law presumes negligence, and casts upon the bailee the onus of showing he was not negligent" (citing *Knights v. Piella*, supra; *Donlin v. McQuade*, 61 Mich. 275, 28 N. W. 114).

The evidence given by defendant's witnesses shows that the room in which the suit case was placed was left unattended for five or ten minutes at a time, when trains arrived and departed, if any baggage had to be placed thereon. Three trains left the depot during the afternoon. We think the question of the negligence of the defendant was,

under the evidence, a proper one for the jury, and that the jury were properly instructed in relation thereto.

It is urged by defendant that plaintiff was negligent in failing to notify the baggage man of the value of the suit case, and in not calling for it at 4:20. As to the first point, we believe that his conversation with defendant's servant (if true) was sufficient to warn defendant that the article was of considerable value. He instructed the man to be very careful as there were lots of goods in the case, and received the assurance of defendant's agent that the company would be responsible and that he need not worry. Touching the second point, it appears that he did make inquiry of defendant about four hours after he had deposited the suit case. It cannot be said that this delay is any evidence of negligence on the plaintiff's part.

The other errors assigned have been considered, but require no discussion.

The judgment is affirmed.

KENTUCKY COURT OF APPEALS.

WESTERN UNION TELEGRAPH COMPANY, Appt.,
v.

NANNIE PRICE.

(137 Ky. 758, 126 S. W. 1100.)

Telegraph — delivery by telephone.

1. A telegraph company which receives an important message after the hours during which it maintains a messenger service must, in case it is connected with the residence of the addressee by telephone which it can use without expense, make reason-

Note. — Duty of telegraph company to deliver message by telephone.

The question of the duty of telegraph companies to deliver messages by telephone has not been frequently before the courts for decision. While companies of this description are not now generally held to be common carriers, their relation to the public is in the nature of that of a common carrier, and they should at least be required to exercise reasonable care and diligence in the delivery of messages intrusted to them for transmission. What constitutes such diligence depends upon the facts in each case. Where, as in *WESTERN UNION TELEGRAPH CO. v. PRICE*, the addressee has a telephone at hand, and no other method of delivering an important message promptly is available, it would seem to be the duty of the telegraph company, in the exercise of reasonable care and diligence, to telephone the message to the addressee.

It has been held where the addressee has no telephone available that the telegraph

able effort to deliver the message by that means.

Trial — jury — diligence in delivering telegram.

2. The jury must determine whether or not a telegraph company exercises reasonable diligence in delaying for an hour the delivery of an important message received during the night, after the messenger goes on duty in the morning, where the ad-

dressee lives within a few squares of its office.

Same — instructions — refusal — error.

3. Failure to instruct that a telegraph company is not negligent in failing to send a messenger to deliver a telegram received during the night is not error, where the evidence tends to show that it was negligent in failing to deliver the message by telephone.

company owed such person no duty to telephone a message.

Thus, in *Hellams v. Western U. Teleg. Co.* 70 S. C. 83, 49 S. E. 12, where an additional charge was collected from the sender for forwarding the message to the addressee, who was located on an island which was connected by a ferry and telephone with the place at which the telegraph company's office was located, it was held that such company owed no duty to telephone the message, where it appeared that the addressee had no telephone, although individuals living in the vicinity had telephones in their residences. The court said: "We do not think that the law imposes upon telegraph companies the duty to telephone a message, as that would seriously impair the confidential relations assumed in the delivery, receipt, and transmission of telegraphic communications. Had the sender or addressee of the message authorized its transmission by telephone to anyone who would receive it and undertake to deliver it, that might have been a proper consideration for the jury in determining the question whether defendant used due diligence in delivery of the message. But in this case there was not a particle of evidence that defendant was authorized to telephone the message to someone on Sullivan's island for communication to plaintiff, and the uncontradicted evidence was that plaintiff had no telephone in his residence, which fact the defendant ascertained on inquiry of the telephone company's office, in its effort to deliver the message by telephone directly to plaintiff."

And it was held in *Lyles v. Western U. Teleg. Co.* 77 S. C. 174, 12 L.R.A.(N.S.) 534, 57 S. E. 725, that the law does not impose upon telegraph companies the duty, under their general contract, to telephone messages, since this method would impair the confidential relations assumed. But it was held to be perfectly competent for them to enter into a special contract binding themselves to make delivery in this manner.

And where the contract with a telegraph company was to transmit a message by telegraph, the fact that a connecting telegraph line was found to be unfit for use, so that a delay would result, does not raise an obligation on the part of the first company to use the telephone to deliver the message. *Western U. Teleg. Co. v. Soraby*, 29 Tex. Civ. App. 345, 69 S. W. 122.

So where a message was sent in care of Charles Wright, and no Charles Wright was found in the telephone directory, it was

held not to be a circumstance going to show negligence because other Wrights, with the initials C. E., C. A., and C. D., were shown in the telephone directory, and the telegraph company's agent failed to call each of them to ascertain if he was the party intended, especially as the name Charles Wright appeared in the city directory. *Western U. Teleg. Co. v. Wright (Ala.)* 53 So. 95.

And in *King v. Western U. Teleg. Co.* 89 Ark. 402, 117 S. W. 521, a telegraph company was held guilty of no negligence, where the message was promptly transmitted, and it appeared that the receiving office found that the addressee lived 6 or 8 miles in the country, inquired concerning telephones, ascertained that the party had none, and that the nearest one to her was a mile and a half away, and thereupon mailed the message; and this was held, notwithstanding the fact that the sender told the operator at the originating station of the importance of the message, and stated that the addressee lived 4 miles from the nearest office.

It was held in *Western U. Teleg. Co. v. Douglass (Tex. Civ. App.)* 124 S. W. 488, where the messenger was told during his inquiry that he could communicate with the addressee of a message over the telephone at a third person's house, that the fact that the sender did not address the message in care of the third party, or advise the company that the sendee was living with such person, would not defeat a recovery for damages sustained on account of delay in the delivery of the message.

Where the addressee of a message asks the messenger boy to telephone him the contents of a message, the messenger is his agent, and the messenger's mistake in transmitting the message cannot be charged against the telegraph company, although its telephone is used with the knowledge of its operator, who, however, is not shown to have heard the message read over the telephone. *Norman v. Western U. Teleg. Co.* 31 Wash. 577, 72 Pac. 474.

In *Western U. Teleg. Co. v. Craig*, 44 Tex. Civ. App. 214, 90 S. W. 681, where the manager of a telegraph company testified to making inquiry as to the addressee of a message, a question on cross-examination as to whether he used the telephone in making inquiry was held not inadmissible on the ground that the company could not discharge its obligation by delivering a message by telephone.

J. T. W.

Damages — failure to deliver telegram.

4. Nine hundred and fifty-five dollars and fifty cents is not excessive to award a widow for the negligent failure of a telegraph company to deliver a message in time to permit her to reach the bedside of her dying husband before he sank into final unconsciousness.

(April 14, 1910.)

APPEAL by defendant from a judgment of the Circuit Court for Logan County in plaintiff's favor in an action brought to recover damages for alleged negligent failure promptly to deliver a certain telegram. Affirmed.

The facts are stated in the opinion.

Messrs. Browder & Browder, A. E. Richards, and Richards & Ronald for appellant.

Messrs. Selden Y. Trimble, S. R. Crewdson, and Trimble & Bell for appellee.

Carroll, J., delivered the opinion of the court :

This appeal is prosecuted from a judgment of the Logan circuit court awarding appellee \$955.50 in damages against the appellant company for its alleged failure to deliver to her within a reasonable time the following telegram:

Kansas City, Feby. 26, 1908.

Mrs. E. S. Price,

Russellville, Kentucky.

Mr. Price seriously ill. Will you come?
Answer. Mrs. H. L. Bales.

The Mr. Price mentioned in the telegram was the husband of appellee, and at the time it was sent he was in Kansas City at the house of Mrs. Bales, where he became seriously ill, and died on February 29, 1908. Mrs. Price and her husband were residents of Russellville, a city of 4,000 inhabitants, and had lived there in the same house some seventeen years; the residence being within a few squares of the telegraph office. The telegram reached Russellville at 9:50 P. M., on the day it was sent, but it was not delivered to Mrs. Price until five or ten minutes after 8 o'clock the following morning.

The evidence shows that the company had a night operator and a day operator, the latter going on duty at 7 o'clock in the morning from 7 o'clock in the morning until 7 o'clock in the evening, it had a messenger boy to deliver messages, but did not have any messenger boy on duty after 7 o'clock in the evening or during the night. If the telegram had been delivered to Mrs. Price at any time before 29 L.R.A. (N.S.)

midnight of the day it was received, she could have left Russellville on a train due there at 1:15 A. M.; or if it had been delivered to her before 6 o'clock the next morning, she could have left on the train due there at 7:17 A. M.; or if had been delivered to her shortly after 7 o'clock, she could have left on a train leaving there at 8:35 A. M. By leaving on either of these trains, in due course of travel she would have reached the bedside of her husband in time to have seen and conversed with him before he became unconscious. As it was, there was no train on which she could leave Russellville until 7:10 P. M. on the 27th, and, going on this train, she did not get to the bedside of her husband until a few hours after he had become unconscious, in which condition he remained until his death.

There is evidence that it was the rule and custom of the Russellville office when telegrams were received during the night, and after the departure of the messenger boy, addressed to persons who had telephones, to deliver the message to the addressee by telephone, and on the following morning deliver the written message. It was also shown that Mrs. Price was at her residence during the whole of the night of the 26th of February, and that she had in the room in which she slept a Cumberland telephone, and that this telephone was also in use in the office of the telegraph company. The operator testifies that a few minutes after receiving the message he called up the telephone exchange and asked the operator to get Mrs. Price for him, that he had an important message to deliver to her; and the telephone operator testifies that she rung up Mrs. Price's residence on two occasions shortly after receiving the request from the telegraph office, but, failing to get an answer from Mrs. Price, no further effort was made to deliver the message over the telephone. Upon this point Mrs. Price testifies that she was in the room in which the telephone was located during the whole of the night, and did not go to sleep until after the hour the telephone operator said she endeavored to call her up, and that the telephone bell did not ring.

Although the company was not required to keep a messenger boy on duty during the night, or obliged to send the telegram by messenger during the night, it was, under the facts of this case, its duty to make reasonable efforts to forward the message over the telephone within a reasonable time after it was received. When a telegraph company has in its office a telephone that will put it in connection with the addressee of an important telegram received at an hour when its messenger is absent, it should exercise reasonable diligence to de-

liver it over the telephone, or notify the addressee of the fact that it has a telegram at its office; and this, notwithstanding the fact that the company may not be under any duty to have a messenger boy at the time the telegram is received to deliver it or be required to then deliver it in person. The fact that a company may establish reasonable hours of service, and be excused during specified hours and at certain places from delivering in person telegrams, will not relieve it of the duty, when its messenger is absent, of delivering an important telegram over the telephone, or at least of notifying the addressee that it has an important message for him, if it can communicate this information from its office without incurring any cost. Many important telegrams are received during the night, and at other times when the reasonable rules of the company do not require that they should be delivered at once by messenger; but if the company has in its office a telephone that will put it without expense in communication with the addressee, it must use due diligence to notify him by telephone of the fact that it has the message, and, if he request it, deliver it to him over the telephone, and the failure to do this is negligence for which a recovery may be had, if the case is one that authorizes damages for the failure to transmit and deliver with reasonable promptness a message. These corporations are public servants. They owe a duty to the public to exercise reasonable diligence to transmit and deliver in due time all messages received; and when this can be done over the telephone at no expense and without leaving the office, there is no reason why they should not be required to do it. It is true that the ordinary method of delivering telegrams is by messenger, and that the sendee is entitled to have delivered to him in writing the identical telegram received. But this rule of law will not and should not exonerate the company from using the telephone in cases where its business and the settled rules of law do not demand that it shall be prepared to promptly deliver the written message by hand. It cannot be successfully maintained that a company has exercised reasonable care and diligence to deliver a telegram in the proper absence of its messenger service, when it fails to use for the purpose so convenient an instrument as a telephone that will connect without delay or expense its operator with the addressee. We do not mean to hold that the company under ordinary conditions or at all times may use the telephone to deliver messages, without

the consent of the addressee or sender, and in the absence of a contract to that effect, or that it would be negligence to fail to use the telephone when the message in reasonable time could and would be delivered in writing by a messenger; but under circumstances and conditions like those proven in this case, we hold that it is the duty of the company to make reasonable efforts to notify the addressee over the telephone of the contents of the telegram, and properly a question for the jury to say whether or not the company exercised reasonable diligence in the delivery of the message.

We might, however, safely pass over the failure of the company to deliver the message on the night it was received, and put our decision upon the ground that it was negligence not to deliver it until after 8 o'clock on the following morning. It is attempted to excuse the failure to deliver the telegram earlier on the morning of the 27th upon the theory that when the day operator came on duty it was necessary that he should check up the business before attending to the delivery of telegrams received during the night, and that as soon as this duty was performed he at once made every reasonable effort to promptly deliver this message. The argument upon this feature of the case does not impress us favorably. The night operator knew the importance of delivering promptly the telegram, and reasonable diligence required that he should have made reasonable efforts to deliver it, and, failing to do so, he should have notified the day operator upon his arrival of the fact that the message was important and undelivered, and the day operator should then have exercised reasonable diligence to see to its prompt delivery. Whether or not the company exercised reasonable diligence to deliver it over the telephone during the night is involved in doubt, owing to the conflicting testimony of Mrs. Price and the telephone operator; and whether or not it exercised reasonable diligence in failing to deliver it the next morning before 8 o'clock was also a question for the jury. We cannot say as a matter of law that in either of these particulars the company exercised reasonable diligence. We might, however, add that, in view of the fact that Mrs. Price was a well-known inhabitant of Russellville, and her residence within a few squares of the telegraph office, and the further fact that she had in her residence the telephone in use in the telegraph office, it would seem that the company did not exercise reasonable diligence to deliver this

telegram to her over the telephone during the night, or in person or over the telephone a few minutes after 7 o'clock the next morning.

Complaint is also made that the court erred in failing to instruct the jury, as requested by the company, that "it was not the duty of the defendant telegraph company to have a messenger in its service in Russellville to carry and deliver messages during the night, and that its failure to have such messenger on the night in question was not negligence." As a statement of the law applicable to this particular case, the instruction is not objectionable, and might properly have been given; but we do not think the failure to give it was prejudicial error, in view of the fact that it was testified to by all the witnesses introduced by the company that it was the rule and custom to deliver messages received during the night over the telephone to an addressee who had a telephone in his residence, and, aside from this rule and custom, was a duty imposed by law upon the company. The question whether it had or had not a messenger boy on duty during the night, or whether it was or was not its duty to deliver messages by the hands of a messenger boy, was not really a material issue in the case. The message could as easily and more quickly have been delivered over the telephone than it could by the hands of the messenger boy, and the jury was authorized under the evidence to find that the company did not exercise reasonable care to deliver the telegram over the telephone during the night.

It is also assigned as error that the court was inaccurate in the use of some words in the instructions given; but in our opinion this criticism is not well founded. The instructions fairly presented to the jury the law of the case as it has been frequently declared by this court.

Other minor errors are pointed out; but they are not of sufficient importance to justify us in commenting upon them.

It is further said that the verdict is excessive; but in this we do not agree. The evidence shows that the failure of Mrs. Price to reach the bedside of her husband before he became unconscious caused her to suffer the keenest mental anguish, and, in view of the relation between the parties, her grief in failing to see and converse with him can be readily understood and appreciated.

Wherefore the judgment is affirmed.
29 L.R.A.(N.S.)

MICHIGAN SUPREME COURT.

BROWN & BROWN COAL COMPANY,
Relator,

v.

GRAND TRUNK RAILWAY SYSTEM.

(159 Mich. 565, 124 N. W. 528.)

Carrier — special privileges — credit.

1. A carrier may withdraw from a shipper the privilege of a custom which he has enjoyed for only about fifteen months, of having his goods reshipped on the original waybills, all charges to be paid at final destination, where the privilege is only extended to shippers on the credit list of the carrier, from which the shipper's name has been stricken because of disputes over freight charges.

Same — statutory provision.

2. Refusal by a carrier to permit a merchant to reship cars of freight consigned to him to purchasers on the original waybill, all charges to be collected at destination, when such privilege is accorded to other shippers, is not within a statute making it unlawful for any carrier to make or give undue preferences or advantages to any particular shipper, or subject him to any undue or unreasonable disadvantage or prejudice.

(February 3, 1910.)

CERTIORARI to the Circuit Court for Wayne County to review an order denying a writ of mandamus to compel defendant to forward relator's goods without prepayment of freight. Affirmed.

The facts are stated in the opinion.

Mr. E. T. Berger for relator.

Mr. L. C. Stanley for respondent.

Blair, J., delivered the opinion of the court:

On or about October 22, 1908, the defend-

Note. — After a careful search no other cases have been found passing upon the question of whether demanding in the case of one shipper, and not of another, the prepayment of charges as a condition for re-shipment of freight on the original waybill, amounts to an unlawful discrimination. However, the question would seem to depend on the right of the carrier to discriminate between shippers as to the prepayment of freight generally, and this question is discussed in *Gamble-Robinson Commission Co. v. Chicago & N. W. R. Co.* 21 L.R.A.(N.S.) 982, and note appended thereto.

As to right of carrier to discriminate with respect to special or unusual service, see *State ex rel. Ellis v. Atlantic Coast Line R. Co.* 12 L.R.A.(N.S.) 506, and note.

ant railroad company delivered to the siding of the relator eight cars of sand, upon all of which cars certain freight charges were due and payable at the time of delivery. On the same day as delivery, the relator directed the railroad company to deliver three of said cars to the Fairview Coal & Supply Company of Detroit, with freight charges to follow, and deliver five of said cars to the People's Ice Company of Detroit, with charges to follow. In directing charges to follow, it was understood that same were collectable from the parties to whom the cars were directed to be forwarded. It is admitted by the railroad company that cars were so delivered and borders were received for forwarding as above stated. The defendant railroad company refused to forward the cars until the charges thereon had been paid by the relator, and refused to undertake to move the cars to, and collect the charges thereon from, the parties to whom they were directed to be forwarded. On October 28, 1908, a car loaded with gravel was delivered to the relator's siding, and on the same day it directed the railroad company to deliver same to Schillinger Brothers, of Detroit, with freight charges to follow. The railroad company refused to move the car until the charges were paid by the relator. The relator claims in this case that it had, until the month of August, 1908, been doing business with the railroad company under its usual custom of forwarding cars to its purchasers with all charges to follow, and that this custom had been in full force and effect ever since it was in the sand and gravel business, and that, because of a dispute with the railroad company over car measurements in another and different matter, the railroad company, as a retaliatory measure, refused to move the cars in question in this case until the relator had advanced freight charges thereon. The relator further claims that other dealers in sand and gravel in the city of Detroit, doing business with the defendant railroad company, are accorded the privilege of forwarding materials in car lots to their customers, with freight charges to follow, and paid by the parties to whom they were to be forwarded. The relator claims that this is the way they do business, and the terms upon which the materials are sold included the payment by the purchaser of the freight charges, and that, by reason of the arbitrary action of the defendant railroad company in suddenly refusing to continue its custom, the relator company was put to a serious disadvantage with its competitors.

Jacob G. Brown, relator's assistant manager, testified:

The Grand Trunk System maintains what 29 L.R.A. (N.S.)

is known as a "credit list," which is an accommodation extended to different concerns for their convenience, giving them the privilege of ordering their shipments to different yards, etc. When the cars are delivered, the bills are sent and they are paid. It is conducted just like a general book account. Our request was, of course, on the condition that those consignees were upon the credit list of the Grand Trunk. If the parties to whom we directed shipments were not on their credit list, we were willing to prepay the freight. We have done this before. Some time in the spring last year we had a disagreement with the Grand Trunk Railway Company with reference to charges. We disputed their measurements of certain cars upon which the charges are based. The discrepancies were so great that we refused to pay the charges, and asked them to correct the bill, and they refused to do that. There were some eighty-eight bills unpaid for that reason, and that resulted in their canceling our credit and at the same time refused to move any cars. The dispute was finally settled, but our credit was not restored, although they stated that their reason was not because of any lack of financial standing. Prior to this dispute we had forwarded cars over the Grand Trunk with charges to follow, without objection.

Q. After this dispute and the settlement of it, did they consent to move cars and have charges to follow?

A. No; they have refused to do so. The matter of reconsignment of cars with charges to follow has never been in dispute before; the previous trouble being for the reason stated. We have competitors along the line of the Grand Trunk Railway. We have purchased material from other concerns along the Grand Trunk last year, and have ourselves paid the charges on the reconsignment of these cars to us, without objection by the railroad company prior to our dispute with them. Our purpose in not prepaying charges, and to have them follow the cars to their final buyer, is because our sand is sold on pit measurement or railroad measurement, and the customers when they settle for the shipment want to see the freight bills before paying, to see if they correspond with the pit measurement. We are always responsible for the freight until it is paid by the consignee, but there are about sixteen cars that we ordered forwarded that were not delivered, all of them being rejected by the railroad company. Because of the failure of the railroad company to move cars on our order, the orders were canceled.

Respondent's local freight agent testified: There were twenty-two cars that were held up in the latter part of August, or the first

part of September, caused by our canceling their credit on account of their delay in settling charges on previous cars. These charges had remained undisposed of for some days. Finally, they paid our charges as rendered except on three cars, making a difference in the charges of about \$1. Those cars were standing there all the time until they paid, so that they had opportunities to remeasure them. As far as my knowledge goes, I have had more trouble with them than with any other firm in settling charges. There was \$600 of freight money outstanding and in dispute in October.

Relator prays for the writ of mandamus commanding the respondent to move the cars refused and all cars in the future, with charges to follow, so long as such privilege is extended to relator's competitors. Relator relies upon the custom shown as bringing it within the rule of *Gates v. Detroit & M. R. Co.* 151 Mich. 548, 115 N. W. 420, and upon § 17, act No. 312, Pub. Acts 1907. In the *Gates* Case the contract between the parties was alleged to have been made with reference to the custom then existing between the parties, to deliver complainant's logs on defendant's side track in Bay City, for transportation to complainant's mill on the Michigan Central. The circuit judge granted the preliminary injunction prayed for, commanding the defendant to deliver cars at the customary place until the further order of the court. Defendant appealed, and, in view of the custom, the temporary inconvenience to defendant and the serious injury to complainant of a contrary holding, this court, for the purpose of maintaining the *status quo* until the final hearing, sustained the trial court.

In the present case the alleged custom, so far as relator was concerned, had only existed from May, 1907, to August, 1908. It did not apply as to all dealers, but only to those who were placed by defendant upon its credit list, and such place did not depend upon contract or other legal right, but upon the grace of the defendant. At least, the defendant was entitled to determine for itself to whom it would extend credit, and, having had serious trouble with relator in collecting its freight charges, we cannot say that it was not justified in striking its name from its credit list. The case is clearly distinguishable from *Gates v. Detroit & M. R. Co.* supra. Section 17, act No. 312, Pub. Acts 1907, provides that "it shall be unlawful for any common carrier subject to the provisions of this act, to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation," etc., or subject

them "to any undue or unreasonable disadvantage or prejudice in any respect whatsoever." We do not think that the acts complained of give an undue or unreasonable preference or advantage to relator's competitors, or subject relator to an undue or unreasonable disadvantage or prejudice, within the meaning of said § 17. *Hutchinson*, Carr. 3d ed. §§ 567, 799, and cases cited in notes; *Little Rock & M. R. Co. v. St. Louis Southwestern R. Co.* 26 L.R.A. 192, 4 Inters. Com. Rep. 854, 11 C. C. A. 417, 27 U. S. App. 380, 63 Fed. 775; *Randall v. Richmond & D. R. Co.* 108 N. C. 612, 13 S. E. 137.

The order of the Circuit Court is affirmed, and the writ is dismissed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

MYRA V. SIMS, Plff. in Err.,
v.

WINFIELD S. SIMS et al.

(— N. J. —, 76 Atl. 1063.)

Wife — tort action — right to maintain.

1. Chapter 248 of the Laws of 1906 held to confer upon a married woman the right to maintain an action in her own name and without joining her husband therein, to recover damages for a tort committed against her.

Same — alienation of affections.

2. The alienation of the affections of the husband of a married woman is a tort committed against her, to recover damages for which, under the provisions of the act of 1906, chap. 248, she may maintain an action in her own name and without joining her husband therein.

(July 11, 1910.)

Headnotes by MINTURN, J.

Note. — Right of wife under modern married woman's acts to sue for alienation of the affections of her husband.

The earlier cases discussing this question are collected in a note to *Nolin v. Pearson*, 4 L.R.A. (N.S.) 643, and this note is supplementary thereto.

As is shown in the earlier note, the courts of most of the states of the Union hold that under the modern statutes the wife is entitled to maintain in her own name an action for the alienation of the affections of her husband, and in the more recent cases this right is also generally recognized. *Eliason v. Draper* (Del.) 77 Atl. 572; *Dodge v. Rush*, 28 App. D. C. 149, 8 A. & E. Ann. Cas. 671; *Smith v. Gillapp*, 123 Ill. App. 121; *Gregg v. Gregg*, 37 Ind. App. 210, 75 N. E. 674; *Workman*

ERROR to the Supreme Court to review an order sustaining a demurrer to the complaint in an action brought to recover damages for alleged alienation from plaintiff of the affections of her husband. Reversed.

The facts are stated in the opinion.

Messrs. Cortlandt Parker and R. Wayne Parker for plaintiff in error.

Messrs. Beecher & Bedford for defendants in error.

Minturn, J., delivered the opinion of the court:

The suit was instituted to recover damages from defendants for maliciously enticing away the plaintiff's husband, and thereby alienating from her his affections. A

demurrer was interposed upon the general ground that suit will not lie for such an injury, and the supreme court having sustained the demurrer, the legal question thus raised is now presented upon writ of error.

The plaintiff bases her right to sue upon an act passed in 1906, entitled "An Act for the Protection and Enforcement of the Rights of Married Women" (P. L. 1906, p. 525). The act provides that "any married woman may maintain an action in her own name, and without joining her husband therein, for all torts committed against her or her separate property, in the same manner as she lawfully might if a *feme sole*; provided, however, that this act shall not be so construed as to interfere with or take away any right of action at law or

v. Workman, 43 Ind. App. 382, 85 N. E. 997; Wolf v. Frank, 92 Md. 138, 52 L.R.A. 102, 49 Atl. 132; Cochran v. Cochran, 127 App. Div. 319, 111 N. Y. Supp. 588 (reversed for errors in the admission of evidence, 196 N. Y. 86, 24 L.R.A.(N.S.) 160, 89 N. E. 470); Keen v. Keen, 49 Or. 362, 10 L.R.A.(N.S.) 504, 90 Pac. 147, 14 A. & E. Ann. Cas. 45; Messervy v. Messervy, 82 S. C. 559, 64 S. E. 753.

In many recent cases an action of this kind by the wife was entertained by the courts without any discussion of her right to maintain it. Among such cases may be noted the following: Codoni v. Donati, 6 Cal. App. 83, 91 Pac. 423; Park v. Park, 40 Colo. 354, 91 Pac. 830; Gilbreath v. Gilbreath, 42 Colo. 5, 94 Pac. 23; Kelso v. Kelso, 43 Ind. App. 115, 86 N. E. 1001; Farneman v. Farneman (Ind. App.) 90 N. E. 775, rehearing 91 N. E. 968; Heisler v. Heisler (Iowa) 127 N. W. 823; White v. White, 76 Kan. 82, 90 Pac. 1087; Powers v. Sumblar, 83 Kan. 1, 110 Pac. 97; Klein v. Klein, 31 Ky. L. Rep. 28, 101 S. W. 382; Scott v. O'Brien, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. Rep. 419, 110 S. W. 260; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. Rep. 486, 112 S. W. 845; Hillers v. Taylor, 108 Md. 148, 69 Atl. 715; Strode v. Abbott, 102 Mo. App. 169, 76 S. W. 644; Barton v. Barton, 119 Mo. App. 507, 94 S. W. 574; Miller v. Miller, 122 Mo. App. 693, 99 S. W. 757; Sickler v. Mannix, 68 Neb. 21, 93 N. W. 1018; Servis v. Servis, 172 N. Y. 438, 65 N. E. 270; Reading v. Gazzam, 200 Pa. 70, 49 Atl. 889; Angell v. Reynolds, 26 R. I. 160, 106 Am. St. Rep. 707, 58 Atl. 625; Tillinghast v. Sawyer (R. I.) 68 Atl. 478; Stanley v. Stanley, 32 Wash. 489, 73 Pac. 596.

So, in Dodge v. Rush, supra, the court said: "Whatever may have been the foundations of the ancient rule of the common law, which denied the wife a right of action for the alienation of the affection of her husband, and consequent loss of consortium, the reasons assigned for making a distinction between the right of the husband and the right of the wife in such case has long ceased to exist. . . . The un-29 L.R.A.(N.S.)

derlying ground of the common-law rule of discrimination between husband and wife in respect of this right, namely, the incapacity of the wife to maintain a separate action for a tort, has been swept away by the modern legislation that has so generally relieved the wife of the ordinary disabilities of coverture."

And in Gregg v. Gregg, supra, the court said that when the statutes gave a married woman the right to sue alone, and changed her status so as to invest her with the general property rights of a citizen, and to impose upon her almost the same obligations as those relating to all citizens free from disability, they clothed her with the right to appeal to the courts to redress the wrong inflicted by one who has tortiously wrested from her the "support, society, and affections" of her husband.

So, in Eliason v. Draper, supra, it was held that statutes providing that a married woman living apart from her husband may "sue in her own name and for her own use . . . for the redress of her personal wrongs, torts, or private injuries," and that "any married woman may prosecute and defend suits at law . . . for the preservation and protection of her property as if unmarried," give to a married woman the right to maintain an action in her own name against another woman for the alienation of the affections of her husband, since the common law gave a married woman the right to the consortium of her husband, and merely withheld the legal remedy by which she might enforce such right.

A woman who has secured a divorce because of her husband's infidelity may maintain an action to recover damages for the alienation of his affections, under a statute giving her the same right to sue in her own name for unjust usurpation of her rights that her husband has. Keen v. Keen, supra.

And in Wolf v. Frank, supra, it was held that the Code, art. 45, § 5, as amended by act 1898, chap. 455, authorized a married woman to sue as if unmarried, for the alienation of the affections of her hus-

in equity now provided for the torts above mentioned." The 2d section provides that "any action brought in accordance with the provisions of this act may be prosecuted by such married woman separately in her own name, and the nonjoinder of her husband shall not be pleaded in any such action."

It is urged in support of the demurrer that this act created no new right of action in behalf of the married woman, and that at common law no right of action existed for the tort alleged in this declaration; and this construction of the act was adopted by the supreme court. The initial inquiry, therefore, must necessarily be made in the light of the fundamental rule of statutory construction, which requires us to search out the old law and the mischief that it engendered, in order to ascertain whether the remedial legislation with which we are now dealing was intended by the legislature to apply to such a condition.

In its early stages the common law notoriously enveloped the identity of the wife and all her possessions in the personality of the husband; and as late as *Wilson v. Alpaugh*, 52 N. J. Eq. 589, 33 Atl. 50, the doctrine "that the rule of the common law that the husband and wife are to be regarded as one person" was held not to have been abrogated by legislation up to that period in this state.

That the right of consortium was recognized by the common law as an existing right in the married woman, however, but incapable of enforcement, owing to the common-law doctrine of identity of personality, is made clear by Blackstone, who, in his third volume, dealing with "Private Wrongs," mentions a class in which the common law, failing to provide a remedy, recognized the right of the ecclesiastical courts or their successor, to administer redress, nor "for reformation of the . . .

party injuring, . . . but for the sake of the party injured; to make him a satisfaction and redress from the damage which he has sustained." 3 Bl. Com. 87. Under this general topic the learned commentator treats of "matrimonial causes, or injuries respecting the rights of marriage," and says: "The suit for restitution of conjugal rights is also another species of matrimonial causes which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again." Id. 94. This recognition by the common law of the fact that the loss of consortium was an injury to the wife, and that its enforcement was her right, and the corresponding failure, on the other hand, to provide her with a legal remedy for the tort, is properly definitive of her status at common law, and places that branch of legal learning upon its proper footing.

From which it follows that if at any time the legislature should remove the common-law impediment as to remedy, the right existing is thus made capable of enforcement under the remedial Code. 21 Cyc. Law & Proc. p. 1149, note 50, and cases cited.

That the common-law courts failed to find a remedy is, under the decisions, rather a recognition of the right, then a denial of its existence. For it may be said that the history of common-law procedure is largely the history of substantive rights, remediless at first for lack of a suitable writ or precedent in the *Registrum Brevium*, until the persistence of the demand for a remedy developed the action of trespass on the case as a general specific in *consimili casu*, under the provisions of the statute of Westminster II. The following cases serve also to illustrate the existence of this right at com-

band, even if the cause of action had arisen before the act took effect, as it emancipated her from disability, and her husband had no right to damages to be recovered by reason of his own misconduct; her cause of action existed at common law, but was held in abeyance by reason of her disability of coverture, and this statute relieved her of that disability.

And in Missouri the statute of limitations does not run against an action brought by a married woman for the alienation of her husband's affections. *Link v. Vorhauer*, 104 Mo. App. 368, 79 S. W. 478.

Under the Kansas statute such an action does not abate at the death of the plaintiff while the action is pending in the supreme court. *Powers v. Sumbler*, *supra*.

And the fact that the marriage was never physically consummated does not deprive the wife of a cause of action. *Cochran v. Cochran*, *supra*.
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In the earlier note it was stated that Wisconsin, Maine, and New Jersey stand alone in denying to a wife the right to sue for the alienation of her husband's affections, and, as authority for this statement in regard to New Jersey, the case of *Hodge v. Wetzel*, 69 N. J. L. 490, 55 Atl. 49, is cited. It is to be noted that this case is distinguished rather than overruled in *SRMS v. SRMS*; but however this may be, the decision in the latter case aligns New Jersey with the great majority of the other states, leaving only Maine and Wisconsin in which the contrary doctrine prevails. In these two states there appears to be no recent decision upon this question.

As to effect of fact that the husband or wife of plaintiff in an action for alienation of affections or criminal conversation was the active and aggressive party, see note to *Scott v. O'Brien*, 16 L.R.A. (N.S.) 742.

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mon law: *Firebrace v. Firebrace*, L. R. 4 Prob. Div. 63; *Yelverton v. Yelverton*, 1 Swabey & T. 586; *Orme v. Orme*, 2 Addams, Ecol. Rep. 382; *R. v. Jackson* [1891] 1 Q. B. 685.

The very helpful briefs of the learned counsel in this case instance the case of *Lynch v. Knight*, 9 H. L. Cas. 577, 11 Irish Jurist, 284, which is highly instructive upon this phase of the question, as illustrating the endeavor of the English judges at that time to supply a remedy for a conceded, existing right. "Can it be," inquired the chief justice of the Irish Queen's bench, "that for an injury of this sort a wife can have no redress? Is it possible to sustain the proposition?" When the case was determined upon another ground in the House of Lords, Lord Campbell said: "Nor can I allow that the loss of consortium or conjugal society can give a cause of action to the husband alone; . . . I think it may be a loss which the law may recognize to the wife as well as to the husband."

These sentiments have found expression and recognition in the adjudications of the highest courts of our states; and now it may be fairly stated that the great weight of authority in this country supports the proposition that the right to the consortium of the husband was recognized at common law as a right inherent in the wife, enforceable, however, owing to the policy of the times, only in an action jointly by husband and wife. *Bennett v. Bennett*, 116 N. Y. 584, 6 L.R.A. 553, 23 N. E. 17; *Foot v. Card*, 58 Conn. 1, 6 L.R.A. 829, 18 Am. St. Rep. 258, 18 Atl. 1027; *Seaver v. Adams*, 66 N. H. 142, 49 Am. St. Rep. 597, 19 Atl. 776; *Haynes v. Nowlin*, 129 Ind. 581, 14 L.R.A. 787, 28 Am. St. Rep. 213, 29 N. E. 389; *Knapp v. Wing*, 72 Vt. 334, 47 Atl. 1075; *Smith v. Smith*, 98 Tenn. 101, 60 Am. St. Rep. 838, 38 S. W. 439; *Bassett v. Bassett*, 20 Ill. App. 543; *Warren v. Warren*, 89 Mich. 123, 14 L.R.A. 545, 50 N. W. 842; *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397; *Mehrhoff v. Mehrhoff* (C. C.) 26 Fed. 13; *Railsback v. Railsback*, 12 Ind. App. 659, 40 N. E. 276, 1119; *Bailey v. Bailey*, 94 Iowa, 598, 63 N. W. 341; *Hodgkinson v. Hodgkinson*, 43 Neb. 269, 27 L.R.A. 120, 47 Am. St. Rep. 759, 61 N. W. 577. So, too, the modern text writers of authority support its existence. "By the great weight of authority," says Tiffany, "since the loss of service is not necessary to the action, and the right to each other's society and comfort is reciprocal, a wife may maintain such an action, . . . even at common law and in the absence of such a statute." *Domestic Relations*, 78. To the same effect are: *Jaggard, Torts*, p. 467; *Bigelow, Torts*, p. 153; 21 Cyc. Law & Proc. p. 1618. 29 L.R.A. (N.S.)

Three states alone have been classified as denying the existence of the right. In Wisconsin, in the early case of *Duffies v. Duffies*, 76 Wis. 374, 8 L.R.A. 420, 20 Am. St. Rep. 79, 45 N. W. 522, it was determined, in effect, upon the theory that the absence of remedy at common law determined the nonexistence of the right. The case was followed upon the doctrine of *stare decisis*, in *Lonstorf v. Lonstorf*, 118 Wis. 159, 95 N. W. 961, by a divided court, two of the learned judges contributing vigorous dissenting opinions to the discussion. The adjudications in the Maine court rest upon opinions based upon the court's view of an expedient public policy in that state, and are of no force as arguments upon the question of the existence or nonexistence of a common-law principle. *Doe v. Roe*, 82 Me. 503, 8 L.R.A. 833, 17 Am. St. Rep. 499, 20 Atl. 83; *Morgan v. Martin*, 92 Me. 190, 42 Atl. 354.

We are finally referred to the determination of our own supreme court in 1903, in *Hodge v. Wetzler*, 69 N. J. L. 490, 55 Atl. 49, which furnishes *ratio decidendi* for the determination of the supreme court in this controversy. *Hodge v. Wetzler*, however, as we read it, does not attempt to decide the question, but, *per contra*, Mr. Justice Hendrickson, in the absence of such a statute as that *sub judice*, and reviewing the question only from the power conferred by the then existing married woman's act (Gen. Stat. p. 2012), and the 23d section of the practice act (Gen. Stat. p. 2536), concluded that these statutes did not confer the right of action. But upon the question as to the existence of the right at common law, the learned justice was careful not to commit the court, and said: "We do not deem it necessary in this case to discuss the question of abstract right, . . . for the reason that, conceding its existence, we fail to find a statute of this state empowering a married woman to sue as a *feme sole* in actions of this character." Page 492 of 69 N. J. L.

The question therefore presented in this case, in the light of the act of 1906, is *res nova*, and the conclusion we have reached is supported by the great weight of authority. That this act was intended to confer the power upon a married woman to protect and enforce her rights is the specific announcement contained in its title. The body of the act declares that she may maintain an action as a *feme sole* might lawfully do, and without joining her husband therein, for all torts committed against her or her property. Keeping in mind the old law and the existing mischief, it becomes manifest that the legislative intent which inspired this remedial measure could have

been only a desire to confer upon the married woman that equality of remedy as an independent suitor, which would enable her to vindicate her right *in personam* for a tort committed against her, and thus remedy the inequality to which she was subjected by the common law.

The judgment of the Supreme Court should be reversed, and judgment rendered in favor of the plaintiff, *quod recuperet*, etc., and the record remitted to the Supreme Court for execution of a writ of inquiry and the entry of final judgment for the damages thus ascertained, with costs, including the plaintiff's costs in this court (2 Tidd, Pr. 1180; Meeker v. East Orange, 77 N. J. L. 623, 25 L.R.A.(N.S.) 465, 134 Am. St. Rep. 798, 74 Atl. 379, 385), unless the Supreme Court shall, on application made for that purpose, grant leave to the defendants to plead to the merits of the action.

NORTH CAROLINA SUPREME COURT.

C. A. BAKER, Admr., etc., of Carl Baker,
Deceased,
v.
SEABOARD AIR LINE RAILWAY COMPANY.

(150 N. C. 562, 64 S. E. 506.)

Negligence — child.

1. An intelligent, smart boy, nearly fifteen years old, is negligent in jumping from a train moving at the rate of 30 miles an hour, which will prevent holding the railroad company liable for the resulting injury.

Trial — evidence — jury.

2. The weight of evidence offered to overthrow the presumption that a fourteen-year old boy has discreet judgment is for the jury.

(May 5, 1909.)

A PPEAL by defendant from a judgment of the Superior Court for Anson County in plaintiff's favor in an action brought to recover damages for the alleged negligent killing of plaintiff's intestate. Reversed.

The facts are stated in the opinion.

Messrs. John D. Shaw and Murray Allen for appellant.

Messrs. Robinson & Caudle and L. Medlin, for appellee:

In the performance of its duty to exercise ordinary care for the protection of children, who, by reason of immature years and want of experience, place themselves in positions of danger under which they are without ca-

capacity to safeguard themselves, defendant was negligent, in that it gave permission to deceased to ride upon an open car where he was exposed to danger of which it failed to warn him, or to take precaution for his protection, and, without warning him of their purpose or forcing him to alight, or giving him an opportunity to do so, proceeded to carry him from his home, thereby inducing him to jump off of the car.

3 Thomp. Neg. § 3315; Lynch v. Nurdin, 1 Q. B. 29; Rolin v. R. J. Reynolds Tobacco Co. 141 N. C. 309, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 A. & E. Ann. Cas. 639; Briscoe v. Henderson Lighting & P. Co. 143 N. C. 396, 19 L.R.A.(N.S.) 1116, 62 S. E. 604; Cook v. Houston Direct Nav. Co. 76 Tex. 353, 18 Am. St. Rep. 52, 13 S. W. 475; Tully v. Philadelphia, W. & B. R. Co. 2 Penn. (Del.) 537, 82 Am. St. Rep. 425, 47 Atl. 1019; Pittsburg, A. & M. Pass. R. Co. v. Caldwell, 74 Pa. 421; Burke v. Ellis, 105

Note. — Contributory negligence of child in jumping on or off moving railroad train.

The greater number of cases involving injuries to children in jumping on and off moving railroad trains is disposed of on the ground that no negligence was attributable to the railroad company, and are therefore excluded from this note.

Cases which do not come within the scope of this note because the child was ejected from the train under such circumstances as to make his act in leaving it not voluntary will be found in the note appended to Doggett v. Chicago, B. & Q. R. Co. 13 L.R.A.(N.S.) 364.

As to contributory negligence of passengers generally in getting on and off moving trains, see note to Hoylman v. Kanawha & M. R. Co. 22 L.R.A.(N.S.) 741.

The responsibility of a child for his own negligence is largely a question of fact to be determined in view of his age and capacity for appreciating the dangers of his act, and the rule deduced from the cases is that he will be expected to exercise such care for his own safety as would naturally be expected of a child of his age, experience, and capacity generally. While the courts sometimes refer to the rules governing the responsibility of children in criminal cases in determining their responsibility for contributory negligence, no such definite lines of responsibility are drawn in the latter as in the former.

Thus, in Barney v. Hannibal & St. J. R. Co. 126 Mo. 372, 26 L.R.A. 847, 28 S. W. 1069, it was held that a statute making it a misdemeanor for persons to jump on or off a car or engine while in motion applied to an infant in a civil suit, making such act wrongful, though he was too young to be liable to criminal prosecution under the statute.

If the child is so lacking in intelligence that it is incapable of appreciating the dan-

Tenn. 708, 58 S. W. 855; Rhodes v. Georgia R. & Bkg. Co. 84 Ga. 320, 20 Am. St. Rep. 362, 10 S. E. 922; Charleston & W. C. R. Co. v. Johnson, 1 Ga. App. 441, 57 S. E. 1064; St. Louis Southwestern R. Co. v. Abernathy, 28 Tex. Civ. App. 613, 68 S. W. 539; Carmer v. Chicago, St. P. M. & O. R. Co. 95 Wis. 513, 70 N. W. 580; Hepfel v. St. Paul, M. & M. R. Co. 49 Minn. 263, 51 N. W. 1049; Gunderson v. Northwestern Elevator Co. 47 Minn. 161, 49 N. W. 694; Texas & P. R. Co. v. Brown, 11 Tex. Civ. App. 503, 33 S. W. 146; Davis v. St. Louis Southwestern R. Co. (Tex. Civ. App.) 92 S. W. 831; Ollis v. Houston, E. & W. T. R. Co. 31 Tex. Civ. App. 601, 73 S. W. 30; Lange v. Missouri P. R. Co. 115 Mo. App. 582, 91 S. W. 989; Ashworth v. Southern R. Co. 116

Ga. 635, 59 L.R.A. 502, 43 S. E. 36; Pilon v. Shedden Co. Rap. Jud. Quebec, 9 C. S. 83; Kentucky C. R. Co. v. Gastineau, 83 Ky. 119; 1 Beven, Neg. 173; Muehlhausen v. St. Louis R. Co. 91 Mo. 332, 2 S. W. 315; Whitehead v. St. Louis, I. M. & S. R. Co. 99 Mo. 263, 6 L.R.A. 409, 11 S. W. 751; Drum v. Miller, 135 N. C. 214, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421.

Defendant owed the deceased a greater duty than simply to refrain from wilfully injuring him.

Lewis v. Norfolk & W. R. Co. 132 N. C. 387, 43 S. E. 919; Perry v. Western North Carolina R. Co. 128 N. C. 471, 39 S. E. 27, 21 Am. & Eng. Enc. Law, p. 473; Whitehead v. St. Louis, I. M. & S. R. Co. and Drum v. Miller, supra; McNeill v. Durham & C. R.

ger of getting on or off a moving train under the circumstances, contributory negligence will not be a defense to an action for the injury sustained. Thompson v. Missouri, K. & T. R. Co. 11 Tex. Civ. App. 307, 32 S. W. 191.

It was so held in Missouri, K. & T. R. Co. v. Tonahill (Tex. Civ. App.) 54 S. W. 419, a former appeal of which was reported in 16 Tex. Civ. App. 625, 41 S. W. 875, where a boy eleven or twelve years of age was of such immature judgment and discretion as not to appreciate the danger attending his act.

And in St. Louis Southwestern R. Co. v. Davis (Tex. Civ. App.) 110 S. W. 939, where a boy nine years old was injured while trying to get off a moving freight train on which he was trespassing, defendant being guilty of nothing more than passive negligence, if any, it was held to be error to give instructions embodying the question of contributory negligence, for it was not involved, as the suit was on the theory that plaintiff was too young to be guilty of contributory negligence.

It is usually left for the jury to determine whether a child, in jumping on or off a moving train, exercised such care as is generally to be expected of a child of its age under the circumstances. State use of Coughlan v. Baltimore & O. R. Co. 24 Md. 84, 87 Am. Dec. 600; Hepfel v. St. Paul, M. & M. R. Co. 49 Minn. 263, 51 N. W. 1049; Avey v. Galveston, H. & S. A. R. Co. (Tex.) 17 S. W. 31.

In Chicago & A. R. Co. v. Lammert, 12 Ill. App. 408, where a deaf and dumb boy about ten years of age attempted to get on a train which was being switched, it was held that he was charged with such care for his own safety as was to be expected of one of his age and condition, and it being against the rules for any but employees to be on the cars, and none of the employees having actual notice of his presence, he stood in no better position, as to the engineer who was alleged to be negligent, than that of a fellow servant.

It does not follow that a child is incapable of appreciating the danger of his 29 L.R.A. (N.S.)

act from the mere fact that he was only nine years old. Wolfe v. Peirce, 24 Ind. App. 680, 57 N. E. 555.

Where the act of getting off a moving train was induced or compelled by some act of an employee of the railroad company, the question of contributory negligence was left to the jury under the following circumstances:

—where plaintiff, eighteen years of age and inexperienced in getting on and off moving trains, was riding in a car in charge of mules, and got off while it was moving, on command of the conductor. Fore v. Alabama & V. R. Co. 87 Miss. 211, 39 So. 493, 690;

—where a boy seventeen years of age was injured in leaving a moving train, at the command of the conductor. Texas & P. R. Co. v. Mother, 5 Tex. Civ. App. 87, 24 S. W. 70;

—where a boy of eleven attempted to get off a car on order of the conductor. Benton v. Chicago, R. I. & P. R. Co. 55 Iowa, 496, 8 N. W. 330;

—where a boy of thirteen was injured in falling while jumping from a caboose when water was thrown on him to make him get off. Clark v. New York, L. E. & W. R. Co. 40 Hun, 605, affirmed without opinion in 113 N. Y. 670, 20 N. E. 1116;

—where a boy eleven years of age who was riding on the ledge of the tender was warned and ordered to get off, but did not do so, although he had opportunity while the engine was stopped, and he was later injured after the engine had started, in getting off when water was thrown on him. Branham v. Central R. Co. 78 Ga. 35, 1 S. E. 274.

Under the following circumstances it was held that there was such contributory negligence on the part of a child as to preclude recovery:

—where a boy of twelve voluntarily jumped from a train going 20 miles an hour, though the train was running in excess of the speed allowed by ordinance. Howell v. Illinois C. R. Co. 75 Miss. 242, 36 L.R.A. 545, 21 So. 746;

—where a boy thirteen years of age,

Co. 135 N. C. 686, 67 L.R.A. 230, 47 S. E. 765; Quantz v. Southern R. Co. 137 N. C. 137, 49 S. E. 79.

Children are held accountable for their contributory negligence in proportion to their years, maturity, and experience in life, and this is always a question for the jury.

Fitzgerald v. Alma Furniture Co. 131 N. C. 641, 42 S. E. 946; 1 Shearm. & Redf. Neg. § 73, 219; 6 Thomp. Neg. § 7600; 7 Am. & Eng. Enc. Law, pp. 405, 408; Ray v. Long, 132 N. C. 894, 44 S. E. 652; Lelew v. Hewett, 130 N. C. 22, 40 S. E. 769; Kehler v. Schwenk, 144 Pa. 348, 13 L.R.A. 374, 27 Am. St. Rep. 636, 22 Atl. 910; Central R. & Bkg. Co. v. Rylee, 87 Ga. 491, 13 L.R.A. 634, 13 S. E. 584; 1 Beven, Neg. pp. 166, 167; Kentucky C. R. Co. v. Gastineau, supra; Pueblo Electric Street R. Co. v. Sherman, 25 Colo. 114, 71 Am. St. Rep. 116, 53 Pac. 322; Campbell v. St. Louis & Suburban R. Co. 175 Mo. 161, 75 S. W. 86; Cincinnati Street R. Co. v. Wright, 54 Ohio St. 181, 32 L.R.A. 340, 43 N. E. 688; Kucera v. Merrill Lumber Co. 91 Wis. 637, 65 N. W. 373; Fehnrich v. Michigan C. R. Co. 87 Mich. 606, 49 N. W. 890; Zalotuchin v. Metropolitan Street R. Co. 127 Mo. App. 577, 106 S. W. 548; Georgia, C. & N. R. Co. v. Watkins, 97 Ga. 381, 24 S. E. 34; Oakland R. Co. v. Fielding, 48 Pa. 320; Wright v. Detroit, G. H. & M. R. Co. 77 Mich. 123, 43 N. W. 765; Haycroft v. Lake Shore & M. S. R. Co. 2 Hun, 489; Texas & P. R. Co. v. Phillips, 91 Tex. 278, 42 S. W. 852; Swift v. Staten Island Rapid Transit R. Co. 123 N. Y. 645, 25 N. E. 378; Gibbons v. Vanderhoogt, 75 Ill. App. 106; Dubiver v. City & Suburban R. Co. 44 Or. 227, 74 Pac. 915, 75 Pac. 693, 1 A. & E. Ann. Cas. 889; Chess & W. Co. v. Gohagan, 32 Ky. L. Rep. 372, 105 S. W. 890; Rahn v. Standard Optical Co. 110 App. Div. 501, 96 N. Y. Supp. 1080; Longree v. Jackes-Evans Mfg. Co. 120 Mo. App. 478, 97 S. W. 272; Ittner Brick Co. v. Killian, 67 Neb. 589, 93 N. W. 951; Adams

v. Clymer, 1 Marv. (Del.) 80, 36 Atl. 1104; Bice v. Wheeling Electrical Co. 62 W. Va. 685, 59 S. E. 626; Wright v. Detroit, G. H. & M. R. Co. 77 Mich. 123, 43 N. W. 765; Bottoms v. Seaboard & R. R. Co. 114 N. C. 712, 25 L.R.A. 784, 41 Am. St. Rep. 799, 19 S. E. 730; 2 Wood, Railway Law, § 321; Hemmingway v. Chicago, M. & St. P. R. Co. 72 Wis. 42, 7 Am. St. Rep. 823, 37 N. W. 804; Whart. Neg. § 377; Shannon v. Boston & A. R. Co. 78 Me. 52, 2 Atl. 678; Barry v. New York C. & H. R. R. Co. 92 N. Y. 289, 44 Am. Rep. 377.

Brown, J., delivered the opinion of the court:

The defendant in apt time entered motions to nonsuit upon the ground that upon plaintiff's own evidence he is not entitled to recover: (1) Because no negligence is shown; (2) because the intestate was guilty of contributory negligence. We are all of opinion that this last contention is so plainly with the defendant that it is unnecessary to consider the first.

These facts appear from plaintiff's evidence: His son Carl, fifteen years of age lacking one month, was killed by jumping from defendant's work train while running about 30 miles an hour. The train consisted of flat cars, equipped with machinery for ditching. Witnesses for plaintiff, who testify concerning the occurrence, say that on the afternoon of August 15, 1906, the boy Carl and his younger brother, Luther Baker, came up to the train from their home, about three quarters of a mile away. When they arrived at the train, Herman Shannon, another boy, was standing on a flat car. Carl Baker asked the conductor if he could ride, and the conductor told him to get on the rear end of the train, on a flat car, out of the way. Carl then climbed up on the flat car and pulled his younger brother up with him. The train continued the work of ditching. The boys remained on the car an hour. It became necessary for the train to take a

familiar with the running of trains, got on and off a moving train, against which he had been warned by his father. Powers v. Chicago, M. & St. P. R. Co. 57 Minn. 332, 59 N. W. 307;

—where a boy of seventeen who was trespassing on the train got off on the order of the conductor, there being no evidence other than the mere fact that he was only seventeen years of age indicating that he was less capable than an ordinary person to look out for his own safety. Doggett v. Chicago, B. & Q. R. Co. 134 Iowa, 690, 13 L.R.A. (N.S.) 364, 112 N. W. 171, 13 A. & E. Ann. Cas. 588;

—where a boy twelve years of age, familiar with the running of trains, was injured in attempting to climb upon a freight car. 29 L.R.A. (N.S.)

Wilson v. Atchison, T. & S. F. R. Co. 68 Kan. 183, 71 Pac. 282; Fitzgerald v. Chicago, B. & Q. R. Co. 114 Ill. App. 118.

And in Louisville & N. R. Co. v. Webb, 99 Ky. 332, 35 S. W. 1117, where a boy jumped off a ladder of a moving freight car, onto a pile of coal, which threw him under the wheels, an instruction that plaintiff "was bound to exercise only such care as a boy of like age and discretion would ordinarily exercise under the same or similar circumstances" was held to be erroneous because it implied the assumption that defendant was negligent, and also that a boy of eleven years of age, irrespective of his intelligence, could not be guilty of contributory negligence. R. L. S.

siding to let another train pass going towards Monroe. After this train passed, the ditching train pulled out for Waxhaw, 2 miles away. When the train had gotten up good speed and was running at a rate of about 30 miles an hour, Carl Baker got up from where he was sitting on a scantling, and sat down on the rear of the flat car, and jumped off between the rails. Herman Shannon, who was on the car with plaintiff's intestate, testified that he remained on the train in the position occupied by himself and Carl Baker until it reached Waxhaw, without injury to himself. This witness was nearly a year younger than Carl Baker. According to the testimony of the plaintiff, his son Carl was an "intelligent, smart boy, and of average size for his age," and for two years had been residing within three quarters of a mile from the railroad.

It is settled beyond controversy by the decisions of this and all other courts in this country that the act of the intestate in jumping off the rapidly moving train of defendant was one of such recklessness as will bar recovery, if the intestate is held in law responsible for his conduct. *Owens v. Atlantic Coast Line R. Co.* 147 N. C. 357, 61 S. E. 198; *Morrow v. Atlantic & C. Air Line R. Co.* 134 N. C. 92, 46 S. E. 12. The learned counsel for plaintiff, Mr. Caudle, in an able and elaborate argument, endeavored to show that the intestate, on account of his age, should not be held responsible for his act; but an examination of the authorities in this and other states discloses that they are overwhelmingly against him. The case is not to be judged by the length of experience of the boy Carl with railroads, although the evidence discloses that for two years he had resided near one, and that his twelve-year-old brother, Luther, is by no means a stranger to them. Carl wore long trousers, was well grown, bright, smart, and intelligent. He was not an infant of tender years, and, in the absence of evidence to the contrary, had the capacity of an adult to appreciate danger. He was three years beyond the age at which he could be employed in a factory, around dangerous machinery, without violating the child labor law, and was old enough to be held responsible for a violation of the criminal law of the land.

An infant of the age of fourteen years is presumed to have sufficient capacity to be sensible of danger, and to have power to avoid it; and this presumption will stand until rebutted by clear proof of the absence of such discretion as is usual with infants of that age. At what age this presumption arises is not a question of fact, but one of law. The inquiry, At what age must an infant's responsibility for negligence be presumed to commence? cannot be answered by 29 L.R.A. (N.S.)

referring it to a jury. That would furnish us with no rule whatever. It would simply produce a shifting standard, according to the sympathies or prejudices of those who composed each particular jury. One jury might fix the age at fourteen, and another at eighteen, and another at twenty. The responsibilities of infants are clearly defined by text writers and courts. At common law fourteen was the age of discretion in males and twelve in females. At fourteen an infant could choose a guardian and contract a valid marriage. After seven an infant may commit a felony, although there is a presumption in his favor, which may, however, be rebutted; but after fourteen an infant is held to the same responsibility for crime as an adult. *Sharswood's Bl. Com.* pp. 20, 435, 404. Inasmuch as an infant, after fourteen, may select a guardian, contract marriage, is capable of harboring malice and of committing murder, it is no great imposition on him to hold him responsible for his own negligence. In the case of *Tucker v. New York C. & H. R. R. Co.* 124 N. Y. 308, 21 Am. St. Rep. 670, 26 N. E. 916, the court of appeals of New York says: "The question at what age an infant's responsibility for negligence may be presumed to commence is not one of fact, but of law. In the absence of evidence tending to show that a boy twelve years of age was not qualified to understand the danger and appreciate the necessity for observing that degree of caution in crossing a railroad track an adult would, he must be deemed *sui juris* and chargeable with the same measure of caution as an adult." To same effect is *Nagle v. Allegheny Valley R. Co.* 88 Pa. 35, 32 Am. Rep. 413. That infants are to be held for the consequences of their own negligence in actions for injuries to them has long been settled by this and other courts, and no declared by text writers. *Shearm. & Redf. Neg.* § 49; *Whart. Neg.* 314; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655; *Murray v. Richmond & D. R. Co.* 93 N. C. 94; *Washington & G. R. Co. v. Gladmon*, 15 Wall. 401, 21 L. ed. 114; *Sioux City & P. R. Co. v. Stout*, 17 Wall. 657, 21 L. ed. 745. From all these and other approved authorities the principle is deduced that an infant, so far as he is personally concerned, is held to such care and prudence as is usual among children of the same age, and if his own act directly brings the injury upon him, while the negligence of the defendant is only such as exposes the infant to the possibility of an injury, the latter cannot recover.

The Supreme Court of the United States has substantially held the same to be sound law in the cases above cited.

We find in the books many cases where children of various ages, from seven years

upwards, have been denied a recovery because of their own negligence. *Boland v. Missouri R. Co.* 36 Mo. 484; *Meeks v. Southern P. R. Co.* 52 Cal. 605; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 98 Pa. 498, 4 Am. & Eng. R. Cas. 533; *Mathis v. Magnolia Mfg. Co.* 140 N. C. 530, 53 S. E. 349; *Murray v. Richmond & D. R. Co.* supra; *Beck v. Southern R. Co.* 149 N. C. 168, 62 S. E. 883. In *Meredith v. Richmond & D. R. Co.* 108 N. C. 616, 13 S. E. 137, the plaintiff, a bright boy about thirteen years old, while passing along the highway, was struck and injured by an engine while attempting to avoid another coming from the opposite direction. The court held that his administrator was not entitled to recover for his death. Judge Avery says: "The witnesses concur in the statement that the boy who was injured was an intelligent youth about thirteen years old. In the absence of knowledge or information to the contrary, the engineer was justified in supposing that he would look to his own safety, even when trains were moving on three parallel tracks, if there was manifestly an opportunity to escape by walking across the rail to a neighboring side track." Again, he says: "The boy injured was described by witnesses as bright and 'smart;' but, if he was apparently capable of appreciating his peril or his situation, it is sufficient to relieve the servants of the company from the imputation of carelessness in assuming that he would step aside before the engine reached him."

This principle has been applied in other states regardless of whether the child was over the age of fourteen years. In *Dull v. Cleveland, C. C. v. St. L. R. Co.* 21 Ind. App. 571, 52 N. E. 1013, it is held that a child eleven years old and of sufficient intelligence to know the difference between safety and danger is a person *sui juris* so as to be charged with contributory negligence resulting in his being struck by a train. "A boy eleven years of age knows as well as an adult does what a railroad is and the use to which it is put and the consequence to a person who should be struck by a passing train, and knows that he should not stop to play or lounge amid a network of tracks. It is true that a boy of that age cannot be presumed to have the judgment of an adult, but it does not require much judgment to keep from walking in a dangerous place, the dangers of which are fully understood." *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602, 27 N. W. 776. Also *Powers v. Chicago, M. & St. P. R. Co.* 57 Minn. 332, 59 N. W. 307. In *Mendenhall v. Atchison, T. & S. F. R. Co.* 66 Kan. 438, 61 L.R.A. 120, 97 Am. St. Rep. 380, 71 Pac. 846, a fifteen-year-old boy paid 29 L.R.A. (N.S.)

a brakeman on a passenger train 25 cents to permit him to ride on the train. The brakeman told him to get on the platform of the baggage car, and to get off at stopping places and keep out of sight. The plaintiff rode upon the platform to a near-by station, and in getting off the train while in motion, on the opposite side from the depot, stumbled over a semaphore board, fell under the train, and received the injury complained of. The demurrer to the complaint was sustained. The court says that he was a trespasser, not a passenger. "The company owed him no duty with regard to the construction of its semaphore, or otherwise, except to avoid wilful and wanton negligence. The plaintiff was injured not because he was riding on the platform, but because he got off the train while it was in motion and on the other side of the car from the depot. . . . The allegations are insufficient to show defendant to have been guilty of any wilful or wanton neglect or to relieve plaintiff from the responsibility for his own obvious recklessness." The Massachusetts court holds that "a street railway corporation is not liable for an injury caused to a boy ten years old who was when injured playing with other children upon cars left standing unguarded for several days on a public street of a city." *Gay v. Essex Electric Street R. Co.* 159 Mass. 238, 21 L.R.A. 448, 38 Am. St. Rep. 415, 34 N. E. 186. In *Studer v. Southern P. Co.* 121 Cal. 400, 66 Am. St. Rep. 39, 53 Pac. 842, recovery was denied in an action for death of a child between twelve and thirteen years of age who was killed in attempting to pass between the cars of a freight train. The court says: "The fact that the deceased was only about twelve years of age did not require the court to submit to the jury whether his attempt to cross between the cars constituted negligence. The law imposes upon minors the duty of giving such attention to their surroundings and care to avoid danger as may fairly and reasonably be expected from persons of their age and capacity, and children as well as adults must use the discretion which persons of their years ordinarily have, and cannot be permitted with impunity to indulge in conduct which they know or ought to know to be careless." In *Sheets v. Connolly Street R. Co.* 54 N. J. L. 518, 24 Atl. 483, an intelligent child thirteen years old was struck by a street car while crossing a public street. Recovery was denied. The court says: "The trial judge laid down the rule of law with respect to her responsibility with substantial accuracy. She was evidently *sui juris*, and the jury were told to consider the degree of care and discretion which would be

expected from her. The jury found by their verdict that she was not guilty of contributory negligence; in other words, she was at the time of the occurrence in the exercise of that degree of care which would reasonably be expected from a child of that age and intelligence."

This presumption of discreet judgment which arises after fourteen years of age must stand until it is overthrown by clear proof of the absence of such natural intelligence as is usual with infants of similar age. If such evidence is offered by the plaintiff to rebut such presumption, its weight and value are for the jury to estimate. In this case the plaintiff does not attempt to rebut such presumption, nor does he offer even a suggestion that the engineer, after he started his train, caused the injury, or could have prevented it. The intestate was sitting on the rear end of the last flat car while it was moving at great speed, and suddenly and voluntarily jumped off and was instantly killed. That his motive was in so doing is immaterial. The conclusion is irresistible that had the intestate imitated the wholesome example of his more youthful yet more prudent companion, who sat beside him, and had gone on the short distance to Waxhaw, he would have easily returned to his home in safety.

The motion to nonsuit is allowed. *Holmgsworth v. Skelding*, 142 N. C. 252, 55 E. 212.

Reversed.

NORTH CAROLINA SUPREME COURT.

W. HUNTER, Admr., etc., of Florence K. Hunter, Deceased,
v.

SOUTHERN RAILWAY COMPANY, Appt.

(152 N. C. 682, 68 S. E. 237.)

Master — independent contractor — blasting — liability.

1. A railroad company cannot avoid liability for injury to neighboring property owners by blasting done on its property, employing an independent contractor to perform the work, when complaint is made that injury will result from the manner the work is carried on by it, if the contractor continues to perform the work the same manner and produces like results as the railroad company, and the work could be done in no other way.

Death — married woman — liability to estate.

2. One who negligently causes the death of a married woman cannot escape liability to her estate because her earnings belong to her husband.

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Proximate cause — blasting — death.

3. That the terror ceased by blasting operations would cause the death of one ill with fever was not foreseen by the one carrying on such operations will not relieve him from liability therefor, if they were performed in such manner that some injury was likely to result from them.

(May 27, 1910.)

Note. — Liability of employer for negligence of independent contractor in the performance of contract requiring blasting.

The earlier cases upon this subject are collected and discussed in a note to *Houghton v. Loma Prieta Lumber Co.* 14 L.R.A. (N.S.) 914, and in notes cited therein. A few cases involving this question have been handed down since the preparation of the earlier note.

The cases generally hold that the mere fact that the work which an independent contractor is to perform requires blasting will not, *ipso facto*, take the case out of the general rule, and render the employer liable for injuries caused by the prosecution of the work, but that whether or not the employer is liable depends upon the circumstances of the particular case.

Thus, in *Kendall v. Johnson*, 51 Wash. 477, 99 Pac. 310, the court, after speaking of the exception to the general rule as to independent contractors, where the work is inherently or intrinsically dangerous in itself, and will necessarily or probably result in injuries to third persons, unless measures are adopted by which such consequences will be prevented, said that the work of blasting may or may not fall within the exception to the general rule, according to the particular circumstances of the individual case, but under the facts presented in the case at bar, where the parties were employed to construct a railroad grade in the Cascade mountains far removed from any human habitation, the general rule of nonliability would apply.

And in *Seattle Lighting Co. v. Hawley*, 54 Wash. 137, 103 Pac. 6, the court said that, in the absence of any showing that the use of dynamite or other explosives was within the contemplation of the parties, or was customary in making improvements of like character, they felt constrained to hold that the grading and improving of a street is not necessarily or inherently dangerous to gas pipes located within the street, so as to render the rule as to independent contractors inapplicable.

But where the plans and specifications for the construction of a roadbed which ran along a river bank or cliff for quite a distance in front of the plaintiff's land call for blasting, it was held, in *Pine Mountain R. Co. v. Finley* (Ky.) 117 S. W. 413, that the railroad company was bound to know that earth and stone and gravelly substances would necessarily be thrown onto the plaintiff's land lying adjacent to the right of way, and separated from it only by a

APPEAL by defendant from a judgment of the Superior Court for Buncombe County in plaintiff's favor in an action brought to recover damages for the death of plaintiff's wife, for which defendant was alleged to be responsible. Affirmed.

Statement by Manning, J.:

The plaintiff, as administrator of his wife, brought this action to recover damages for the death of his wife, and alleged that:

"(4) During the spring and summer of 1906, the defendant railroad company did wilfully, wantonly, and in a grossly negligent manner, and in utter disregard of the rights of the plaintiff's intestate, carry on and conduct its blasting operations across the French Broad river from where the plaintiff's intestate lived, and did use excessively large charges of explosives, and did wantonly, wilfully, negligently, and carelessly fail to take proper precautions to prevent throwing of rocks by the explosions of the blasts around and about the home of the plaintiff's intestate.

"(5) The plaintiff in this case, James W. Hunter, who was, at the time of the acts and negligence complained of, the husband of the plaintiff's intestate, notified the defendant, its agents, and servants, of the dangerous and negligent manner in which they and the defendant were conducting the said blasting operations, and the said defendant, its agents, and servants, were requested by the said James W. Hunter to use the proper care in such operations, that his intestate

was in a delicate state of health, and that such reckless and dangerous blasting so near her home would probably inflict upon her serious injury, and might cause her death; that the defendant railway company through its agents and servants replied to the said James W. Hunter, on being notified, that they, the said agents and servants of the defendant, had been instructed to 'tear hell out of the side of that mountain,' and that they intended to do it, regardless of consequences, and thereafter the said blasting was continued in the same negligent manner as before.

"(6) On account of the negligence of the defendant, its agents, and servants, as hereinbefore set forth, the health of the plaintiff's intestate was destroyed, and her nervous system was so shocked and wounded that she became seriously ill therefrom and died,—all of which was caused by the acts and negligence of the defendant, its agents, and servants, as hereinbefore set forth."

The defendant, after denying the imputed acts of negligence, for a further defense, pleaded that this defendant, Southern Railway Company, on the—day of June, 1906, made and entered into a written contract with Timothy Shea to construct a roadbed for extension of certain tracks at Alexander, North Carolina, and that said contract was in all respects a lawful one, which the parties thereto might lawfully make and perform; that the work of constructing a roadbed of the character and nature the said Timothy Shea was employed by this defend-

narrow river, and the company could not shield itself by the employment of an independent contractor. The court said that ordinarily the question of liability on the part of the employer in instances of this kind was left to the jury, but there might be instances where, from the nature of the contract, the character of the work to be done, and its proximity to the property of others, the court would be justified in declaring that, as a matter of law, the undertaking was so hazardous, and the probability of injury to the adjoining property so certain, as to warrant the court in saying that the employer could not excuse himself on the ground that the work was done by an independent contractor, for in such instances he could not help but know that no degree of care on the part of the employee could prevent loss or damage being inflicted on the adjoining property.

In *Murphy v. New York City*, 128 App. Div. 463, 112 N. Y. Supp. 807, it was said that there is no doubt that where the work contracted for will itself constitute a nuisance, the principal as well as the contractor becomes liable for the damages resulting therefrom, but that this rule does not apply when the nuisance lies not in the work contracted for, but in the means adopted

by the contractor for carrying out the work, such as the negligence in storing upwards of 200 pounds of dynamite in the excavation, instead of 50 pounds, as allowed by the permit issued by the fire commissioner. And to the same general effect was the decision in *Carpenter v. New York*, 115 App. Div. 552, 101 N. Y. Supp. 402, a case arising out of the same accident.

A railroad company is not liable for injuries resulting from the explosion of dynamite from some cause unknown, which was being used by an independent contractor for the purpose of widening the tracks, where the railroad had nothing at all to do with the dynamite. *Hall v. New York, N. H. & H. R. Co.* 121 App. Div. 488, 106 N. Y. Supp. 108.

But a city cannot escape liability to third persons who have suffered damages by a violation of the provision in a water tunnel contract prohibiting the use of explosives except in rock excavation, where the contractor made use of dynamite in excavating clay and other materials, with the knowledge and consent of the officer having full supervision of the work by the terms of the contract. *Chicago v. Murdock*, 212 Ill. 9, 103 Am. St. Rep. 221, 72 N. E. 46.

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ant to make was an independent avocation, calling, or business in which the said Timothy Shea was, and had for many years previously been, engaged, and for the exercise of which he had and owned all of the necessary means and appliances; that this defendant, under said contract, was neither principal nor master, nor did it reserve any general or special control over said Timothy Shea, either in respect of the manner of performance of said contract by him or in respect of the agents to be employed by the said Shea in doing said work; nor did this defendant, before the commencement of said contract by the said Shea heretofore mentioned, or at the commencement of the same, or at any time during the progress of its performance, assume, or in any manner attempt to assume, control of the said Shea or the said work or any of the workmen engaged upon the said work or in any other respect whatever; that the said Shea was neither the agent nor the servant of this defendant, but was an independent contractor, taking said work as a job and as a whole, for a definite, fixed, agreed sum, and this defendant was only interested in the result of the work, and not in any way in the means employed by the said Shea in its performance; that in making said contract with said Shea, by which he agreed and contracted to do the work of constructing a roadbed for the extension of certain tracks at Alexander, North Carolina, this defendant ascertained that the said Shea was a man of experience in the kind and character of work which by said contract he bound himself to perform, and he was in every way thoroughly competent and skilled, and this defendant knew when it employed the said Shea that he for a long time had been engaged in the performance of such work, and this defendant, before making and signing said contract, made due inquiries as to the capacity and reliability of the said Shea in respect of such work, and ascertained that he was both capable and trustworthy, and this defendant is advised, informed, and believes that the said blasting mentioned in the plaintiff's complaint was the blasting done by the said Shea and his employees and subcontractors while engaged in doing the work set out in the contract made between this defendant and the said Timothy Shea. This defendant never authorized the said Timothy Shea or anyone else to resort to blasting in constructing the roadbed for the extension of the tracks at Alexander, or to use powder, dynamite, or any other unlawful agency in the performance of said work.

The following issues were submitted to the jury, who answered them as set out:

"(1) Was the death of plaintiff's intestate

caused by the negligence of the defendant, Southern Railway Company, as alleged in the complaint? Answer: Yes.

"(2) What damages, if any, is plaintiff entitled to recover of defendant, Southern Railway Company? Answer: \$2,000."

Judgment was rendered for the plaintiff, and defendant appealed to this court.

Messrs. Moore & Rollins for appellant.
Messrs. Craig, Martin, & Thomason, Frank Carter, and H. C. Chedester, for appellee:

A proprietor is liable for the consequences of a nuisance upon his premises which he creates, or which, having authority to prevent, he permits another to create thereon.

Shearm. & Redf. Neg. §§ 176, 176; 1 Thomp. Neg. §§ 652, 771.

Defendant cut itself off from its defense based upon the employment of an alleged independent contractor, since all the evidence offered by it in reference to the matter in which the work was executed goes to show that the work was carried on properly, in the only way in which it could have been done, and with the least possible injury to neighboring persons and property; and therefore that the injurious consequences complained of were unavoidably incident to the execution of the work in the only manner in which it could have been executed, and in the manner necessarily in the contemplation of the parties when said contract was entered into.

Ibid.; Davis v. Summerfield, 133 N. C. 325, 63 L.R.A. 492, 45 S. E. 654; 2 Cooley, Torts, 3d ed. pp. 1088 et seq.; Wetherbee v. Partridge, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894; Hawver v. Whalen, 49 Ohio St. 69, 14 L.R.A. 828, 29 N. E. 1049; Thomas v. Harrington, 72 N. H. 45, 65 L.R.A. 742, 54 Atl. 285; Jacobs v. Fuller & H. Co. 67 Ohio St. 70, 65 L.R.A. 833, 65 N. E. 617; Anderson v. Fleming, 160 Ind. 597, 66 L.R.A. 119, 67 N. E. 443; Louisville & N. R. Co. v. Tow, 23 Ky. L. Rep. 408, 66 L.R.A. 941, 63 S. W. 27; Dill. Mun. Corp. 4th ed. § 1029.

Manning, J., delivered the opinion of the court:

In view of the verdict of the jury rendered under the charge of his Honor, the following facts are established by the evidence: That in the month of April or May, 1906, the defendant, desiring to widen its roadbed at or near Alexander, in Buncombe county, and lay additional tracks or straighten its existing tracks then used and having been used for many years, found it necessary to blast out a perpendicular cliff of rock, about 400 feet long and 42 feet high at its greatest height, situate on its right of

way, and began the work of blasting down the cliff by its own employees. This continued two or three weeks. The plaintiff lived across the French Broad river with his wife and two small children, in the corporate limits of Alexander, and a quarter of a mile from the blasting. The results of defendant's operations were to throw rocks of large and small size across the river in plaintiff's yard, on his house and buildings, in his garden and field, and the blasting was of such violence that the window glass in plaintiff's house was shaken out, and his wife much frightened and rendered very nervous. The plaintiff made frequent complaints, but to no avail. The defendant suspended operations by its own employees, and in June, 1906, made a contract with one Timothy Shea to continue the work and complete it according to certain plans and specifications. He soon thereafter began work, and conducted it in the same manner as the defendant had done, and he and his foreman and other witnesses offered by the defendant testified that the work could be done in no other way. The results, in so far as it affected the plaintiff's wife and his premises, were the same. Rocks were constantly thrown with great force in and around his house. In the latter part of August plaintiff's wife was taken with typhoid fever. The violent blasting continued with its results. The effect upon plaintiff's wife was that she was kept in a highly nervous condition; that her condition was made known to the foreman in charge, and the effect of the blasting and falling rock upon her; that the blasting continued up to three or four days before her death. The physician testified that, in his opinion, but for the blasting, and the nervous condition and alarm produced by it upon Mrs. Hunter, she would have recovered. After making several efforts to have the blasting stopped, the plaintiff succeeded, with a threat of suit, on Thursday or Friday before his wife's death, on the following Monday night, September 11, 1906. This action was begun October 4, 1906. The liability of the defendant was presented to the jury in this language, given substantially in accordance with one of the prayers of the defendant: "The court charges you that the act of blasting, as a means of excavation of a railroad in North Carolina, is not in itself negligence; that it is the recognized method of clearing the way of the railroad track, and the simple fact of the blasting making noise is not negligence, for that is the natural result of blasting. So that this, aside from the fact that rocks were thrown, if you find from the greater weight of the evidence that they were thrown, in the yard of the plaintiff, the court charges you that the noise

of the blasting would not be negligence unless you find that, after the contractor was notified of the sickness of Mrs. Hunter, he wilfully and wantonly and negligently continued the blasting; that the simple act of blasting would not be negligence, and, if the result of it was to produce death even, the simple noise, disassociated from the fact that if they had thrown any rocks in the yard, had produced her death, that would not be negligence for which the defendant would be liable, unless, as I say, it was done negligently, wilfully, and wantonly, after notice on the part of the contractor." The defendant, however, contended that the vital error committed by his Honor was his failure to give the following instruction: "The court charges the jury that, under the terms of the contract introduced in evidence, between the defendant, Southern Railway Company, and one Timothy Shea, the relation of master and servant did not arise between them, but that the said Timothy Shea, under said contract, was an independent contractor, and anything done by said Timothy Shea under said contract he was responsible for, and not the Southern Railway Company." His Honor held, and so charged the jury, that the contract created Timothy Shea an independent contractor, but declined to hold that that fact alone exonerated the defendant from liability to the plaintiff. In *Young v. Fosburg Lumber Co.* 147 N. C. 26, 16 L.R.A.(N.S.) 255, 60 S. E. 654, Mr. Justice Connor, speaking for the court, said: "When the contract is for something that may be lawfully done, and it is proper in its terms, and there has been no negligence in selecting a suitable person in respect to it, and no general control is reserved, either in respect to the manner of doing the work or the agents to be employed in doing it, and the person for whom the work is to be done is interested only in the ultimate result of the work, and not in the several steps as it progresses, the latter is not liable to third persons for the negligence of the contractor as his master." This is quoted with approval in *Gay v. Roanoke R. & Lumber Co.* 148 N. C. 336, 62 S. E. 436, from the opinion of Mr. Justice Walker in *Craft v. Albemarle Timber Co.* 132 N. C. 157, 43 S. E. 597, and expresses with clearness the general doctrine. In both these cases, however, the exceptions are recognized as well settled, which impose liability upon the proprietor or owner for the acts of the independent contractor. In *Young v. Fosburg Lumber Co.* supra, it is said: "It is conceded that, upon grounds of public policy, certain exceptions are made by the law to the general rule. The one upon which plaintiff relies is well stated by Andrews, Ch. J.,

in *Engel v. Eureka Club*, 137 N. Y. 100, 33 Am. St. Rep. 692, 32 N. E. 1052: "Where the thing contracted to be done is necessarily attended with danger, however skilfully and carefully performed, or is intrinsically dangerous, it is held that the party who lets the contract to do the act cannot thereby escape responsibility for any injury resulting from its execution, although the act to be performed may be lawful. But if the act to be done may be safely done in the exercise of due care, although, in the absence of such care, injurious consequences to third persons would be likely to result, then the contractor alone is liable, provided it was his duty under the contract to exercise such care." In *Davis v. Summerfield*, 133 N. C. 325, 63 L.R.A. 492, 45 S. E. 654, the court, speaking through Mr. Justice Montgomery, says: "There is yet another class of cases where there is an exception to the exemption, and that is where the thing contracted to be done is necessarily attended with danger, however skilfully and carefully performed, said by Judge Dillon to be 'intrinsically dangerous.' There the employer cannot escape liability for an injury resulting from the doing of the work, although the act performed might be lawful. [2 Dill. Mun. Corp. § 1029]." These rules of the liability of the owner or proprietor for the acts of the independent contractor are stated in 2 Cooley on Torts, 3d ed. p. 1090: "(1) If a contractor faithfully performs his contract, and the third person is injured by the contractor in the course of its due performance or by its result, the employer is liable, for he causes the precise act to be done which occasions the injury; but for the negligence of the contractor not done under the contract, but in violation of it, the employer is, in general, not liable. . . . (2) If I employ a contractor to do a job of work for me which, in the progress of its execution, obviously exposes others to unusual perils, I ought, I think, to be responsible on the same principle as in the last case, for I caused acts to be done which naturally expose others to injury. . . . (3) If I employ as contractor a person incompetent or untrustworthy, I may be liable for injuries done to third persons by his carelessness in the execution of his contract. . . . (4) The employer may be guilty of personal neglect, connecting itself with the negligence of the contractor in such manner as to render both liable." *Lawrence v. Shipman*, 39 Conn. 586; 1 Thomp. Neg. §§ 652, 771; *Wetherbee v. Partridge*, 175 Mass. 185, 78 Am. St. Rep. 486, 55 N. E. 894; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 Am. Rep. 408, 2 Mor. Min. Rep. 194; *Southern Ohio R. Co. v. Morey*, 47 Ohio St. 207, 7 L.R.A. 29 L.R.A. (N.S.)

701, 24 N. E. 269; *Hawver v. Whalen*, 14 L.R.A. 828, and editor's note (40 Ohio St. 69, 29 N. E. 1049); *Thomas v. Harrington*, 65 L.R.A. 742, and editor's note (72 N. H. 45, 54 Atl. 285); *Louisville & N. R. Co. v. Tow*, 66 L.R.A. 941, and note (23 Ky. L. Rep. 408, 63 S. W. 27). In *Wetherbee v. Partridge*, supra, the conclusion of the court is thus stated in the headnote: "At the trial of an action for injuries to the plaintiff's property by the blasting of rocks upon adjoining land of the defendant, the defense relied on was that the work was in the hands of an independent contractor. The contract contemplated that blasting would be done, and the place where it was done was within 3 or 4 feet of the line between the plaintiff's and the defendant's land, and about 8 or 9 feet from the plaintiff's house. Held that it was plain that performance of the contract would do the damage complained of, unless it was guarded against, and that the defendant was bound to see that due care was used to prevent harm." In the present case, from the evidence of the defendant, it was plain that performance of the contract would injure the plaintiff. The defendant by its own servants had first attempted to perform the work subsequently included in its contract with Shea,—the independent contractor,—and the injury to plaintiff was made plain. The independent contractor prosecuted the work in the same manner as the defendant had done, and testified it could be done in no other way, and he produced like results to the plaintiff. It therefore in our opinion results from the facts of this case that, whether we follow the New York rule (which this court in *Davis v. Summerfield*, supra, declined to follow, and the Massachusetts court in *Wetherbee v. Partridge*, supra, also declined to follow), or accept the doctrine of the cases cited, we must reach the conclusion that the defendant is liable under the evidence in this case.

The sole remaining question to be determined is whether plaintiff, as administrator of his wife, can recover damages for her wrongful death, or is he prevented because, as husband, he is entitled to her earnings, and she can accumulate nothing, and is valueless to her estate. We cannot yield our assent to this argument of the defendant. We are not prepared to so interpret our law that, under Lord Campbell's act, all the wives in the state could meet with a tortious and wrongful death, and yet, because the husbands are entitled to their earnings, the issue of damages must be answered, "Nothing." Nor can the defendant escape liability because the particular form of injury was not foreseen. "While the defendant could not foresee the exact consequence

of his act, he ought, in the exercise of ordinary care, to have known that he was subjecting plaintiff and his family to danger, and to have taken proper precautions to guard against it." *Kimberly v. Howland*, 143 N. C. 398, 7 L.R.A.(N.S.) 545, 55 S. E. 778; *Hudson v. Atlantic Coast Line R. Co.* 142 N. C. 198, 55 S. E. 103; *Drum v. Miller*, 135 N. C. 208, 65 L.R.A. 890, 102 Am. St. Rep. 528, 47 S. E. 421; *Sawyer v. Roanoke R. & Lumber Co.* 145 N. C. 24, 22 L.R.A.(N.S.) 200, 58 S. E. 598; *Rolin v. R. J. Reynolds Tobacco Co.* 141 N. C. 300, 7 L.R.A.(N.S.) 335, 53 S. E. 891, 8 A. & E. Ann. Cas. 638. A careful examination of the record and the brief of the learned counsel of the defendant has failed to discover to us any reversible error, and the judgment is affirmed.

No error.

PENNSYLVANIA SUPREME COURT.

ALFRED H. MOON

v.

CHARLES J. MATTHEWS, Appt.

(227 Pa. 488, 76 Atl. 219.)

Master — act of chauffeur — disobedience of orders.

The mere fact that a chauffeur in taking out his master's automobile in obedience to a command of the master's family, for the entertainment of friends and guests of the family, disobeys the master's command not to take out the car unless the master accompanies it, does not show that he is acting outside the scope of his employment, so as to relieve the master from liability for injury done by the negligent handling of the car.

(March 21, 1910.)

APPEAL by defendant from a judgment of the Court of Common Pleas for Bucks County in plaintiff's favor in an action brought to recover damages for personal injuries for which defendant was alleged to be responsible. Affirmed.

The facts are stated in the opinion.

Note. — No other cases have been found upon the responsibility of the owner of an automobile for the negligence of his chauffeur while the car is out at the direction of a member of his family, but in disobedience to the owner's orders.

As to the liability of an owner for injuries caused by an automobile while being used by servant for his own business or pleasure, see the following notes in 26 L.R.A.(N.S.) 382, 21 L.R.A.(N.S.) 93, 14 L.R.A.(N.S.) 216, 9 L.R.A.(N.S.) 1035, and 1 L.R.A.(N.S.) 215.
29 L.R.A.(N.S.)

Messrs. John G. Johnson, J. Hibbs Buckman, and William C. Ryan for appellant.

Messrs. Harman Yerkes and Gilkeson & James for appellee.

Potter, J., delivered the opinion of the court:

In this action the plaintiff sought to recover damages for injuries received in a collision between a buggy in which he was riding and an automobile owned by the defendant, and operated by his chauffeur. The accident happened upon a dark night. Plaintiff was driving along the road, when he saw and heard the automobile approaching. He turned as far as possible to the right side of the road to let it pass; but, according to his testimony, the automobile came directly towards him, struck his buggy, and he either jumped or was thrown into the road, and severely injured. It was admitted that the automobile was owned by defendant and that the chauffeur was employed by him to care for and operate that particular vehicle. The trial judge submitted to the jury for their determination, as questions of fact, whether the accident was caused by the negligence of the chauffeur, whether the plaintiff was guilty of contributory negligence, and whether at the time of the accident the chauffeur was acting within the scope of his employment, and was upon his master's business. Upon all these matters, the jury found in favor of the plaintiff.

The first and second assignments of error raise the question whether the court should not have taken the case from the jury and directed a verdict for defendant, or entered judgment *non obstante verdicto* in his favor.

Counsel for appellant maintain that at the time of the accident the chauffeur was not engaged in the master's business, and was acting in disobedience of his orders. This claim is based upon evidence offered by the defendant, tending to show that he had forbidden the chauffeur to take out the car unless the defendant was with it, and that upon the night of the accident the car was taken out by the chauffeur, under the direction of the sister of the defendant, who made her home with defendant and was regarded as a member of the family. It was not pretended that the chauffeur was acting in any way upon his own business. Miss Alice Matthews testified that she made up her party for an automobile ride, expecting to get her brother's consent when he came home; but, as he was late in arriving, she ordered the chauffeur to take out the automobile upon her own responsibility. It also appears from the evidence that, upon

the morning after the accident, defendant and his sister called upon plaintiff, discussed the accident with him, and tried to arrange a settlement. Defendant at that time asked plaintiff to send him his doctor's bill and the bills for repairing the carriage and all other repairs. Neither then nor at any time before suit was brought did it appear that the defendant disclaimed liability upon the ground that the chauffeur was not acting for the master at the time of the accident. It seems to have been set up for the first time, as a matter of defense, at the trial. It has been held that the facts and circumstances at the time of an accident may raise a presumption that the regular chauffeur employed by the owner, and in charge, was acting within the scope of his employment. In *Long v. Nute*, 123 Mo. App. 204, 209, 100 S. W. 511, 513, Bland, J., said: "Where a servant who is employed for the special purpose of operating an automobile for the master is found operating it in the usual manner such machines are operated, the presumption naturally arises that he is running the machine in the master's service. If he is not so running it, this fact is peculiarly within the knowledge of the master, and the burden is on him to overthrow this presumption by evidence which the law presumes he is in possession of." In the case of *Guinney v. Hand*, 153 Pa. 404, 410, 26 Atl. 20, 21, it appeared that the plaintiff was injured by a beer wagon belonging to defendants, and in charge of a driver employed by them. Judgment on a verdict for plaintiff was affirmed; Chief Justice Sterrett saying: "The question whether Carroll [the driver] was acting within the scope of his employment, *tc.*, was clearly a question of fact for the jury." In *Simmons v. Pennsylvania R. Co.* 99 Pa. 232, 238, 48 Atl. 1070, 1072, we said: "Since the scope of the servant's employment is necessarily dependent on circumstances, a hard and fast rule cannot be laid down as to the scope of any particular employment; and it is ordinarily a question for the jury whether or not a particular act comes within the scope of a servant's employment."

In the case at bar, the defense depended entirely upon the oral testimony of the defendant and his sister, as to the instructions given to the chauffeur for the use of the automobile. Clearly the chauffeur was sent out upon any errand of his own. He is directed to take the machine out by a member of defendant's family, and he did. Was it for him, under such circumstances, to dispute the right of a member of the family to order the machine out? Was it to presume that permission of the owner had not been obtained? The facts of this

case distinguish it clearly from those in *Lotz v. Hanlon*, 217 Pa. 339, 10 L.R.A. (N.S.) 202, 118 Am. St. Rep. 922, 66 Atl. 525, 10 A. & E. Ann. Cas. 731. There the plaintiff simply showed that the defendant owned the machine, and rested. The defendant then called a witness, presumably the chauffeur, whose testimony was not contradicted in any manner, and from which it appeared conclusively that the use of the machine by the driver on the evening when the accident occurred was wholly unlicensed, was for his own convenience and pleasure, and entirely apart from his master's business. Under such circumstances, the owner was naturally held not liable for the conduct of the chauffeur. So, in *Sarver v. Mitchell*, 35 Pa. Super. Ct. 69, 72, the plaintiff showed that the car was registered in the name of the defendant, and that the chauffeur had been seen driving his car before. The defendant then took the stand and admitted that the car belonged to him, and that the chauffeur was in his employ, and then the defendant testified that he had gone over to New York and had forbidden the chauffeur to take the machine out of the garage while he was away. The people who were in the machine at the time of the accident were the chauffeur's personal friends, and he had them out on a pleasure trip. Here there was no real testimony tending to impeach the testimony of the defendant, and, as the superior court said, "all the attending circumstances, as narrated by plaintiff's witness, who was in the party at the time the child was killed, tending to show that the occupants of the car were the friends of the chauffeur, and not of the defendant." And the case was ruled upon the ground that there was no evidence to show that at the time of the accident the car was being used in or about the business of its owner.

But in the present case the facts were entirely different. It was shown that the automobile belonged to defendant, and at the time of the accident was being operated by his regular chauffeur, not upon any errand of his own, or to serve his own purposes, but in obedience to the order of a member of defendant's family; that the occupants of the car were friends of defendant, and guests of his sister, and the errand upon which the car was taken was entirely proper and fitting in itself. Under such circumstances, the burden was upon the defendant to show that the chauffeur was not acting within the scope of his employment, and upon the business for which he was employed by his master. The test is whether the act was done in the prosecution of the business in which the servant was employed to assist. If it was, the master is responsi-

ble. The fact that while acting for the master he may have disobeyed his commands does not take the act out of the scope of his employment. *McClung v. Dearborne*, 134 Pa. 398, 8 L.R.A. 204, 19 Am. St. Rep. 708, 19 Atl. 698. The present case, as made out by the evidence of the plaintiff, was sufficient to warrant a recovery. Whether or not it was overcome by the testimony offered by the defendant was for the determination of the jury.

The assignments of error are overruled, and the judgment is affirmed.

TEXAS COURT OF CRIMINAL APPEALS.

GEORGE PRIDEMORE, Appt.,

v.

STATE OF TEXAS.

(— Tex. Crim. Rep. —, 129 S. W. 1112.)

Evidence — incest — acts not covered by indictment.

Where by statute each act of sexual intercourse between a father and a daughter is a separate offense, evidence of prior or subsequent acts is not admissible in support of an indictment charging one specific act.

(Ramsey, J., dissents.)

(June 15, 1910.)

A PPEAL by defendant from a judgment of the District Court for Lamar County convicting him of incest. Reversed.

The facts are stated in the opinion.

Mr. John A. Mobley for the State.

Cobb, Special Judge, delivered the opinion of the court:

In this case it is charged that appellant on November 10, 1905, had carnal knowledge of his daughter, Myrtle Pridemore. In due time he was prosecuted and convicted, and has appealed to this court, and the action and judgment of the court below he has assailed in assignments of error, which we proceed to consider.

1. The first assignment of error complains of proof of acts of intercourse subsequent to the one act charged in the indictment. The second assignment of error is upon the admission of evidence of acts of intercourse prior to the act charged. The third relates to the refusal to withdraw the testimony complained of in the first and second. The ground taken by appellant is that since pros-

ecutrix had testified to a distinct and complete act of intercourse occurring in December, 1904, proof of neither prior nor subsequent acts was allowable, because such proof did not throw light on the proven act, was not necessary to show its completeness, was not *res gestæ*, and was irrelevant and prejudicial. The objection to the evidence of prior and subsequent transactions was duly taken, and bills of exception reserved.

Myrtle Webb, *nee* Pridemore, testified that she was at the time of the trial twenty years old; that in the fall of 1904, she, her brother Cleve, and her father, appellant, were picking cotton; that she and her father went across eight or ten rows from those they were picking; and that he there did the act. She further testified, over appellant's objection, that he had had intercourse with her first when she was twelve years old, and had continued to do so from time to time until she married, the 8th of April, 1906. Cleve Pridemore testified in explicit terms to the same cotton patch transaction. The question is by the record pointedly presented, and no other will be considered: It is permissible in incest, where one specific act is clearly singled out by the testimony of the female accomplice, and there is corroboration of her testimony as to such act, to prove antecedent or subsequent acts of intercourse with the party charged? We premise a discussion of some general provisions of our Penal Code. Article 3 of the Penal Code of 1895: "In order that the system of penal law in force in this state may be complete within itself, and that no system of foreign laws, written or unwritten, may be appealed to, it is declared that no person shall be punished for any act or omission, unless the same is made a penal offense and a penalty is affixed thereto by the written law of this state." Article 4 of the Penal Code: "This Code, and every other law upon the subject of crime which may be enacted, shall be construed according to the plain import of the language in which it is written, without regard to the distinction usually made between the construction of penal laws and laws upon other subjects, and no person shall be punished for an offense which is not made penal by the plain import of the words of a law." Article 439, subd. 7, of the Code of Criminal Procedure of 1895, reads as follows: "The offense must be set forth in plain and intelligible words." Article 440 of the Code of Criminal Procedure reads as follows: "Everything should be stated in an indictment which it is necessary to prove, but that which is not necessary to prove need not be stated."

It is provided by the terms of articles 3

Note. — Admissibility of other acts in prosecution for incest, see note to *Skidmore v. State*, 26 L.R.A. (N.S.) 460, 29 L.R.A. (N.S.)

and 350, Penal Code 1895, that if a man carnally know his daughter, he should be punished by imprisonment in the penitentiary. The act here denounced is that of sexual intercourse. Is it to be inferred from the words used that, though there be many separate such acts, extending over a period of years, there is but one offense, or was each several act in itself a complete offense? This question needs no answer. If, then, each act is a separate offense complete in itself, independent of what may have preceded or may follow it, upon what ground can it be claimed that proof of acts other than the one charged may be introduced? It is fundamental law that all the elements of a cause of action, civil or criminal, shall appear in the pleadings, and that what needs not be alleged shall not be proved except the proffered fact be relevant to an issue made by the pleadings, or bear upon the credibility of relevant testimony. Testimony that neither tends to affirm or negative, aid or rebut, an issue made by the pleadings, nor to sustain or impair the evidence directly relevant to the issues made by the pleadings, ought not to be received where the doctrine that the allegation and proof must correspond obtains. It is insisted by some that, as proof of other acts tends to render more probable the commission of the certain act charged, it ought therefore to be allowed. This contention proves too much, and, if applied in the administration of our penal laws, we must abandon our system, and adopt that prevailing in parts of continental Europe, and inquire into the entire antecedence of the person on trial. It is no more true that proof of other incestuous acts renders more probable guilt in the particular instance than would proof of other thefts in a theft case, or proof that a defendant in any case was an abandoned and dissolute reprobate. It is also suggested that proof of other acts tends to corroborate the accomplice witness, and ought therefore to be allowed. This is to say that whatever proof will help out the credited testimony of the *particeps criminis* ought to be admitted. Evidence offered to sustain testimony of the accomplice should be subjected to the same test of admissibility as any other, and the preliminary question is not what effect it will have, but what relation or relevancy it has to the issues arising from the pleadings. Why should the state be allowed to prove other acts of incest? Upon what terms different from those imposed in theft or murder or arson? Is it to enhance the penalty? Prosecuting officers deem the verdict in any one case inadequate to the guilt of numerous repetitions of the act, let them prosecute again and again for the other (L.R.A.(N.S.))

acts, and not resort to the device of charging one offense and proving many. The suggestion that, if proof of opportunity sought and an inclination to do the deed be admissible, the finished act, being better or fuller of proof, is much more admissible, is a mere begging of the question. Proof that the party sought opportunity or displayed an inclination will not add to the punishment if but one offense be proved, and violates no rule of pleading and evidence. It might be asked why should even that kind of proof be admitted when proof of the act charged is full and complete?

It seems that in *Taylor v. State*, 110 Ga. 150, 35 S. E. 161, the court regarded all prior acts that were not barred admissible, upon the principles stated by Greenleaf on Evidence, vol. 2, § 43, that, criminal intercourse being once shown, its continuance, if there be opportunity, will be presumed. If this suggestion be carried to its logical result, all that need be shown to convict for an act not barred would be clear proof of an act barred and proof of continued opportunity, and defendant would be convicted, not by proof, but by presumption. It has been held that previous intimacy of the parties may be shown, because such previous intimacy tends to render probable the act charged. If such rule were applied, any practice, habit, trait of character, or disposition of the defendant, that indicated he might probably commit the offense, would be admissible in evidence, and thus a boundless field of speculation be opened, and many collateral matters to the confusion and befuddlement of the jury would have to be passed on. It is doubtless true that any evil practice, any proven violation of the law of chastity, renders it antecedently probable in some degree that the perpetrator might offend in the same or some such particular whenever opportunity presented; but defendants, in our system of penal law and practice, are not called upon to answer for habits or tendencies or practices, however evil, but to answer for particular designated acts. We do not perceive how the testimony regarding other acts, either prior or subsequent, could in any sense be regarded as developing the *res gestæ*. The same reasoning that would admit other acts of incest would apply with equal cogency to other thefts. But all the holdings and arguments in favor of the admission of proof of other acts of incest seem based on a false assumption that incest is a continuous offense or a habit, and that the offender in this base crime will continue in his evil way, while our statute law makes one act of incest, as is one act of theft or murder, a distinct, separate, and complete offense. The first incest case reported in

illustrates to our minds an exception to the rule here contended for. It is the Lott Case, reported by one Moses. We do not know how well the state was represented; but the defense seems successfully to have been interposed that the defendant was drunk and did not know what he was doing, or, if he did, did not recognize the other party. In such case as that, proof of other acts would be admissible to develop guilty knowledge.

The above discussion is drawn largely from a review of the Skidmore Case, 57 Tex. Crim. Rep. 497, 26 L.R.A.(N.S.) 466, 123 S. W. 1129, appearing in a recent number of the Central Law Journal, in which the cases holding the contrary view, we think, are successfully shown to be based on unfounded assumption and fallacious reasoning. See also Hughes, Crim. Law & Proc. 3139.

The judgment is reversed, and the cause is remanded.

McCord, J., not sitting.

Ramsey, J., dissenting:

It is to be admitted that the position of the court is stated with great force and exceptionable clearness by Judge Cobb. Among the fallacies, as I conceive, in the opinion, is the assumption that, because the proof in the one case was clear, other acts could not be admitted. This conclusion is directly in the face of every text-writer among English-speaking people throughout the world. It is opposed to the settled holding of this court from the day of its organization until the appearance of the Clifton Case, 46 Tex. Crim. Rep. 18, 108 Am. St. Rep. 983, 79 S. W. 824, in 1904, where the Burnett Case, 32 Tex. Crim. Rep. 86, 22 S. W. 47, was overruled without discussion or the citation of a single authority. It is to be noted further that not a single authority is cited in support of the decision in this case. There are only two states in the Union whose decisions do support it, South Dakota and Utah. The rule is otherwise, and in accordance with my views in England, Canada, and all the other states of the American Union, supported by every text writer to whose work I have access. My own views are so fully stated in the recent case of Skidmore v. State, 57 Tex. Crim. Rep. 497, 26 L.R.A.(N.S.) 466, 123 S. W. 1129, that it is unnecessary to here restate them. Ordinarily, I should feel inclined to acquiesce in the opinion of so wise, sound, and accomplished a lawyer as Judge Cobb, especially as his ruling follows the most recent holding of this court; but since, in my opinion, the ruling is not only opposed to the conclusions of practically all

the authorities the world over, since, as I believe, it is intrinsically unsound, and since, as I believe, it interferes with and hinders the administration of justice, aids and encourages the libertine, and makes easy the way to death and ruin, I cannot and do not consent to it, but dissent now, as I will dissent with my latest breath, hoping if I am right that the court will some day get back in harmony with the rule so long and thoroughly established by it, and in harmony with the rule settled for generations in practically every civilized country in Christendom.

WEST VIRGINIA SUPREME COURT OF APPEALS.

JULIA McHENRY

v.

CITY OF PARKERSBURG, Plff. in Err.

(66 W. Va. 533, 66 S. E. 750.)

Damages — temporary — surface water.

1. Injury to real property caused by a city, in the collection of surface water and casting the same upon the premises, by means of the grading and sewerage of its streets, so as to subject the same to occasional and intermittent submergence, gives right to recovery of temporary, not permanent, damages.

Same — evidence of difference in value — admissibility — effect of admission.
2. In the trial of an action for such damages, evidence of the difference between the

Headnotes by POTTENBARGER, J.

Note. — Measure of damages recoverable from municipal corporation for overflow from defective sewer or street.

The general question as to the measure of damages recoverable for an injury to land seems to depend, in many cases at least, upon the further question whether the cause of the injury is of such a nature that it may be easily remedied, and thus give rise to a recovery of temporary damages, or whether the conditions which cause the injury may be said to be of a permanent nature, thus permitting a recovery of all the damages in one action, and a recovery of what is called permanent damages.

The question, therefore, as to proper measure of damages recoverable from a municipal corporation for the flooding of land caused by a defective sewer or street, in the majority of cases, depends upon whether the peculiar conditions of the sewer or street which give rise to the overflow fall within the one class or the other.

In the majority of cases the conditions of the sewer or street which caused the

value of the property before it was subjected to the injury and its value thereafter is inadmissible, and, if admitted without objection, a verdict based upon it will be set aside upon motion.

Trial — verdict — improper evidence — setting aside.

3. A verdict in such an action, predicated partially upon evidence going beyond the true measure of damages, and tending to prove the cost of altering the condition of the property so as to abate the cause of injury or render the property immune from its operation, in addition to the true elements of damages, the cost of repairing the injury to the property, reimbursement for expenses directly occasioned by the flooding of the property, and compensation for loss of use of the property and rentals, destruction of, and damages to, personal property,

and the like, should be set aside on motion, although the evidence was admitted without objection.

(Robinson and Williams, JJ., dissent.)

(December 21, 1909.)

ERROR to the Circuit Court for Wood County to review a judgment in plaintiff's favor in an action brought to recover damages caused by the alleged unlawful casting of surface water upon plaintiff's land. Reversed.

The facts are stated in the opinion.

Messrs. W. S. Allen and W. B. Pedigo for plaintiff in error.

Messrs. McCluer & McCluer for defendant in error.

overflow have evidently been held or assumed to be easily remedied, and thus of a temporary nature; and in these cases it has been generally held that the measure of damages is the diminished rental value of the property, or, as it has been stated in some cases, the loss of the use of the property.

Such cases are *Keithsburg v. Simpson*, 70 Ill. App. 467 (overflow caused by ditch constructed by municipal corporation in street); *Loughran v. Des Moines*, 72 Iowa, 382, 34 N. W. 172 (contents of sewer discharged from outlet upon adjoining premises); *Bennett v. Marion*, 119 Iowa, 473, 93 N. W. 558 (sewage dumped into creek and then over plaintiff's farm); *Louisville v. O'Malley*, 21 Ky. L. Rep. 873, 53 S. W. 287 (sewage and water discharged on property from end of sewer); *Ahrens v. Rochester*, 97 App. Div. 480, 90 N. Y. Supp. 744 (sewer, because of insufficient grade, causing water to back up into lateral sewers and thus into cellars, etc.); *Gillett v. Kinderhook*, 77 Hun, 604, 28 N. Y. Supp. 1044 (failure to provide proper outlet for sewage); *Weir v. Plymouth*, 148 Pa. 566, 24 Atl. 94 (flooding of property caused by digging of ditches); *McCartney v. Philadelphia*, 22 Pa. Super. Ct. 257 (defective highway causing water to accumulate and stand thereon and to flow upon adjoining premises); *Cairns v. Chester City*, 34 Pa. Super. Ct. 51 (defective sewer causing water to back up in cellar).

Of course the same measure of damages applies where the injury complained of is called a continuing nuisance. *Toledo v. Lewis*, 17 Ohio C. C. 588 (raising of street grade causing water to set back upon lot).

In *Eufaula v. Simmons*, 86 Ala. 515, 6 So. 47, where premises were overflowed because the city diverted thereon water which would not otherwise have flowed there, it was held that, waiving the question of permanent injury, the damage suffered by the owner of the property was properly measured by the diminished rental value of the premises during the statutory period of limitations prior to commencement of suit, 29 L.R.A. (N.S.)

through the continuance of which the nuisance continued.

In *South Bend v. Paxon*, 67 Ind. 228, it was held that in an action against a municipal corporation for so negligently constructing and repairing its streets and sewers that a stream of water flowing across an owner's lot was obstructed, the measure of damages is the fair rental value of the premises, or such part as the owner had been deprived of by reason of the water, and compensation in damages for the permanent diminution in value of the premises, if any.

In *Hutchison v. Maysville*, 30 Ky. L. Rep. 1173, 100 S. W. 331, after saying that an injury to property caused by water being thrown thereon by the acts of a city, in digging ditches, constructing culverts, and grading and regrading streets, was temporary in its character, and was such a thing that might be readily remedied, the court held that the measure of damages was the depreciation of the rental value of the property if it be rented, or if occupied by the owner the diminution in value of its use and occupancy, and if the proof authorized it, the time and money expended in cleaning out the cistern and cellars and repairing the property after each flood, to make it tenable and inhabitable.

So, in *Foncannon v. Kirksville*, 88 Mo. App. 279, where because of the construction of a sewer so that its outlet was into a small ditch, filth was carried upon adjoining premises, it was held that the rule of difference in value does not apply where injury is temporary.

In *Langley v. Augusta*, 118 Ga. 590, 98 Am. St. Rep. 133, 45 S. E. 486, where a municipal corporation so maintained drains or sewers in connection with a ditch as to cause the latter to become a nuisance to an adjoining property owner because of the resulting stench and overflows, the court, after holding that the improper maintenance of the ditch was not permanent, and that therefore there could be no recovery of prospective damages resulting from the construction and maintenance of the ditch as a

Poffenbarger, J., delivered the opinion of the court:

Julia McHenry recovered a judgment for \$750 against the city of Parkersburg, as damages for collecting surface water, by means of its sewer system, and casting the same, in a body, upon her lot, to the injury of her grounds and dwelling house. Assigning several errors, the city complains of the judgment.

Plaintiff's lot is in low ground, and a small drain, generally dry except in wet weather, has always run through it. Street improvement and the construction of sewers in the neighborhood of the lot have facilitated the flow of water and added to the volume which passes through the lot. This drain passed right under the plaintiff's

house. The increased flow of water has somewhat enlarged it, but it is still a mere gutter. Owing to the general improvement in the neighborhood, the water stands on the lot after a heavy rain and in protracted spells of wet weather. On one or two occasions, it has been in the house, once attaining a depth of 12 inches on the floor. The shrubbery and flowers have been injured and destroyed, plaintiff has been prevented from using the lot for gardening purposes, some of the pillars of the house have settled, throwing it out of shape and cracking the plastering, the floors have been injured, and some little damage may have been done to carpets and furniture. Notwithstanding all this, plaintiff occupied the house as her residence until the 10th day of

nuisance, said: "The plaintiff is, however, entitled to recover for all legitimate damages of every kind which he has sustained, at least up to the time that he served his notice of claim upon the city authorities. He can recover for the increased expense to which he has been put in the building of bridges, etc., by reason of the construction and maintenance of the ditch. He can recover whatever actual damages he has sustained by reason of sickness, or by reason of injury to his property, growing out of the maintenance of the ditch in such a way as to make the same a nuisance. In a word, the plaintiff can recover all the actual damages he has sustained by reason of the wrong complained of, on the theory that the ditch as maintained is a nuisance; but he can recover nothing on the theory that the city will continue to maintain the nuisance. If, as matter of fact, it does continue to maintain it, he can bring another action for damages after they have accrued, and do this just as long as the city fails and refuses to abate the nuisance. If the rental value of the plaintiff's premises has been less during the maintenance of the nuisance and by reason of it, this would be a proper element of damage; and the damage to the plaintiff's land caused by caving and washing can also be recovered, the measure of damages being the cost of restoring his land to the condition in which it was prior to the injury."

In this case, however, it was held further that the plaintiff had the right to recover damages if his property was damaged by the construction of the ditch, even though it was properly constructed and maintained, and in such case if the freehold was injured by the construction of the ditch, the measure of damages would be the difference in market value before and after the injury.

In *Carson v. Springfield*, 53 Mo. App. 289, it was held that for the flooding of property with surface water due to insufficient gutters along a street, the owner's measure of damages is the actual damage sustained at the date of institution of the action, either from loss of rentals or in the destruction or damaging of property.

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In *Van Pelt v. Davenport*, 42 Iowa, 305, 20 Am. Rep. 622, where adjoining property was overflowed because of an insufficient culvert under a street, the measure of damages was held not to be the difference in the value of the lot immediately before and immediately after the grading of the street and the construction of the culvert, but rather the injury which the lot, buildings, and other property sustained from the successive overflows when they occurred.

In *Ewing v. Louisville* (Ky.) — L.R.A. (N.S.) —, 131 S. W. 1016, when water was caused to back up on adjoining premises because of the failure of the city to construct culverts or drains in a newly established alley, it was said: "The rule approved by this court as to the measure of damages in a case like this is that, where the injury or nuisance complained of is permanent, the measure of recovery is the depreciation in the market value of the property, and the one recovery must suffice. If, however, the injury to the property is temporary in its character, that is, such as can be remedied by abating the nuisance, or removing the cause of the injury, and readily repairing the property, the measure of damages is the reasonable cost of repairing the property and the depreciation in its rental value during the period sued for, if it be rented out or owned for renting, or, if it be occupied by the owner, in addition to the reasonable cost of repairs, the damage to its use; that is, the diminution, if any, in the value of the use of the property during the continuance of the nuisance or injury, covered by the period for which the action is brought. It does not appear in this case which one of the two rules was the proper one to be applied.

However, in *Kerns v. Kansas City*, 73 Kan. 582, 100 Pac. 624, where a city constructed a grade and culvert across a creek, causing the water therein to back up and injure adjoining property, including dwelling houses, outbuildings, board walks, etc., the court said: "There are two well-known rules for determining his actual loss or actual damage: (1) The difference in the value of the property immediately before

March, 1907. Many witnesses permitted to testify, without objection, to the value of the property five years before the bringing of this suit, said it was worth from \$1,500 to \$2,500, and then, in response to questions as to the value at the time the suit was instituted, said it was worthless. Others, placing a high value on it prior to the injury, said it had been greatly damaged. All this testimony embodies the theory of permanent injury. It assumes the cause of injury to be irremovable and unabatable. Practically no evidence of any other kind was adduced. Mrs. McHenry's husband, after stating the conditions, said it would require \$900 to restore the property to the condition in which it was prior to the placing of the sewers by the city. Possibly one

other witness gave substantially the same testimony. This is all the evidence in the case pertaining to the elements or quantum of damages. It all went in without objection. Its admissibility was, therefore, impliedly assented to, but a motion to set aside the verdict challenges its sufficiency to sustain the verdict.

The case calls for what are designated, in the decisions, temporary damages. Injury to real estate differs in nature and degree. Under some circumstances, recovery may be had from time to time as damages accrue. Under others, but one recovery can be had, and that includes all the injury the property has sustained in the past and will sustain in the future. Damages recovered in the latter class of cases are called

and immediately after the injury; (2) the reasonable cost of putting the property in as good condition as it was before the injury, together with the loss of rent, if any, during the necessary time consumed in making the repairs. These two methods of procedure should generally lead to the same result, if, as there should not be, no depreciation in value is allowed for the probable or possible recurrence of the overflow. It is not to be presumed that the city will continue to maintain an insufficient culvert, or, if it does and the overflow recurs, that the plaintiff would be without a remedy. If the plaintiff has in part repaired the injury, the reasonable cost of such repairs, with the additional sum necessary to complete the same, or the difference in the value before the overflow and the value after the partial repairs are made, together with the amount expended for repairs, should constitute the amount of his damage. The plaintiff had the option of proving the amount of his damages on either of these theories."

As was shown in *Hutchison v. Maysville*, the court in Kentucky seems to be somewhat particular in stating that only in case the property is rented the measure of damages is the rental value, and that in case the property is occupied by the owner himself the measure of damages is the loss of the use of the property.

Therefore where the owner himself resided on the property it is error to instruct the jury to award him damages for loss of rental value. *Pickerill v. Louisville*, 30 Ky. L. Rep. 1239, 100 S. W. 873.

In addition to the loss of use of the property, a person whose lot has been overflowed may recover from the city also the cost of repairs. *Keithsburg v. Simpson & Cairns v. Chester City*, supra.

Where the injury is easily reparable, the cost of repairing or restoration is the measure of damages. *Cincinnati v. Wright*, Ohio N. P. N. S. 53 (property injured by cause of overflow from gutter).

So, in *Eshleman v. Martie Twp.* 152 Mo. 68, 25 Atl. 178, it was held that the measure of damages in cases of injury to a lot owner by the settling

to property by water flowing from a public highway is the cost of remedying the injury, unless that equals or exceeds the value of the thing injured, when such value becomes the measure.

In *Cincinnati v. McLaughlin*, 12 Ohio C. C. N. S. 220, where the city unnecessarily collected and cast upon premises more surface water than would naturally flow thereon, it was held that the person whose property was injured could not recover both the cost of restoration to its former condition and necessary repairs, as that would allow a recovery of double damages. The court said: "If the court had told the jury to allow all repairs necessary during the period named to preserve the property, and also the further cost of restoring the property to its condition before the injuries were sustained, not exceeding the difference in value of the property, there could be no objection."

There are a few cases, however, in which the court saw fit to designate the conditions which caused the overflow as permanent conditions, and in these cases the measure of damages was held to be the diminished value of the realty.

In *Madisonville v. Hardman*, 29 Ky. L. Rep. 253, 92 S. W. 930, a sewer which caused water to stand on premises, and adjoining property to become very unhealthy, and which had existed in that condition for several years, without change having been made in it, was held to properly fall within the line of permanent structures, and therefore the measure of damages recovered was the depreciation in the market value of the property.

To the same effect is *McClure v. Broken Bow*, 81 Neb. 384, 115 N. W. 1081 (filling up of bed of stream and placing in its stead an iron conduit which in time of flood proved insufficient).

The cost of repairing property cannot be recovered in addition to the difference in value of the property before and after the injury. *Ibid.*

In *Toledo v. Grasser*, 12 Ohio C. C. 520, it was held that the measure of damages for injury to a lot owner by the settling

"permanent" damages, and damages recovered in the former "temporary" damages. Permanent damages are given on the theory that the cause of injury is fixed and indeterminable and the property must always remain subject to it. The injured party is limited to the recovery of temporary damages, when the injury is intermittent and occasional, or the cause thereof remediable, removable, or abatable. It assumes that the plaintiff himself may be able to remedy the cause of injury or relieve his property from its ill effects, or that the defendant will be induced or compelled, by the infliction of repeated judgments for damages, to remove it. *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 803; *Godbey v. Bluefield*, 61 W. Va. 604, 57 S. E. 45; *Sutherland, Damages*, §§ 114-116. Our two decisions, just cited, put cases of this kind in the class

limiting the recovery to temporary damages, and in this we are sustained by the text cited and the decisions upon which it is predicated. The correctness of this position is not questioned here, and was not in the court below. The contention is that the evidence in the case justifies a verdict for temporary damages. This we do not deny. It is also said to be sufficient to sustain a recovery for \$750. This position is, in our opinion, untenable. In other words, we think the damages awarded are larger than the evidence will sustain.

The evidence of prior and subsequent value necessarily looks to the future, as well as to the present and the past. In effect, it says prior to the injury the property would have sold in the market for so much money, and afterwards it would not have sold for anything or would have sold for

of the lot and the cracking and breaking of the walls of his building in consequence thereof, necessitating their rebuilding, resulting from the bad condition or want of repair of a sewer, either by reason of negligent construction or failure to examine or inspect it, is the difference between the value of the building in the condition in which it was before it was so injured and its value immediately after the injury happened, and not the cost of repairs. A similar case, and holding to the same effect, is *Cummings v. Toledo*, 12 Ohio C. C. 650.

In *Martin v. Bond Hill*, 7 Ohio C. C. 271, it was held that the measure of damages to the owner of lands from the failure of a village to plan for an extension to the full width of a highway, of a culvert previously placed therein on a partial improvement thereof, thus shutting off the natural drainage of adjoining lands so as to flood them, is the difference between value of the lands in the condition in which they were before such improvement, and their fair value as they will be when the improvement is completed, not taking into account the general increase in the value of the lands in the neighborhood caused by the improvement.

In *Moore v. Langdon*, 6 Mackey, 6, it was held that the only measure of damages for the construction of a drain resulting in throwing sewage on adjoining property, in the absence of any loss of sale of the property, is the extent of the deprivation of its enjoyment. In this case the court said that undoubtedly the value of the property might be considered for the purpose of ascertaining the damages caused by diminished enjoyment, but the jury could not resort to the rate of interest as a measure, since there was no presumption that any form of property other than money was equal to interest on its money value.

In *Podhaisky v. Cedar Rapids*, 106 Iowa. 543, 76 N. W. 847, where a city had turned drains for surface water into a ditch which had been washed out in a public highway, and removed an obstruction therein in 29 L.R.A. (N.S.)

such manner that the ditch was washed wider and undermined property of an adjoining owner, an instruction that the measure of damages would be the difference in the value of the premises as they were before the city removed the dirt and made the additional ditches, and what they were worth after the lots were washed away, which would not have been washed away had the city not performed those acts, was held erroneous for reasons in the words following: "Under the charge given, the jury was authorized to allow as damages the difference between the value of the premises just before the island was removed and the new ditches were made, and their value at any time afterwards, during the entire term of four or more years, even though the depreciation might have been due in part to other causes. The charge should have limited the plaintiff's recovery to the damages caused by the wrongful acts or negligence of the defendant."

Punitive damages are not recoverable against a municipal corporation for injuries to land caused by the overflow of a creek during a severe storm, which overflow was caused by the discharge into it of the water which the sewer was unable to carry. *Costich v. Rochester*, 68 App. Div. 623, 75 N. Y. Supp. 835.

This note does not concern itself with the right to damages for loss of health, doctor's bills, inconvenience of tenants, loss of profits, etc., as those matters pertain to, or are at least inextricably connected with the question of substantive law as to what conditions may be deemed the proximate results of the wrong complained of, and thus the subject of compensation, rather than the question as to the measure to be applied in ascertaining the quantum of damages from a condition conceded or assumed to be a proximate result of the wrong and thus a legitimate subject of compensation.

Measure of damages for the occasional flooding of land, see note to *Harvey v. Mason City & Ft. D. R. Co.* 3 L.R.A. (N.S.) 973.

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very little. The difference in market value is the measure of damages in cases of permanent injury, or cases calling for permanent damages. The contrary of this view of the evidence is strenuously insisted upon, but we are unable to see how its effect can be confined to the actual damage done up to the time of the institution of the action. It affords no basis for a finding otherwise than upon the theory of a depreciation in market value and the continuance of the cause of injury. It is true nothing is said about the future operation of this cause, but it is clearly and manifestly assumed. The evidence proves past value and value under present conditions. What is the present condition? The property is subjected to this intermittent or recurrent injury from the flowing of water. The purchaser, on a sale, would have to take it in that condition. This evidence does not assume or intimate the discontinuance of this injurious cause. Nothing suggests to the jury that it ever can be, or will be, removed. A recovery of the difference in market value now would not, according to the argument here submitted, prevent recovery of the difference in market value in as many subsequent suits as the plaintiff may see fit to institute, and in each of these subsequent suits a different set of witnesses may testify. While those who are introduced in this case said the property was worthless at the time of the commencement of this action, those who may be introduced in the next action may say it was only slightly injured, and was worth in their opinion \$1,500 or \$2,000, and has since become worthless. This would give room for another recovery of difference in market value, and the operation could be repeated *ad libitum*. The judgments in former actions would only prove the amount recovered, the cause of action, and the dates to which the estimates of damages extended. The record would not disclose the evidence. It is never reduced to writing and made part of the record except for appellate purposes, nor are the instructions. None would prove the value of the property at the date of the commencement of the action, as a basis of, or starting point for, the estimate in the next succeeding one. That would be an open question in the second action, and, if the evidence therein should fix it even higher than the highest proved in any former trial, and then a total, or practically total, loss, the court would have no power of control over it, and recovery on that basis would follow. This would amount to a travesty upon justice, enabling the owner to recover over and over, as upon repeated sales of the property, and still remain its owner. A verdict in a case of this class cannot stand

upon such evidence. Is there any other in the case upon which it can stand?

Plaintiff's husband, and possibly one other witness, said it would take \$900 to restore the property to its former condition, but did not indicate what this cost would include, otherwise than by the previous detailing of the extent and character of the injury and the cause thereof. Did this include the cost of putting a sewer through the lot to carry the water away, or of filling the lot so as to divert the water from it, in addition to the cost of repairing the building, and loss of, and injury to, carpets and furniture, and deprivation of use and rents? No juror could say, nor can we. These witnesses did not say what it would require to repair the house, fill the gutter, and compensate for loss of rents, use, and articles destroyed. Their testimony goes far beyond that, affording ground for the inclusion of the cost of raising the house and filling the lot, so as to put them above the reach of the water. This would be an improvement to the property and an abatement of the injury, not a mere reparation of the damages, such as the repair of the house and filling the gutter. It has never been done. No money has been so expended and may never be. If recovered in this action, and not applied, it could be recovered over again in the next action and still not applied, and so on, as long as plaintiff might care to repeat the operation, for the record of this action would not show it in any conclusive form. We repeat this would be cost of improvement as well as cost of reparation of injury, and, if such outlay had been actually made, the cost thereof in excess of what was required for reparation could not be recovered. No person can directly or indirectly charge a municipal corporation with the cost of benefits to his own property except in so far as they work reparation of injury done to it by the corporation. *Godbey v. Bluefield*, cited. Obviously, this evidence goes beyond the cost of repairs and other recoverable damages, but, if the construction thereof be an equally balanced question, the beam is tipped by the great mass of evidence of permanent damages, accompanying it.

We admit the admissibility of opinion evidence, but insist upon its weakness and upon the necessity of the statement of *data* to enable the jury and court to test its admissibility, weight, and value; and we regard the testimony here discussed as constituting a mere scintilla of evidence, insufficient to sustain a verdict for so large an amount in view of the facts disclosed by the evidence in general. It should not have been admitted in the form in which it was offered.

We are not overlooking the caution of the court in respect to the time limitation in finding and estimating the damages. This does not cure the error in allowing a verdict to stand on evidence of the cost of unmade improvements and future injury.

Finding the damages clearly excessive, we reverse the judgment, set aside the verdict, and remand the case for a new trial.

Robinson, J., dissenting:

The overthrow of the verdict and judgment in this case meets with my unqualified, but respectful, dissent. Deep convictions, arising from a most thorough examination of the record, impel me to offer here my views upon every feature of the case that has been presented by assignments of error in this court.

That there is liability for damages caused by a municipal corporation in collecting surface water and casting it in a mass or body upon one's property is settled law in this state. *McCray v. Fairmont*, 46 W. Va. 442, 33 S. E. 245; *Clay v. St. Albans*, 43 W. Va. 539, 64 Am. St. Rep. 883, 27 S. E. 368; *Jordan v. Benwood*, 42 W. Va. 312, 36 L.R.A. 519, 57 Am. St. Rep. 859, 26 S. E. 266; *Gillison v. Charleston*, 16 W. Va. 282, 37 Am. Rep. 763.

Five propositions are advanced by the appellant to support a reversal. We shall state and briefly consider each of them.

First: That there is a variance between the allegations of the declaration and the proof as to the location of the sewers which are alleged to have caused the damage.

This point is extremely technical. The declaration is broad enough to permit proof of damage caused by collected surface waters from any sewers put in by the city in the vicinity of plaintiff's property. Under this head it is insisted that the evidence does not show that all the sewers described by witnesses as the ones which collected the surface water were constructed within five years prior to the institution of the suit. The declaration does not allege, nor need it do so, that the sewers were constructed within five years prior to the suit. It alleges that surface waters were collected by sewers in the vicinity of the property and cast in a body upon it to its damage, within five years. The statute of limitations, which has been pleaded in this case, begins to run from the occurrence of the injury. *Pickens v. Coal River Boom & Timber Co.* (W. Va.) 24 L.R.A.(N.S.) 354, 65 S. E. 865; *Eells v. Chesapeake & O. R. Co.* 49 W. Va. 65, 87 Am. St. Rep. 787, 38 S. E. 479; *Henry v. Ohio River R. Co.* 40 W. Va. 234, 21 S. E. 863. There is no right of action for an injury until it happens, though the instrument causing it may have existed for 29 L.R.A.(N.S.)

all time. If the instrument does no harm, there can be no recovery because of its mere existence, even though it threatens harm. This case seems to have been tried on the erroneous idea that it must be shown that the sewers were constructed within five years before the suit. An instruction embodying such proposition was given to the jury on behalf of plaintiff. Yet this erroneous theory could not prejudice the city. In a way, it was favorable to it.

Second: That the open drain or ditch was and is a natural water course.

There was evidence that plaintiff's property was naturally so situated that there was in it a depression of the ground, in which water ran at times. Into this hollow or ravine the collected surface water was thrown so that it was made a damaging body of water. The city insists that this hollow was a natural water course. Generally, there is no liability for damages arising from the casting of collected surface water into a natural water course. But was the hollow through plaintiff's lot a natural water course? Whether it was shown to be a natural water course depends on the evidence. How else can it be determined what it was? That evidence is conflicting. The jury were, therefore, the judges of the facts in this particular. They were instructed as to what facts were necessary to establish the existence of a natural water course. There can be no just exception to the definitions given the jury as a guide in their determining whether or not there was a natural water course through plaintiff's lot. They were told by the court that a natural water course is "a natural stream flowing in a definite bed or channel, with banks and sides, and having permanent sources of supply." They were also told that "a water course is a stream usually flowing in a particular direction, in a definite channel, and discharging into some other stream or body of water, and the term does not include surface water conveyed from a higher to a lower level for limited periods during the melting of snow or during or soon after the fall of rain, through hollows or ravines which at other times are dry." These definitions are generally recognized by legal authorities. 2 *Bouvier's Law Dict.* 468, 1219; 21 *Am. & Eng. Enc. Law*, 2d ed. p. 420; 30 *Am. & Eng. Enc. Law*, 2d ed. p. 347; *Neal v. Ohio River R. Co.* 47 W. Va. 316, 34 S. E. 914. Yet counsel for the city say that they tended to make the jury believe that the hollow was not a water course simply because water did not flow through it continually. The definitions could not have that effect upon intelligent minds. Taken together they clearly meant that, if there is no source of supply which usually does supply, the

ravine or hollow cannot be considered a water course. They in fact told the jury what the law actually says,—that there must be some other source of supply than occasional surface water from rains or melted snows. The way was open to counsel for the city to place before the jury explanations of these definitions by instructions embracing further proper considerations as to what will constitute water courses. They sought nothing of this kind at the trial. The definitions were applicable to the evidence in the case. And upon a special interrogatory propounded to the jury at the instance of the city, the jury expressly found that the depression through plaintiff's lot was not a natural water course. No error can be perceived in such finding.

Third: That no more water ran in the hollow after the placing of the sewers than ran there before they were placed.

Whether this alleged fact be true or not, it was the province of the jury to find. It turns on oral evidence of witnesses given in the presence of the jury. They have found, upon a special interrogatory, that the sewers did increase the flow "to a very material extent." That finding enters into the general verdict. Though the testimony may be conflicting in this particular, still there is much evidence to support it. It was distinctly a jury question.

Fourth: That the damage was done from back water from obstruction below, rather than from water flowing from above.

The jury have upon special interrogatory also negatived this proposition from conflicting oral testimony. We cannot invade their province so to do. *Coalmer v. Barrett*, 61 W. Va. 237, 56 S. E. 385.

Fifth: That the verdict and judgment are excessive.

The amount of the verdict is fully supported by testimony. It has been ascertained from facts and *data* quite as certain as those ordinarily used and held to be sufficient in the ascertainment of damages. *Grafton & G. R. Co. v. Foreman*, 24 W. Va. 662; *Hargreaves v. Kimberly*, 26 W. Va. 787, 53 Am. Rep. 121; *Miller v. Shenandoah Pulp Co.* 38 W. Va. 558, 18 S. E. 740; *Pickens v. Coal River Boom & Timber Co.* 58 W. Va. 11, 50 S. E. 872, 6 A. & E. Ann. Cas. 285; *Hurxthal v. St. Lawrence Boom & Mfg. Co.* 65 W. Va. 346, 64 S. E. 355. The nature of the injury being recurrent or intermittent, the plaintiff could recover in successive actions. *Rogers v. Coal River Boom & Driving Co.* 39 W. Va. 272, 19 S. E. 401; *Henry v. Ohio River R. Co.* 40 W. Va. 234, 1 S. E. 863; *Pickens v. Coal River Boom & Timber Co.* *supra*. Then in this action no respective or future damages could be taken into consideration. And it distinctly

appears from the record that the trial court allowed no element of prospective or future damages to go into the evidence. The only damages proved were based upon the actual injuries to the property arising from the collected surface water prior to the institution of the suit. Witnesses clearly detailed the items of actual injury to the property. It was shown without the least contradiction that the surface water collected and cast upon the property by the city washed a great hole under the house, and washed the soil from the lot in other places; that the washing away of the ground caused the house to settle and thereby to become misshapen; that the plastering was thereby broken and caused to fall off; that the water standing on the floors so injured them that new ones would have to be put in; and that plaintiff and her family were obliged to seek a home elsewhere because of the injured condition of the property. These are only some of the details of actual injury established by the evidence. The exact manner in which the property was injured prior to the suit was detailed to the jury. The plaintiff's husband testified that it would cost \$900 to repair all this damage. Another witness, shown to be fully acquainted with the property and the injury done to it, corroborates him as to the amount necessary to put the property in the condition it was before the injury. These witnesses speak only of actual past damages and the amount necessary to repair the same. Besides, it was shown that plaintiff had been compelled to expend at least \$170 within the five years prior to the suit, in clearing away *débris* and making repairs after the floods. Surely all this evidence affords a definite basis upon which the jury could find an amount. The city did not even seek to contradict it. Nor was it attacked upon cross-examination. The way was open to test the accuracy of the amounts stated by these witnesses. Yet these amounts stand unimpeached as a basis for the ascertainment of the damages.

Some of the witnesses valued the property as high as \$2,400. Can we say that the jury did not accept this amount as the true value? The assessment of the property for taxation is not conclusive evidence of its value. 3 Wigmore, Ev. § 1640. By statute, it is now admissible evidence in a suit of this character upon the question of value. Code 1899, chap. 29, § 115 (Code 1906, § 801). But that statute expressly makes it admissible "with other evidence." Is the amount of the verdict an unreasonable one for all the injury shown to have been done to a property of the value of \$2,400? It would appear that it is not. But, let us iterate, testimony that stands absolutely unquestioned says that the actual past

damage amounted to \$900,—that it would take that amount to repair the damage. Does not this support the verdict for \$750? "In the ascertainment of damages absolute certainty is not required. The causes and probable amount of the loss may be shown with reasonable certainty. Substantial damages may be recovered though the loss can be stated only approximately." *Hurxthal v. St. Lawrence Boom & Mfg. Co. supra.*

By the majority opinion the verdict and judgment are overthrown because evidence was introduced to show a difference between what the property was worth before it was injured by the surface water and what it was worth after it was so injured by reason of the past damage that was thereby done to it. It is assumed that the witnesses in stating this difference took into consideration the fact that the sewers would damage the property in the future. But how can this fact be assumed when it is not in evidence that the witnesses based a difference in the value upon the future presence of the sewers? As far as this evidence goes it established a reduction in value by reason of the actual past injury done by the surface water that was thrown on the lot prior to the suit, and by reason of no other thing. And such reduction in value was a proper measure of the injury resulting from the actual past invasion of the property. That reduction, mentioned by the witnesses, was based wholly upon the fact of a past invasion of plaintiff's property. It nowhere appears that it was to the most limited extent based by them upon the consideration that the sewers would continue in place, and that in the future they would cause further damages. The witnesses were asked to draw a difference in the value of the property as caused by what had been done, not to draw a difference by anything that might occur in the future. And such difference was drawn in the testimony only by reducing the value of the property at the time of the trial by a consideration of its injured condition at that time, and not by a consideration of its location in reference to the sewers or regard of future damages likely to happen to it. The general market value of the property, as influenced by a continuing cause of damage near the property, plainly was not made a criterion before the jury. Testimony of future damages never entered into this case. So clearly does this appear that counsel for the city do not even suggest that any element of future damages may have been considered. It is not proper to assume that something outside of the record influenced the jury in fixing the amount of the damages. The extent of the actual past injury and the amount that it would cost to put the prop-

erty in the identical shape that it was before the surface water injured it were distinctly made the basis upon which the damages were found. Besides, the rulings of the trial court throughout the taking of testimony made it clear that only evidence of past damages was permitted to go to the jury. No jury of ordinary intelligence would arbitrarily take future damages into consideration in view of the way this case was submitted to such jury. No verdict should be overthrown by assuming a fact that has not been made to appear, because the amount seems larger than the court would have made it. It arbitrarily strikes at the most vital and fundamental of rights so to annul a verdict.

If the verdict is excessive, it is the fault of the city. Why did it not show, by cross-examination or otherwise, that the damages given in testimony were unwarranted? No exception of any kind was taken to the evidence in relation to the extent of the damages. No bias or prejudice on the part of the jury appears. They were the proper judges of the extent of the damages. We are not authorized to substitute our judgment in this particular for theirs, even if we would find differently. *Miller v. Shenandoah Pulp Co. supra.*

Another point is presented. A witness for the city testified that Mrs. McHenry could have filled in and raised her lot at an expense of \$200, and thereby prevented damage by the flood turned upon her property. Evidently intended to be founded on this testimony was an instruction which was refused. Had it been given it would have told the jury that if they believed that the plaintiff could have protected her property at reasonable expense, she was entitled to recover nothing beyond the cost of such protection if furnished by her. And all but one of the special interrogatories that were refused were also based on the same theory. It was entirely proper to exclude from the case a proposition of this character. It was, in reason, not incumbent on plaintiff to raise her lot. The property was her own in its natural state. She was entitled to enjoy it without the invasion by the city. The city's turning collected surface water upon it was a positive tort. It would be strange justice to say that she cannot recover because she did not make it impossible for the city to wrong her. Such view would be an absolute reversal of liability for wrong.—place it upon the party wronged, and not upon the wrongdoer. True, after a wrong is committed it is the duty of the party wronged to avoid such damages as may be avoided by reasonable diligence, ordinary prudence, and reasonable expense. 8 Am. & Eng. Enc. Law, 2d ed. pp. 605-607; 1

Sedgw. Damages, chap. 6. But it will be observed by an examination of the authorities that the rule in no case requires more than the exercise of ordinary efforts and the outlay of reasonable expense on the part of the party wronged to aver damages after the wrong has been done. It requires no such extraordinary thing, nor so great an expense, as is insisted upon in this case. *Galveston, H. & S. A. R. Co. v. Borsky*, 2 Tex. Civ. App. 545, 21 S. W. 1011. The plaintiff was not obliged to use more than ordinary diligence to avert the damages. 1 Sedgw. Damages, § 221. There is absolutely no evidence that plaintiff did not use such diligence. "What efforts an injured party must make to limit his damages is to be determined by the rules of common sense and fair dealing," 8 Am. & Eng. Enc. Law, 2d ed. p. 606. Common sense and fair dealing did not enjoin upon Mrs. McHenry the filling of her lot at an expense of \$200 to her, simply because of the city's wrong. How could that wrong put such obligation on her to stop it? The instruction and interrogatories were therefore unwarranted.

It is assigned that the court erred in refusing to give two other instructions asked on behalf of the city, and in refusing one other special interrogatory. Yet no specific criticism of these refusals is made in the briefs. It would seem that counsel do not rely upon them. At any rate, no error in these particulars is perceived.

The judgment ought to be affirmed. Tested by the record, it is plainly right. There has been a fair trial, and the verdict is supported by law and the evidence.

Williams, J.: I concur in the foregoing opinion of Judge Robinson.

Petition for rehearing denied January 13, 1910.

MISSISSIPPI SUPREME COURT.

GLOBE & RUTGERS FIRE INSURANCE COMPANY, Appt.,

FIREMEN'S FUND INSURANCE COMPANY et al.

(— Miss. —, 52 So. 454.)

Pleading — complaint — affidavit — effect.

1. The question whether or not a complaint for enticing away a servant states a cause of action cannot be affected by an affidavit of denial by the servant.

Master — enticing servant — liability.

2. One is liable in damages for maliciously enticing away another's servant for the sole purpose of harming the master.
29 L.R.A. (N.S.)

Parties — conspiracy — defendants.

3. All parties to a conspiracy to injure one by enticing his servant away from him may be joined in an action to recover the damages thereby caused.

(May 30, 1910.)

Note. — Basis of distinction between absolute and qualified rights as affecting right to inquire into motive.

The theory that malice will make an otherwise lawful act unlawful and actionable has been the subject of much discussion, and great confusion exists as to when, if at all, the doctrine is applicable. The general question of the effect of a malicious motive on an otherwise lawful act is discussed at length in a note to *Passaic Print Works v. Ely & W. Dry Goods Co.* 62 L.R.A. 673. The question is considered with reference to the liability of an individual in the absence of conspiracy, for driving away another's customers, in a note to *Sparks v. McCrary*, 22 L.R.A. (N.S.) 1224; with reference to actions for damages for inducing a breach of contract, in notes to *Swain v. Johnson*, 28 L.R.A. (N.S.) 615, and *Knickerbocker Ice Co. v. Gardiner Dairy Co.* 16 L.R.A. (N.S.) 746; with reference to actions for inducing the discharge of a servant, in notes to *Huskie v. Griffin*, 27 L.R.A. (N.S.) 966, and *McGurk v. Crönenwett*, 19 L.R.A. (N.S.) 561. And see also note to *Beekman v. Marsters*, 11 L.R.A. (N.S.) 201, as to the right to an injunction to restrain a third person from inducing a breach of a contract or aiding therein, and note to *Thacker Coal & Coke Co. v. Burke*, 5 L.R.A. (N.S.) 1091, as to civil liability for inducing a servant to quit.

Although much confusion exists upon the subject, by the weight of authority some acts otherwise lawful may become unlawful where exercised for a malicious purpose; that is, for the primary purpose of injuring another rather than benefiting the wrongdoer.

This is also the doctrine of *GLOBE & R. F. INS. CO. v. FIREMEN'S FUND INS. CO.*, and it was approved by that court in the recent case of *Wesley v. Native Lumber Co.* (Miss.) 53 So. 346, wherein a retail merchant was held entitled to damages against an employer who forced his employees to cease trading with the former upon pain of dismissal from their employment.

If the distinction between the exercise by an individual of his absolute rights, and the exercise by him of his qualified or common rights, is kept in mind, much of the seeming conflict apparently to be found in the cases considering the general question as to the effect of malice will be obviated. Absolute rights are rights incident to the ownership of property, rights growing out of contractual relations, or the right to enter or refuse to enter into contractual relations. These rights the individual may exercise without reference to his motive as to any injury directly resulting therefrom, since such injury is not a legal injury in

APPEAL by plaintiff from a judgment of the Circuit Court for Adams County dismissing an action brought to recover damages alleged to have been caused by defendants' alleged malicious interference with plaintiff's business. Reversed.

The facts are stated in the opinion.

Messrs. T. M. Miller and Joseph Hirsh, for appellant:

A contract for services at will is as much entitled to protection against malicious interference as any other part of a business; nor can it be of any consequence whether a single individual is guilty, or a combination of persons are the offenders, the only difference being in the added power of the combination to do the mischief.

the sense that it is actionable. The courts, apparently on the ground of expediency, have at all times refused to inquire into the motive in the exercise of such rights at the instance of anyone injured thereby as a direct result of the exercise of the right. On the other hand, under the guise of exercising an absolute right, it is not lawful indirectly to interfere with the business, employment, or occupation of a third person, where the exercise of the right is maliciously to injure the latter rather than primarily to benefit the person exercising same. That is to say, one will not be protected in the exercise of an otherwise absolute right as against a third person collaterally injured thereby, where the primary purpose of exercising the right was, in the first instance, to cause such collateral injury. This proposition may perhaps be illustrated by reference to the right of a mortgagee to foreclose a mortgage. This being a contractual right, he may exercise it as against the mortgagor and all persons holding through or under him, without being called to account for injuries thereby occasioned to such persons, even though his motive in foreclosing is malicious. On the other hand, should he exercise this right or threaten to exercise it, to force the mortgagor into some action injurious to the business, employment, or occupation of a third person, the mortgagee would be liable in damages to such third person for the injury so occasioned.

The motive of a person in the exercise of common or qualified rights, that is, the right to engage in a business, occupation, profession, or employment in competition with others, is a proper subject of inquiry by the courts, and if exercised for the primary purpose of injuring another in his common or qualified rights, rather than to benefit himself, the injury is actionable. The reasons rendering it inexpedient to make motive a subject of inquiry as to injuries directly flowing from the exercise of an absolute right do not apply as to collateral or secondary injuries to third persons, occasioned by the exercise of such rights, neither do they apply to injuries occasioned by the exercise of common or

Martell v. White, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 345, 69 N. E. 1085; Walker v. Cronin, 107 Mass. 555; 2 Cooley, Torts, 3d ed. p. 598.

It makes no difference whether the employment is for a fixed term, not yet expired, or is terminable at the will of the employer.

2 Cooley, Torts, 3d ed. pp. 590, 591; London Guarantee & Acci. Co. v. Horn, 204 Ill. 493, 99 Am. St. Rep. 185, 69 N. E. 526.

Neither one person nor a combination of persons may interfere with one's business contracts by inducing the obligors to break such contracts, and for any such interference an action will lie.

2 Cooley, Torts, pp. 600, 601; Doremus

qualified rights. Generally, as to such injuries, it is more expedient to protect, and public policy will be more conserved by protecting, persons against malicious interference with their business, occupation, profession, or employment, where such interference does not directly result from the exercise of an absolute right, or cannot be justified on the ground of competition or of other benefit to secure which was the primary object of the act.

In many cases, in considering the general question as to the effect of malice where damages were claimed to have been caused through the exercise by another of an absolute right, the court has disposed of the question by asserting and applying the general proposition that the action could not be maintained, because an otherwise lawful act does not become unlawful by reason of the motive of the person exercising it. As to absolute rights, this doctrine is undoubtedly correct, but it has no application where the damages claimed or relief sought relate to injuries arising from the exercise by another of a common or qualified right. On the ground of expediency, if for no other reason, the court will refuse to inquire into the motive of a person in the exercise by him of the ordinary rights incident to the ownership of property, or the ordinary rights growing out of contractual relations. Security in the exercise of such rights requires that the person exercising the same may do so without fear of being called to account for damages naturally arising from the exercise thereof. This reason does not exist with reference to the right of individuals to pursue a business, occupation, profession, or employment, when considered with reference to the serious character of the injury which may be caused through the malicious exercise of such rights to injure or interfere with another in the exercise by him of his common or qualified rights.

Although the distinction between the exercise of absolute rights and common or qualified rights has been but infrequently considered by the courts, yet the great majority of the decisions may be reconciled if that distinction is kept in mind. This

v. Hennessy, 176 Ill. 608, 43 L.R.A. 797, 68 Am. St. Rep. 203, 52 N. E. 924, 54 N. E. 524; Bowen v. Hall, L. R. 6 Q. B. Div. 333, 1 Eng. Rul. Cas. 717; 16 Am. & Eng. Enc. Law, pp. 1111, 1112, 1114; Webb v. Drake, 52 La. Ann. 290, 26 So. 791; Graham v. St. Charles Street R. Co. 47 La. Ann. 214, 27 L.R.A. 416, 49 Am. St. Rep. 366, 16 So. 806; Longshore Printing Co. v. Howell, 26 Or. 527, 28 L.R.A. 464, 46 Am. St. Rep. 640, 38 Pac. 553.

Messrs. McLaurin, Armistead, & Brien, for appellees:

One has a right to decline to enter into a business undertaking with anyone. It is a part of every man's civil rights that he

be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason or is the result of whim, caprice, prejudice, or malice. With his reason neither the public nor third persons have any legal concern.

2 Addison, Torts, § 580; Cooley, Torts, 1st ed. p. 278; Cooley, Torts, 2d ed. pp. 328, 332; Bourlier Bros. v. Macauley, 91 Ky. 135, 11 L.R.A. 550, 34 Am. St. Rep. 171, 15 S. W. 60; Delz v. Winfree, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111; Beach, Monopolies & Industrial Trusts, § 851, note 3; 1 Eddy, Combinations, 1901, § 565, ¶ 4, p. 486; Citizens' Light, Heat & P. Co. v. Montgomery Light & Water-

proposition may be illustrated by reference to two recent decisions wherein the question has been considered. Thus, in Wesley v. Native Lumber Co. supra, it is said that an act legal in itself may become illegal and a ground of action when accompanied with the malicious purpose to injure the business of another, where resulting in such injury. It is, however, conceded that a person has a right to refuse to have business relations with any person whomsoever, whether his refusal is the result of caprice or malice, without laying himself liable to action therefor; but it is said that he cannot, from such motives, influence others to the same course, for the purpose of injuring the business of such other. It will be remembered that this language was used in holding an employer liable for inducing his employees to cease trading with a retail merchant. In other words, an indirect interference with the common rights of another, under the guise of exercising an absolute right. In Arnold v. Moffitt, 30 R. I. 310, 75 Atl. 502, the court asserts the doctrine that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act, so as to make the doer of the act liable to a civil action. But this language was used in holding that an employee was not liable where, as an expert, he examined another's work, and gave his opinion as to what it should cost, and reported that the bill therefor was exorbitant. It not appearing that the opinion was not fair and honest, the court held that the question of motive in rendering same was immaterial. It will be observed, however, that in this case the person sought to be held was acting under a contract of employment, and was asked by his employer for his opinion; hence, in giving same, he was exercising an absolute right, and the injury directly resulted therefrom.

Although *GLOBE & R. F. INS. CO. v. FIREMEN'S FUND INS. CO.* involved the question of civil liability for enticing a servant, the doctrine therein enunciated is not limited to the liability of persons for interfering with the relation of master and servant, but includes liability for interference in all classes of contracts.

In *Jones v. Maher*, 62 Misc. 388, 116 N. Y. L.R.A. (N.S.)

Y. Supp. 180, the doctrine is asserted that a person is liable for enticing away the employee of another unless such act is justified; and it is held that employees on a strike are not liable for attempting peaceably to persuade fellow workmen or employees in the same general line of employment likewise to cease working, and also to induce workmen not to enter into such employment, the common interest of the employees being a sufficient justification.

The contrary doctrine was asserted, however, in *George Jonas Glass Co. v. Glass Bottle Blowers' Asso.* 72 N. J. Eq. 653, 66 Atl. 953, which holds that employees on a strike are not in competition with their employer in a sense to justify them in enticing his employees engaged in the same line of employment from further service with him, or to induce workmen intending to seek employment with him from doing so. The court reasoned: "Honest competition is what every business man must submit to, but it must be competition, and not a malicious intention to injure. Inducing the employees of a person to leave their employment, or others not to accept his employment, for the purpose of crippling his business, where the organization offering the inducement is not engaged in any business, competitive or otherwise, and which has no need of the labor, and no reason for interfering beyond the avowed purpose of overthrowing the complainant in the stand which it has taken against the demand of the organization that it shall unionize its factory, is not the competition which the law recognizes or upholds."

In the abstract, this proposition as stated may be good law. It, however, ignores a well-settled right of employees to organize and resort to all peaceful means to promote their interest. Within these rights is included the right to induce other workmen to agree upon hours of labor, compensation for the same, the redress of grievances, and other matters affecting their common interests. To attain their end in these respects, they have a right to cease labor, and also to induce and persuade others similarly situated to do likewise.

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Power Co. 171 Fed. 553; *Mogul S. S. Co. v. McGregor*, L. R. 21 Q. B. Div. 553; *Hunt v. Simonds*, 19 Mo. 583; 1 *Eddy, Combinations*, § 579, p. 513, note 2; *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770; *Clemmitt v. Watson*, 14 Ind. App. 38, 42 N. E. 367; *Baker v. Metropolitan L. Ins. Co.* 23 Ky. L. Rep. 1174, 55 L.R.A. 271, 64 S. W. 913; 2 *Eddy, Combinations*, § 1197; *Cooley, Torts*, 1st ed. pp. 278-830.

Malicious motives may make a bad case worse, but they cannot make that wrong which, in its own essence, is lawful.

1 *Eddy, Combinations*, § 565; *Chambers v. Baldwin*, 91 Ky. 121, 11 L.R.A. 545, 34 Am. St. Rep. 168, 15 S. W. 57.

Conspiracy in a civil case amounts to nothing unless some "legal damage" is shown to be the direct and proximate result.

6 Am. & Eng. Enc. Law, pp. 872 et seq.; *Kimball v. Harman*, 34 Md. 407, 6 Am. Rep. 340; *Adler v. Fenton*, 24 How. 407, 16 L. ed. 696.

The declaration charging defendant with inducing Lawrence to abandon his contract with the plaintiff does not state a cause of action, as Lawrence was not under contract to plaintiff.

Ashley v. Dixon, 48 N. Y. 430, 8 Am. Rep. 559; *Chambers v. Baldwin and Bourlier Bros. v. Macauley*, supra.

Mayes, Ch. J., delivered the opinion of the court:

The *Globe & Rutgers Fire Insurance Company* began suit in the circuit court of Adams county against numerous insurance companies. We deem it unnecessary to name all the companies made defendants to the declaration. The suit is for an alleged tort, and the amount sued for is \$50,000. The declaration alleges substantially that plaintiff is engaged in the business of writing fire insurance in the state of Mississippi, having complied with all the laws of the state relative thereto, and being duly licensed; that plaintiff conducts its business through numerous local agents in various towns and cities of the state, including the city of Natchez, all local agencies being under the supervision of its general state agents; that plaintiff is, and always has been, in active competition with defendants, all being engaged in the same business and in the same territory; that plaintiff has built up a large and lucrative business in fire insurance, and in consequence of its good management, stability, and just dealing has secured the good will of all the communities where its business is carried on; that plaintiff is independent of all combination among insurance companies, and 29 L.R.A. (N.S.)

does not seek to increase rates of insurance, or cheapen the services of desirable agents, or otherwise hamper free competition in the fire insurance business, but conforms in all respects to all the laws applicable to the business; that, in order to prosecute its business successfully, plaintiff has found it necessary to employ agents in various places, who are experienced in the business and thoroughly competent, and who also represent other insurance companies; that because of its independence, justice, liberality, and success it has brought itself into strong disfavor with the defendants, who are its rivals in business; that because of these facts the defendants, with others unknown to plaintiff, wickedly and maliciously contriving and intending to harass, vex, oppress, annoy, and injure the plaintiff, and as far as practicable put it out of business in the state, by depriving it of the service of successful and experienced agents employed by it, and in an effort to bring it into discredit and disfavor with the public, and compel it to quit business, or employ inexperienced persons as its local agents, did about the 30th of April, 1908, and in the county of Adams, wickedly, maliciously, and unlawfully, and with the intention and purpose aforesaid, conspire with each other and with others unknown, and intending to deprive plaintiff of the services of one Trabue Lawrence, its local agent, maliciously and unlawfully, persuade, cajole, and intimidate Trabue Lawrence, the defendants' local agent, threatening to drive him out of his business as insurance agent unless he should yield; that thereupon the said Lawrence was persuaded, forced, and intimidated by the defendants into abandoning and leaving the service of plaintiff, so that from and after the 2d day of May, 1908, plaintiff lost the benefit of the valuable service of the aforesaid Lawrence on account of the wicked, malicious, and unlawful conspiracy of the defendants; that because of this conspiracy plaintiff was compelled either to quit business in Natchez or intrust its affairs to less experienced and less competent local agents, to its damage of at least \$3,000 per annum in net premiums, which it could and would have earned, had it been permitted to retain the services of Lawrence. Wherefore plaintiff claims that by reason of the aforesaid wicked, malicious, unlawful, and oppressive conspiracy it has sustained injury and damage in the sum of \$50,000, for which it sues. To this declaration a demurrer was interposed, setting up numerous grounds; the chief one being that the declaration does not aver any facts which constitute a cause of action. The demurrer was sustained, and the

suit dismissed, from which judgment an appeal is prosecuted.

It may here be stated that there is an affidavit filed by Lawrence in which he denies the allegations of the declaration. But this case must be considered without reference to this affidavit, since it forms no part of the question presented by the record. If the declaration states a good cause of action, the demurrer must be overruled. Plaintiff cannot be precluded in its suit by any denial made by Lawrence. It may be able to prove the facts alleged in the declaration by other witnesses. The demurrer confesses every material allegation of the declaration, and with such allegations confessed it is for us to determine whether a cause of action appears. The affidavit cannot add to or take away from the legal effect of the case.

The declaration states facts which show that defendants are not in the mere exercise of just rights, but that they are wickedly, unlawfully, and maliciously interfering with plaintiff's employee for the sole purpose of harming it. Under the facts alleged in the declaration, it may have been perfectly permissible for the defendants to have employed the agent of plaintiff, and to pay him better for his services. They might employ him, or any number of plaintiff's agents similarly in the employ of plaintiff, without violating any principle of lawful right, if the object of the employment was in the honest furtherance of their own business enterprises. But the facts stated in the declaration show a determination to destroy and drive plaintiff out of business, and the declaration alleges a conspiracy for this purpose. Surely no individual or corporation may maliciously and wantonly set about to ruin a competitor. As an incident to the advance of one's own business and for the purpose, he has the right to use all proper methods, and his competitors must be able to cope with his ingenuities. As is said in the case of *Martell v. White*, 185 Mass. 260, 64 L.R.A. 263, 102 Am. St. Rep. 346, 69 N. E. 1087: "Competition in business is permitted, although frequently disastrous to those engaged in it. It is always selfish, often sharp, and sometimes deadly." The fact that a rival in business is vanquished is not of itself sufficient to give rise to a cause of action against his competitor; but the facts must go further, and show that the contest was carried on by methods not allowable in such warfare.

For an association of persons to conspire together for the sole purpose of destroying one's business certainly transcends legitimate and lawful competitive methods. Every person must be free to ply his own

calling. If he may be interfered with by having his employees driven from his service by fraud, misrepresentation, intimidation, obstruction, or molestation, and in this way have his business destroyed, the effect upon his business operations and progress is as deadly as if the law permitted an incendiary to burn or a mob to destroy. If his business is to be destroyed, it can make little difference in result whether it be by the unlawful use of fire or unlawful intimidation or molestation. Legitimate competition he must meet, or surrender; but legitimate competition only means that all may make the best lawful use of their faculties and their means. If in so doing their competitor's business is destroyed as a mere incident of his inability to successfully contend against superior skill or means, that is but the hardship of legitimate warfare. The world is always in search of improved methods and reduction of cost. *Martell v. White*, 185 Mass. 255, 64 L.R.A. 260, 102 Am. St. Rep. 341, 69 N. E. 1085.

In the case of *Employing Printers' Club v. Dr. Blosser Co.* 122 Ga. 509, 69 L.R.A. 90, 106 Am. St. Rep. 137, 50 S. E. 353, 2 A. & E. Ann. Cas. 694, there is to be found a lengthy and exhaustive discussion of the question involved in this case. In that case it is held that, wherever there is a malicious interference with one's employees, an action can be maintained against the party so interfering. It is stated on page 516 of 122 Ga., that "at common law the remedies for breach of contract were confined to the contracting parties, and limited to direct damages and consequential damages proximately resulting from the act of him who is sued. This general rule admitted of one exception, and that was the right of action against a stranger for wrongfully enticing away a servant in violation of his contract of service with his master. The exception is said to have been based on the ancient statute of laborers. The early English cases limited the action to the enticement of menial servants; but the later cases, beginning with *Lumley v. Gye*, 2 El. & Bl. 216, 1 Eng. Rul. Cas. 706, have extended the doctrine beyond menial servants, and by the modern interpretation of this doctrine by the English courts the rule is extended to a malicious interference with any contract. . . . In the later case of *Quinn v. Leatham* [1901] A. C. 495. . . . [after reviewing many cases, it was stated that]: 'A combination of two or more, without justification or excuse, to injure a man in his trade, by inducing his customers or servants to break their contracts with him, or not to deal with him or continue in his employment, is, if it results in damage to

him, actionable.' The Supreme Court of the United States approvingly cited the English cases of *Lumley v. Gye*, supra, and *Bowen v. Hall*, L. R. 6 Q. B. Div. 333, 1 Eng. Rul. Cas. 717; and reached the conclusion that, if one maliciously interferes with a contract, to the injury of the other, the party injured may maintain an action against the wrongdoer. *Angle v. Chicago*, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240."

In the case of *Delz v. Winfree*, 80 Tex. 400, 26 Am. St. Rep. 755, 16 S. W. 111, it is stated that "everyone has a right to enjoy the fruits and advantages of his own enterprise, industry, skill, and credit. He has no right to be protected against competition; but he has a right to be free from a malicious and wanton interference, disturbance, or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it come from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing." See also *Walker v. Cronin*, 107 Mass. 562.

In the case under consideration, as well as the case above cited, it appears from the declaration that the interference with the business of plaintiff was not incidental to the accomplishment of some legitimate purpose of the defendants, but that the interference was wanton and malicious, and for the purpose of driving the plaintiff out of business. The gist of this action is the malicious and unlawful interference with plaintiff's business, to his damage. The action would lie as well against one as against all the defendants; but the charge of the conspiracy is the basis of the right to join all in the same suit as parties defendant. It becomes, by reason of the conspiracy, the joint wrong of all conspirators. *Cooley*, Torts, § 125; *Delz v. Winfree*, supra. See also 11 Am. St. Rep. note on page 474.

As we have already seen from the authorities, the right to recover for malicious interference extends to all kinds of contracts; that is to say, all contracts of service, whatever may be their nature. But it is argued on the part of appellees that there was no contract for any definite period of time between plaintiff and Lawrence, and therefore there could be no interference which would justify the action. We do not think, under the authorities, that it makes any difference whether there was a contract between plaintiff and Lawrence for a definite period of time or not. There was a service and a quasi contract, and plaintiff had a

right to have this service to continue free of malicious interference. The suit is because of a malicious and wanton interference with plaintiff's rights, and is not for the breach of any contract.

Counsel for appellees cite the cases of *Hunt v. Simonds*, 19 Mo. 583, and *Orr v. Home Mut. Ins. Co.* 12 La. Ann. 255, 68 Am. Dec. 770, wherein it was held that an action would not lie against the officers of an insurance company, combining and conspiring to wilfully and maliciously injure the owner by refusing, without cause, to take insurance upon his boat, whereby he is deprived of his occupation, and compelled to sell the boat. We say of these cases that they are decided, one in 1854 and the other in 1857, and are out of harmony with modern decisions upon this subject. In truth, their holding is expressly repudiated in *Eddy on Combinations*, vol. 2, p. 513; 16 Am. & Eng. Enc. Law, 2d ed. p. 1111.

There may be some early authorities which conflict with the view of the law announced in this case; but the more modern and more just decisions, according to our view, sustain our conclusions. We were early taught that one of the maxims of the law was that "there is no wrong without its remedy." Wanton and malicious interference with one's business, with the purpose to destroy it, is a wrong that will be admitted by the most indifferent. We hardly think it necessary to pursue the discussion of this case further.

Reversed and remanded.

MISSOURI SUPREME COURT.

E. C. WHITE, Resp't.,

v.

MISSOURI, KANSAS, & TEXAS RAILROAD COMPANY, Garnishee, App't.

(— Mo. —, 130 S. W. 325.)

Constitutional law — prohibiting garnishment of wages — class legislation.

1. A statute forbidding garnishment of the wages of railroad employees under \$20 in value, until a judgment has been rendered against the debtor, is not unconstitutional class legislation, although the same prohibition does not apply to other classes of employees, nor when the wages due are over the prescribed amount.

Same — special favors to railroads.

2. A statute exempting the wages of railroad employees from garnishment as class legislation has been passed upon.

Note. — A search has disclosed no case in which the question as to exemption of wages of railroad employees from garnishment as class legislation has been passed upon.

road employees from garnishment is not one for the benefit of the railroad companies, so as to render it unconstitutional in granting them special favors.

(Woodson and Gantt, JJ., dissent.)

(June 21, 1910.)

APPEAL by the garnishee from a judgment of the Circuit Court for Pettis County affirming a judgment of a justice of the peace in plaintiff's favor in an action brought to recover the amount alleged to be due upon a certain promissory note. Reversed.

The facts are stated in the opinion.

Mr. George P. B. Jackson for appellant.

Messrs. E. C. White and Barnett & Barnett for respondent.

Valliant, J., delivered the opinion of the court:

Plaintiff brought suit by attachment in a justice's court against one York, on a promissory note for \$58.40 and interest. The railroad company was summoned as garnishee. There was no personal service of process on York. He was brought in by publication only on the constable's return of *non est*. No appearance for him was entered, and nothing of his was reached by the attachment except the debt which the railroad company, the garnishee, owed him. The garnishee, by its answer to the interrogatories, admitted that it was "indebted to the defendant E. P. York, a married man, the head of a family, and a resident of the state of Missouri, in the sum of \$76.90, which amount is for services rendered by defendant to this garnishee during the month of October, 1903, and will be due and payable on or about the 1st day of November, 1903. Said sum is for wages earned during the thirty days next preceding its becoming due." The garnishee's answer then stated that no judgment had been rendered against the defendant; that, the amount claimed by plaintiff being less than \$200, and the amount the garnishee owed defendant being for wages owing him as an employee of the railroad company, it was not subject to garnishment, but was exempt therefrom, under the provisions of §§ 3447 and 3448, Rev. Stat. 1899 (Anno. Stat. 1906, p. 1981). There was no denial of the garnishee's answer. The justice rendered judgment against the garnishee for \$76.90, and the latter appealed. When the case reached the circuit court, the plaintiff filed a motion for a judgment against the garnishee on the admission of the indebtedness in its answer, notwithstanding the provisions of §§ 3447 and 3448, Rev. Stat. 1899, which plaintiff alleged were unconstitutional because they were in conflict: First, with certain sections of the state Constitution, to wit, § 53, art. 4 (Anno. Stat. 1906, p. 197): "The general assembly shall not pass any local or special law" in reference to certain subjects specified, among which is, "granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." Second, § 30, art. 2 (Anno. Stat. 1906, p. 166): "No person shall be deprived of life, liberty, or property without due process of law." Third, § 4, art. 2 (page 128): "All persons have a natural right to life, liberty, and the enjoyment of the gains of their own industry." Also in conflict with the 14th Amendment of the Federal Constitution: "Nor shall any state deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." The circuit court sustained the motion, and rendered judgment against the garnishee, holding that the statute in question was unconstitutional. From that judgment the garnishee prosecutes this appeal.

There is no dispute of the facts stated in the garnishee's answer. If the sections of the statute in question are in violation of any of the provisions of the Constitution, state or Federal, set out in the motion, the judgment should be affirmed; if those sections were the result of a lawful legislative power, the judgment should be reversed.

The two sections of the statute being §§ 3447 and 3448, Rev. Stat. 1899 (Anno. Stat. 1906, p. 1981), now §§ 2427 and 2428, Rev. St. Stat. 1910, are as follows:

"Sec. 3447. Garnishment not to issue, when railroad corporation.—That hereafter no garnishment shall be issued by any court in any cause where the sum demanded is \$200 or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action.

"Sec. 3448. Railroad not required to answer, when.—No railroad corporation shall be required to make answer to any interrogatories propounded to it, in any action against any person to whom it may be indebted on account of wages due for personal services, nor shall any default or other liabilities attach because of its failure to so answer in such cases, where a writ of garnishment was issued or served in advance of the recovery by the plaintiff against the defendant, in any action for \$200 or less; and any judgment rendered against any railroad corporation, for its said failure or refusal to make answer to any garnishment

so issued or served before the recovery of final judgment in the action between the plaintiff and defendant in the cases mentioned in § 3447, shall be void, and any officer entering said judgment, or who may execute the same, shall be taken and considered a trespasser, and in addition thereto may be enjoined by any court having jurisdiction."

Whilst there are three sections of the state and one of the Federal Constitution violated by this statute, according to the motion filed by the plaintiff in the circuit court, yet, according to the oral argument and brief in his behalf in this court, the whole contention is narrowed down to the proposition that it is arbitrary class legislation. According to respondent's brief, the statute violates the 14th Amendment, "in that it arbitrarily undertakes to separate wage earners who are in the employ of a railroad corporation from other classes of people and even other wage earners; and it violates § 53, art. 4, because it grants to the railroad company immunity from garnishment not granted to others." Just how it deprives the plaintiff of his property without due process of law, or how it deprives him of his natural right to life, liberty, and gains of his industry, there is no suggestion in his brief, and we perceive no such possible effect. But the argument is: It is class legislation; it shuts the plaintiff off from pursuing his writ of garnishment against an employee of a railroad company when under like circumstances he could attach the wages of an employee of any other kind of corporation or of an individual; it shuts him off from running the garnishment to recover his small debt, whereas a creditor with a debt of over \$200 could go in and recover; and it shuts him off from pursuing a railroad company, whereas, if it were any other kind of employer, the process of garnishment could be used. That is the epitome of the argument.

The class marked out for favor in the statute is the class of railroad employees covered by its terms. Incidentally, the railroad company receives the favor of freedom from the annoyance which constant calls to answer as garnishee would entail; but the persons really protected are the employees whose wages, when they are absent or have no notice of a suit, cannot be attached. Section 3447 says that, when the amount sought to be recovered from the employee is \$200 or less, his wages shall not be touched by garnishment until there has been a judgment for the amount against him. Of course, there can be no judgment against him until he has been served with summons. The statute means that the

process of garnishment should be withheld until the employee is brought into court and is allowed to make his defense, if any he has, and a personal judgment rendered against him. The next section, 3448, is but a corollary to the former, and is designed to secure its performance, to render more certain the accomplishment of its purpose.

It is earnestly argued that the statute is vicious class legislation because it is in the interest of railroad corporations, shielding them as a class from the process of garnishment, while all other corporations and individuals are liable to that process. And to exemplify this position, attention is called to the fact that it is the railroad company, and not the employee, that is prosecuting this appeal; and not only that, but attorneys of other railroad companies have asked and obtained leave to come in as *amici curiae*, and file briefs and make oral arguments to sustain the statute. The railroad company is the only party to this suit who had the right to appeal or bring the cause to this court, because it is the only party against whom or against which the judgment was rendered. But, aside from that, it seems like a narrow view to attribute no other motive than that of a pecuniary interest to this railroad and the other railroad companies who have shown an interest in this case. The only selfish interest a railroad company could have in the matter is to be freed from the annoyance of being constantly called into court to answer as garnishee. Its real pecuniary interest is but little, if any. If it owes the employee, it can bring the amount into court and be paid out of the fund in its hands for the expenses it has incurred for answering; if it owes nothing, or if the amount it owes is not sufficient to pay what the court allows for the expense of answering, the garnishee recovers judgment therefor from the attaching creditor. In the contemplation of the law of garnishment the garnishee is not, in the first instance, considered as an adverse party in the litigation. He is a disinterested stakeholder, ready to pay what he owes, and to pay it to whom the court decrees. He becomes an adversary only when a dispute arises over his answer. But the interest taken by the railroad companies in the subject of this suit is not to be attributed alone to their desire to avoid annoyance. It is the duty of the master to protect his servant. Perhaps, in a case like this, such is not the master's duty to the extent that he would be liable if he failed to give such protection; but above his legal liability he has a moral duty to protect his servant when it comes in his way to do so, which, whether he can be com-

pelled to perform it or not, is of sufficient consideration to justify his conduct when he does perform it. This moral duty, if we call it nothing else, is especially incumbent on railroad corporations. Their employees, particularly those composing their train crews, are often men of little means, small wages, and in the performance of their work are carried hundreds of miles away from their homes. They are more helpless in many respects than men engaged in other kinds of business. They especially need protection, and, if in such case the master will not protect his servant, who will protect him? We can see in the subject now under consideration a blended interest of master and servant, with the servant's share in the interest alone likely to suffer if the master withholds his protection.

It is said that, if the statute is unconstitutional, it is immaterial whether its purpose be to protect one class or another, the railroads or their employees, and that is so. But when the validity of the statute is assailed on the ground that it is class legislation, it is important to ascertain what class is created, so that we can see whether there was legal justification for making the class. Statutes have been enacted and held to be valid which make railroad companies a class; but the same reason that would justify making railroads a class would not always justify bringing other concerns into that class. Our fellow servant statute of 1897 is an example of that kind of legislation. And the statute giving railroad companies the power to condemn a right of way 100 feet wide through your land creates railroad companies into a class for that purpose. But there were good reasons for that classification; reasons which would justify the imposing of the burden upon the class in the one statute, and the conferring of the power in the other; reasons that would not justify the inclusion of other concerns in either of those classes.

In the case at bar, if the purpose of the statute in question was to create railroad companies into a class, to exempt them from the burden or from the inconvenience of answering as garnishees, no one would undertake to defend it as a reasonable classification. But who will undertake to say that the general assembly intended by this act to create railroad companies into a privileged class, to exempt them from the common burden borne by everybody else? When, in the legislative history of this state, has the general assembly ever manifested such partiality to railroad companies as a class, partiality in which there was no purpose but to favor the class, granting to

them a special privilege without any conceivable benefit to the public? On the other hand, when we think of the employees, their peculiar helpless condition, in the predicament contemplated by this statute, we see a very good reason for the classification. A man at home, or whose place of business is near his home, can attend the justice's court when he is sued, and, either with or without an attorney, defend against an unjust suit. But if an unfair plaintiff has a small claim against a brakeman on a freight train, against which claim he knows there is or may be a good defense, he may watch a time when the brakeman is gone, give constructive notice by publication, seize his wages, and thus obtain an unconscionable advantage. Even if the publication was brought to the notice of the railroad employee, when perhaps he was 500 miles away from home, and could not leave his post of duty without sacrificing his position, it is easy to conceive how he would submit to wrong rather than undertake the expense and trouble of defending the suit for the small amount involved,—small, perhaps, in comparison to the expense and trouble, though not small in comparison to his wages. The law contemplates that a man can ordinarily be found by the sheriff or constable in the county in which he lives, and if he cannot be found the law provides for constructive notice to him as to one who absconds or conceals himself to avoid the writ, and, as a general rule, that is fair. But is it fair to this class of men? Are they to be put in the category of men absconding or hiding from the sheriff or constable? Or if the general assembly should undertake to give them as a class certain exemption from that condition, can we say that it is arbitrary classification?

The record in this case illustrates what advantage may be taken of a railroad employee but for this statute. The defendant in this case is a resident of this state. Then, why was the time to sue chosen when he was absent, and when only constructive notice, which in fact is often no notice, could be given? So far as this record shows, this man knew nothing of this suit; but, if this law will not protect him, his wages are to be gathered in by the adroit plaintiff whether he owed the debt or not. This case illustrates only one aspect of the condition to which the statute was designed to apply. It applies as well to a nonresident railroad employee as to a resident. A man living in Texas having a disputed claim against a railroad train man who lives in the same town may send his claim to Missouri, where it is likely the defendant may never be, and institute suit by attachment, and the defendant never hear of it until his pay day

comes, and he finds that his wages have been appropriated. Is it possible the law-making power of this state cannot regulate the process of the courts of the state to prevent such an abuse of the law?

Without the statutory provision of garnishment a creditor would have no right to seize the wages of his debtor until after he obtained judgment on his debt. The statute granting the right may direct how and to what extent it may be used, and a person using the process given him by the statute has no right to complain of the restrictions or conditions imposed by the very same law that gives him the right. We do not mean to imply that a statute evidently designed to give one class of creditors the property of their debtor, and withhold it from another class, would not be obnoxious to the Constitution, state and Federal; but we do say that, in giving such process to creditors as our garnishment statutes give, it is in the power of the general assembly to make reasonable exceptions, and the creditor using the process has no right to complain of the exception.

The statute in question, designed as an amendment to the statute regulating the process of garnishment, was enacted in 1899 (Acts 1899, p. 221). It consists of two sections only, the first, which is § 3447, Rev. Stat. 1899, now § 2427, Rev. Stat. 1910, is in these words: "That hereafter no garnishment shall be issued by any court in any cause when the sum demanded is \$200 or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action." The whole force and effect of the act is contained in that section. If the 2d section had been omitted entirely, the purpose of the act would have been accomplished completely. The effect of the 1st section was to forbid the issuance of a writ of garnishment in such case. Such a writ issued in violation of the terms of that section would be an illegal writ, under which no right could be acquired, no obligation imposed. The party protected was the man whose wages were thereby shielded. The class created was the class composed of such men. The law which exempts to a servant his wages, or shields his wages from legal process, cannot be said to be a law for the benefit of the master. The 2d section (§ 3448, Rev. Stat. 1899, now § 2428, Rev. Stat. 1910) is designed only to aid in the practical accomplishment of the purpose contained in the 1st section. It authorizes the railroad company to ignore a writ of garnishment, if one issued in violation of the express terms of the 1st section should

be served on it. There is just this much protection to the railroad company in that provision, and no more, to wit, but for that provision the railroad company would be bound to answer the writ, or, failing, let a judgment by default go against it. But surely it cannot be said that the general assembly violates the Constitution when it says that the railroad company may ignore a writ which the law has expressly forbidden to issue. If it be said that the exemption applies only to railroads, the answer is: It is against railroads only that the writ in such case can go. The wages of a servant can be reached only by garnishing the master. We are satisfied that the class intended to be benefited by the act was of railroad employees, that the railroad companies are only relatively concerned, and, if protected, it is so only incidentally, and in furtherance of the protection designed for the employees. And we are also satisfied that the well-known conditions that surround the employees of the railroad companies are sufficient to justify the general assembly in making a class of them for the purpose indicated.

It is suggested that but for this statute a resident employee of the said railroad company whose wages are exempt from execution or attachment might be sued by attachment in another state through which the railroad ran, his wages be there seized by garnishment, and the company be compelled by judgment to pay the same to the plaintiff in that suit, and thereafter the employee could sue here and recover; thus the railroad company would be subject to two judgments for the same debt. *ergo*, this statute is for the benefit of the railroad company. If the statute, although aimed to protect the employees, should incidentally afford the railroad companies protection from such a wrong, it would be no reproach to the statute. But no such purpose can be gathered from the reading of the statute, and, besides, it confers no such protection. It does not prevent a creditor suing the employee in another state and there seizing his wages by garnishment, nor does it prevent the employee from afterwards suing for his wages at his own home in this state. But in such case, independent of this statute, the judgment of the court in the other state, if it was a court of competent jurisdiction, would be a perfect defense to the subsequent suit here, by force of § 1, art. 4, U. S. Const., requiring each state to give "full faith and credit to the . . . judicial proceedings of any other state."

The power of the general assembly to enact class legislation has so often been considered by this court that we deem it ac-

essary now to do no more than to refer to some of the cases. The well-established doctrine of this court on that subject is that class legislation is not an offense against the Constitution of the state or of the United States if it is based on reason, and if it includes all persons or corporations coming within the reason. It is impossible to make all laws applicable to all persons or corporations; classes in fact exist, and laws must be made to apply to them as classes. The general assembly does not really create the class, although we usually speak of it in that way. The class exists by its very nature or inherent conditions, and the lawmaker recognizes the fact and makes the law to suit. If there is reason why a law should be made to apply to a particular class, the lawmaking department of the state government has authority to make it, unless it is otherwise prohibited by the Constitution. *Humes v. Missouri P. R. Co.* 82 Mo. 231, 52 Am. Rep. 369; *Daggs v. Orient Ins. Co.* 136 Mo. 382, 35 L.R.A. 227, 58 Am. St. Rep. 638, 38 S. W. 85; *Geist v. St. Louis*, 156 Mo. 647, 79 Am. St. Rep. 545, 57 S. W. 766; *Hamman v. Central Coal & Coke Co.* 156 Mo. 232, 56 S. W. 1091; *State ex rel. Fath v. Henderson*, 160 Mo. 216, 60 S. W. 1093. Those are a few of the decisions on this subject, but are not all that have been cited by the learned counsel for appellant, as reference to their briefs will show; but they are sufficient. Decisions of the Supreme Court of the United States are also cited to the same effect, and answer respondent's contention in reference to the Federal Constitution.

Respondent relies with confidence on the decision of this court in *Re Flukes*, 157 Mo. 125, 51 L.R.A. 176, 80 Am. St. Rep. 619, 57 S. W. 545. In that case the legislature, in § 2356, Rev. Stat. 1899 (Anno. Stat. 1906, p. 1451), had undertaken to make it a misdemeanor for any person holding a claim for a debt owing by a person resident in this state, to send it out of the state for the purpose of instituting suit on it in the foreign jurisdiction, and there attaching by process of garnishment against the debtor's employer the wages due him, when the employer was a resident of this state and could be served with process here. In that statute the legislature was making an effort to extend its arm across the state boundary line, and prevent a creditor from using the courts of another state for the collection of his debt. There was some discussion of the class feature of the statute; but the decision really turned on the point that the statute attempted to abridge the right of the citizen, under the Federal Constitution, to go anywhere he chose in

the United States and institute his suit, without being subject to, indictment and punishment.

But it is argued that, conceding the railroad employees constitute a class justifying special legislation in their behalf, this statute is bad because it does not embrace all railroad employees. If the reasons for class legislation as above discussed are observed, the legislature might recognize the existence of a class within a class; for a class within a class is but a class, and it may be as well marked as is the larger class out of which it is formed, and if the statute embraces all those who come within its reason, it is not obnoxious to the Constitution. The argument is that this statute reaches only those railroad employees whose debts amount to \$200 or less, and that drawing the line at that maximum figure is arbitrary. If that fact creates a class within a class, it cannot be denied that the statute reaches everyone within that interior class. In point of fact the statute applies to every railroad employee who is sued by attachment for a sum not exceeding \$200. It was evidently the purpose of the legislature to provide for cases when the amounts sued for were so small that the defendants could not afford to abandon their posts of duty, and come, at a great distance and expense, to defend the suits. If that was the purpose of the law, the lawmaker had to draw the line at some point to designate what was considered a small amount; and, wherever the line might have been drawn, it would have been subject to the same criticism that is now made. If the line had been drawn at \$25 or \$50, it would not have protected one who was sued for \$26 or \$51.

If the legislature had authority to pass a statute affording protection to the class of persons named, it had the authority to draw the line, and the courts have no authority to question the wisdom of their demarcation. A statute designed to shield the wages of a railroad employee without limit as to the amount sued for, shielding the salaries of the big as well as the wages of the little, could not stand, because there would be no reason or justice on its face. But a statute aimed to protect an employee from an abuse of the process of garnishment on a claim too small to justify him in leaving his post, and coming a distance to make his defense, has both reason and justice to support it; in fact, the statutes concerning garnishments, without this provision, would be a weapon that could be used to great injustice, and we doubt not that it was to prevent that abuse that this act was passed. We must remember that this act does not deprive the creditor entirely of the

writ of garnishment in such case, but only postpones him until he gets a judgment on his claim. It is argued that this statute applies to all railroad employees regardless of their station or the amount of their wages, the line being drawn only at the amount of the debt sued for, and that therefore it cannot be said that it was aimed to cover only the small wage earner. That is an argument on the letter rather than on the spirit of the law. *Qui hæret in litera, hæret in cortice*. Who can read this statute without seeing that it was to protect that class of small wage earners whose calling carried them away from home; and who can reflect on it without seeing that that is its practical effect? If the statute had gone on to specify the amount of wages the man was to earn in order to come within its terms, the same criticism that is now made in reference to the amount of the debt sued for would be made in reference to the amount of wages specified. If the statute drew the line at \$60 a month, the complaint would be that it excluded from its protection the man whose wages were \$61 a month. If the lawmaker thought that a station agent or a clerk in an office, or a man whose position was high enough to command a large salary, was not as apt to be subjected to the abuse that the statute was aimed to correct as one whose duties called him away from home, and for that reason left the statute more general than it might have been, we cannot say that the conclusion was unreasonable, nor can we condemn the statute because possibly it might cover a case not contemplated. When a statute is designed to correct a well-known evil, there is no use to encumber it with words to exempt from its effect a condition which, though possible, is unlikely, and which would rarely, if ever, occur.

It is argued also that this statute by an arbitrary line creates a class of preferred creditors, allowing those whose claims are for \$201 or more free to sue out a writ of garnishment, while excluding those whose claims are \$200 or less. Whatever may be said as to the effect of the statute, it certainly cannot be claimed that its purpose was to give one class of creditors a privilege over another class. It is as difficult to imagine that the general assembly had in mind the intention to create a preferred class of creditors, drawing the line at \$201, as it is to imagine the intention to create a particularly preferred class consisting alone of railroad companies. The purpose of the statute was not to prefer a class of creditors or a class of railroads, and, if the effect is to give an incidental preference to creditors whose claims are more than \$200, that consequence cannot defeat

the statute, if its purpose was to accomplish an object which the general assembly had a right to accomplish and in the main does accomplish. As already said, there would be neither reason nor justice in withholding the writ of garnishment from all creditors, regardless of the amount of their claims, and thus shield the large salaries as well as the little wages; but there is both reason and justice in withholding from the creditor whose claim is so small as not to justify the defense involving abandonment of post as well as expense, the right to seize the wages of the debtor until his claim is in judgment, and, as also already said, if the aim was to cover only such small cases, the line had to be drawn somewhere, and it was for the lawmaker to say where.

This statute is not designed to shield a railroad employee from the payment of an honest debt, but only to protect him from the abuse that might be made of the writ of garnishment to his injury in his absence. It gives him a chance to be heard before his wages are taken, a chance he would be less likely to have, on account of the nature of his daily work, than persons engaged in other business. We hold that §§ 3447 and 3448, Rev. Stat. 1899, now §§ 2427 and 2428, Rev. Stat. 1910, are not obnoxious to any of the mandates of either the state or Federal Constitution.

The judgment is reversed.

Fox, Ch. J., and Lamm and Graves, JJ. concur.

Woodson, J., dissenting:

This is a suit by attachment instituted by plaintiff against E. P. York before a justice of the peace of Pettis county, on a note for \$58.40, executed by the latter to one Lukenbill, who indorsed it to plaintiff. The defendant railroad company was duly served as garnishee in the cause. The defendant York was a resident of this state but personal service could not be had upon him, and in due time and in proper form he was served by publication, as was authorized by statute in such cases. The garnishee answered and admitted that it was indebted to the defendant York, a married man, the head of a family, and a resident of the state of Missouri, in the sum of \$76.40, which amount is for services rendered by defendant to this garnishee during the month of October, 1903, and will be due and payable on or about the 1st day of November, 1903. Said sum is for wages earned during the thirty days next preceding its becoming due. Further answering this garnishee says that it is summoned into court by virtue of a summons in gar-

nishment, based upon a writ of attachment; that a judgment has never been rendered against the defendant E. P. York in favor of E. C. White; that the sum sought to be reached by this proceeding is less than \$200, and is wages earned by the defendant York as an employee of this garnishee, a railroad corporation; and that under the provisions of § 3447, Rev. Stat. 1899, said railroad company is not subject to garnishment in this case. Wherefore, having fully answered, said garnishee prays that it be discharged with its costs, and that it be allowed \$5 for its attorney fee and expenses herein." The justice rendered a judgment by default in favor of the plaintiff against the defendant York for the sum of \$92.76, and against the garnishee, the railroad company, for the sum of \$76.90, the amount owed by it to York. The garnishee duly appealed the cause to the circuit court. There was no dispute as to the facts of the case. It was virtually conceded that they were as stated in the pleadings. Judgment was again rendered in favor of plaintiff and against the defendants. From this judgment the garnishee, the railroad company, appealed to this court.

1. The validity of this judgment depends upon the constitutionality of §§ 3447 and 3448, Rev. Stat. 1899. If constitutional, then the judgment should be reversed; but, if unconstitutional, then it should be affirmed.

Counsel for respondent contends that said sections violate that clause of § 53 of article 4 of the Constitution which provides that the legislature shall not pass any law "granting to any corporation, association, or individual any special or exclusive right, privilege, or immunity." In order to determine whether or not the statutes in question grant any special privilege or immunity from garnishment to the appellant, or special privilege to any creditors of railroad employees, we must first ascertain who are subject to garnishment under the general garnishment laws of the state, and who may avail themselves of them. Section 3433, Rev. Stat. 1899 (Anno Stat. 1906, p. 1971), governs this matter, and reads as follows: "All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys, or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees." By that section of the statutes, all persons are subject to garnishment who are: First, named as garnishees in the writ; second, or have in their possession goods, moneys, or effects of defendant not seized; third, all

debtors of the defendant; and, fourth, all such other persons as the plaintiff shall direct to be summoned as garnishees. That section is very sweeping and comprehensive in its provisions. It authorizes garnishment proceedings against all persons named in the writ of garnishment, and all persons who have in their possession any goods, moneys, or effects of the defendant in the suit, and all persons who are indebted to such defendant. In other words, it includes every person in the state against whom a judgment in garnishment proceedings could be rendered. It is general and uniform in its operation throughout the entire state, and exempts no one therefrom; not even railroad companies, as is shown by the numerous judgments which have been rendered against them in such proceedings, and affirmed by this court.

But how about §§ 3447 and 3448? They exempt railroad companies from garnishment proceedings in all cases where the amount demanded of the defendant in the suit does not exceed \$200, without the claim has been first reduced to a judgment. That immunity is not granted or extended to any other corporation, association, or individual in the state, nor is it extended to them in any case where the sum sought to be recovered against the defendant employee in the case exceeds the sum of \$200. If that is not a special privilege or immunity granted to the railroad companies of the state, then those words as used in said constitutional provision have lost their meaning. That is axiomatic. The mere statement of the proposition shows that these statutes grant to railroad companies, and none other, immunity from garnishment where the amount of the indebtedness to the plaintiff does not exceed \$200. It would be just as absurd, to my mind, to undertake to argue that proposition, as it would be to argue that two and two are four.

Counsel for appellant attempted to escape the effects of this conclusion by argument that the immunity so granted by said statutes to railroad companies was in reality granted for the benefit of the railroad employees. I do not so understand it, for the reason shown on their face they were enacted primarily for the benefit of the railroad companies themselves, and only incidentally do they benefit their employees. But even that would be just as obnoxious, for the reason that railroad employees under that provision of the Constitution are no more entitled to special privileges, benefits, or immunities than are the railroads themselves.

In addition, during oral argument of this case, counsel for appellant stated, in open court, in substance, that the railroad com-

panies were deeply interested in the result of this case, for the reason that they had been compelled to pay claims twice, amounting annually to thousands of dollars, on account of creditors of the resident employees of his company selling to nonresidents of the state, in order to evade our exemption laws, who would bring suit thereon by attachment in the courts of some foreign state through which the road ran, and garnish the company for the wages due the employee, and recover judgment against it in said garnishment proceeding, which it was compelled to pay, because the wages of residents of this state were not exempt by the laws of said foreign state; and that subsequent thereto the said employee would sue the company in the courts of this state for the same wages which had been garnished in the foreign state, and said company would be required by the courts of this state to pay said wages a second time to the resident employee, because they were exempt, as stated, under the laws of this state, and would not recognize the payment made in the foreign state.

My personal experience while on the circuit bench taught me that all counsel stated in that regard was only too true, which facts induced the writer to draw the act referred to in the case of *Re Flukes*, 157 Mo. 125, 51 L.R.A. 176, 80 Am. St. Rep. 619, 57 S. W. 545, which was intended to protect both the employer and employee from the evils of such foreign attachments and garnishments. But this court in the case held, and properly so in my judgment, that said act was unconstitutional; and, if these statutes were enacted for the same purpose, they, for the same reason, should also be held unconstitutional.

It cannot, therefore, be truthfully said that these sections of the statutes were enacted for the sole or primary benefit and protection of railroad employees; but they were, as before stated, enacted primarily for the protection of the railroad companies, for ultimately, as shown by said statement of counsel, before their enactment the companies were compelled, first, to pay the wages of the foreign garnishing creditor, and, second, to pay them to the employee, who again sued the company therefor in the courts of this state, thereby showing that the employee was ultimately out nothing except the delay in the use of his money. So, if the question as to benefits conferred by these statutes is to determine their application, then clearly they should apply more strongly to the railroad companies than to the employees of those companies. The argument, therefore, advanced, to the effect that this exemption from garnishment was made for the benefit of employees, in 29 L.R.A. (N.S.)

stead of for the benefit of the railroad companies, is unsound, regardless of the persons for whose benefit the statute was enacted.

But in my judgment the question as to which of the parties these statutes benefit the most has nothing to do with the determination of the constitutionality of these sections. If they grant special privileges or immunity to appellant or to anyone else, they are void. The language of the sections should be borne in mind. They do not undertake to bestow some affirmative benefit upon the railroads of the state; but they undertake to grant immunity from garnishment to them where the sum sought to be collected from the employee is less than \$200, while all other employers in the state are required to answer and defend against all garnishment proceedings, regardless of the amount claimed of their employees. If the statutes in question had exempted railroad companies from all garnishment proceedings, instead of from all those for sums less than \$200 due their employees, which they do, then quite a different proposition would be presented for determination.

Immunity is primarily an exemption from the performance of some charge, duty, office, tax, imposition, or penalty. The benefits conferred by such a grant do not consist of affirmative matters bestowed upon the grantee, but is an exemption from the performance of some legal duty, or the payment of some penalty imposed. If, tested by this rule, which is clearly the proper one (for the reason that we must presume that the legislature in the use of the word "immunity" used it in its plain or ordinary and usual sense), then the two sections of the statutes under consideration have no application to railroad employees, except incidentally, as before stated, because they neither confer any privilege upon them, nor do they exempt them from the performance of any legal duty or from the payment of any penalty; but they do, upon the other hand, undertake to excuse and exempt railroad companies from the legal duty to answer garnishment proceedings, authorized to be instituted against them and all other persons by said § 3433, before quoted, regardless of the amount due. I entertain no doubt but what said §§ 3447 and 3448 are violative of said § 53 of the Constitution.

2. Counsel for respondent also insists that said §§ 3447 and 3448 offend against § 1 of the 14th Amendment of the Constitution of the United States, which provides, among other things, that no state "shall make or enforce any laws . . . nor deny to any person within its jurisdiction the equal protection of the laws."

Those sections of the statute, in substance,

provide that a railroad company shall not be garnished for the wages due any of its employees where the sum sought to be recovered from such employee is less than \$200, without the claim against him has first been reduced to judgment. In other words, all persons who have claims against any railroad employee for a sum in excess of \$200 may sue him, and garnish the railroad company for any wages due him, without first reducing his claim to a judgment; but if his claim is for \$200 or less, then he cannot garnish the company until after the claim is reduced to final judgment, which in most cases of attachment, as we all know, would practically amount to a denial of justice; while another person with a claim for any sum over \$200 could attach and garnish the company, and thereby recover his debt before the employee could collect his wages from the company or leave the state; but in either of said cases the person whose claim was for less than \$200 could never collect a cent from the same employee, if he, after suit brought, should see proper to collect or assign his wages or leave the state before his claim could be reduced to judgment.

If these statutes are constitutional and valid, then one of two merchants, for instance, doing business side by side in the city of St. Joseph, might, where he had sold to a railroad employee a bill of goods for the sum of \$201, sue him therefor in any court of competent jurisdiction, and garnish the railroad company for which he was working, without first reducing his claim for the goods to a judgment, and recover his money; while the other merchant who had sold him but \$200 worth of goods or less could not garnish the railroad company until after he had reduced his claim to judgment. And if the employee should happen to be a nonresident of the state, or had concealed himself so that the ordinary process of law could not be served upon him, then the latter merchant could never reduce his claim to judgment, as is required by said § 3447, for the obvious reason that personal service could not be had upon him, the employee; and, consequently, if that section of the statute is valid, then said merchant could not garnish the employee's wages, for the equally obvious reason that his claim has not been reduced to judgment, which, according to that section, is a prerequisite to the right of garnishment. So it is thus seen that in all cases where the employees are nonresidents of the state, or where they have concealed themselves so that the ordinary process of law cannot be served upon them, the merchant who sells to him \$200 worth of goods or less is absolutely deprived of all legal remedy. He can neither secure

a personal judgment against such an employee, for the reason, as before stated, personal service cannot be had upon him, nor can he sue by attachment and garnish such an employee's wages, for the reason that, according to § 3447, he must first reduce his claim to judgment before he can garnish the employee's wages in the hands of railroad companies.

Is that equal protection of the law within the meaning of the constitutional provision before mentioned? Clearly not. It is class legislation of the simplest form. Here are two merchants doing business side by side in the same city; one sells the same railroad employee \$201 worth of merchandise, and the other sells him \$200 worth. The first may sue and garnish the railroad company before judgment is obtained against the employee, and thereby collect his debt, simply because his claim is for \$201; but the valuable right of garnishment is withheld from the other merchant simply because his claim was for \$1 less, and he is thereby deprived of all remedy.

This court and the Supreme Court of the United States have frequently held that the constitutional provision before mentioned does not prevent legislation which embraces all persons or things that rationally belong to the same class and are similarly situated and upon whom it must operate equally and uniformly. *State ex rel. Hadley v. Standard Oil Co.* 218 Mo. 1, loc. cit. 369, 116 S. W. 902, and cases cited. But the Supreme Court of the United States, in the case of *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 150, 41 L. ed. 666, 17 Sup. Ct. Rep. 255, expressly held that the purpose of that provision was to prevent legislation which embraces within its provisions and affects only a portion of the persons or things which rationally belong to the same class, and who are similarly situated. The rule there announced applies to and fits the facts of the case at bar as perfectly as a glove fits the hand. The two merchants suggested belong rationally to the same class, as do also their claims; but, as before shown, the statutes in question do not operate uniformly upon them or their claims, or upon all others who are similarly situated. So, in the case at bar, the statutes in question would not apply to any other person who rationally belongs to the class to which respondent, White, belongs whose demand against the railroad employee exceeds \$200. In other words, these statutes deny White's right to garnish the appellant, while they permit all other persons that right whose demands are for more than \$200 notwithstanding the fact that he belongs to the same class to which they belong, and notwithstanding the further fact that all of

their demands are based upon identically the same claims, or belong to the same class or character of claims, differing only in amounts, and probably differing only a few cents or dollars in many cases.

In the discussion of a similar question, Judge Sherwood, in the case of *State v. Walsh*, 136 Mo. 400, loc. cit. 405, 35 L.R.A. 231, 37 S. W. 1112, 1113, speaking for the full court, in division 1, said: "Now, it is a rule of long-established construction in this state, a rule so well settled that it admits no contravention, 'that a statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special.' *State ex rel. Lionberger v. Tolle*, 71 Mo. 650; *State ex rel. Harris v. Herrmann*, 75 Mo. 340; *State v. Julow*, 129 Mo. 163, 29 L.R.A. 257, 50 Am. St. Rep. 443, 31 S. W. 781."

The statutes involved in the case at bar, as before shown, and as appears upon their face, were enacted for the purpose of exempting railroad companies from garnishment for wages due their employees, where the amount claimed did not exceed \$200; and at the same time authorizes a portion of a certain class of creditors to garnish railroad companies for the purpose of collecting their claims against railroad employees, but withholds that same valuable right from the remaining portion of that same class, whose claims are of the same character and class as are those of the former, differing only in amounts.

The case of *Re Flukes*, 157 Mo. 125, 51 L.R.A. 176, 80 Am. St. Rep. 619, 57 S. W. 545, held § 2356, Rev. Stat. 1899, to be unconstitutional, null, and void for violating not only the Constitution of the United States, but also for the reason that it did violence to said § 53 of our Constitution. That statute was designed to prevent residents of this state from assigning or sending out of this state claims due and owing them by other residents of this state, for the purpose of having instituted a suit thereon in the courts of another state, with the view of garnishing the wages of said resident debtors, and thereby evade our statutes which exempt certain wages from garnishment and execution. This court, in speaking of that statute, said it violated said section of the Federal Constitution, in that it denied to the citizens of this state the right, among other things, to sue their debtors and garnish railroad companies and others for the wages due their employees, while the citizens of all other states and foreign countries could sue and garnish them. Under the statutes in question not all, but only a part of, the citizens of other states and foreign countries, may, 29 L.R.A. (N.S.)

as a part of the citizens of this state, sue and garnish railroad companies for their claims, but all the rest who have claims under \$200 cannot do so. By this it is seen that the statute in the *Flukes* Case made a single division of the people who could and who could not sue and garnish, namely, the nonresidents might do so, while the residents could not do so.

According to the statutes under consideration, no resident or nonresident can sue and garnish when their claim is for a sum less than \$200; but the other class, all residents and nonresidents whose claims are for a sum over \$200, may do so. The only difference between the two acts is that the former divides the people into classes by state lines, while the latter divides them into classes by the dollar mark. I submit that the latter is more offensive than the former. In other words, the plain English of these sections of the statutes is that all persons who have claims against others for sums over \$200 may sue them therefor and garnish railroad companies for the wages due them, while it expressly withholds that right to all persons whose claims are for less than \$200. For illustration, suppose § 3447, one of those under consideration, should be amended by the legislature by adding thereto the following proviso: "Provided, however, that in all cases where the sum so demanded exceeds \$200, garnishments may issue as is now provided by law." And when so amended that section would read as follows: "That hereafter no garnishment shall be issued by any court in any cause where the sum demanded is \$200 or less, and where the property sought to be reached is wages due the defendant by any railroad corporation, until after judgment shall have been recovered by the plaintiff against the defendant in the action: provided, however, that in all cases where the sum so demanded exceeds \$200, garnishments may issue as is now provided by law." If that section should be so amended, as above suggested, and a case identical in all respects to the one at bar should come before this court, challenging its constitutionality, would it hesitate for a moment to hold it invalid because it violated both the state and Federal Constitutions in the particular before mentioned? Certainly not, for clearly it would do violence to both. But in the case at bar, when stripped of all unnecessary verbiage, counsel for appellant is simply asking this court to add, by way of construction, that proviso to that section, and then to enforce it as amended. That is the plain meaning and effect of his request, nothing more, nor nothing less. I, for one, do not believe courts should enact

laws, and especially unconstitutional and vicious ones, as this one would clearly be.

The statute mentioned in the *Flukes Case* was broader than those here under consideration, for the reason that it did not simply prohibit the merchant or other creditors who had claims against employees for less than \$200 from taking or sending them out of the state for the purpose of garnishing the wages of a resident employee in the courts of a foreign state; but it included all merchants and others who had like claims, regardless of the amounts, from taking or sending them out of the state for that purpose. But, as before stated, notwithstanding the broader provision of that statute, this court held it to be unconstitutional, null, and void because it violated said sections of the state and Federal Constitutions. In the *Flukes Case*, on page 132 of 157 Mo., this court, in discussing that statute, said: "The act is also obnoxious to the charge that it grants special and exclusive privileges to certain persons or association of persons, and denies the same to others in the same or similar situations. Judge Cooley says: 'A statute would not be constitutional . . . which should select particular individuals from a class or locality, and subject them to peculiar rules, or impose upon them special obligations or burdens from which others in the same locality or class are exempt. . . . Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free governments.' Cooley, Const. Lim. 6th ed. 481-483. Finally § 2356 undertakes to arbitrarily separate natural classes of people, and to provide different rules of action for each of the dissevered fractions, thus unwarrantably formed into a class of its own. *State v. Julow*, supra."

Counsel for appellant, in printed briefs and in oral argument, concede that the *Flukes Case* is an authority against their position in this case, and, if followed, will result in our holding the statutes under consideration unconstitutional, null, and void. But they insist that the doctrine announced in that case is unsound, and has been departed from by this court in a class of cases upholding the act of the legislature giving lawyers a lien upon judgments for their fees, the statute exempting certain public officers and municipal corporations from garnishment; and many other acts similar in character. For these reasons it is contended that the *Flukes* 9 L.R.A. (N.S.)

Case should be overruled and no longer followed. We are unable to concur with these views of counsel. There is no conflict between the doctrine stated in the *Flukes Case* and that stated in the cases upholding the acts mentioned.

The attorneys' lien law was passed in 1901, and gives an attorney a lien on the judgment recovered for their services performed therein. The constitutionality of this act was challenged in the case of *O'Connor v. St. Louis Transit Co.* 198 Mo. 622, 115 Am. St. Rep. 495, 97 S. W. 150, 8 A. & E. Ann. Cas. 703, and the following language, used by Judge Fox in that case, shows that he recognized the validity of the doctrine announced in the *Flukes Case*, which denounces class legislation, namely: "This act undertakes to cover a certain class of persons engaged in a particular profession. It does not undertake to select any particular person in that class, but applies to all alike who fall within the class of attorneys at law. The history of legislation in this state demonstrates that the lawmaking power found it essential, for the purposes of legislation, to divide both persons and business in separate classes, and it is now no longer an open question in the courts of this state that legislation applicable to a particular class is not violative of the constitutional provision which prohibits the enactment of special laws. That lawyers in this state belong to a particular class, we think there can be no dispute, and we can see no reason, even though they be only lawyers, why legislation which deals in a general way with the affairs of that class should be held unconstitutional. We have legislation in this state respecting other classes of persons, such as fellow servants, mechanics, landlords, bankers, insurance laws, and other legislation which has reference to only one line of trade or class of persons; yet wherever these laws have been in judgment before the courts of this state, they have been held constitutional and valid."

That case properly held that lawyers constitute a particular and natural class, and that the act dealing with them as a class was not obnoxious to the constitutional provision prohibiting class legislation. But suppose that act, instead of dealing with the entire class of lawyers, as it does, had provided that all lawyers whose fees exceed the sum of \$200 should have a lien upon the judgment recovered by them for their services so rendered, then would it be seriously contended that such an act would be valid? Certainly not. That is made perfectly clear by the first paragraph above quoted from Judge Fox's opinion. Nor is there anything contained in any of the cases upholding the statute exempting certain officers of the

law and municipalities from garnishment, in conflict with the doctrine announced in the Flukes Case. That statute exempts the officers and cities therein mentioned from all garnishment proceedings, and this court has repeatedly and properly enforced its provisions; but its constitutionality has never been questioned. It was enacted solely upon principles of public policy, as will be seen by consulting the following cases: *Geist v. St. Louis*, 156 Mo. 643, 79 Am. St. Rep. 545, 57 S. W. 766, and cases cited.

But suppose that statute, instead of entirely exempting those officers and cities from all garnishment proceedings, had exempted them from all garnishment proceedings where the sum claimed does not exceed \$200, then could it be logically contended that such a statute would not discriminate against all persons whose claims are for sums less than \$200? I think not.

The policy announced in the cases before cited would be waived by permitting those officers and cities to be garnished in cases where the sums claimed were for \$200 and over. Such a statute would be discriminative between the two classes of claimants, namely, those whose claims are for \$200 or less, and those whose claims are for more than \$200. Such a statute would clearly violate both the state and Federal Constitutions, as did the statute mentioned in the Flukes Case, and as §§ 3447 and 3448 do.

For the reasons before expressed, I think the judgment should be affirmed.

Gantt, J., concurs.

Burgess, J., not sitting.

Petition for rehearing denied July 20, 1910.

OKLAHOMA SUPREME COURT.

B. H. POWELL et al., Pliffs. in Err.,
v.

JAMES E. NICHOLS et al.

(— Okla. —, 110 Pac. 762.)

Appeal — question arising on motion — motion for new trial — necessity for.

1. The filing and determining of a motion for a new trial of a contested question of fact not arising upon the pleadings, but upon a motion, is unnecessary to authorize this court to review the order upon such hearing.

Execution — leasehold.

2. A leasehold estate, the term of which

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under the written lease exceeds the period of two years, and with a covenant against subletting or assigning on the part of the lessee without the consent of the lessor, is subject to sale under an execution against such lessee.

(July 12, 1910.)

ERROR to the District Court for Oklahoma County to review a judgment overruling a motion to vacate and set aside an execution levied on a certain leasehold. **Affirmed.**

The facts are stated in the opinion.

Messrs. Giddings & Giddings for plaintiffs in error.

Messrs. Burwell, Crockett, & Johnson, for defendants in error:

The covenant in the lease, not to assign or underlet the premises without the lessor's consent, does not apply to an involuntary sale of the leasehold under execution against the lessees.

Farnum v. Hefner, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955; *Medinah Temple Co. v. Currey*, 58 Ill. App. 433; *Smith v. Putnam*, 3 Pick. 221; 1 *Freeman, Executions*, 3d ed. § 119; 24 *Cyc. Law. & Proc.* pp. 968, 970; 2 *Greenl. Ev.* § 245; *Wood, Land. & T.* 2d ed. 714; *Riggs v. Pursell*, 66 N. Y. 198; 1 *Taylor, Land. & T.* §§ 408, 409; *Bemis v. Wilder*, 100 *Mass.* 446; *Jackson ex dem. Stevens v. Silvernail*, 16 *Johns.* 278; *Davis v. Eyton*, 7 *Bing.* 154; *Doe ex dem. Bridgman v. David*, 5 *Tyrw.* 125; *Roe ex dem. Hunter v. Galliers*, 2 *T. R.* 133; *Re Bush*, 126 *Fed.* 878; *Charles v. Byrd*, 29 *S. C.* 544, 8 *S. E.* 1.

Williams, J., delivered the opinion of the court:

The questions to be determined on this record are as follows:

(1) Is it necessary for a motion for new trial to be filed in order to review the action of a nisi prius court in granting or over-

Note. — Leasehold estate as subject of levy under execution or attachment.

The cases on this question are presented in a note to *Thalheimer v. Tischler*, 17 *L.R.A. (N.S.)* 841.

In addition to the cases collected in the earlier note the following cases also hold that a leasehold estate is subject to levy under execution. *Lefever v. Armstrong*, 15 *Pa. Super. Ct.* 565; *Sowers v. Vie*, 14 *Pa.* 99; *Thomas v. Blackemore*, 5 *Yerg.* 113; *Strawhacker v. Ives*, 114 *Iowa*, 661, 87 *N. W.* 669.

In *Gerber v. Hartwig*, 11 *W. N. C.* 197, it was held that a debtor who holds as tenant at will has such an interest in the lands as is subject to levy and sale under execution.

A. L. R.

ruling a motion where evidence is heard thereon?

(2) Is the leasehold estate owned by the judgment debtor under a written lease for more than two years, containing a covenant against subletting or assigning without the consent of the lessor, subject to execution?

1. The first question seems to have been settled in the case of *McDermott v. Halleck*, 65 Kan. 403, 69 Pac. 335, paragraph 1 of the syllabus being as follows: "A new trial is a re-examination of an issue of fact. An issue of fact arises upon the pleadings. The pleadings upon which an issue of fact can arise under the Code are the petition, answer, and reply. Hence the filing and determination of a motion for a new trial of a contested question of fact not arising upon the pleadings, but arising upon a motion, is unnecessary to authorize this court to review the order made upon such hearing." In support of that conclusion, the following authorities were cited: *Slobodisky v. Curtis*, 58 Neb. 211, 78 N. W. 522; *Harper v. Hildreth*, 99 Cal. 205, 33 Pac. 1103; *Beach v. Spokane Ranch & Water Co.* 21 Mont. 7, 52 Pac. 560; *Stone v. Bank*, 8 Ohio C. C. 636; *First Nat. Bank v. Swan*, 3 Wyo. 356, 23 Pac. 743; 2 *Thomp. Trials*, § 2716; 4 *Enc. Pl. & Pr.* p. 853. In § 99, at page 66, *Burdick on New Trials and Appeals* (1907), it is declared that "in case, moreover, of an order upon a contested question of fact not arising upon the pleadings, but arising upon a motion, no motion for a new trial is necessary" in order to have the action of the court reviewed by the appellate court. In addition to *McDermott v. Halleck*, supra, the case of *McDonald v. Weeks*, 32 Kan. 58, 3 Pac. 786; *Cook v. Larson*, 47 Kan. 70, 27 Pac. 113; and *Dreese v. Myers*, 52 Kan. 126, 39 Am. St. Rep. 336, 34 Pac. 349, are cited in footnote 26 in support of the text. The supreme court of the territory of Oklahoma seems never to have passed on this question. We conclude that a motion for a new trial is not essential in this case to have the action of the trial court reviewed.

2. The lease creating the estate levied upon under the execution bears date October 13, 1906, and demises to the plaintiffs in error certain premises from November 1, 1906, to July 1, 1909. Section 3330, *Wilson's Rev. & Anno. Stat.* 1903, provides: "No tenant for a term not exceeding two years, or at will, or by sufferance, shall assign or transfer his term or interest, or any part thereof, to another, without the written assent of the landlord or person holding under him." The leasehold here in controversy having been created for a period exceeding two years, this section of the statute has no application thereto. *Gano v. 29 L.R.A. (N.S.)*

Prindle, 6 Kan. App. 851, 50 Pac. 110. The case of *Moser v. Tucker*, 87 Tex. 94, 26 S. W. 1044, 1105, which is relied on by the plaintiffs in error, is based upon article 3250, *Sayles's Civ. Stat.* in words and figures as follows: "If lands or tenements are rented by the landlord to any person or persons, such person or persons renting said lands or tenements shall not rent or lease said lands or tenements during the term of said lease to any other person without first obtaining the consent of the landlord, his agent or attorney." In the case at bar the leasehold is not affected by such statutory provision, but is to be determined by the covenant therein against an assigning of the same without the consent of the lessor. By the weight of authority, covenants in leases against assignment or subletting were intended by the parties to apply only to the voluntary acts of the tenant; the lease is not forfeited by any transfer made by operation of law, including sales under execution. A holding otherwise would in effect permit the creation of valuable interests in lessees which may be held by them in defiance of creditors. *Medinah Temple Co. v. Currey*, 58 Ill. App. 433; *Smith v. Putnam*, 3 Pick. 221; *Riggs v. Pursell*, 66 N. Y. 193; *Jackson ex dem. Stevens v. Silvernail*, 15 Johns. 278; *Re Bush (D. C.)* 126 Fed. 878; *Farnum v. Hefner*, 79 Cal. 575, 12 Am. St. Rep. 174, 21 Pac. 955; 24 *Cyc. Law & Proc.* p. 970, and authorities cited in footnote; 1 *Freeman, Executions*, 3d ed. § 119. It does not affirmatively appear from this lease that the restriction was to apply other than to voluntary acts of the lessee.

It follows that the judgment of the lower court should be affirmed.

All the Justices concur.

UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT.

RE JOHN OSBORN'S SONS & COMPANY,
Incorporated, Bankrupt.

HOWARD J. M. CARDEZA et al., Trustees, etc., Petitioners.

(100 C. C. A. 392, 177 Fed. 184.)

Bankruptcy — allowed claims — interest.

Allowed claims in bankruptcy are to be treated as judgments, and bear interest

Note. — *Right to interest on allowed claims in bankruptcy.*

The question here considered is whether interest may be allowed upon claims which have been proved under § 63 of the bank-

from maturity, although the contracts do not provide therefor; and this rule is not affected by the acceptance by the creditor from the trustee of the principal of the claim without stipulating for interest, but the trustee is entitled to retain possession of the assets until he has accumulated funds enough to satisfy such interest.

(March 21, 1910.)

PETITION to revise an order of the District Court of the United States for the Southern District of New York refusing to require the trustee in bankruptcy of John Osborn's Sons & Company, Incorporated, to pay over to the trustees in liquidation a balance of the funds in his hands. Affirmed.

The facts are stated in the opinion.

ruptcy act of 1898. This does not include the question whether a lien creditor who procures an order for the sale of the encumbered property free from liens may claim interest from the proceeds of such sale, for it is generally held that a lien claimant who adopts that method of satisfying his claim against the bankrupt does not, strictly speaking, come into bankruptcy, but the proceedings are regarded as being outside of bankruptcy. As said in 2 Remington on Bankruptcy, § 1985, it is not necessary for a secured creditor in such cases to make proof in the form prescribed for proof of secured claims, but he may simply file an intervening petition, setting up his lien as in other cases. For similar reasons, cases involving the right of a secured creditor to marshal the securities which he holds, and, after selling them, to apply the proceeds not only to the principal of his debt, but also to the interest, do not throw any light upon the question indicated by the foregoing title.

Section 63 provides that debts of the bankrupt may be proved and allowed against his estate, which are, among other things, a fixed liability as evidenced by a judgment, or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date, or with a rebate of interest upon such as were not then payable and did not bear interest. This means, broadly speaking, that interest upon such claims may, in proving a claim, be included up to the time of the filing of the petition; whether interest for the period subsequent to the filing of the petition may be allowed is the question involved in this note, but it has not been expressly regarded as depending upon the foregoing provisions.

Section 19 of the bankruptcy act of 1867 contained a similar provision that all debts due and payable from the bankrupt at the time of the adjudication of bankruptcy, and all debts then existing but not payable until a future day, a rebate of interest being made when no interest is payable by the 29 L.R.A. (N.S.)

Argued before Lacombe, Coxe, and Ward, Circuit Judges.

Mr. W. G. Cook for petitioners.

Mr. Maxwell C. Katz for respondents.

Ward, Circuit Judge, delivered the opinion to the court:

This is a petition to revise an order of the district court refusing to require the trustee in bankruptcy to pay over to the trustees in liquidation of a bankrupt corporation a balance of funds in his hands. The petition in the district court alleged that none of the debts of the bankrupt corporation was based upon any contract providing for the payment of interest, but that they were all ordinary debts arising out of the purchase of goods, that the principal of all

terms of the contract, might be proved against the estate of the bankrupt.

This provision was construed in *Re Orne*, 1 Ben. 361, 1 Nat. Bankr. Reg. 57, Fed. Cas. No. 10,581, where the court said: "Under this provision, when a debt is in existence at the time of the adjudication of bankruptcy, but is not payable until afterwards, and the debt is one not bearing interest or not running with interest,—that is, is one on which, when it becomes payable, there will be payable merely the amount of the debt, without an additional sum for interest,—in such case the debt may be proved for the amount of its worth or value at the time of the adjudication of bankruptcy, which worth or value is to be arrived at by deducting from the amount of the debt the amount of the interest on it from the time of the adjudication of the bankruptcy until the time it becomes payable. The time of the adjudication of bankruptcy is taken, by the statute, as the decisive time. The debt must exist at that time, or it cannot be proved. If it is created afterwards, it cannot be proved. If it exists then, but is not payable till afterwards, and is not a debt running with interest,—that is, if, for instance, it is a promissory note for so many dollars, given before the adjudication of bankruptcy, but not maturing till afterwards,—then a rebate must be made from its amount, of the interest on that amount from the time of the adjudication of bankruptcy to the time of the maturity of the note. It is equally clear that where the debt is one not only in existence at the time of the adjudication of bankruptcy, but payable before that time, and running with interest by its terms or character, so that the obligation of the debtor in regard to the debt will not be wholly discharged without payment of such interest as well as the principal, the statute intends that the debt shall be proved for the amount of the principal and of the interest thereon to the time of the adjudication of bankruptcy."

In *RE JOHN OSBORN'S SONS & Co.*, it appeared that the principal indebtedness had been paid in full, and the ground of the

the indebtedness had been paid in full, and that the ground of the trustee's refusal to pay over the balance was that he intended to collect enough out of the bankrupt estate to pay interest on the said indebtedness. These allegations are uncontradicted.

There can be no doubt, as matter of law, that if a creditor who has not stipulated for interest accepts payment of the indebtedness in full, he cannot subsequently recover interest thereon. The reason is that interest, in the absence of an express agreement to pay it, is a mere incident of the debt, and is to be recovered as damages for its detention. *Stewart v. Barnes*, 153 U. S. 456, 33 L. ed. 781, 14 Sup. Ct. Rep. 849. It makes no difference that the payment is accepted under protest (*Cutter v.*

trustee's refusal to pay over the balance was that he intended to collect enough out of the bankrupt estate to pay interest on the said indebtedness. The court, however, laid very little stress on this fact, and stated rather broadly that allowed claims in bankruptcy were to be treated as judgments bearing interest from maturity. It will be noted that in this case the contest was being waged between the bankrupt, who claimed the residue of the assets, and the creditors who claimed interest. It is interesting to speculate whether, if the contest had been between rival creditors, the same result would have been reached. It is reasonable to suppose that a creditor is entitled to interest when the assets are more than enough to pay the principal of all debts. There seems to be no valid reason why a creditor who has been compelled to forego the satisfaction of his debt should, as against any right the bankrupt may seek to assert, be deprived of interest, where he would have been entitled to interest if the bankruptcy had not intervened.

As a matter of fact it has been held that where the bankrupt's estate is sufficient, interest will be paid on all allowed claims from the date of the adjudication. *Re Bank of North Carolina*, 12 Nat. Bankr. Reg. 130, Fed. Cas. No. 895; *Re Hagan*, 6 Ben. 407, 10 Nat. Bankr. Reg. 383, Fed. Cas. No. 5,898; *Re Town*, 8 Nat. Bankr. Reg. 40, Fed. Cas. No. 14,112.

When, however, the assets are insufficient to satisfy the principal of claims asserted, a somewhat different question arises. The court said in *Re Haake*, 2 Sawy. 231, 7 Nat. Bankr. Reg. 61, Fed. Cas. No. 5,883: "It is immaterial to the creditor at what time interest stops upon his debts, provided interest on all the debts of the bankrupt stops simultaneously with his own, for his proportionate share of the assets will be the same whatever period be fixed for the stoppage. . . . There can be no doubt, therefore, that interest on provable debts cannot be computed as against the general assets beyond the date of the adjudication."

Where a separate creditor of a member

New York, 92 N. Y. 166); nor that the payment is made while a suit for both principal and interest is pending (*Canfield v. Eleventh School Dist.* 19 Conn. 529; *Davis v. Harrington*, 160 Mass. 278, 35 N. E. 771). The district judge, admitting this to be the general rule, held that it did not apply to bankruptcy proceedings because they constitute a mere division of the fund belonging to the creditors, dividends from which are not to be regarded as payments on account of the bankrupt's indebtedness. In other words, that it is a distribution among equitable co-owners of their own property. We cannot accede to this view. The creditors are not owners of the bankrupt's assets; on the contrary, the trustee owns them in trust to pay the bankrupt's

of a bankrupt partnership is paid in full out of the separate estate, he is not entitled to interest from the date of adjudication out of the separate estate, as against judgment creditors of the firm whose claims cannot be paid in full. *Re Berrian*, 6 Ben. 297, Fed. Cas. No. 1,351. In *Re Bugbee*, 9 Nat. Bankr. Reg. 258, Fed. Cas. No. 2,115, where it appeared that a claim was based upon a judgment rendered, and acceptances falling due after the adjudication, it was held that interest could not be allowed beyond the date of adjudication.

But the United States has been allowed interest after the adjudication upon a judgment against the bankrupt, by virtue of a Federal statute providing that interest should be allowed on all judgments from the date of their rendition, and the bankruptcy act giving priority to debts due to the United States. *Re Bousfield & P. Mfg. Co.* 17 Nat. Bankr. Reg. 153, Fed. Cas. No. 1,704.

And it is held in *Re Kallak*, 147 Fed. 276, that the rule that debts will not be permitted to draw interest after the filing of the petition has no application to a claim for taxes. The court said that § 64a of the bankruptcy act, which directs the court to order the payment of all taxes in advance of the payment of dividends to creditors, had the effect of removing a demand for taxes from the category of "claims" in bankruptcy, and that interest should be allowed to the date of tender or payment. This case was followed in *Re Schuyler*, 21 Am. Bankr. Reg. 428.

Bills and notes of a bankrupt, bought up by another in good faith for the unsuccessful purpose of stopping the proceedings and giving the bankrupt time, were held in *Re Strachan*, 3 Biss. 181, Fed. Cas. No. 13,519, to bear interest to the time of actual payment at the stipulated rate, or, where the rate was not agreed upon, at the legal rate.

It was held in *Re Kessler*, 171 Fed. 751, that a creditor holding security which was liquidated, after the filing of the petition in bankruptcy, by conversion into money "according to the terms of the agreement,

debts and any surplus to the bankrupts. Payment by the trustee, unless differentiated for some other reason, is as much subject to the rule that after a debt unaccompanied by a contract for interest is paid in full no interest can be recovered as if the payment were made by the bankrupt.

The trustee, however, contends that upon authority the rule does not apply to payments by executors, administrators, or receivers, or trustees in bankruptcy. He cites a number of cases to prove this, which do not appear to us to be controlling. In *Williams v. American Bank*, 4 Met. 317, the question whether the creditors of a decedent's estate were entitled to interest in addition to principal arose before the

principal had been paid. Chief Justice Shaw decided merely between the equities of the creditors and the next of kin, without the question under consideration being raised at all. The subsequent case of *Brown v. Lamb*, 6 Met. 203, under the insolvent laws of Massachusetts, did involve the question, but it was not considered, and the decision was rested entirely upon *Williams v. American Bank*. Judge Bond's decision in *Re Bank of North Carolina*, 12 Nat. Bankr. Reg. 130, Fed. Cas. No. 895, is founded on these two cases. In *Re Murray*, 6 Paige, 204, a proceeding under the insolvent laws of New York in which the indebtedness had not been paid in full, Chancellor Walworth held that the balance,

pursuant to which the securities were delivered to the creditor as provided by § 57h, relating to secured claims," was entitled to interest after the date of adjudication and to the day of liquidation, and could first apply the proceeds of the security to the payment of such interest, and later prove his claim for any unpaid balance. This case was affirmed in (C. C. A.) 180 Fed. 979, but Judge Ward, although recognizing the right to apply the proceeds first to the payment of interest, dissented upon the ground that when the creditor subsequently came into bankruptcy to claim upon any unpaid balance, so much of the proceeds as had been applied to interest accruing after the filing of the petition should have been deducted from that balance. Judge Ward's idea seems to be that where the creditor has placed himself on an equal footing with general creditors by seeking to prove his claim, he should be required to relinquish the advantage he has gained as a secured creditor.

It has been held that a creditor, the payment of whose dividend has been delayed by the trustee acting for all the other creditors, is entitled, as against them, to interest upon his dividend from the time it became payable to the date of payment. *Re Kitzinger*, 19 Nat. Bankr. Reg. 238, Fed. Cas. No. 7,862, affirmed in 19 Nat. Bankr. Reg. 307, Fed. Cas. No. 7,863.

And it was held in the same case, that where the trustee appealed from an order allowing a creditor interest upon his unpaid dividend at the full legal rate, and the creditor procured an order directing the trustee to deposit the dividend and interest in a bank pending the appeal, the deposit was not a setting aside of certain moneys as constituting the creditor's dividend, and the creditor did not waive his right to full interest, and thus become bound to accept merely the interest which the deposit earned. *Re Kitzinger*, 19 Nat. Bankr. Reg. 307, Fed. Cas. No. 7,863.

Criticizing the *Kitzinger* Case, the court in *Hersey v. Fosdick*, 20 Fed. 44, said: "That decision, though by a very able judge, and sustained on appeal, is a new departure in the law of bankruptcy. Of the

almost numberless cases in which a proof has been contested, no other has been found in which such an allowance has been made. By the act of 49 Geo. III. chap. 121, § 12, the action of assumpsit for recovery of a dividend was abolished, and a remedy by summary petition was substituted, and the lord chancellor was authorized, when justice appeared to him to require it, to order payment of interest for the time the dividend should have been withheld. See 2 *Christ. Bankr. Law*, 477. This statute refers to dividends ordered upon debts duly proved, and to a mode of managing the estates of bankrupts, which is now superseded. The assignees took the funds, and dealt with them as trustees; and it was one of the abuses of the system that they would delay payment of dividends after they had been declared by the commissioners, in order to make interest for themselves. By the old law they could be sued for the several amounts, and no doubt were bound to pay interest for the delay. But it was a delay in paying a debt due from themselves after it had been judicially ascertained. It is to this practice that the statute is addressed. . . . I can see no reason why, because a creditor finally prevails in a claim honestly and fairly disputed by the assignees, he should have more than his dividend. Not, surely, as damages for withholding something due him, for there is nothing due him in bankruptcy until his debt, both as to its legality and its amount, has been ascertained. Not as matter of contract, for there is no contractual relation between the parties. I am confident that the practice has always been against it, and that it is both just and expedient that the general creditors should be at liberty to investigate doubtful claims, without the liability to such a penalty as would be imposed upon them by granting this petition. I do not say that if funds have been set aside to meet a large claim of this kind, and have earned interest, the court had not power to order the precise amount of interest so earned on a sum which proves to be the creditor's money, to be paid to him."

L. A. W.

with interest, was payable out of funds subsequently collected. In *People v. Merchants' Trust Co.* 187 N. Y. 293, 79 N. E. 1004, it was held that interest should be paid out of the estate of an insolvent trust company to depositors and holders of certified checks who had no contract for interest and whose claims had been paid in full. The court said it felt committed to this doctrine because of certain *obiter* observations in the earlier case of *People v. American Loan & T. Co.* 172 N. Y. 371, 65 N. E. 200. In that case, however, all that was decided was that interest ceases from the appointment of a receiver of an insolvent trust company. This is the usual rule in all cases of insolvency, because, the assets almost invariably not being sufficient to pay the debts, calculations of interest are waste of time. The court added what is also everywhere the rule, that if the assets are sufficient interest must be paid. Of course, it meant interest that is due, whether by contract or as damages. Judge Haight further relied upon *Sickles v. Herold*, 149 N. Y. 332, 43 N. E. 852, holding that interest as damages was due after demand; *Richmond v. Irons*, 121 U. S. 27, 64, 30 L. ed. 864, 876, 7 Sup. Ct. Rep. 788, holding that stockholders of an insolvent national bank subject to assessment were liable for interest if the bank was; *Wheeler v. Millar*, 90 N. Y. 353, 363, holding that stockholders whose stock had not been fully paid are liable to pay interest; *Mahoney v. Bernhard*, 45 App. Div. 499, 63 N. Y. Supp. 642, affirmed in 169 N. Y. 589, 62 N. E. 1097, in which the question as to interest was raised before the indebtedness was paid in full. None of these authorities seems to us to justify Judge Haight's conclusion. But he did cite another authority (*National Bank v. Mechanics' Nat. Bank*, 94 U. S. 437, 438, 24 L. ed. 176, 177), which deserves separate consideration because it proceeds upon an entirely different theory. In it depositors in an insolvent national bank in the hands of the Comptroller of the Currency, whose claims had been paid in full, were held entitled to interest on the ground that when their claims were proved to the satisfaction of the Comptroller they were to be treated as judgments. Mr Justice Swayne said:

"The 50th section of the national banking act (13 Stat. at L. 1115, chap. 106) requires the Comptroller of the Currency to apply the moneys paid over to him by the receiver 'on all such claims as may have been proved to his satisfaction, or adjudicated in a court of competent jurisdiction.' The act is silent as to interest upon the claims before or after proof or judgment. Can it be doubted that a judg-

ment, if taken, would include interest down to the time of its rendition? Section 996, of the Rev. Stat. p. 182, U. S. Comp. Stat. 1901, p. 711, declares that all judgments in the courts of the United States shall bear the same rate of interest as judgments in the courts of the states, respectively, where they are rendered. Interest is allowed by the law of New York upon judgments from the time they are perfected. 3 N. Y. Rev. Code 1859 ed. p. 637. If these claims had been put in judgment, whether in a court of the United States or in a state court of that state, the result as to interest upon the judgment would have been the same. It was unnecessary to reduce them to judgment, because they were proved to the satisfaction of the Comptroller. After they were so proved, they were of the same efficacy as judgments, and occupied the same legal ground. Hence they are within the equity, if not the letter, of these statutes, and bear interest as judgments would have done. *Sedgw. Constr.* 311, 315."

We think that allowed claims in bankruptcy are as much entitled to be treated as judgments. Section 57 of the bankruptcy act (act July 1, 1898, chap. 541, 30 Stat. at L. 560, U. S. Comp. Stat. 1901, p. 3443) provides that the proof of debts shall be in writing, signed and sworn to by the creditor, stating the consideration and other particulars, and, when this proof is filed in the court or before the referee, the claim shall be allowed unless objected to. The subject is further regulated by General Order 21 (32 C. C. A. xxii, 89 Fed. ix.), and by forms prescribed by the Supreme Court.

Following the case of *National Bank of the Commonwealth v. Mechanics' National Bank*, *supra*, the order is affirmed.

FLORIDA SUPREME COURT.

A. E. McMILLAN et al., Plffs. in Err.,

v.

WESTERN UNION TELEGRAPH COMPANY.

(— Fla. —, 53 So. 329.)

Telegram — contents — notice — sufficiency.

1. A message reading: "We want some brick. When are you going to ship?"—puts

Headnotes by COCKRELL, J.

Note.—*Negligence of telegraph company causing discontinuance of contract, terminable at pleasure of other party thereto, as a ground of liability.*

This note does not deal with the general question of loss of profits as element of

a telegraph company on notice that substantial business loss to the addressee may follow nondelivery.

Same — nondelivery — liability.

2. The fact that one party may at will put an end to a continuing contract does not destroy the right to substantial damages against a telegraph company, whose negligence alone actually caused its discontinuance.

(Whitfield, Ch. J., dissents.)

(March 4, 1910.)

ERROR to the Circuit Court for Escambia County to review a judgment in defendant's favor in an action brought to recover damages alleged to have been caused by defendant's negligent failure promptly to deliver a certain telegram. Reversed.

Statement by Cockrell, J.:

The plaintiffs in error brought an action in the circuit court for Escambia county against the defendant in error, in which the declaration alleges:

"That the defendant was, during the months of May and June, A. D. 1906, the owner of and was operating a public telegraph line between the city of Camden, in the state of Alabama, and the station of Pine Barren, in the state of Florida, and held itself out to the public as receiving, transmitting, and delivering for hire tele-

graphic messages between the said two points; that during said months the plaintiffs were engaged in the business of manufacturing and selling brick, and entered into a contract with the Camden Hardware Company, whereby the said Camden Hardware Company agreed to buy from them brick at the rate of four (4) cars per week, beginning June 1, 1906, until notified to stop [which said brick were purchased by the said Camden Hardware Company for the purpose of erecting a certain building which the said hardware company had contracted to build, and it was understood between the said hardware company and the plaintiffs, in entering into said contract, that the said hardware company expected to buy from the said plaintiffs all of the brick, amounting to about 150,000, which would be required for the said building]. That on the 4th day of June, A. D. 1906, the said Camden Hardware Company delivered to the said defendant, at its office in Camden, Alabama, for transmission and delivery for hire to the plaintiffs at Pine Barren, Florida, a message as follows:

"Camden, Ala., 4th.

"We want some brick. When are you going to ship?

"Camden Hardware Company."

"Which message was received by the said

damages for breach of contract to transmit telegram, as that question has been the subject of discussion in a note to Hall v. Western U. Teleg. Co. 27 L.R.A. (N.S.) 639, which supplements a note to Wells v. National Life Asso. 53 L.R.A. 91, but is intended to discuss the peculiar question presented in McMILLAN v. WESTERN U. TELEG. CO.; that is, conceding that a contract has been entered into between the complaining party and another, what effect upon the liability of the telegraph company for loss of profits will the fact have that the contract between the complaining party and another was terminable at the pleasure of the latter. As thus limited, but very little authority has been found tending to throw any light on this question.

In Merrill v. Western U. Teleg. Co. 78 Me. 97, 2 Atl. 847, where a delay in delivery of a message resulted in the prevention of performance of employment which had been secured for the plaintiff by his agent at a certain sum per day, the court, in denying the right to recover more than nominal damages, said: "The contract was defeasible at the will of either party. How, then, can any substantial damage be measured? Had the engagement to employ the plaintiff been for a stipulated and definite period, not over one year, the plaintiff would have a right to demand damages that could be definitely measured

and assessed. He would then have been entitled to enjoy the fruit of his labor during the time of his engagement; but, under the terms of the contract in proof, he was liable to be dismissed from his employment as soon as he had entered upon it, and it cannot be known what damages he has suffered in the premises. The plaintiff must prove his damages before they can be assessed."

A somewhat similar case is Kenyon v. Western U. Teleg. Co. 100 Cal. 454, 35 Pac. 75, where it was held that a telegraph company is not liable in damages to one who, because of its failure to deliver a telegraph message, failed to secure an appointment as deputy assessor, since, as the court said: "An appointment as deputy does not imply a contract for his employment for any length of time, nor otherwise than at the pleasure of the officer making the appointment. The allegation, therefore, that he would have received the appointment is not an allegation that he would have been retained for any definite length of time, nor could such allegation be made. He might have received the appointment and been discharged the same day either for cause or without cause; and, as damages or compensation must be measured by the loss sustained, where that loss cannot be ascertained, damages cannot be recovered."

G. V.

defendant company for transmission and delivery to the said plaintiffs as aforesaid, and which it was its duty to transmit with all due promptness and diligence to the plaintiffs at said Pine Barren; yet the said defendant, disregarding its duty in the premises, neglected and failed promptly to transmit and deliver the said message to the plaintiffs, and unreasonably neglected, delayed, and withheld the same until the 6th day of said month of June, at which time it was delivered to the plaintiffs. [That the plaintiffs, immediately upon receipt of said message, made a shipment of brick to the said Camden Hardware Company, and telegraphed said hardware company of said fact, and that they would rush the balance of the order; but the said Camden Hardware Company, being in need of brick and incurring liability for demurrage for want of them, on said 6th day of June, before hearing from the plaintiffs in response to their said telegram, and being ignorant as to whether any brick had been shipped, or when brick would be shipped under their said contract, upon said 6th of June wrote to the plaintiffs, declining and refusing to continue their said contract or to take brick from the plaintiffs thereunder. That but for the said neglect and failure of duty on the part of the said defendant, in failing with due diligence and promptness to transmit and deliver the message as aforesaid, the said Camden Hardware Company would have purchased from these plaintiffs who were ready, able, and willing to supply same under said contract, and would have done so had said message been delivered with reasonable promptness, the brick required for the erection of the building aforesaid, amounting to 150,000 brick, whereby the said plaintiffs would have derived their reasonable profits in the sale of said brick, amounting to the sum of five hundred (\$500) dollars, and which said profits they have lost by reason of the said failure and neglect of duty on the part of the defendant as aforesaid.] Wherefore plaintiffs sue and claim one thousand (\$1,000) dollars."

On motion the court struck the two portions of the declaration contained within the brackets. The plea of not guilty was entered and withdrawn. Default was entered, and upon waiving a jury the court tried the cause, and rendered judgment for \$1 and costs in favor of the plaintiffs, who, on writ of error here, insist merely that the trial court erred in sustaining the motion to strike the portions of the declaration contained in the brackets as above set forth. Only compensation for loss of probable profits is involved.

29 L.R.A. (N.S.)

Messrs. Maxwell & Reeves for plaintiff in error.

Messrs. Blount & Blount & Carter, for defendant in error:

The defendant was not advised of the special circumstances, and the message which was delayed did not disclose them.

Beaupré v. Pacific & A. Teleg. Co. 21 Minn. 155; 3 Sutherland, Damages, § 970; Jones, Teleg. & Teleph. Cos. §§ 534, 535.

The damages claimed were remote, and contingent upon the will of the Camden Hardware Company.

Jones, Teleg. & Teleph. Cos. §§ 526-563; 3 Sutherland, Damages, § 647.

In an action for damages for the failure to deliver a telegram with diligence, the right to recover depends upon whether the defendant, either from the character of the message or from the information imparted to its agent, had such notice as that the injurious consequences alleged should have been contemplated as probable results of the negligence complained of, and that such injurious consequences resulted proximately from such negligence.

Hildreth v. Western U. Teleg. Co. 56 Fla. 387, 47 So. 820; Brock v. Gale, 14 Fla. 523, 14 Am. Rep. 356; Kagy v. Western U. Teleg. Co. 37 Ind. App. 73, 117 Am. St. Rep. 278, 76 N. E. 792; Bennett v. Western U. Teleg. Co. 129 Iowa, 607, 106 N. W. 13; Horne v. Midland R. Co. L. R. 7 C. P. 583, L. R. 8 C. P. 131, 5 Eng. Rul. Cas. 506.

Unless there was a binding contract between the McMillan Brick Company and the Camden Hardware Company there can be no recovery.

Wilson v. Western U. Teleg. Co. 124 Ga. 131, 52 S. E. 153.

Cockrell, J., delivered the opinion of the court:

The wording of the message: "We want some brick. When are you, going to ship?"—addressed to a brick company, clearly put the telegraph company on notice that a matter of real business concern to the addressee was involved, and that negligence in its transmission would probably result in considerable pecuniary loss. This being so, the chief question is: Do the allegations stricken from the declaration destroy this potential right to substantial damages?

The fact that the sender of the message could put an end to the contract at any time might well prevent a cause of action *ex contractu* against it, but it does not of necessity destroy this action in tort against the telegraph company. This would seem to be foreshadowed by the court in Chipley v. Atkinson, 23 Fla. 206, 11 Am. St. Rep. 367, 1

So. 934, in which we held that the inability of an employee to recover from his employer for a discharge from service did not prevent recovery against a third party who maliciously caused the dismissal.

There are cases, such as *Savannah, F. & W. R. Co. v. Willett*, 43 Fla. 311, 31 So. 246, where it was held that a servant could not recover upon a contract of employment of indefinite duration, terminable at the will of the master, and also cases holding no recovery can be had for lost prospects of employment or other contracts, uncertain as to duration, because terminable at the whim or will of the other party.

There would seem, however, to be a basis for distinction between contracts not yet entered into and those already made, where the only element of uncertainty as to time or volume of business is the ability of the losing party to please. To hold otherwise, and to confine the addressee of a telegram to cases where an ironclad contract exists, would be to deny him redress altogether; for, if the other party to the contract be solvent, he has there full redress, and, if he be not solvent, there has been no loss.

The declaration states positively that the building company would not have discontinued the purchasing, had it not been delayed and subject to the damage by reason of the negligence in the delivery of the message, putting that fact in issue.

There would seem no special difficulty in admeasuring the damages in cases of this character, and this can be regulated by proper charges.

The judgment is reversed.

Shackleford and Parkhill, JJ., concur.

Whitfield, Ch. J., and Hocker, J., dissent.

Taylor, J., absent on account of illness.

A petition for rehearing having been granted, the following *Per Curiam* response was handed down June 25, 1910:

A rehearing having been granted and the cause again fully considered, it is ordered and adjudged that the judgment heretofore entered stand as the judgment of the court.

All concur, except **Whitfield, Ch. J.**, who dissents.

Parkhill, J., concurring:

It is not so difficult to understand the rule that obtains as to the measure of damages in actions against telegraph companies for negligence in the transmission or delivery of messages, but it is its application to the different cases which puzzles and confuses the courts. We know very well that the 29 L.R.A. (N.S.)

damages must flow directly and naturally from the breach, and that they must be certain, both in their nature and in respect to the cause from which they proceed, and that under this rule only such damages may be recovered as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. But it is equally well settled that this rule, formulated in the famous English case of *Hadley v. Baxendale*, 9 Exch. 341, 5 Eng. Rul. Cas. 502, does not require that the parties must have contemplated the actual damages which are to be allowed, but such as may reasonably be supposed to have been contemplated. It is not essential that the particular loss or injury sustained was contemplated, but the company is liable if the loss sustained should have been contemplated as a probable and proximate result of its negligence. In other words, as was well said by Chief Justice Earl in *Leonard v. New York, A. & B. Electric Magnetic Teleg. Co.* 41 N. Y. 544, text 567, 1 Am. Rep. 446, "A party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from its breach, if, at the time they entered into it, they had bestowed proper attention upon the subject, and had been fully informed of the facts." See also *Western U. Teleg. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169, 46 So. 1024; *Jones, Teleg. & Teleph. Cos.* ¶ 517.

Now it will be conceded that, without reference to the question whether the defendant company knew of the contract between the plaintiff and the Camden Hardware Company, the message: "We want some brick. When are you going to ship?"—clearly indicated to the company's operator that it related to a business transaction of importance, and that a pecuniary loss would probably result unless it was promptly and correctly transmitted. *Western U. Teleg. Co. v. Merritt*, supra.

Now the loss the plaintiffs are said to have sustained by reason of the negligence of the defendant company is the sum of \$500 that the plaintiffs would have realized as profits on the sale of 150,000 brick if the telegram had been delivered to the plaintiffs. Should not the loss of these profits have been contemplated as a probable result of the defendant's negligence?

The liability of the defendant company does not require that the company must have contemplated the actual damages which are to be allowed, but such as may reasonably be supposed to have been contemplated.

"We want some brick." It is clear that the telegraph company knew that the Cam-

den Hardware Company wanted to get some brick from the plaintiffs,—that the Camden Hardware Company wanted to buy some brick from the plaintiffs. It is not essential that the telegraph company knew how much brick the Camden company wanted to buy from the plaintiff.

"When are you going to ship?" Is it not reasonably certain from these words, "When are you going to ship?" that the telegraph company knew that the buying of the brick depended upon an answer as to when the plaintiff's would ship the brick,—that if an answer came promptly that the plaintiff was ready to ship, and would ship, that the Camden company would buy or take the brick, and that if no answer was received by the Camden company it must and would look elsewhere for brick? Is it not plain to be seen, then, that the negligent delay of the telegraph company was the direct cause of the loss to the plaintiffs of the sale and the profits on the sale of brick that the Camden company would have bought from the plaintiffs had the telegram been delivered promptly? I think so.

It is doubtless true that the telegraph company did not know anything about a contract said to have been entered into between the Camden company and the plaintiffs; but is it not essential to the liability of the telegraph company that it knew of or should have contemplated the existence of this particular contract. The telegraph company will be liable for the failure of the plaintiffs to have made the sale of the brick, upon proof at the trial that, without the contract, the Camden company would have bought 150,000 brick from the plaintiffs if the telegram had been delivered promptly, and the plaintiffs were ready and willing to furnish the brick, and would have done so. In other words, had the plaintiffs not mentioned the contract with the Camden company, but merely alleged in the declaration that, but for the said neglect and failure of duty on the part of the said defendant, in failing with due diligence and promptness to transmit and deliver the message as aforesaid, the said Camden Hardware Company would have purchased from these plaintiffs, who were ready, able, and willing to supply same, and would have done so had said message been delivered with reasonable promptness, the brick required for the erection of a certain building, amounting to 150,000 brick, whereby the said plaintiffs would have derived their reasonable profits in the sale of the brick, amounting to the sum of \$500, etc.,—a good cause of action would have been stated.

This, then is not an action to recover profits for which the Camden company had already bound itself to the plaintiffs, but an effort to recover profits which are shown 29 L.R.A. (N.S.)

with reasonable certainty to have been lost by the loss of the sale from which they would have been derived.

Without averring a binding obligation on the part of the Camden company to take 150,000 brick, the declaration shows the purpose for which the brick were ordered, which called for that number, and the mutual expectation that the number would be taken, and the allegation that, but for the delay in the delivery of the telegram, that number would have been taken.

This is not a suit to recover profits under a contract by which the Camden company had already bound itself to the plaintiff; for in such a case the suit would be brought against the contracting Camden company for breach of the existing contract, and not against the telegraph company for loss of the sale of the brick.

Unless the Camden company had bound itself for the whole 150,000 brick, it could not be sued for refusing to take them. If, however, it may be shown with reasonable certainty that, but for the negligent act of the defendant, the Camden company would in fact have taken the brick, the loss resulting from a failure to do so may be recovered from the telegraph company. This distinction may be seen in the two cases of *Savannah, F. & W. R. Co. v. Willett*, 43 Fla. 311, 31 So. 246, and *Western U. Teleg. Co. v. McKibben*, 114 Ind. 511, 14 N. E. 894. In the first case it is held that the defendant, not having bound itself for any particular time, could discharge the plaintiff at pleasure, and he could recover only nominal damages for failure to employ him. In the other case the plaintiff was allowed to recover on the basis of the wages he would have earned from the date of the expected employment to the institution of the suit.

In order to recover, then, the plaintiff must show, not an existing binding contract with the Camden company for the 150,000 brick, but a reasonable probability that such a number of brick would have been taken but for the negligent act of the defendant. The declaration therefore alleges the existence of a contract then being performed, but subject to be terminated by notice, the expectation of each party that it would continue until the building in question was completed, and that this would have been the case but for the default in the delivery of the telegram and the stoppage of the contract, and the loss of the sale of the brick in consequence of such default on the part of the telegraph company. At the trial, upon proof of these facts, the plaintiffs may recover. The declaration may have stated the evidence with too much detail and particularity, but such an objection may not avail the telegraph company.

Owing to the difficulty of applying the

well-known principles of the law to the particular facts of each case, I voted for a rehearing in this case, so that we might consider the question involved fully. I again come to the conclusion that the special damages claimed may be recovered, and that the judgment should be reversed.

Whitfield, Ch. J., dissenting:

The law casts upon a telegraph company, because of the public service it is engaged in, the duty to promptly deliver to the addressee a telegram properly intrusted to the company for transmission, and a corresponding liability in damages for negligence in performing the duty. *Western U. Tele. Co. v. Milton*, 53 Fla. 484, 11 L.R.A. (N.S.) 560, 125 Am. St. Rep. 1077, 43 So. 495; *International Ocean Tele. Co. v. Saunders*, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; *Jones, Teleg. & Teleph. Cos.* ¶¶ 478, et seq; *Western U. Tele. Co. v. Dubois*, 2 A. & E. Ann. Cas. 398, note.

In an action for damages the declaration by its allegations, or by the fair inferences arising from such allegations, should contain all the elements essential to the plaintiffs' cause of action; and if from the allegations it appears that special damages claimed are not legally recoverable in the action, statements contained in the declaration relating solely to such special damages, that are wholly irrelevant, may be stricken on proper motion under the statute, so as not to embarrass a fair trial of the action. *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* 55 Fla. 514, 20 L.R.A. (N.S.) 92, 46 So. 732; *Hildreth v. Western U. Tele. Co.* 56 Fla. 387, 47 So. 820; *Williams v. Atlantic Coast Line R. Co.* 56 Fla. 735, 24 L.R.A. (N.S.) 134, 131 Am. St. Rep. 169, 48 So. 209; *Western U. Tele. Co. v. Wells*, 50 Fla. 474, 2 L.R.A. (N.S.) 1072, 111 Am. St. Rep. 129, 39 So. 838, 7 A. & E. Ann. Cas. 531; *Milligan v. Keyser*, 52 Fla. 331, 42 So. 367.

To warrant the recovery sought, it should appear by the allegations of the declaration, or from fair inferences from such allegations, (1) that the plaintiff, the addressee of a telegram, is interested in, or will be benefited by, the prompt delivery of the telegram, or will be injured by a negligent delivery; (2) that the defendant was negligent in delivering the telegram; (3) that the plaintiff actually sustained substantial financial loss; (4) that the loss as alleged was such that from the telegram or other information imparted to the defendant it should reasonably have been regarded as naturally and ordinarily to result from the negligence, or such as may reasonably under the circumstances stated be supposed to have been contemplated at the time by the 29 L.R.A. (N.S.)

defendant as a probable result of the negligence; (5) that the loss as alleged would not have occurred but for the negligence of the defendant; (6) that the loss as alleged is not remote, contingent, or conjectural, and is capable of reasonably certain ascertainment. *Western U. Tele. Co. v. Milton*, supra; *Jones, Teleg. & Teleph. Cos.* ¶ 478; *Isham v. Dow*, 70 Vt. 588, 45 L.R.A. 87, 67 Am. St. Rep. 691, 41 Atl. 585; *Western U. Tele. Co. v. Merritt*, 55 Fla. 462, 127 Am. St. Rep. 169, 46 So. 1024; *Williams v. Western U. Tele. Co.* 1 A. & E. Ann. Cas. 359, and note (136 N. C. 82, 48 S. E. 559); *Harrison v. Western U. Tele. Co.* 10 A. & E. Ann. Cas. 476, and note (143 N. C. 147, 55 S. E. 435); *Fererro v. Western U. Tele. Co.* 9 App. D. C. 455, 35 L.R.A. 548; *Western U. Tele. Co. v. Wilson*, 32 Fla. 527, 22 L.R.A. 434, 37 Am. St. Rep. 125, 14 So. 1; *Woodbury v. Tampa Waterworks Co.* 57 Fla. 243, 21 L.R.A. (N.S.) 1034, 49 So. 556; *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* supra; *Western U. Tele. Co. v. True*, 101 Tex. 236, 106 S. W. 315; *International Ocean Tele. Co. v. Saunders*, supra; *Frazier v. Western U. Tele. Co.* 67 L.R.A. 319, 2 A. & E. Ann. Cas. 396, and notes (45 Or. 414, 78 Pac. 330); *Western U. Tele. Co. v. Woodard*, 84 Ark. 323, 105 S. W. 579, 13 A. & E. Ann. Cas. 354; *Western U. Tele. Co. v. Schriver*, 4 L.R.A. (N.S.) 678, 72 C. C. A. 596, 141 Fed. 538; 29 Cyc. Law. & Proc. p. 499; *Hildreth v. Western U. Tele. Co.* supra; 21 Am. & Eng. Enc. Law, 2d ed. pp. 493 et seq.; 29 Cyc. Law & Proc. pp. 488 et seq.; *Snyder v. Philadelphia Co.* 63 L.R.A. 896, 102 Am. St. Rep. 941, 1 A. & E. Ann. Cas. 225 and notes (54 W. Va. 149, 46 S. E. 366); *Young v. Western U. Tele. Co.* 107 N. C. 370, 9 L.R.A. 669, 22 Am. St. Rep. 833, 11 S. E. 1044.

If it appears from the declaration that the loss was the proximate result of an independent efficient cause intervening between the negligence and the loss, and it does not reasonably appear that the loss would not have occurred but for the negligence of the defendant; or if it appears from the declaration that the loss as alleged is contingent, remote, or conjectural, and not capable of reasonably certain proof; or, even though contributory negligence is in general a matter of defense, if it appears from the declaration that the loss was contributed to by the fault of the plaintiffs, the special damages claimed cannot legally be recovered in this action. See *Williams v. Atlantic Coast Line R. Co.* supra.

The damages claimed in the portion of the declaration that was stricken do not naturally and necessarily result from the negligence charged, and to be recovered should

be specially alleged. *Jacksonville Electric Co. v. Batchis*, 54 Fla. 192, 44 So. 933. Therefore, if the motion to strike was erroneously granted, such error was not harmless to the plaintiff.

That the plaintiff had an interest in the telegram, that the defendant was negligent, and that the plaintiff sustained loss, appear by the declaration.

Under the allegations of the declaration it appears that the refusal of the sender of the message to take the brick was the direct efficient cause of the loss to the plaintiff. This being so, the defendant is not liable unless its negligence so contributed to the loss that without the negligence the loss would not have occurred. The defendant's negligence did not put in operation a dangerous agency, or make it possible for a natural condition or ordinary circumstance to directly cause the loss, as in such cases as *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 157, 17 L.R.A. 33, 65, 9 So. 661; *Florida East Coast R. Co. v. Welch*, 53 Fla. 145, 44 So. 250, 12 A. & E. Ann. Cas. 210; *Alabama G. S. R. Co. v. Quarles*, 145 Ala. 436, 5 L.R.A. (N.S.) 867, 117 Am. St. Rep. 54, 40 So. 120, 8 A. & E. Ann. Cas. 308; *Green-Wheeler Shoe Co. v. Chicago, R. I. & P. R. Co.* 130 Iowa, 123, 5 L.R.A. (N.S.) 882, 106 N. W. 498, 8 A. & E. Ann. Cas. 45. See also *Bibb Broom Corn Co. v. Atchison, T. & S. F. R. Co.* 69 L.R.A. 509, 110 Am. St. Rep. 361, 3 A. & E. Ann. Cas. 450, and notes (94 Minn. 269, 102 N. W. 709); *Illinois C. R. Co. v. Siler*, 229 Ill. 390, 15 L.R.A. (N.S.) 819, 82 N. E. 362, 11 A. & E. Ann. Cas. 368. Even in this class of cases the negligence of the defendant must, by uninterrupted sequence, contribute proximately to the loss. *Norris v. Savannah, F. & W. R. Co.* 23 Fla. 182, 11 Am. St. Rep. 355, 1 So. 475; *Lightfoot v. St. Louis & S. F. R. Co.* 126 Mo. App. 532, 104 S. W. 482; *Fentiman v. Atchison, T. & S. F. R. Co.* 44 Tex. Civ. App. 455, 98 S. W. 939. Nor did the defendant's negligence contribute to the loss conjointly with another cause as in the cases of *Moore v. Lanier*, 52 Fla. 353, 42 So. 462; *Janes v. Tampa*, 52 Fla. 292, 120 Am. St. Rep. 203, 42 So. 729, 11 A. & E. Ann. Cas. 510; *Illinois C. R. Co. v. Siler*, supra. This is not a case of malice or wilful action as in *Chipley v. Atkinson*, 23 Fla. 206, 11 Am. St. Rep. 367, text 376, 1 So. 934; *Western U. Teleg. Co. v. Wells*, supra. Or of personal injury, as in *Jacksonville Electric Co. v. Batchis*, supra. Nor does the message in this case convey to the telegraph company information of its special importance, as did the message and the attending circumstances in *Western U. Teleg. Co. v. Merritt*, supra. There is here

no direct offer of special employment, as in *Fairley v. Western U. Teleg. Co.* 73 Miss. 6, 18 So. 796, and *Western U. Teleg. Co. v. McLaurin*, 70 Miss. 26, 13 So. 36.

The intervening act of refusing to take the brick was not a mere natural condition that should reasonably have been contemplated, as in *Benedict Pineapple Co. v. Atlantic Coast Line R. Co.* supra. Nor was such refusal to take the brick an irresponsible and natural circumstance succeeding a tort, as in *Lowery v. Manhattan R. Co.* 90 N. Y. 158, 52 Am. Rep. 12, 1 N. E. 608; *Isham v. Dow*, supra; *Griggs v. Fleckenstein*, 14 Minn. 81, Gil. 62, 100 Am. Dec. 199. The principle announced in the case of *American Process Co. v. Florida White Pressed Brick Co.* 56 Fla. 116, 47 So. 942, 16 A. & E. Ann. Cas. 1054, that "where one of two innocent parties must suffer through the act or negligence of a third person, the loss should fall upon the one who by his conduct created the circumstances which enabled the third party to perpetrate the wrong or cause the loss," is not applicable here, because the negligence of the defendant here did not enable the sender of the telegram to refuse to take the brick; but such refusal appears from the declaration to have been within the hardware company's rights, independent of the defendant, and the refusal required the independent and voluntary act of a human mind. See *Vicars v. Wilcocks*, 8 East, 1; *Walser v. Western U. Teleg. Co.* 114 N. C. 440, 19 S. E. 366; *Merrill v. Western U. Teleg. Co.* 78 Me. 97, 2 Atl. 847. See also *Western U. Tel. Co. v. Schriver*, 4 L.R.A. (N.S.) 678, and note (72 C. C. A. 596, 141 Fed. 538).

A telegraph company, like every natural person and corporate entity, should be required to properly perform all legal duties and to meet and satisfy all legal liabilities. Such a corporation is authorized to do business primarily for the public welfare, and can act only through officers and employees. It is not held to a greater degree of responsibility than should be reasonably demanded in view of the circumstances under which its duties are performed, and of the just requirements of the public welfare. A more onerous rule would probably invade constitutional rights, and prove detrimental to the public welfare in high rates or inefficient service.

One who commits a trespass or other wrongful act is, in general, liable in damages for all the consequences directly resulting from the tort, whether foreseen by the wrongdoer or not, if the wrongful act is not interrupted by the intervention of an independent procuring or efficient cause, without which intervening cause the injury or loss would not have ensued, and the

plaintiff is not at fault. But in actions for damages alleged to have been caused by the mere negligence of one engaged in performing a public service, as to which the law may imply a contract or impose a duty, the damages for which recovery may be had are such as naturally and ordinarily arise out of or flow from the negligence, or such as may reasonably be supposed to have been contemplated at the time of the negligence as a probable result of it. *Hall v. Western U. Teleg. Co.* 59 Fla. —, 27 L.R.A. (N.S. 639, 51 So. 819. If the party charged with negligence, by giving proper attention to the subject under the circumstances of the particular case, should reasonably have contemplated the injury or loss alleged as being likely to occur as a proximate result of the negligence, the law holds the negligent party liable in damages, whether such injury or loss was actually contemplated or not.

The true rule applicable to cases of this character is that, where it appears that the defendant is engaged in rendering a public service as to which there may be a duty implied by law in favor of the plaintiff, that the defendant was merely negligent in performing the duty due to the plaintiff, and that as a proximate result of such negligence, without any intervening independent efficient cause, the plaintiff actually sustained losses that would not have occurred but for the defendant's negligence, there may be a recovery, if such losses, from information conveyed to the telegraph company by the message or otherwise, should under the circumstances reasonably have been contemplated at the time by the negligent party, and the losses as alleged are not dependent upon another's will, and are not speculative, remote, contingent, or conjectural, and are capable of reasonably certain ascertainment. See *International Ocean Teleg. Co. v. Saunders*, 32 Fla. 434, 21 L.R.A. 810, 14 So. 148; *Wilson v. Western U. Teleg. Co.* 124 Ga. 131, 52 S. E. 153; *Western U. Teleg. Co. v. Milton*, 53 Fla. 484, 11 L.R.A. (N.S.) 560, 125 Am. St. Rep. 1077, 43 So. 495; *Woodbury v. Tampa Waterworks Co.* 57 Fla. 243, 21 L.R.A. (N.S.) 1034, 49 So. 556; *Paul E. Wolff Shirt Co. v. Frankenthal*, 90 Mo. App. 307, 70 S. W. 378; *Williams v. Atlantic Coast Line R. Co.* 56 Fla. 735, 24 L.R.A. (N.S.) 134, 131 Am. St. Rep. 169, 4 So. 209; *Walser v. Western U. Teleg. Co.* supra; *Jones Teleg. & Teleph. Cos.* ¶ 526; *Atchison, T. & S. F. R. Co. v. Calhoun*, 213 U. S. 1, 53 L. ed. 671, 29 Sup. Ct. Rep. 321.

Even if from the words of the message the telegraph company should reasonably have contemplated that negligence in delivering the message would proximately and probably result in any loss to the persons

to whom the message was addressed, the loss should be such as grows directly out of a contract with reference to the brick between the sender and the addressees, that might reasonably have been apparent from the language of the message, and not such as may arise out of a collateral contract between the sender and a third person, even though the addressees knew of the collateral contract and that it was an inducement to the agreement between the sender and the addressees, because, even if the special damages alleged are capable of reasonably certain ascertainment, there is nothing in the message itself to impart to the telegraph company any information as to a collateral contract upon which the telegraph company should reasonably have contemplated that the special loss as alleged would probably result to the addressees if the message be not properly delivered. No knowledge of the defendant, except that given by the message, is alleged.

If the message did reasonably indicate to the telegraph company any urgent need for brick, it did not make a definite offer for brick, and it did not indicate to the telegraph company that the sender and addressees had an understanding that the brick were wanted for any special purpose, or that the sender would incur demurrage liabilities, or would terminate a contract for brick, if there was further delay in delivering the brick.

Even if the negligence of the defendant was the procuring cause of the refusal of the sender of the message to take the brick, and was consequently a proximately contributing efficient cause of the loss, the special damages as alleged and stricken do not naturally and ordinarily follow the negligence alleged, and, under the circumstances stated, could not reasonably be supposed to have been contemplated by the defendant at the time of the negligence, since the message imparted to the defendant no information as to the collateral contract for the special use of the brick, and no other knowledge thereof by the defendant is alleged.

It is alleged that under the contract the hardware company agreed to buy from the plaintiff "brick at the rate of four cars per week beginning June 1, 1906, until notified to stop." The immediate cause of the loss alleged was the refusal of the hardware company on June 6, 1906, to take the brick. This refusal was the exercise of a right not in any way dependent on the defendant or its negligence.

The defendant's negligence in failing to promptly deliver the telegram may have exerted some influence in the decision of the hardware company, a third party, to refuse to take the brick, yet the negligence of the

defendant was not necessarily the procuring cause of the refusal to take the brick, even though it may have been an incentive, and advantage may have been taken of such negligence to voluntarily refuse to take the brick, which refusal directly caused the loss.

Special damages should be predicated upon the direct or proximate consequences of the negligence alleged, and not upon any occurrence, circumstance, or act merely attending or succeeding the negligence, and requiring additional or independent agencies to cause the damage. See *Whatley v. Murrell*, 1 Strobl. L. 389; *Aetna L. Ins. Co. v. Boon*, 95 U. S. 117, text 130, 24 L. ed. 395, 398.

Whether the refusal of the hardware company to take the brick was within its rights or not, it was a voluntary act of a responsible party wholly independent of the defendant. The refusal was the voluntary independent exercise of a legal right, and was not a mere condition or circumstance that should have been contemplated by the defendant as likely to occur. The refusal of the hardware company to take the brick, and not the negligence of the defendant, was the proximate cause of the special damages alleged; such refusal being an independent efficient cause intervening between the negligence of the defendant and the loss of the plaintiff as alleged, and directly causing the loss, and it not appearing with reasonable certainty that, but for the negligence, the loss as alleged would not have occurred.

The negligence of the defendant did not directly cause the loss; it did not put into operation a controlling force or dangerous agency; it was not a procuring cause, or a directly contributing or concurrent efficient cause, of the loss; it did not make it possible for a natural condition or ordinary circumstance to directly cause the loss; it was not such negligence as that without it the subsequent refusal of the hardware company to take the brick would not have caused the loss; but the negligence of the defendant merely preceded, and may have influenced or prompted, but could not have put into operation, or could not have controlled or directed, the independent voluntary refusal of the hardware company to take the brick, which refusal was the sole immediate efficient cause of the loss. Consequently it does not appear that the defendant's negligence was the proximate cause of the loss, or that but for such negligence the loss would not have occurred. See *Wilson v. Western U. Teleg. Co.* supra.

Remote, speculative, or contingent damages cannot in general be recovered, nor in general can recovery be had for such losses as may have been prevented if the injured party had exercised reasonable diligence. 29 L.R.A. (N.S.)

Consequential damages that may be recovered in cases of this character should be that reasonably should have been contemplated, and must be capable of ascertainment and computation with reasonable certainty. *Jones, Teleg. & Teleph. Cos.* ¶¶ 191, 320, 524, 526, 530, 547, 560, 563, et seq.; *Williams v. Atlantic Coast Line R. Co. and Western U. Teleg. Co. v. Milton*, supra; *Walser v. Western U. Teleg. Co.* 114 N. C. 440, 19 S. E. 366; 27 Am. & Eng. Enc. Law, 2d ed. p. 1060; *Kagy v. Western U. Teleg. Co.* 117 Am. St. Rep. 278 and exhaustive note (37 Ind. App. 73, 76 N. E. 792). See also *Moses v. Autuono*, 56 Fla. 499, 20 L.R.A. (N.S.) 350, 47 So. 925; *Savannah, F. & W. R. Co. v. Willett*, 43 Fla. 311, 31 So. 246; *Sweet v. Western U. Teleg. Co.* 139 Mich. 322, 102 N. W. 850, 5 A. & E. Ann. Cas. 730.

Profits expected to be made are too remote and contingent to be recovered when the rights under the contract may be defeated by another's will. See *Jones, Teleg. & Teleph. Cos.* ¶ 526.

The message itself indicated that the addressee had already delayed longer than the sender had anticipated under the contract, and, upon the allegations of the declaration, the sender could have at any time, voluntarily and independent of the defendant, terminated the contract with the addressee for that or any other reason, or for no reason, thereby making the profits claimed to have been lost, if not remote, conjectural, or speculative, at least contingent upon the voluntary independent will of the sender of the telegram, and consequently not capable of reasonably certain proof. See *Western U. Teleg. Co. v. Barlow*, 51 Fla. 351, 4 L.R.A. (N.S.) 262, 40 So. 491; *Williams v. Atlantic Coast Line R. Co.* 56 Fla. 735, 24 L.R.A. (N.S.) 134, 131 Am. St. Rep. 169, 4 So. 209; *Merrill v. Western U. Teleg. Co.* 78 Me. 97, 2 Atl. 847; *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 455, 35 L.R.A. 548; *Walser v. Western U. Teleg. Co.* supra; *Western U. Teleg. Co. v. Lehman*, 106 Md. 318, 67 Atl. 241, 14 A. & E. Ann. Cas. 736.

In view of the apparent absolute right of the hardware company to arbitrarily refuse to take brick at any time, and of the plaintiff's apparent delay in forwarding the first instalment under the contract, as shown by the allegations of the declaration and the telegram itself, the allegation that but for the negligence of the defendant the hardware company would not have refused to take the brick does not appear to be capable of reasonably certain proof.

There was no legal obligation to take the brick, and neither the interest nor the intention of the purchaser is a certain guide in determining the loss of contemplated

profits. The telegram did not indicate a desire for or an intention to take any particular number of brick, and it was not an offer that would have been binding if accepted.

The interest or intention of the purchaser to take the brick, made essential in this case, is contingent and conjectural, dependent upon the arbitrary or independent will of the purchaser, and should not be accepted as a reasonably certain essential factor determining liability for loss of contemplated profits.

If the special damages that were alleged and striken were proximately caused by the negligence of the defendant, and should have been contemplated as a natural and probable result of the negligence, it appears that such special damages, if not speculative, conjectural, or remote, were contingent upon the exercise at any time of the arbitrary will of the sender of the telegram within its rights, wholly independent of the defendant's negligence, and consequently such damages are not capable of any degree of certain ascertainment, and cannot be recovered in this action.

As the defendant is not shown to be liable for the special damages alleged, the question does not arise as to whether, in case of liability, the allegations relative to the measure of damages would properly have been subject to a motion for compulsory amendment, rather than to a motion to strike. See *Williams v. Atlantic Coast Line R. Co.* supra.

The special damages as alleged were not recoverable in this action; and, as they were calculated to embarrass a fair trial of the action, no error was committed in striking from the declaration the allegations as to such special damages. See § 1433, Gen. Stat. 1906; *Hildreth v. Western U. Teleg. Co.* 56 Fla. 387, 47 So. 820.

The principal cases relied on by plaintiff in error involve direct offers for special services, or propositions relating to property of special value, binding on the sender of the message, where losses could be ascertained with reasonable certainty, or are cases where the negligence was an efficient cause of the loss, which is not the case here. See also *Barker v. Western U. Teleg. Co.* 134 Wis. 147, 14 L.R.A. (N.S.) 533, 126 Am. St. Rep. 1017, 114 N. W. 439, where a statute influenced the decision.

As no point is presented for determination, except the propriety of striking the portions of the declaration relating to the special damages, and as the judgment is for merely nominal damages for the admitted breach of duty in not promptly delivering the message, no other questions need be discussed here.

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MAINE SUPREME JUDICIAL COURT.

JOSEPH C. TREMBLAY

v.

OTIS W. KIMBALL

(—Me. —, 77 Atl. 405.)

Druggist — duty — care required.

1. The ordinary care which a druggist is bound to exercise in the filling of prescriptions is the highest possible degree of prudence, thoughtfulness, and diligence, and the employment of the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not be exposed to the danger following from the substitution of deadly poisons for harmless medicines.

Same — filling prescription — negligence.

2. A druggist may be found to have been wanting in the exercise of due care in filling a prescription from an opened bottle of tablets bearing the manufacturer's label, where two similar bottles containing tablets stand side by side, but the tablets in the two are strikingly different in appearance, and those from which he fills the prescription have an extraordinary, if not unprecedented, color for that kind of tablets.

(September 1, 1910.)

Note. — Duty of druggist or apothecary in the sale or compounding of drugs or medicines.

There is no conflict of authority as to the duty required of a druggist in his dealings with his customers. All the decisions support the principle enunciated in *TREMBLAY v. KIMBALL*, that while the law requires of a druggist only reasonable and ordinary care in compounding prescriptions, in selling medicines, and in performing the other duties of his profession, such care with reference to him means the highest degree of prudence, thoughtfulness, and diligence, and is proportioned to the danger involved; and that a breach of such duty would be negligence rendering him liable for injuries resulting therefrom.

Thus, in *Peters v. Johnson* (*Peters v. Jackson*) 50 W. Va. 644, 57 L.R.A. 423, 88 Am. St. Rep. 909, 41 S. E. 190, it was held that apothecaries and druggists, and persons engaged in manufacturing, compounding, or selling drugs, poisons, or medicines, were required to be extraordinarily skilful, and to use the highest degree of care known to practical men, to prevent injury from the use of such articles.

And in *Smith v. Middleton*, 112 Ky. 555, 56 L.R.A. 484, 99 Am. St. Rep. 308, 11 S. W. 388, it was declared that it was incumbent upon a druggist to exercise the high degree of caution and care called for by the peculiarly dangerous nature of his business, in other words, that, in a business so hazardous, having to do so directly and

MOTION by defendant for a new trial after verdict for plaintiff on a trial before the Supreme Judicial Court for Androscoggin County of an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence. Overruled.

The facts are stated in the opinion.

Messrs. Newell & Skelton for defendant.

Mr. B. Emery Pratt for plaintiff.

Whitehouse, J., delivered the opinion of the court:

The plaintiff recovered a verdict of \$1,400 for an alleged failure of duty on the part of the defendant, who was a registered apothecary employed by the Hamel Brothers in their drug store at Livermore Falls,

frequently with the health and lives of so great a number of people, the highest degree of care and prudence for the safety of customers was required.

And in *Walton v. Booth*, 34 La. Ann. 913, it was held that in the discharge of their functions, druggists and apothecaries should be required not only to be skilful, but also exceedingly cautious and prudent, in view of the terrific consequences that might attend the least inattention on their part. To quote from the opinion: "All persons who deal with deadly poisons are held to a strict accountability for their use. The highest degree of care known among practical men must be used to prevent injury from the use of such poisons. A druggist is undoubtedly held to a special degree of responsibility for the erroneous use of poisons, corresponding with his superior knowledge of the business."

And in *Beckwith v. Oatman*, 43 Hun, 265, it was held that in filling a prescription a druggist must possess the ordinary skill of a druggist or apothecary, and exercise due and proper care and skill, and that the degree of care required of him must be proportioned to the gravity of the injury that would naturally result from want of care.

And in *Kerr v. Clason*, 2 Ohio Dec. Reprint, 666, it was held that druggists having the custody and preparation of explosive and dangerous fluids and chemical compounds should, in their mixture and use, employ not merely ordinary, but the utmost, care and caution to avoid injury to life or limb, that is, the care usual with very prudent druggists; that "this care should be such as would be exercised by the most prudent and cautious of those having a competent knowledge to enable them to judge when danger may be likely to arise, at least, that usual, ordinary, or reasonable skill generally possessed by well educated druggists, not, indeed, the highest learning and skill, which can only be attained by few men of rare genius, endowments, or opportunities, for this would be impracticable; but that usually possessed by those esteemed competent in their business."

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and in that capacity filled a physician's prescription for the plaintiff calling for chlorodyne tablets by substituting corrosive sublimate tablets containing about 7.3 grains of bichloride of mercury and 7.3 of muriate of ammonia. One grain of this mixture was sufficient to cause death. Neither of the Hamel brothers was a registered apothecary or pharmacist, and the sole responsibility of compounding medicines and filling prescriptions was imposed upon the defendant. It is not in controversy that the plaintiff presented to the defendant a prescription from a regular physician calling for chlorodyne tablets, and that, instead of this harmless medicine, the defendant delivered to the plaintiff the corrosive sublimate tablets, the deadly poi-

Hence, it would be a breach of this duty rendering him liable in damages, for a druggist so negligently to fill a prescription as to cause injury to the purchaser. *Faulkner v. Birch*, 120 Ill. App. 281; *Burgess v. Sims Drug Co.* 114 Iowa, 275, 54 L.R.A. 364, 89 Am. St. Rep. 359, 86 N. W. 307; *Fleet v. Hollenkemp*, 13 B. Mon. 219, 56 Am. Dec. 563; *McCubbin v. Hastings*, 27 La. Ann. 713; *Beckwith v. Oatman*, supra; *Stretton v. Holmes*, 19 Ont. Rep. 286.

On the other hand, if a druggist in good faith recommends a prescription not as his own, but as that of another named person, whereupon his customer orders him to fill it, which he does, charging only for the medicine and the compounding thereof, he cannot be held responsible to the customer for any damage resulting from the use or administration of the remedy by the latter. *Ray v. Burbank*, 61 Ga. 505, 34 Am. Rep. 103.

And in *Laturen v. Bolton Drug Co.* 16 N. Y. Anno. Cas. 267, 93 N. Y. Supp. 1035, in which it appeared that a prescription calling for "Elixir Pinus Comp. cum heroin-ounces 4" was given to a druggist who did not have the compound, but had "Elixir Pinus Compositus" and a bottle of heroin, and on consulting a pamphlet issued by the maker of the heroin and the Elixir Pinus Compositus, he found that such manufacturer also put up a compound known as "Elixir Pinus Compositus with heroin," and the formula in the pamphlet showed that the proportion of heroin in the Elixir Pinus Compositus with heroin was $\frac{1}{4}$ of a grain per dram, whereupon, in filling the prescription, he added $\frac{1}{4}$ of a grain of heroin to each dram of Elixir Pinus Compositus, it was held that the pharmacist was not negligent in so compounding the prescription.

It would also be a breach of the duty required by law of a druggist negligently to sell to a customer a poison or other dangerous drug in the place of a harmless medicine. *Smith v. Hays*, 23 Ill. App. 244; *Howes v. Rose*, 13 Ind. App. 674, 55 Am. St. Rep. 251, 42 N. E. 303; *Knoefel v. Atkins*, 40 Ind. App. 428, 81 N. E. 600; *Hansford v. Payne*, 11 Bush, 380; *Sutton v.*

son above described. According to the directions accompanying the prescription, the plaintiff immediately took one tablet, and thereby suffered the injuries of which he complains; his life being saved only by the prompt administration of appropriate remedies. The physician states that the plaintiff is now suffering from a stricture of the pylorus or lower part of the stomach, and that in his opinion he will never be able to perform any hard work in the future. It is alleged in the plaintiff's declaration that in filling this prescription the defendant performed his duty as an apothecary carelessly, unskilfully, and negligently. On the other hand, it is contended by the defendant that the mistake was made by one of the Hamel brothers in having two bottles side by side marked chlorodyne tablets, one of which, however, contained the poisonous tablets in question, and that those tablets so closely resembled each other that it was not negligence on the part of the defendant to fill the prescription as he did. The jury returned a verdict for the plaintiff as above stated, and the case comes to the law court on a motion to set aside this verdict as against the evidence.

The rules of law governing this class of cases are closely analogous to those appli-

cable to physicians and surgeons. A registered apothecary, or any person who undertakes to act in the capacity of a qualified druggist in preparing medicines and filling physicians' prescriptions, is required by law, in the first place, to possess a reasonable and ordinary degree of knowledge and skill with respect to the pharmaceutical duties which he professes to be competent to perform. He is not required to possess the highest degree of knowledge and skill to which the art and science may have attained. He is not required to have skill and experience equal to the most eminent in his profession. He is only required to have that reasonable degree of learning and skill which is ordinarily possessed by other druggists in good standing as to qualifications in similar communities.

In the second place, the law imposes upon the druggist the obligation to exercise a reasonable and ordinary care and prudence in applying his knowledge and skill in compounding medicine, filling prescriptions, and performing all of the other duties of an apothecary. He is not bound to use extraordinary care and prudence, or a greater degree of care than is ordinarily exercised by other qualified druggists. Ordinary skill is the test of qualifications, and ordi-

Wood, 120 Ky. 23, 85 S. W. 201, 8 A. & E. Ann. Cas. 894; Walton v. Booth, 34 La. Ann. 913; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Brown v. Marshall, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392; Quin v. Moore, 15 N. Y. 432; Minner v. Scherpich, 5 N. Y. S. R. 851; Davis v. Guarnieri, 45 Ohio St. 470, 2 Am. St. Rep. 548, 15 N. E. 350; Brunswick v. White, 70 Tex. 504, 8 S. W. 85; Hargrave v. Vaughn, 82 Tex. 347, 18 S. W. 695; Peters v. Johnson, supra; Kennedy v. Plank, 120 Wis. 197, 97 N. W. 895.

Upon the same principle, it was held in Horst v. Walter, 53 Misc. 591, 103 N. Y. Supp. 750, to be negligence for a druggist to give to one asking for something to wash out a wound, a solution of carbolic acid so strong as to burn the flesh and turn it black.

And in Goldberg v. Hegeman & Co. 60 Misc. 107, 111 N. Y. Supp. 679, it was held to be negligence for a druggist to give a customer asking for corrosive sublimate to apply to his body, a solution so strong as to cause severe injury when so applied.

So, the manufacturer of a medicine for a particular purpose would be liable to a purchaser thereof for unskilfulness and negligence in the manufacture of it, whereby the customer was injured. Blood Balm Co. v. Cooper, 83 Ga. 457, 5 L.R.A. 612, 20 Am. St. Rep. 324, 10 S. E. 118; George v. Skivington, L. R. 5 Exch. 1.

And a druggist selling poison without labeling the same, as required by law, will be liable for injury to one who uses the 29 L.R.A. (N.S.)

same in ignorance of its deadly qualities. Sutton v. Wood, 120 Ky. 23, 85 S. W. 201, 8 A. & E. Ann. Cas. 894; Osborne v. McMasters, 40 Minn. 103, 12 Am. St. Rep. 698, 41 N. W. 543; Fisher v. Golladay, 35 Mo. App. 531.

Thus, in Smith v. Middleton, 112 Ky. 588, 56 L.R.A. 484, 99 Am. St. Rep. 303, 66 S. W. 388, it was held to be gross negligence of an aggravated form for a druggist to fill an order for calomel tablets, with morphine, and place them in a box labeled calomel without giving notice of the fact.

And where a druggist labels a poison with the name of a harmless drug, he will be liable for injury resulting to one using it for such harmless drug. Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455.

So, in Peterson v. Westman, 103 Mo. App. 672, 77 S. W. 1015, it was held to be negligence for a druggist, when furnished an empty bottle labeled "carbolic acid," and ordered to fill it with arnica, to fill it with carbolic acid instead, without attaching a new label, making him liable for injuries received by one using the acid thinking it arnica.

But in Wohlfahrt v. Beckert, 92 N. Y. 490, 44 Am. Rep. 406, affirming 27 Hun. 74, it was held that the omission by a druggist to label a substance "poison," as required by statute, would not make him liable for the death of or injury to a customer by taking an overdose thereof, if he fairly warned the purchaser of the character of the medicine, and gave accurate information and directions as to the

may care is the test of the application of it.

Finally, in applying his knowledge and exercising care and diligence, the druggist is bound to give his patrons the benefit of his best judgment; for even in pharmacy there is a class of cases in which judgment and discretion must or may be exercised. The druggist is not necessarily responsible for the results of an error of judgment which is reconcilable and consistent with the exercise of ordinary skill and care. He does not absolutely guarantee that no error shall ever be committed in the discharge of his duties. It is conceivable that there might be an error or mistake on the part of a qualified druggist which would not be held actionable negligence. *Patten v. Wiggins*, 51 Me. 596, 81 Am. Dec. 593; *Leighton v. Sargent*, 27 N. H. 460, 59 Am. Dec. 388; *Small v. Howard*, 128 Mass. 131, 35 Am. Rep. 363. As to druggists, see *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455; *Norton v. Sewall*, 106 Mass. 143, 8 Am. Rep. 298; *McDonald v. Snelling*, 14 Allen, 290, 92 Am. Dec. 768; *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392.

But while, as has been seen, the legal measure of the duty of druggists towards

their patrons, as in all other relations of life, is properly expressed by the phrase "ordinary care," yet it must not be forgotten that it is "ordinary care" with reference to that special and peculiar business. In determining what degree of prudence, vigilance, and thoughtfulness will fill the requirements of "ordinary care" in compounding medicines and filling prescriptions, it is necessary to consider the poisonous character of so many of the drugs with which the apothecary deals, and the grave and fatal consequence which may follow the want of due care. In such a case "ordinary care" calls for a degree of vigilance and prudence commensurate with the dangers involved. The general customer ordinarily has no definite knowledge concerning the numerous medicines and poisons specified in the "United States Dispensatory and Pharmacopœia," which registered apothecaries are by our statutes expressly allowed to keep, but must rely implicitly upon the druggist, who holds himself out as one having the peculiar learning and skill, and conceptions of legal duty, necessary to a safe and proper discharge of that duty. "Ordinary care" with reference to the business of a druggist must therefore be held to signify the highest practicable degree

quantity which might be taken, and the overdose was taken in disregard of such directions.

In *Wilson v. Faxon, Williams, & Faxon*, 63 Misc. 561, 117 N. Y. Supp. 361, it was held that a druggist was guilty of negligence if, without investigation, he sold a box of tablets put up by a manufacturer for a harmless vegetable remedy, but which in fact contained calomel.

On the other hand, in *West v. Emanuel*, 198 Pa. 180, 53 L.R.A. 329, 47 Atl. 965, it was held that a druggist was not guilty of negligence in selling to customers proprietary medicines in the package and under the label of the proprietor or the patentee, without making an analysis of the contents.

In *Kerr v. Clason*, 2 Ohio Dec. Reprint, 666, it was held that a druggist would be liable for injuries caused to a customer in his store, resulting from an explosion of stuff he was mixing, due to his negligent handling thereof.

In *Gibson v. Torbert*, 115 Iowa, 163, 56 L.R.A. 98, 91 Am. St. Rep. 147, 88 N. W. 443, it was held that no liability attached to a druggist for injuries to a customer for lack of instruction as to the safe manner of handling an article, such as phosphorus, called for by him and sold to him, where he had reached the age of discretion, and was apparently in possession of his mental faculties, and there was nothing connected with the transaction, or previously known to the seller, indicating that the would-be purchaser could not safely be intrusted with the substance.

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In *Gwynn v. Duffield*, 61 Iowa, 64, 47 Am. Rep. 802, 15 N. W. 594, on subsequent appeal, 66 Iowa, 708, 55 Am. Rep. 286, 24 N. W. 523, recovery was refused against a druggist, where it appeared that the plaintiff ordered extract of dandelion, and in response thereto the defendant started to wrap up extract of belladonna, a poison, and while so doing the plaintiff went to the jar from which the druggist took the same, thinking it dandelion, and, helping himself to a portion thereof, asked the defendant if what he was taking was a proper dose, and, upon being told that it was a proper dose, swallowed it, and was thereby injured.

In *Keating v. Hull*, 78 Conn. 719, 62 Atl. 661, it appeared that the trial court found the defendant, a druggist, guilty of negligence in leaving poison ordered by another customer unlabeled where the plaintiff might take it by mistake for her parcel of a harmless drug; but, as the court also found the latter negligent in so taking it, and awarded her only nominal damages, and she appealed from the judgment, the supreme court was not called upon to question the finding as to the defendant's negligence.

As to liability of druggist for injury to stranger from drug or poison sold by him, see note to *McKibbin v. Bax*, 13 L.R.A. (N. S.) 646.

As to liability of manufacturer or vendor, generally, to persons not in privity of contract with him, for injury from defects in articles sold, see note to *Tomlinson v. Armour & Co.* 19 L.R.A. (N.S.) 923. J. A. C.

of prudence, thoughtfulness, and vigilance, and the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not constantly be exposed to the danger flowing from the substitution of deadly poisons for harmless medicine. As observed by Judge Cooley in *Brown v. Marshall*, 47 Mich. 576, 41 Am. Rep. 728, 11 N. W. 392: "The case, it must be conceded, is one in which a very high degree of care may justly be required. People trust not merely their health, but their lives, to the knowledge, care, and prudence of druggists, and in many cases a slight want of care is liable to prove fatal to someone. It is therefore proper and reasonable that the care required shall be proportioned to the danger involved." *Maxfield v. Maine C. R. Co.* 100 Me. 80, 60 Atl. 710, and cases cited. *Raymond v. Portland R. Co.* 100 Me. 531, 3 L.R.A.(N.S.) 94, 62 Atl. 602.

In the case at bar no question appears to have been raised in regard to the skill and experience of the defendant as a registered apothecary, and it was incumbent upon the plaintiff to prove that, in delivering to him corrosive sublimate instead of the chlorodyne tablets called for in the prescription, the defendant failed to exercise the high degree of care and prudence required of him under the rules above stated.

When the physician who prescribed the chlorodyne tablets for the plaintiff returned to the defendant the poisonous tablets of corrosive sublimate, and informed him that "there must be a mistake," the defendant freely admitted that there had been a mistake, but claimed that, at the time of the removal of Hamel Brothers from Chisholm to Livermore Falls, one of the firm had, by mistake, put these large white tablets into a bottle having upon it the manufacturer's label "chlorodyne tablets." The defendant testifies that Hamel stated to him that he "put those tablets in there," and when the stock was removed from the other store, "the tablets got mixed, or that bottle was mixed, in with the others, and that was the explanation." It is also contended in the argument for the defendant that not only were those two bottles alike that were labeled "chlorodyne tablets," but that the tablets in the two bottles were alike in color, size, and shape.

But the evidence fails to support the contention that the tablets in both bottles had the same appearance. On the contrary, the physician distinctly states in his testimony that the tablets in the two bottles shown him by the defendant were wholly and strikingly different in both color and size, that in one were large white tablets,

"marked 'poison' in big letters on the tablets," and in the other were the "real chlorodyne tablets," small and very dark green in color, and having the same appearance as the small dark tablets exhibited in evidence to the court. The defendant denies that the word "poison" was stamped on the white tablets, but admits that the genuine chlorodyne tablets with which he filled the plaintiff's prescription after the discovery of the mistake were taken from the other one of the two bottles on the shelf labeled "chlorodyne tablets," and that those tablets "looked like" the two small dark green ones in evidence. He further states that the bottle from which the white poisonous tablets were taken disappeared without his knowledge. There is evidence that chlorodyne tablets are of different colors, but no evidence of white ones. The physician states that he never saw any white ones. There is conflict of testimony, as already stated, upon the question whether the word "poison" was stamped on the white tablets delivered to the plaintiff by the defendant. One of these tablets exhibited in court has been so discolored and worn by handling that no letters can now be distinguished even with the aid of a magnifying glass.

Although the two bottles of tablets in question both had the manufacturer's label upon them, it must be remembered that the tablets were not sold in unopened bottles as original packages, but were taken out of a large quantity in a bottle that had been opened, and thus the defendant had full opportunity to inspect and examine the tablets. It is inconceivable that, if he had given thoughtful attention to the matter, he could have failed to note the striking difference in the appearance of the tablets in the two bottles bearing the same label, and the extraordinary, if not unprecedented, fact that in one of them the supposed chlorodyne tablets were white. Yet, so far as appears, no special examination or effort was made to determine the real character of the white tablets, but, apparently without question or hesitation, they were delivered to the plaintiff as harmless medicine. The explanation of the mistake was evidently unsatisfactory to the jury.

It is the opinion of the court that there was sufficient evidence to support the conclusion manifestly reached by the jury that, although the defendant may have been a skillful and competent druggist, he unfortunately omitted on the occasion in question to exercise such care and prudence, and to take such reasonable precautions, as the safety of his customer and the measure of his own legal duty required.

Motion for new trial overruled.

MARYLAND COURT OF APPEALS.

HENSON MATTHEWS, Appt,
v.
MATILDA MATTHEWS.

(112 Md. 582, 77 Atl. 249.)

Courts — notice of proceedings — former divorce action.

A court cannot, in a second proceeding before it for divorce, base its denial of relief upon facts proved at the first hearing.

Note. — Judicial notice of the court's own record in other actions.

This subject is covered by the note to *Murphy v. Citizens' Bank*, 11 L.R.A. (N.S.) 616.

The general rule there stated, that a court will not take judicial notice, in deciding one case, of what may appear from its own record in another and distinct case, is sustained by later cases: *State ex rel. Armour Packing Co. v. Dickmann* (Mo. App.) 124 S. W. 29 (refusing on appeal in sheriff's bond for false return to take judicial notice of relator's appearance in original action, even upon the assumption that that fact appeared from the record on appeal in the original action); *Ollschlager's Estate*, 50 Or. 55, 89 Pac. 1049 (denying right, in proceeding to settle administrator's account, to take judicial notice of record in guardianship proceedings before the same court, finding that the objectors were not heirs and had no interest in the estate, although they were parties in the guardianship proceedings); *Lownsdale v. Grays Harbor Boom Co.* 54 Wash. 542, 103 Pac. 833; *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151; *Wellman v. Hoge*, 66 W. Va. 234, 66 S. E. 357; *Pickens v. Coal River Boom & Timber Co.* 66 W. Va. 10, 24 L.R.A. (N.S.) 354, 65 S. E. 865.

The same rule is declared in *Haaren v. Mould* (Iowa) 24 L.R.A. (N.S.) 404, 122 N. W. 921, but was held not to apply to the right of a court, in contempt proceedings for violation of an injunction decree, to take judicial notice of the decree. (See on that subject, note to this case in 24 L.R.A. (N.S.) 404.)

The rule applies even when the parties to both actions are the same. *Pacific Iron & Steel Works v. Goerig* and *Lownsdale v. Grays Harbor Boom Co.* supra.

In *Wellman v. Hoge*, supra, the parties and the issues in the first suit were different from those in the second, but that was not apparently made a limitation of the decision so far as the question of judicial notice is concerned. It may be observed in this connection that the question whether the proceedings in the first action are *res judicata* of the second is distinct from the question whether the court in the second will take judicial notice of the proceedings in the first.

It is also true, of course, that what a

if the record of such hearing is not offered in evidence in the second cause.

(February 24, 1910.)

A PPEAL by plaintiff from a decree of the Circuit Court for Washington County dismissing a bill filed for divorce. Reversed.

The facts are stated in the opinion.

Mr. Joseph W. Wolfinger for appellant.

Mr. Scott M. Wolfinger for appellee.

trial court cannot judicially notice the appellate court cannot notice when sitting in review. *Pacific Iron & Steel Works v. Goerig* and *Lownsdale v. Grays Harbor Boom Co.* supra.

In *Danforth v. Egan*, 23 S. D. 43, 119 N. W. 1021, however, upon appeal in a contest over the election of the state's attorney, the supreme court said it would take judicial notice of the judgment of that court in a former proceeding disbarring the appellant as an attorney,—especially as it was referred to in the case at bar.

In *Bank of Eau Claire v. Reed*, 232 Ill. 238, 122 Am. St. Rep. 66, 83 N. E. 820; *Reed v. Waterbury Nat. Bank*, 135 Ill. App. 105 (affirmed in 231 Ill. 246, 83 N. E. 188), the court declares generally that it knows its own records and will take judicial notice of them, but the decisions in these cases on this point were merely to the effect that the court will take judicial notice of the record of a judgment, in a proceeding under a writ of scire facias to revive the judgment; and, as stated in the latter case, scire facias is a continuation of the same suit. These cases, therefore, are not strictly within the scope of the notes.

A similar declaration is made in *People v. Ackermann*, 146 Ill. App. 301, holding that in an action on a bond on appeal from a justice of the peace to the supreme court, the latter court may take judicial notice of the bond when a transcript of the same under the hand of its own clerk is laid before it. This also seems to be a case of a subsequent proceeding in the same action, and thus outside the scope of the notes.

The rule which precludes a court from taking judicial notice of its own records in other actions does not, of course, prevent it from taking judicial notice of the doctrine or the rule of law adopted by the court in the first action, and applying that under the principle *stare decisis* in the second action, if the same question of law is presented. This distinction is expressly recognized in *Pickens v. Coal River Boom & Timber Co.* supra, the court holding that the rule of law laid down in the first action governed the second under the principle *stare decisis*, notwithstanding that the court could not have taken judicial notice of its record in the former action as a basis for applying the principle *res judicata*.

G. H. P.

Briscoe, J., delivered the opinion of the court:

The bill in this case was filed on the 5th day of December, 1908, in the circuit court for Washington county, by the appellant against the appellee, to procure a divorce *a vinculo matrimonii*, on the ground of abandonment and desertion, under article 16, § 36, of the Code of Public General Laws. The appellant and appellee were married on the 16th day of August, 1893, and lived together as husband and wife, in Hagerstown, Maryland, until some time in February, 1905. It is charged by the bill and admitted by the answer that they had lived apart for over three years. The bill was filed on the 5th day of December, 1908, is in proper form, and contains the usual and necessary averments in bills for divorce for abandonment and desertion, under the statute. If the averments of the bill are sustained by the proof, the plaintiff is undoubtedly entitled to the relief sought by this suit.

The statute (article 16, § 36, Pub. Gen. Laws) provides the cause or the grounds upon which the courts in this state may decree a divorce *a vinculo matrimonii*, and one of the causes is provided as follows: "When the court shall be satisfied by competent testimony that the party complained against has abandoned the party complaining, and that such abandonment has continued uninterruptedly for at least three years, and is deliberate and final and the separation of the parties beyond any reasonable expectation of reconciliation." This statute has frequently been before this court for interpretation, and the rules by which this and similar cases are to be controlled have been fully considered and stated by this court. In *Gill v. Gill*, 93 Md. 654, 49 Atl. 558, this court reaffirmed the rule laid down in *Lynch v. Lynch*, 33 Md. 328, to the effect that abandonment, to constitute ground for a final divorce, must be the deliberate act of the party complained of, done with the intent that the marriage relation should no longer exist, and we there said: "And this is in full accord with the best-considered cases elsewhere." *Lynch v. Lynch* and *Gill v. Gill*, supra; *Gregory v. Pierce*, 4 Met. 479; *Bennett v. Bennett*, 43 Conn. 313. Mr. Bishop, in his work on Marriage, Divorce, & Separation (vol. 1, §§ 1662 and 1672), says: Desertion as a matrimonial offense is the voluntary separation of one of the married parties from the other, or the voluntary refusal to renew a suspended cohabitation, without justification either in the consent or the wrongful conduct of the other. In all cases the criterion is the intent to abandon. And in 9 Am. & Eng. Enc. Law, 2d ed. p. 29 L.R.A. (N.S.)

764, it is said: "Desertion is the wilful termination of the marriage relation by one of the married parties without lawful or reasonable cause, or a refusal without reasonable cause to renew the marriage relation after the parties have been separated."

In the case now under consideration, the evidence is clear and undisputed as to the continuance and uninterrupted separation of the parties for the statutory period of three years, and that the abandonment of the husband by the wife, at the time of desertion, was deliberate and final. The sole question for us to consider, on this record, and one of the requirements of the statute that the plaintiff must meet, is whether this conceded separation of the parties for over three years is beyond any reasonable expectation of reconciliation. And this brings us to a consideration of the pleadings and proof set out in the record.

The bill, after alleging the marriage on the 16th day of August, 1893, in Hagerstown, Maryland, where both of the parties resided, and where they lived until their separation, and that no children have been born of the marriage, and that the plaintiff provided a home for the defendant, was always a faithful and loyal husband to her, giving her no cause or reason to leave his home, alleges in the third paragraph of the bill that on the 14th day of February, 1905, the defendant abandoned and deserted him, without any cause whatever; that the abandonment is deliberate and final, and has continued for more than three years and is beyond any hope of reconciliation. And by the fourth paragraph of the bill the plaintiff avers that he has not lived nor cohabited with the defendant since she left him, and that he has always been willing to live with her and provide a home for her, as he always had done. The defendant answered this bill on the 1st of February, 1909, admitting in part its allegations, except the allegation of abandonment and that the plaintiff is entitled to a decree of divorce, but avers by the fifth paragraph of the answer that the allegations complained of in the bill filed in this cause were heretofore passed upon by a final decree of this court passed in No. — equity, in the circuit court for Washington county, Maryland, and no further cognizance ought to be had of this case. To this answer the plaintiff filed a general replication on the 10th of February, 1909, joining issue on the answer, in so far as it denied the allegations of the bill, and testimony was subsequently taken on behalf of the plaintiff, but none on behalf of the defendant. The testimony appears to have been closed and returned, at the request

of the counsel for the plaintiff and consent of the counsel for the defendant. The case was heard in the circuit court for Washington county on the pleadings and evidence, and from a decree passed on the 16th day of March, 1909, denying the relief sought by the husband and dismissing the plaintiff's bill, this appeal has been taken.

We cannot agree with the conclusion reached by the court below, on the record in this case, that the plaintiff has failed to establish a case of abandonment and desertion on the part of the wife, within the meaning and contemplation of § 36 of article 16 of the Code of Public General Laws, as to entitle him to a divorce. On the contrary, we think, the proof is sufficient and ample, not only to answer the requirements of the statute, but to warrant and justify the decree asked by the plaintiff in his bill. The uncontradicted evidence shows that the wife abandoned her husband's home more than three years ago, without any lawful and reasonable cause, and the separation has continued uninterruptedly since the day she left him to live with her sister in the same town. She has refused, without reasonable cause and without any explanation whatever, to renew the marriage relation, although requested by her husband to do so, and has repeatedly stated to others that the separation was final and that she would never return to his home. The plaintiff testified "that, since my wife left me about four years ago, I have asked her to return and live with me, but she said never again." He also testified that she had left him several times before the final separation, that he was always ready and willing to provide a comfortable home for her, and would be with her now if she had stayed; that he had provided her a good home and gave her no reason to leave "our house." The plaintiff's testimony is not only supported and corroborated by the undisputed testimony of four disinterested witnesses, but by all the circumstances surrounding the separation since and at the time of the desertion of the husband by the wife.

The witness Washington, a nephew of the defendant, testified that he knew the plaintiff and defendant; that he visited their home while they lived together as husband and wife. "I remember the occasion about four years ago when Mrs. Matthews left Mr. Matthews. I know that she has never lived with him since. Mrs. Matthews, in a conversation I had with her about three or four months ago, told me that she would never live with Mr. Matthews as long as she lived. I have also heard her tell others in my presence that she would never live with him again. Mrs. Matthews has always had a high temper.

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Mr. Henson Matthews always provided a good home for his wife, and he always tried to have everything as comfortable as a poor man could. From my acquaintance with Mrs. Matthews, I believe the separation is final. She once spoke to me about her liking to have a home, and I told her that would be all right as soon as she and Mr. Matthews got together again, and she said never as long as she lived." There was also testimony to the effect that the defendant was previously married to one John Brown, now deceased, and they lived together a while as husband and wife, but she deserted and abandoned him in the same manner as she did her present husband; that she had a "very mean and quarrelsome disposition;" that the plaintiff had always been a faithful and loyal husband and provided a comfortable home for her; but that she would not live with him nor return to his home.

In this state of the proof, without any attempt on the part of the defendant to justify or explain her conduct in abandoning her husband's home, her continued absence therefrom, although residing in the same town, and her declared intention never to return to him or to live with him again, although requested to return, we think all of the requirements of the statute are clearly and fully made out, and the plaintiff is entitled to the relief prayed.

The ground upon which the learned judge below denied the relief and dismissed the bill, as stated in his opinion, is: "That this is the second application made by the complainant for a divorce, the first being on the 2d day of March, 1908, the same being equity cause No. 6,879, and the application in this case being filed on the 5th day of December, 1908. On the 11th day of June, 1908, I filed an opinion in the first cause, and dismissed the bill of complaint." He then proceeds to deny the relief in this case, upon the ground that the request by the husband of his wife to return to his home and live with him was made subsequent to the first suit, and was not made in good faith to accomplish the object of reconciliation. He then says: "This was the first time he had made any such request of her since the separation; and in view of what he testified to in the other case, in view of the ground upon which the application in the other case was denied, and in view of the fact that just about the time he asked her to return he made application in this case,—it requires no stretch of the imagination to see that the request was not made in good faith, to accomplish the object of reconciliation, but to get rid of the difficulty in the way of his desire for a divorce." He also states: "Without

further discussion I hereby refer to the opinion filed in No. 6,879, in equity, and the views therein expressed," and rests his conclusion largely upon an alleged inconsistency between the facts in the first application, above referred to, and those of this case, as to the sincerity of the effort made by the husband to reconcile his wife.

While there is a reference to the former suit in the defendant's answer, the record in this case fails to disclose a certified copy of the testimony, the decree, the opinion of the court below, or any of the proceedings in the former case to be taken and used as evidence in this case. There was no testimony taken at all on the part of the defendant, or any exhibits filed before the examiner. The proceedings in the first case were not, therefore, properly before the court below in this case, and, not being in the record, are not before us on this appeal.

In *Anderson v. Cecil*, 86 Md. 490, 38 Atl. 1074, this court said: "This court cannot look outside the record for the facts of the case. . . . If, as contended at the argument, the complainants' right to the relief prayed for in the bill rested upon anything in those proceedings, they should have exhibited with the bill such evidence of their claim as would satisfy the court of the correctness of their contention. If the facts rest in record or depend upon written evidence, such documentary evidence of their truth as office copies, or short copies and docket entries, are required." *Myers v. Amey*, 21 Md. 306.

The fact that the proceedings referred to may be in the same court will not relieve the parties of this obligation. "A court will take notice of its own records, but cannot travel for this purpose out of the records relating to the particular case; it cannot take notice of the proceedings in another case, unless such proceedings are put in evidence." 2 *Wharton*, Ev. § 326.

In *Fisher v. Fisher*, 95 Md. 320, 93 Am. St. Rep. 334, 52 Atl. 898, it was held, if there be reason for the suspicion that important testimony has not been produced, the judge may of his own motion elicit such evidence, in any manner that the rules of his tribunal will allow. In *Fisher's Case*, supra, the judge sent for the solicitors in the case, and in open court they admitted to the court that the parties to the cause on trial were the same persons who were parties in the former case of *Fisher v. Fisher*, where a bill and a cross bill for divorce had been dismissed upon the ground that both parties were *in pari delicto*; that is, had violated their marital vows. This court, in passing upon the facts of that case, said: "It was entirely proper for the

judge to elicit, on his own motion, proof as to the identity of the parties, and it having been admitted that 'the Louisa Fisher and William L. Fisher, parties to this cause, are the same persons who were the parties to the antecedent cause,' the bill was properly dismissed."

In this case there is nothing in the record to show that the proceedings in the former case were put in evidence, and the mere reference to the proceedings in the answer is not supported by any proof whatever. It would not be sufficient, even if it was considered by the court, to establish the defense of *res judicata*, or avail the defendant, on this appeal, without disregarding the testimony on the part of the plaintiff, by four disinterested witnesses, set out in this record, as to the intention and determination of the wife to live apart from her husband, and to defeat the plaintiff's application under the facts of this case. *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375. The testimony, we think, fully supports the plaintiff's case, and entitles him to a decree *a vinculo matrimonii* as prayed by the bill.

The cases of *Twigg v. Twigg*, 107 Md. 680, 69 Atl. 517, and *Wheeler v. Wheeler*, 101 Md. 435, 61 Atl. 216, relied upon by the appellee, are entirely unlike this, and rest upon dissimilar facts.

For the reasons stated, the decree of the circuit court for Washington county, passed on the 16th day of March, 1909, will be reversed, and the cause is remanded, to the end that a decree *a vinculo matrimonii* may be passed in conformity with this opinion.

Decree reversed, and cause remanded, to the end that a decree *a vinculo matrimonii* may be passed in conformity with this opinion, with costs to the appellant above and below.

MASSACHUSETTS SUPREME JUDICIAL COURT.

ANDREW NEWELL, Trustee, etc., et al.,
v.

EUGENE J. HADLEY et al., Trustees,
etc., et al.

(206 Mass. 335, 92 N. E. 507.)

Trust — mingling funds — liability.

1. A trust fund is not liable to make good money transferred to its bank account by the common trustee from another account, to facilitate his applying it to his own use.

Note. — The doctrine applied by the majority opinion in the foregoing case, that a representative's knowledge of his own fraud

and checked out by him for private purposes.

Same — satisfaction of debts — liability.

2. A trust fund whose bank account has been depleted by the default of the trustee in applying it to his own use, so that there are not sufficient funds to pay taxes, interest, and simple debts, may be required by equity to replace money belonging to another estate of which the trustee also has charge, and which he applies in satisfaction of such claims.

Same — transfer of title.

3. Where a trustee who has misappropriated the funds of the trust attempts to pay his debt by misappropriating those of another trust, and placing them to the credit of the bank account of the former, and then uses them to pay its debts, the money remains the property of the second trust, so that it can recover the amount from the first one.

Same — bona fide purchasers — rights.

4. Beneficiaries of a trust and one of its trustees, who receive funds due from it and commissions out of a bank account in which a defaulting trustee has placed funds of another trust to make good his defalcation, are purchasers in good faith, so that the latter trust cannot recover from them or their trust the amount so misappropriated and paid.

Same — accounting — effect.

5. An accounting three months after a defaulting trustee has placed funds of a stranger in the trust's bank account, and paid them out in satisfaction of its debts, is not sufficient to render the trust a purchaser for value, so as to entitle it to hold the funds against the true owner,—especially where the fact of the defalcation and attempted repayment is not brought to the notice of the beneficiary.

Same — supplying funds — effect.

6. That the beneficiaries of a trust have put the trustee in funds with which to pay debts of the trust does not give them a superior equity where he misappropriates the funds, and then replaces them with funds belonging to another trust, with which he pays the debts, so as to justify their refusal to return the funds belonging to the latter trust.

is chargeable to the person or trust represented, if he acts as the sole representative of the latter in the transaction, notwithstanding that he is interested adversely to the latter, is considered in the note to *Brookhouse v. Union Pub. Co.* 2 L.R.A. (N.S.) 993, in its relation to the question whether a corporation is chargeable with knowledge of an officer who is acting in the transaction for his own account or in the interest of a third person.

See also later cases in this series on the same point. *Cook v. American Tubing & Webbing Co.* 9 L.R.A. (N.S.) 193, and *Lowndes v. City Nat. Bank*, 22 L.R.A. (N.S.) 408. 29 L.R.A. (N.S.)

Same — misappropriation of funds — charging checks.

7. Where a trustee in order to enable himself to secure funds for his own use and also to pay debts of the trust, the funds which were provided for which he has misappropriated, places, in the bank account of the trust, money belonging to a stranger, and then draws checks upon the fund for his own use and to pay the debts, the checks for his own use, although drawn first, will not be charged against the money already in the account, so as to charge the trust with the loss, but against the fund placed by him in the account, since it was his duty to use the money in the account in payment of the debts.

(Knowlton, Ch. J., dissents.)

(September 6, 1910.)

RESERVATION by the Supreme Judicial Court for Suffolk County for the opinion of the full bench of a suit to recover certain moneys which had been taken from one trust fund and transferred to another by a common trustee for his own purposes. Judgment for plaintiffs.

The facts are stated in the opinion.

Messrs. Matthews, Thompson, & Spring, for plaintiffs:

The intention of Berry, not disclosed to the trust company, cannot make what would otherwise have been the joint property of himself and Major the separate property of one of them, namely, himself. The acts of Berry, and not his intention, determined the nature of the obligation of the trust company as a liability to both trustees, and not merely to one.

Matthews v. Thompson, 186 Mass. 14, 66 L.R.A. 421, 104 Am. St. Rep. 550, 71 N. E. 93; *Freeman v. Pope*, L. R. 5 Ch. 538; *Smith v. Cherrill*, L. R. 4 Eq. 395; *French v. French*, 6 De G. M. & G. 95; *Taylor v. Coenen*, L. R. 1 Ch. Div. 636; *Coolidge v. Melvin*, 42 N. H. 519; *Freeman v. Burnham*, 36 Conn. 469; *Wilson v. Howser*, 12 Pa. 109.

Trustees are joint tenants, and either

The cases which sustain this doctrine as applied to a corporation whose sole representative in a particular transaction is the officer or agent who is interested on the other side may, as is shown by the reported case, be properly invoked where a trust is sought to be charged with knowledge of the fraud of a trustee who was its sole representative in the transaction, notwithstanding that he was adversely interested.

The doctrine is discussed in the valuable article by Professor Mechem in 7 Mich. L. Rev. 113, 137, et seq.

may, without the knowledge of the other, take title in such a way that it will vest in the tenants jointly; and trustees, being joint tenants, either may receive all or as much of the property as he (either one of them) can come by.

Perry, Tr. 5th ed. § 415; Bruen v. Gillet, 115 N. Y. 10, 4 L.R.A. 529, 12 Am. St. Rep. 764, 21 N. E. 676; Re Blauvelt, 131 N. Y. 249, 30 N. E. 194; Purdy v. Lynch, 145 N. Y. 462, 40 N. E. 232; Fesmire's Estate, 134 Pa. 67, 19 Am. St. Rep. 676, 19 Atl. 502; Barroll v. Forman, 88 Md. 188, 40 Atl. 883; Dyer v. Riley, 51 N. J. Eq. 124, 26 Atl. 327; Pom. Eq. Jur. 3d ed. § 1060.

One trustee may act as agent for the other.

Perry, Tr. 5th ed. § 415; Townley v. Sherborne, J. Bridg. 35, 2 White & T. Lead. Cas. in Eq. 960.

Notice of the source of the funds used by Berry must be imputed to the defendant Major, as notice to one trustee is notice to all joint trustees.

Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Skinner v. Merchants' Bank, 4 Allen, 290; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496; Allen v. South Boston R. Co. 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; Otis v. Otis, 167 Mass. 245, 45 N. E. 737; Jaquith v. Davenport, 191 Mass. 416, 78 N. E. 93; Foote v. Cotting, 195 Mass. 55, 15 L.R.A. (N.S.) 693, 80 N. E. 600; Chapman v. Chapman, 91 Va. 397, 50 Am. St. Rep. 846, 21 S. E. 813; Pom. Eq. Jur. 3d ed. § 667; Batavia v. Wallace, 42 C. C. A. 310, 102 Fed. 240; Meux v. Bell, 1 Hare, 73; Willes v. Greenhill, 4 De G. F. & J. 150; Bank of United States v. Davis, 2 Hill, 464; Myers v. Ross, 3 Head, 59; Smith v. Smith, 2 Cromp. & M. 231; Ex parte Rogers, 8 De G. M. & G. 271; Wise v. Wise, 2 Jones & L. 412; Le Neve v. Le Neve, 1 Ambl. 436, 2 White & T. Lead. Cas. in Eq. 6th ed. 26; First Nat. Bank v. Blake, 60 Fed. 78; National Bank v. Munger, 36 C. C. A. 659, 95 Fed. 92.

Knowledge of Berry's act was not imputable to the plaintiffs, whom he was defrauding.

Corcoran v. Snow Cattle Co. 151 Mass. 74, 23 N. E. 727; First Nat. Bank v. Babidge, 160 Mass. 563, 36 N. E. 462; Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912.

The defendants, who are beneficiaries of the Pickett trust, got the equitable title to the \$11,000 in question, and should refund it, because they took with notice.

Merchants' Bank v. Ballou, 98 Va. 112, 44 L.R.A. 306, 81 Am. St. Rep. 715, 32 S. E. 481.
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The trustee in a deed to secure creditors is a purchaser for value, and notice to him is notice to the beneficiaries.

Wittenbrock v. Parker, 102 Cal. 93, 24 L.R.A. 197, 41 Am. St. Rep. 172, 36 Pac. 374.

Even if the defendant Major was a purchaser for value, he could not retain this money, because he took it with notice, but he was not a purchaser for value. The money was not applied or intended to be applied by Berry to the payment of his indebtedness to the Pickett estate.

Atlantic Bank v. Merchants' Bank, 10 Gray, 532; Atlantic Cotton Mills v. Indian Orchard Mills, supra; Thacher v. Phinney, 7 Allen, 146; Sherman v. Wilder, 106 Mass. 537; Pollock v. Morrison, 176 Mass. 83, 57 N. E. 326.

If the defendant Major took the money in question with notice of the rights of the plaintiffs, he held it in trust for their benefit.

Otis v. Otis, 167 Mass. 245, 45 N. E. 737; Loring v. Brodie, 134 Mass. 453; Doe ex dem. Robinson v. Allsop, 5 Barn. & Ald. 142; Lowe v. Jones, 192 Mass. 94, 6 L.R.A. (N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 A. & E. Ann. Cas. 551; Pom. Eq. Jur. 3d ed. § 1048; Walston v. Smith, 70 Vt. 19, 39 Atl. 252; Andrews v. Tuttle-Smith Co. 191 Mass. 461, 78 N. E. 99.

As between two *cestui que trust*, payments by a trustee from a mixed trust account will be held to have been made in the order of the deposit, so that the first sum paid in will be deemed the first drawn out.

Re Hallett, L. R. 13 Ch. Div. 696; Hancock v. Smith, L. R. 41 Ch. Div. 456; Re Hallett [1894] 2 Q. B. 237; Re Oatway [1903] 2 Ch. 356; Lowe v. Jones, supra; Furber v. Dane, 203 Mass. 108, 89 N. E. 227; United States v. Carter, 96 C. C. A. 587, 172 Fed. 1; Pom. Eq. Jur. 3d ed. § 1048; Perry, Tr. 5th ed. § 837; Cavin v. Gleason, 105 N. Y. 256, 11 N. E. 504; Packer v. Crary, 121 Iowa, 388, 96 N. W. 870.

The plaintiffs are entitled to recover the sum of \$8,534.47, which is the aggregate of several checks drawn and paid out by Berry for the benefit of the Pickett beneficiaries subsequent to the deposit of the stolen \$11,000, on the ground of unjust enrichment.

Vickery v. Ritchie, 202 Mass. 248, 26 L.R.A. (N.S.) 810, 88 N. E. 835; Foote v. Cotting, 195 Mass. 55, 15 L.R.A. (N.S.) 693, 80 N. E. 600; Wallis v. Shelly, 20 Fed. 747; Hall v. Marston, 17 Mass. 379; Carnegie v. Morrison, 2 Met. 381; Frost v. Gage, 1 Allen, 262; Hills v. Bearse, 9 Allen, 403; Wiley v. Connelly, 179 Mass. 360, 1 N. E. 784; Albea v. Griffin, 22 N. C. 62 Dev. & B. Eq. 9; Mathews v. Davis, 6

Humph. 324; Rucker v. Abell, 8 B. Mon. 506, 48 Am. Dec. 406; Smith v. Hatch, 46 N. H. 146; Keener, Quasi Contr. 377; Bright v. Boyd, 1 Story, 478, Fed. Cas. No. 1,875, 2 Story, 608, Fed. Cas. No. 1,876; Exall v. Partridge, 8 T. R. 308; Edmunds v. Wallingford, L. R. 14 Q. B. Div. 811.

The plaintiffs are, at least, entitled to recover the amount paid out for taxes on Pickett real estate and the interest due on mortgages on that estate.

Pom. Eq. Jur. 3d ed. § 1239; Lewin, Tr. R. 7th ed. p. 766; Warner v. Morse, 149 Mass. 400, 21 N. E. 960; Fowler v. Parsons, 143 Mass. 401, 9 N. E. 799; Elmore v. Symonds, 183 Mass. 321, 67 N. E. 314; Unity Joint Stock Bkg. Asso. v. King, 27 L. J. Ch. N. S. 585; Davies v. Thomas [1900] 2 Ch. 462; Beazley v. Harris, 1 Bush, 533; Haggerty v. McCanna, 25 N. J. Eq. 48; Perry v. Board of Missions, 102 N. Y. 99, 6 N. E. 116; Osgood v. Osgood, 78 Mich. 290, 44 N. W. 325; Walker v. Brown, 165 U. S. 654, 41 L. ed. 865, 17 Sup. Ct. Rep. 453; Whitaker v. Williams, 20 Conn. 527; Howes v. Whipple, 41 Ga. 322; Evans v. Page, 16 Ky. L. Rep. 177, 26 S. W. 1016; Rogers v. Walker, 24 Fed. 344; Badgerow v. Manhattan Trust Co. 64 Fed. 931; Re Olzendam Co. 117 Fed. 179; Howard v. Delgado, 57 C. C. A. 270, 121 Fed. 26.

The plaintiffs are entitled to be subrogated to the rights of the city of Boston and of the mortgagees, to the extent of the sums paid for taxes and interest, viz., \$7,670.01.

Cambridge v. Hanscom, 186 Mass. 54, 70 N. E. 1030; Webber Lumber Co. v. Shaw, 189 Mass. 366, 75 N. E. 640; Keith v. Easton, 21 Pick. 261; Skinner v. Tirrell, 159 Mass. 474, 21 L.R.A. 673, 38 Am. St. Rep. 447, 34 N. E. 692; Hart v. Western R. Corp. 13 Met. 99, 46 Am. Dec. 719; Amory v. Lowell, 1 Allen, 504; Wall v. Mason, 102 Mass. 313; Robinson v. Leavitt, 7 N. H. 73; Sheldon, Subrogation, 2d ed. § 13; Bodkin v. Merit, 102 Ind. 298, 1 N. E. 625; De Concillio v. Brownrigg, 51 N. J. Eq. 532, 25 Atl. 383; Matthews v. Fidelity Title & T. Co. 52 Fed. 687; Cotton v. Dacey, 61 Fed. 481; Farmers' Loan & T. Co. v. Detroit, B. C. & A. R. Co. 71 Fed. 29; Silver Lake Bank v. North, 4 Johns. Ch. 370; Peltz v. Clarke, 5 Pet. 481, 8 L. ed. 199; New Haven Sav. Bank & Bldg. Asso. v. McPartlan, 40 Conn. 90; Armstead v. Neptune, 56 Kan. 750, 44 Pac. 998; Dorrah v. Hill, 73 Miss. 787, 32 L.R.A. 631, 19 So. 961; Caudle v. Murphy, 89 Ill. 352; Hand v. Savannah & C. R. Co. 17 S. C. 219; McCormick v. Irwin, 35 Pa. 111; Slade v. Van Vechten, 11 Paige, 21; Gould v. Central Trust Co. 6 Abb. N. C. 381; Clifford v. Campbell, 65 Tex. 243; Oury v. Saunders, 19 L.R.A. (N.S.)

77 Tex. 278, 13 S. W. 1030; Clark v. Clark, 58 Miss. 68.

Messrs. Eugene J. Hadley and George L. Mayberry, for defendants:

The Newell estate funds did not become Pickett estate money merely by being deposited in the bank account of the estate; it was simply money from another source mingled with the trust funds previously deposited there; and when money was afterward drawn out by Berry to make the payments referred to, it must be assumed to have been drawn from this sum of \$11,000, which had been deposited for that purpose, rather than from the Pickett estate funds, with which it was mingled.

Re Hallett, L. R. 13 Ch. Div. 696; Lowe v. Jones, 192 Mass. 101, 6 L.R.A. (N.S.) 487, 116 Am. St. Rep. 225, 78 N. E. 402, 7 A. & E. Ann. Cas. 551.

The taxes and mortgage interest paid by Berry were debts for which Berry himself was personally liable, as he was trustee when the taxes were assessed and the mortgage interest accrued, and judgment therefor might have been obtained and enforced against him individually.

Richardson v. Boston, 148 Mass. 512, 20 N. E. 166; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87.

The transaction was beyond the scope of Berry's authority under the trust, and must be regarded as an independent fraudulent act committed by him on his own account, and therefore neither Major nor the beneficiaries would be affected by Berry's knowledge of the fraud, and they cannot be held to have had constructive notice of the transaction.

Innerarity v. Merchants' Nat. Bank, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; Bowditch v. New England Mut. L. Ins. Co. 141 Mass. 292, 55 Am. Rep. 474, 4 N. E. 798; Allen v. South Boston R. Co. 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; Indian Head Nat. Bank v. Clark, 166 Mass. 27, 43 N. E. 912; Foote v. Cotting, 195 Mass. 55, 15 L.R.A. (N.S.) 693, 80 N. E. 600; Thorndike v. Hunt, 3 De G. & J. 563; Taylor v. Blakelock, L. R. 32 Ch. Div. 560; Case v. James, 29 Beav. 512, 3 De G. F. & J. 256.

Berry could not bind the Pickett trust, either expressly or impliedly, by the payments which he made with money fraudulently obtained from the Newell estate. The Pickett trust could not in this way be made the involuntary debtor of the Newell trust.

Windsor v. Savage, 9 Met. 346; Kelley v. Lindsey, 7 Gray, 287; Provincetown v. Truro, 135 Mass. 263; Craft v. South Boston R. Co. 150 Mass. 207, 5 L.R.A. 641, 22 N. E. 920; Foote v. Cotting, supra; Railroad Nat. Bank v. Lowell, 109 Mass. 214;

Agawam Nat. Bank v. South Hadley, 128 Mass. 503.

Loring, J., delivered the opinion of the court:

This is a bill in equity brought by the surviving trustee under the will of Andrew H. Newell and the beneficiaries of that trust against the trustees and beneficiaries under the will of James B. Pickett.

In November, 1901, one Charles F. Berry was the active trustee of each of these two trusts. His cotrustee in the Newell trust was Andrew Newell, whose residence was in Australia; and his cotrustee in the Pickett trust was Thomas E. Major, whose residence was in Ohio.

On November 15, 1901, Berry found himself in immediate need of \$2,000 to be sent to the West in order to carry through a private speculation of his own. The Pickett trust was in need, but not in immediate need, of money for taxes and mortgage interest due in respect of a building or buildings owned and maintained by that trust. The need of money for taxes and mortgage interest on the part of the Pickett trust came from the fact that Berry had previously stolen money from that trust exceeding in amount the money needed for these purposes.

Under these circumstances Berry, on November 15th, took to certain brokers a certificate for fifty-one shares of stock, the property of the Newell trust, and instructed them to sell the shares, and asked for an advance of \$11,000 on account. He received from the brokers their check for \$11,000, payable to "C. F. Berry, Trustee." Berry and Major, trustees of the Pickett trust, had a deposit account with the Old Colony Trust Company, on which checks could be drawn by either trustee. Berry indorsed the check for \$11,000, and deposited it to the credit of this account. There was at that time the sum of \$1,380.44 to the credit of that account. The deposit of the check for \$11,000 seems to have been made after banking hours on the 15th, and for that reason was credited on the 16th of November. On the afternoon of the 15th, Berry drew a check for \$2,000 on this account, took it to the trust company, and obtained for it two drafts on New York, each for \$1,000, which he sent to the West to carry through his personal speculation. Thereafter he drew twenty-one other checks on the account. The last check, for \$63, was dated December 16, 1901, and resulted in the account being overdrawn to the amount, as stated in the reservation, of \$8.88, but which appears to have been \$18.88. Four of the twenty-two checks thus drawn, amounting in the aggregate to \$3,864.85, 29 L.R.A. (N.S.)

were used by Berry for his personal expenses; eleven, amounting in the aggregate to \$7,903.14, were used by Berry in paying, on account of the Pickett trust, taxes and mortgage interest due on the buildings of the Pickett trust, wages due to the scrub women and elevator boys of these buildings, and bills for lighting, steam heating, and insurance on these buildings; six checks, amounting in the aggregate to \$568.33, were used in payments to the beneficiaries of the Pickett trust of income due to them; and the last check, for \$63, of which \$18.88 was an over draft, was used in paying to Mr. Major, Berry's cotrustee in the Pickett trust, the commissions due to him for services as trustee for that trust. That is to say, on the last check \$44.12 was drawn out of the \$11,000. Berry testified that he had no personal bank account at that time, and that he deposited the check for \$11,000 with the Old Colony Trust Company to the credit of Mr. Major and himself, trustees of the Pickett trust, because that "was the handiest place," by which we understand him to have meant that depositing the check for \$11,000 to the credit of the account of Major and himself as trustees of the Pickett trust was the most convenient way for him to cash it. He further testified that, when he made this deposit, "it did not enter my [his] head" to make the deposit as payment of his debt to that trust. At that time he knew that he was largely in debt to the Pickett trust, and, on an examination made during the hearing before the single justice, he found that the sum then due from him to the Pickett trust amounted to \$11,185.50 gross, or, deducting a sum equal to the usual commissions, to \$9,515.50. But he testified that at the time (to wit, on November 15, 1901) he did not know the exact amount of that debt. In March, 1902, Berry was again in debt to the Pickett trust to the amount of \$8,042.33. From some source or sources not mentioned in the reservation, he paid up this amount on March 26th, and rendered an account on March 27, 1902, which was allowed. Berry resigned his position of trustee of the Pickett trust in March, 1903, and was succeeded by the defendant Hadley.

The plaintiff's first contention is that the defendants are liable for the whole \$11,000. In our opinion that is not so. Berry did not in fact intend to make the \$11,000 the property of the Pickett trust by borrowing that money in behalf of that trust, or by paying with it his debt to the Pickett trust. All that he intended to do was to put the \$11,000 in the name of himself and his cotrustee in the Pickett trust, as the "handiest" way of cashing the \$11,000 check. The

\$11,000 while it was on deposit in the Old Colony Trust Company belonged in equity to the Newell trust, as the property into which its \$11,000 had been converted. The whole \$11,000 had been all drawn out by Berry before the defendants or any of them knew anything about it. A defendant is not liable to repay to the owner the amount of a stolen check fraudulently put to his (the defendant's) credit, to enable the thief to collect the amount of it, when the proceeds have been drawn out by the thief before the defendant knows anything about the matter.

It follows that the defendants are not liable for the \$3,864.85 applied by Berry for his own use.

The plaintiffs' second contention is that so far as the \$11,000 was applied in discharge of debts owed by the Pickett trust, the Newell trust has a right of recovery.

The amount drawn out of this bank account to pay debts owed by the Pickett trust is (as we have said) \$7,903.14. But there was the sum of \$1,380.44 to the credit of the Pickett trust in this bank account when the \$11,000 was deposited. There is question therefore whether the amount of the plaintiffs' \$11,000 used in paying the defendants' debts is \$7,903.14, or \$7,903.14 less \$1,380.44; that is to say, \$6,522.70. As a matter of convenience we will now assume that it is the smaller amount (namely, \$6,522.70), and we will deal with that matter later on.

On the footing that the amount paid out of debts is \$6,522.70, the amount paid out of mortgage interest and taxes was \$6,045.14, and for unsecured debts due from the Pickett trust, \$477.51.

It was decided in *Foot v. Cotting*, 195 Mass. 55, 15 L.R.A.(N.S.) 693, 80 N. E. 10, that, under the circumstances of the case at bar, the Newell trust has no remedy at law, even for the money belonging to it expended in paying taxes on the land of the Pickett trust. But it was suggested in that case, at 195 Mass. 63, that to the extent to which one trust has been benefited through payment, out of its money, of the taxes on the land of the other (under circumstances such as those in the case at bar), there might be a remedy in equity on the principle of subrogation, citing *Webber Lumber Co. v. Shaw*, 189 Mass. 366, 75 N. E. 640. In a recent case which lends support to this suggestion, see the first case reported under the title of *Title Guarantee & T. Co. v. Haven*, 196 N. Y. 487, 25 L.R.A.(N.S.) 6, 89 N. E. 1082, 1085. It would seem that on this principle the plaintiffs would be entitled to a decree (1) for a charge upon the defendants' land to the amount of the money paid with their (the plaintiffs') money, and (2) for a charge, except as against the

mortgagee, upon their (the defendants') land to the amount of the mortgage interest paid with their (the plaintiffs' money). But it is not necessary to pursue this further, because we are of opinion that the plaintiffs are entitled to a personal decree against the defendants for simple debts paid with their (the plaintiffs') money, and that they are entitled on the same ground to a personal decree for payments of taxes and mortgage interest made with their money.

It has long been the settled law of England that where the money of A has been used in extinguishing the legal liabilities of B (although no debt or other obligation is created thereby at law), equity will let A enforce against B the obligations of B's creditors paid off by his (A's) money. The principle was applied in *Harris v. Lee*, 1 P. Wms. 482, where a wife borrowed money to pay for necessaries, and afterwards the husband died having devised land in trust for the payment of his debts. Although a husband is liable for his wife's debts incurred for necessaries, he is not liable for money borrowed by his wife to be used in paying for necessaries. That was admitted in *Harris v. Lee*, *ubi supra*; and *Knox v. Bushell*, 3 C. B. N. S. 334, is a decision to that effect. Not only was that decided in *Knox v. Bushell*, but it was also decided there that in such a case there is no remedy on the common counts or in any other way at law. It was held in *Harris v. Lee* that the plaintiff (whose loan to the wife was void) had a right to be paid the sums which were due to the creditor who had furnished necessaries to the wife, and who had been paid out of the money furnished the wife under the void loan. The principle was applied also in case of money borrowed by an infant, which was used to buy necessaries. *Marlow v. Pitfield*, 1 P. Wms. 558. It was pointed out in *Marlow v. Pitfield* that there is no liability at law in such a case; and *Darby v. Boucher*, 1 Salk. 279, is a decision to that effect. The most common application of this principle has been where money borrowed by a corporation which had no power to borrow money has been used in paying its debts. *Re Cork & Y. R. Co. L. R. 4 Ch. 748*; *Blackburn Bldg. Soc. v. Cunliffe*, L. R. 22 Ch. Div. 61; *Re Wrexham, M. & C. Q. R. Co.* [1899] 1 Ch. 205, s. c. on appeal [1899] 1 Ch. 440. Lastly, this principle was applied in 1906 in a case where the London agent of ship and insurance brokers carrying on business in Liverpool (who had withdrawn money for his own account without right) without authority borrowed money in behalf of his principals, and applied it in payment of the expenses of the principals' London business. *Bannatyne v. MacIver* [1906] 1 K. B. 103.

The case at bar is a stronger case for the application of this principle than any of these mentioned above in which it has been applied. The plaintiffs' money in the case at bar was stolen from them without fault on their part, not lent by them under an invalid contract. Since Berry had the legal right to the custody of the property in which the plaintiffs had the beneficial interest, the plaintiffs were not at fault in letting it remain in his possession. On the other hand, it might well have been held that the persons who lent the money in the English cases *ubi supra* were chargeable with knowledge of the invalidity of the loans. See, in that connection, *Bannatyne v. MacIver* [1906] 1 K. B. 103, 109.

There are suggestions in some of these cases that the doctrine on which they rest is that in such case the lender is subrogated to the rights of the creditors. In others it is suggested that in these cases the true owner of the money is allowed to trace his property into the benefit inuring to the defendant, on the principle on which an owner can in equity trace his property into any form into which it has been wrongfully converted. And in others, that this is an independent ground of equitable relief.

It is not necessary to determine whether these principles are not in their essence the same, or what is the most accurate way of stating the principle on which these cases rest, for we are of opinion that they were well decided, and that the principle on which they rest is well founded, and should be adopted by us.

The question, therefore, on which the case at bar depends, is whether the money with which the debts due from the defendants stated above were paid was the plaintiffs' money.

But before we take up that question, we will consider some cases relied on as cases which stand in the way of giving to the plaintiffs any relief in the case at bar:

It is settled that an intermeddler, by gratuitously paying the debt of another, does not create a legal obligation between himself and that other. That was decided in *Winsor v. Savage*, 9 Met. 346; *South Scituate v. Hanover*, 9 Gray, 420; *Provincetown v. Truro*, 135 Mass. 263; *Massachusetts Mut. L. Ins. Co. v. Green*, 185 Mass. 306, 70 N. E. 202. For decisions based on the same principle, see *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Brown v. Fales*, 139 Mass. 21, 29 N. E. 211; *Harrison v. Moran*, 163 Mass. 495, 40 N. E. 850.

It is also settled that the result is the same if the money used in paying the debts was lent to one who had authority to pay the debt, but who had no authority to borrow the money. *Kelley v. Lindsey*, 7 Gray, 29 L.R.A. (N.S.)

287; *Railroad Nat. Bank v. Lowell*, 109 Mass. 214; *Agawam Nat. Bank v. South Hadley*, 128 Mass. 503.

All these decisions were put in the several opinions on grounds applicable to actions at law, namely: (1) That an action for money paid does not lie unless the money was paid at the defendant's request; and (2) that the conferring of a benefit on another, if it be done voluntarily—that is to say, if it be done without any request by that other,—does not create any legal obligation, and therefore an action for money had and received does not lie. The fact (that no liability at law is brought into existence by the use of A's money in paying B's debts without B's knowledge or request) does not stand in the way of equity allowing A to stand in the shoes of B's creditors, paid off by his (A's) money. It is pointed out in nearly every one of the English cases, *supra*, that there is no remedy at law, and it was suggested (as we have said) in *Foot v. Cotting*, 195 Mass. 55, 63, 15 L.R.A. (N.S.) 693, 80 N. E. 600, that although there was no remedy at law (as was decided by this court in that case), relief might be given in equity. The distinction between *Kelley v. Lindsey*, *supra*, and *Bannatyne v. MacIver* [1906] 1 K. B. 103, (in which opposite conclusions were reached), is that one was an action at law and the other a suit in equity.

It should be noted in passing that a gratuitous payment by a plaintiff who is an intermeddler does not entitle him to any relief in equity by way of subrogation. *Sheldon, Subrogation*, § 1. This is settled, and was stated in *Title Guarantee & T. Co. v. Haven*, 196 N. Y. 487, 495, 496, 25 L.R.A. (N.S.) 1308, 89 N. E. 1082, 1085, to be law.

The decision in *Craft v. South Boston Co.* 150 Mass. 207, 5 L.R.A. 641, 22 N. E. 920, however, was put on broader grounds than those taken in *Winsor v. Savage* and the other cases *supra*. In that case a defaulter, without authority, borrowed the plaintiff's money and used it in paying the debts of the defendant (his principal). At the time the money he had stolen. The decision that the plaintiff was not entitled to relief was put on the ground that the plaintiff had sought relief in an action at law. On the contrary, *Field, J.*, said: "Whether a person under any circumstances can be made a debtor for money borrowed by another for him without authority, and appropriated to his use without his knowledge or consent, need not be considered. See *Kelley v. Lindsey*, *supra*. No obligation on the part of the defendant ought to be implied in this case. The cause Reed was a defaulter, and the money was used to cover up his defalcation in paying debts of the company, which it

money of the company, if he had not embezzled it, would have been used to pay. The only reasonable inference is that Reed's primary purpose in using the money in this way was to escape detection and to benefit himself. Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain. The money was not borrowed bona fide for the use of the company. See *Railroad Nat. Bank v. Lowell*, and *Agawam Nat. Bank v. South Hadley*, *supra*."

It appears from the original paper in that case that the money there in question was borrowed by the defaulter in January, 1885, and used at that time in covering up his defalcations by paying some of the defendant's debts. It was not until November, 1886 (a year and nine months later), that his defalcations were discovered. Reed, the defaulter, testified that "for some time before giving the note, and at that time, and so continuing until November, 1886, he had taken large sums of the defendant's money, and appropriated them to his own personal use, all of which he had concealed from the defendant's officers until November, 1886, when his embezzlements were discovered." In other words, the use of the plaintiff's money in paying the defendant's debts in that case had resulted in enabling the defaulter to steal more money from the defendant, and what this court meant when it said, "Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain," was that this plaintiff had failed to prove that the transaction as a whole had resulted in a benefit to the defendant, when the payment of the defendant's debts with the plaintiff's money had enabled the defaulter to steal more money than was so paid.

It is not necessary to consider in the case at bar whether this court was right in deciding in *Craft v. South Boston R. Co.* that the rights of the parties depended upon the ultimate result of Reed's transactions taken as a whole, and not upon the direct and immediate result of the individual payment of one of the defendant's debts with the money of the plaintiff. What was decided there was that where no benefit inures to the defendant from all of the defaulter's transactions taken as a whole, no benefit can be said to inure to a defendant because one of its debts was paid in the course of a series of thefts which the defaulter was enabled to continue by the payment in question. In the case at bar the payment of the defendants' debts with the plaintiff's money, whether Berry's transactions be taken as a whole or separately, did inure in a benefit to the defendant. In the case at

bar, as in *Craft v. South Boston R. Co.* there was a further defalcation. But in the case at bar the further defalcation did not result in any loss on the part of the defendant, as it did in *Craft v. South Boston R. Co.* The \$8,042.33 subsequently stolen by Berry was paid up by him on March 27, 1902. There is no suggestion that there was any subsequent defalcation on Berry's part.

There were two cases before the court in *Title Guarantee & T. Co. v. Haven*, 196 N. Y. 487, 25 L.R.A. (N.S.) 1308, 89 N. E. 1082, 1085. In one case relief was given by way of subrogation; in the other it was denied. In the case in which it was denied, it was denied because the tax paid was levied in the lifetime of the testatrix and constituted a debt due from her estate, and not from the defendant, who was devisee of the land. What was decided was that in such a case the benefit inuring from the payment of that tax inures to the benefit of the estate of the testatrix, and not to the benefit of the devisee of the land. In the case in which subrogation was allowed, the assessment did not create a personal obligation on the part of anybody. It was a lien on the defendant's land, and nothing more. For that reason the benefit from the payment of the assessment inured to the benefit of the devisee of the land.

We find nothing in these cases which prevents us from acting on the principles applied in *Re Cork & Y. R. Co. L. R. 4 Ch. 748*, and the other English cases, *supra*, and we are finally brought to the question stated above, namely: Was the money used in paying these debts of the defendants the money of the plaintiffs?

We have already held that the \$11,000 did not become the money of the defendants when it was deposited by Berry to the credit of the defendants' trustees in the Old Colony Trust Company, without their knowledge, to enable him to complete his theft.

But when Berry drew out \$6,522.70 of the \$11,000 belonging to the Newell trust on deposit in the Old Colony Trust Company, and applied it in payment of debts due from the Pickett trust, either he directly paid the defendants' debts with the plaintiffs' money, or he, in legal contemplation, undertook to pay his debt to the Pickett trust with the plaintiffs' money, and used the money so paid to that trust in paying its debts.

If he is to be considered to have paid the defendants' debts directly with the plaintiffs' money, the case at bar comes within the principle of the English cases referred to above.

And the result is the same if, in legal contemplation, Berry is to be considered to have undertaken to pay his debt to the

defendants with the plaintiffs' money, and then to have used that money in paying the defendants' debts. This attempted repayment by Berry of his debt to the Pickett trust did not make the money so paid to them their money. It was the plaintiffs' money in the beginning, it remained the plaintiffs' money while it was on deposit in the Old Colony Trust Company, and it did not cease to be the plaintiffs' money when Berry used it in paying his debt to the trust of which he was one of two trustees, because he and he alone acted for the Pickett trust in receiving the attempted payment.

The general rule is that an assignee of money gets no better title than the assignor of it had. But the assignee does get a better title than his assignor had, if he is a purchaser for value in good faith and without notice.

Apart from authority, it would be a strange doctrine if it were law that the true owner of money lost his title to it by a thief who stole it undertaking to use it in paying a debt owed by the thief to another, when the thief and no one else received for that other the payment so made. It is not conceivable that such a manipulation by a thief of stolen money should result in the true owner's losing his title, and the creditor of the thief getting a better title to the money than the thief had to it.

But that proposition does not rest on principle alone. It was on this ground that this court rested its decision in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496. It was decided in that case that if a payment is made with stolen money, and the person to whom the payment is made is represented in receiving the payment by the thief who is paying his debt with the stolen money, the person to whom the payment is made is chargeable with the thief's knowledge, and gets no better title than the thief had to give. The auditor in *Atlantic Cotton Mills v. Indian Orchard Mills* found that the money transferred in that case was not a payment, but a transfer to cover up the defalcation. And this court might well have rested its decision on that ground. But to quote the words used by it: "We have preferred to put the decision of this point upon the broad ground that, if the treasurer of a corporation is a defaulter, and his defalcation is as yet unknown and unsuspected, and he steals money from a third person and places it with the funds of the corporation in order to conceal and make good his defalcation, and the corporation uses the money as its own, no other officer knowing any of the facts, the corporation does not thereby acquire a good title to the money, as against the true owner, but the

latter may maintain an action against the corporation to recover back the same." See 147 Mass. 276. It was pointed out in *Atlantic Cotton Mills v. Indian Orchard Mills*, just cited, that majority and the minority of this court in the earlier case of *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, were agreed on this point.

This proposition (decided in *Atlantic Cotton Mills v. Indian Orchard Mills*) has been recognized since then as undoubted law. *Corcoran v. Snow Cattle Co.* 151 Mass. 74, 75, 23 N. E. 727; *First Nat. Bank v. Babbidge*, 160 Mass. 563, 565, 36 N. E. 462; *Jaquith v. Davenport*, 191 Mass. 415, 417, 418, 78 N. E. 93; *Footo v. Cotting*, 195 Mass. 61, 62, 15 L.R.A. (N.S.) 693, 80 N. E. 600. And there is no case to the contrary in any jurisdiction.

It was expressly pointed out in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 277, 9 Am. St. Rep. 698, 17 N. E. 496, that where the person receiving the stolen money is represented by an innocent person (a class of cases of which *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282, is an example, and is the leading case in this commonwealth), a different case is presented from that which is presented where the thief, and the thief alone, acts for his creditor in receiving stolen money.

There can be no question, either on principle or on authority, of the correctness reached in *Innerarity v. Merchants' Nat. Bank*, and the other cases belonging to that class. But they are quite apart from the case decided in *Atlantic Cotton Mills v. Indian Orchard Mills*, and from the case which we have to decide here, where no one but the thief acts for the principal to whom payment of the stolen money is made. There is no case in which it has been held that under those circumstances the original owner of the money has lost his title, and the person in whose behalf the thief receives the payment gets a better title than the thief had. Further, there is no case in which the distinction pointed out in *Atlantic Cotton Mills v. Indian Orchard Mills*, supra, has been questioned.

Adopting the words of this court in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 274, 9 Am. St. Rep. 698, 17 N. E. 496, 501: It is not as if Berry, after stealing \$11,185.50, or \$9,515.50, from the defendant trust (as he did), had called the innocent trustee or the beneficiaries of that trust "together and informed them of his indebtedness and of his desire to make a payment on account, and had then paid over to them the money [this \$6,522.70] as money coming from himself, and they had received it without know-

edge or suspicion that it had been stolen, and given him credit for it as part payment." In that case the Pickett trust would have been a purchaser without notice, within the doctrine invoked by the defendant in the case at bar.

That is not what took place. When Berry repaid in part the money stolen from the defendants by paying their debts with the \$6,522.70 stolen from the plaintiffs, Berry, and Berry alone, represented the defendants in receiving the \$6,522.70. They "must be deemed to have known what he knew; and" they "cannot retain the benefit of his act, without accepting the consequences of his knowledge." The defendants "cannot obtain greater rights from his act than if [they] did the thing itself, knowing what he knew," to quote again from *Atlantic Cotton Mills v. Indian Orchard Mills*, supra.

But it is said that when this money was used in paying the defendants' debts, there was a transaction in which Berry was not the only person on both sides. It is said that the creditors who were paid were on the other side of the transaction. But the transaction in which the creditors were on the other side consisted in the payment of the debts owed by the defendants to them. In that transaction the creditors got a good title to the money paid to them by Berry. But they took no part in the transaction by which Berry paid his debt to the defendants with money stolen from the plaintiffs. Berry, and Berry alone, was on both sides of that transaction.

In this connection it should be pointed out that there were payments made out of this \$11,000 to the beneficiaries of the defendant trust and to Berry's cotrustee. In receiving these payments the beneficiaries and the cotrustees did not act through Berry. They acted for themselves. They are bona fide purchasers without notice of the money so paid to them, and the plaintiffs have no claim for the \$612.45 (\$568.33 plus \$44.12) so paid out.

But the defendants say that there was an accounting later on, and that they became purchasers for value without notice, by virtue of that accounting, within the doctrine recognized by this court in *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 279, 9 Am. St. Rep. 698, 17 N. E. 496, 504: "There is another class of cases where the same person has been trustee of two different funds, and has fraudulently transferred securities from one trust fund to the other. But in each case of this class which has been cited there has been something in the nature of an accounting, and the trust fund which has received and has been held entitled to retain the benefit has been partly or wholly represented either by the *cestui*

que trust or by an innocent trustee representing them. *Thorndike v. Hunt*, 3 De G. & J. 563; *Taylor v. Blakelock*, L. R. 32 Ch. Div. 560; *Case v. James*, 29 Beav. 512, a. c. on appeal, 3 De G. F. & J. 256."

But that is not so in the case at bar. The last of the \$11,000 was drawn out by Berry on December 16, 1901. It was drawn out by the check for \$63, which paid the innocent trustee the commissions due to him, and that check (as we have said) was an over draft to the amount of \$18.88. The accounting here relied on by the defendants was three months later, in March, 1902.

The accounting in the case at bar was had not only after the repayment had become complete without anybody (but the thief) knowing of the repayment, but the accounting was had three months after the last penny of the money repaid had been expended without anybody but the thief knowing of the repayment and of the expenditure of the money repaid. There was no fund then in existence of which the defendants could become purchasers for value without notice. How that accounting could be held to make the defendants purchasers without notice of money which had been paid out three months before has not been explained.

Apart from its effect upon the defendants being purchasers for value, the accounting which was had did not affect the rights of the parties. When the accounting was had in the case at bar, the fact of the repayment was not stated or known to anyone but Berry, the thief. What happened was that four months after the repayment was made, and three months after the money repaid had been expended, Berry filed an account in which he stated that he had received and properly paid out the income of the trust fund, and that account was assented to by the defendants on the footing that it was a true account. In a case where a thief steals money without his principal's knowledge, repays it with money stolen from someone else without his principal's knowledge, and pays out the other stolen money (so repaid by him) without his principal's knowledge, the rights of the parties are not changed by the fact that after the money so repaid has been paid out, the thief makes up a lying account in which no one of these facts is disclosed, and the principal assents to it on the footing that it is a true account. Such an account is a fraud on the principal, and can be set aside by him at any time.

It happens that it has been decided that the rights of the parties in a case like that now before us are fixed when the payment is made, and that they are not affected by a subsequent accounting similar in its legal aspects to the accounting which took place

in the case at bar. It was so decided in *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532. It could not be held that the subsequent accounting in the case at bar made the defendants bona fide purchasers for value without overruling the decision there made. The facts in that case were these: The paying teller of the defendant bank was a defaulter to the amount of \$25,000. He was told at a quarter before 2 o'clock that his cash would be counted that afternoon. By a fraudulent conspiracy he procured possession of bank bills belonging to the plaintiff bank by 2 o'clock, and put them in his drawer. Between 3 and 6 o'clock on the same afternoon, these bills were taken from his drawer and counted as the property of the defendant bank by a committee of the directors appointed to examine into the condition of the bank. It was held by a majority of the court that the repayment was complete when the bills were put in his drawer by the paying teller at 2 o'clock; that the bank was chargeable with the knowledge of the defaulting teller, because he acted for the bank in receiving the repayment; and that the defendant's title is not affected by the subsequent counting of the bills as the defendant's property later during the same afternoon. The minority took the view that the repayment was not complete until the bills were counted by the committee of the directors, and that the defendants, by that counting, became purchasers without notice.

We are of opinion therefore that whatever view be taken of the transaction, the \$6,522.70 used by Berry in paying the defendants' debts was the plaintiffs' money.

The only other ground on which the defendants could be thought to have a better equity than the plaintiffs arises from the fact that the defendant trust had provided Berry with money to pay the debts paid by him with the money of the plaintiffs.

The fact that the defendants had put Berry in funds to pay the debts paid with the plaintiffs' money (in our opinion) does not bar them from the equity to which that gives rise. The first act done by Berry was to steal from the defendants \$11,185.50, or \$9,515.50, whichever is the true sum (as we have stated above). That made Berry the defendants' debtor for that sum. Then Berry repays to the defendants (Berry, and Berry alone, accepting the payment in behalf of the defendants) \$6,522.70 on account of this debt of \$11,185.50 or \$9,515.50, owed by him to the defendants. The \$6,522.70 so repaid did not become the defendants' money, because Berry acted for the defendants in receiving it. Then Berry uses this money so repaid to the defendants in paying the defendants' debts. The money used in

paying the defendants' debts was the plaintiffs' money. Berry still owes the defendants the \$11,185.50 or \$9,515.50. That debt was not in part paid by Berry's manipulation of the \$6,522.70. It cannot be that in equity the defendants are to have both their claim against Berry for the \$11,185.50 or \$9,515.50, and the payment of their debt to the amount of \$6,522.70. Since Berry's manipulation of the \$6,522.70 did not pay his debt to the defendants (and we have seen that it did not), the fact that the occasion for Berry's stealing \$6,522.70 from the plaintiffs, and using it in paying the defendants' debts, was because he had stolen the funds provided by the defendants to pay these debts, does not affect the plaintiffs' equity growing out of the fact that it was their (the plaintiffs') money which in fact paid the defendants' debts, and that a benefit inures to the defendants from that fact.

As matter of authority, the only case on the point that has come to our attention (*Bannatyne v. MacIver* [1906] 1 K. B. 103) is in accord with this view of the law. The suit in *Bannatyne v. MacIver* was on a bill for £350, the amount of unauthorized borrowing of money made by the defendants' London agent (Hudson by name) at four different times. When the first money was borrowed, the London business was short of funds without fault on Hudson's part. But subsequently to the first loan, and before the other three had been made, the principals had "sent him [Hudson] considerable sums of money, more than sufficient to cover the liabilities of the branch, and rendering any borrowing by Hudson unnecessary." Page 104. The necessity for the money borrowed on the last three occasions came from the fact that Hudson had withdrawn sums which he had no right to withdraw. How much of the £350 constituting the four borrowings was attributable to the first, when Hudson had not wrongfully withdrawn money, and how much of it was attributable to the three other borrowings caused by Hudson's wrongful withdrawals, does not appear. It was held that the plaintiffs' equity to stand in the shoes of the creditors paid off with their money did not depend upon the state of the account between the defendants and Hudson. Romer, L. J., dealt directly with this part of the case in these words: "It [the state of account between the agent and the principals] might be relevant if the plaintiff were seeking to enforce a different equity; that is, the right to stand in the shoes of the agent as against his principal."

It follows that the defendants have no superior equity with respect to the \$6,522.70 used in paying the debts of the defendants.

and that the plaintiffs to that extent are entitled to be repaid by the defendants.

This brings us to the question which we referred to in the beginning of this opinion, and which we then left undecided, to wit: "How much of the \$7,903.14 paid in discharge of debts due from the Pickett trust was paid out of the \$11,000 stolen from the plaintiffs?" The plaintiffs claim that the rule in Clayton's Case, 1 Meriv. 572, applies; and applying that rule, that the \$2,000 drawn by Berry on November 15th for his own use must be applied to the balance on deposit when the \$11,000 was deposited, so far as the amount of that balance (\$1,380.44) goes, and that \$619.56 only of that \$2,000 was paid out of the \$11,000. In other words, that when Berry took \$2,000 out of this account for his own use in the afternoon of November 15th, he stole \$1,380.44 from the Pickett estate, and \$619.56 only from the Newell trust. The defendants contend, however, that Berry stole this \$2,000 from the Newell trust and that the \$1,380.44 on deposit in the Pickett account must be taken to have been applied to the payment of the Pickett trust debts. If the contention of the defendants is right, the sum expended out of the \$11,000 in payment of the Pickett trust debts amounts to \$6,522.70, as we have said.

We are of opinion that the contention of the defendants is correct, and that the rule in Clayton's Case does not apply. The rule in Clayton's Case is that, as between two *cestui que trust*, the order of drawings on a bankrupt's bank account is the order of application. But when the fund drawn on is a mixed fund belonging to the defendant and his beneficiary, the order in which the drawings are made is not material, and money which could have been properly drawn out by the bankrupt will be appropriated accordingly. *Hewitt v. Hayes*, 205 Mass. 356, 91 N. E. 332; *Re Hallett*, L. R. 13 Ch. Div. 696; *Re Oatway* [1903] 2 Ch. 356. The bank account here in question was not Berry's bank account, but the bank account of the Pickett trust, and the \$11,000 put into that account was put in there primarily to enable Berry to get a draft for the sum of \$2,000 on his own account, and secondarily to pay taxes and mortgage interest amounting to \$7,903.14 due from the Pickett trust, and then overdue because of prior stealings by him from the Pickett trust. It was Berry's duty to use the \$1,380.44, so far as it went, in paying this \$7,903.14 due from the Pickett trust for taxes and mortgage interest; and, under the rule in Hallett's Case, he must be taken to have done so, without regard to the order in which the checks were drawn.

We are therefore of opinion that the
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plaintiffs are entitled to recover the several sums making up the amount of \$6,522.70, with interest at 6 per cent from the several dates on which they were respectively used in paying debts due from the defendants.

Decree accordingly.

Knowlton, Ch. J., dissenting:

Because the decision in this case seems to me wrong, and likely to be misleading, I think it my duty to give the reasons for my dissent. With much of the discussion in the opinion I agree, but some of the cases referred to seem to me to be wrongly interpreted.

It is shown conclusively in the opinion that no debt was created against these defendants. Neither an action for money had and received, nor an action of any other kind could be maintained against them. The principle upon which the plaintiff seeks to recover is that an owner of property which has been stolen or misappropriated, if he has no adequate remedy at law, may follow it wherever he can find it and identify it, and have it restored to him by a court of equity. In some of the early cases it was decided that this could not be done if the property was money. But the law is now held more liberally, so that a plaintiff may prevail if the fund can be traced and identified, even though the particular pieces of money are mingled with others and cannot be recognized. This rule is subject to the exception that, if the money is used in the payment of a debt to one who receives it in good faith in satisfaction of the debt, it cannot be recovered in equity any more than at law. In my opinion, this principle is applicable to the present case.

Berry, as a trustee, stole the plaintiffs' money. As a trustee he had stolen a similar sum from the defendants previously. He was engaged in a general course of embezzlement from the defendants. He used the plaintiffs' money in this course of embezzlement, to pay debts of the defendants which he should have paid previously with other money belonging to them, intending by these payments to prevent detection in his criminal course. Subsequently, he stole other money of the defendants to a like amount, and afterwards on their demand rendered an account as trustee, and paid back the balance due them. Neither the defendants nor anyone representing them had any knowledge of his embezzlements, but they acted in good faith in the settlement with him. Can they be charged with the stolen money that he used in the payment of their debts, for the payment of which he was primarily liable as trustee, he having also received money from them

which should have been used in paying the debts?

It is too plain for argument that there could be no recovery by the plaintiffs from the original creditors to whom the payments were made. They received the money in good faith and discharged their claims, and in reference to their rights the money is equitably as well as legally theirs. The obligation of Berry to make these payments, and the right of the defendants to have him make them, were as great in reference to the defendants' rights as they were in reference to the rights of the original creditors. At that time, as between Berry and the defendants, these were his debts, and not the defendants' debts. The equitable as well as the legal right of the defendants to have and retain the benefit of his payments was as perfect as the similar right of the original creditors. The only ground upon which this can be questioned is that Berry was one of the trustees, and as such, for some purposes, an agent of the defendants, who might be thought to be chargeable with his knowledge and conduct when he made the payments. This ground would be substantial, if, at the time of making the payments, he had been acting fairly as their trustee, without any wrongful purpose to obtain an advantage to himself to their detriment. But he was in the midst of a course of embezzlement from these defendants, begun before and continued after the making of the payments, and the payments were made in his own interest, to prevent the discovery of his crimes. In such a case the knowledge of the agent is not imputable to the principal against whom he is acting criminally for his own benefit. This principle is well established in Massachusetts. *Indian Head Nat. Bank v. Clark*, 166 Mass. 27-30, 43 N. E. 192; *Allen v. South Boston R. Co.* 150 Mass. 200-206, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Foote v. Cotting*, 195 Mass. 55, 61, 62, 15 L.R.A. (N.S.) 693, 80 N. E. 600; *Innerarity v. Merchants' Nat. Bank*, 139 Mass. 332, 52 Am. Rep. 710, 1 N. E. 282; *Produce Exch. Trust Co. v. Bieberbach*, 176 Mass. 577-588, 58 N. E. 162; *Shepard & M. Lumber Co. v. Eldridge*, 171 Mass. 516-531, 41 L.R.A. 617, 68 Am. St. Rep. 446, 51 N. E. 9. In 31 Cyc. Law & Proc. p. 1595, the doctrine is stated as follows: "The rule that notice to an agent is notice to the principal, being based upon the presumption that the agent will transmit his knowledge to his principal, the rule fails when the circumstances are such as to raise a clear presumption that the agent will not perform this duty; and accordingly, where the agent is engaged in a transaction in which he is interested adversely to his principal, or is engaged in a

scheme to defraud the latter, the principal will not be charged with knowledge of the agent acquired therein." A note contains copious citations in support of this doctrine, from the highest courts in Alabama, Connecticut, Georgia, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Jersey, New York, North Dakota, Ohio, Pennsylvania, South Carolina, Texas, Utah, the United States, England, and Canada. The rule is stated in similar language in 1 Am. & Eng. Enc. Law, 2d ed. p. 1145, and is supported by numerous citations.

I think that the law is overwhelmingly established, not only in Massachusetts, but all over the English-speaking world, to the effect that the defendants are not chargeable with Berry's knowledge which was acquired or used in connection with the crimes that he was committing against them. If they are not so chargeable, whether we treat the case as an attempt to follow the fund and have it restored to the plaintiffs, or as an attempt to be subrogated to the former rights of the original creditors and thus to get the benefit of the fund, I think there is no ground for a claim against these defendants.

If the plaintiffs seek to follow the fund and have it returned by those in possession of it, the defendants answer that the money paid to their creditors never came into their possession. It did not go beyond the possession of the creditors, who received it in payment of their debts from the person who ought to pay them. The plaintiffs may then say that because these creditors applied the money to the discharge of these debts, which were also secondarily the defendants' debts, it came constructively into the hands of the defendants, since they have had the benefit of it. If for this reason it is to be treated as constructively in the hands of the defendants, it came into their hands through the original creditors who represented them in the receipt of it, and who received it in payment of debts, under such circumstances that it cannot be taken away from them; and the constructive receipt of it by the defendants through them is for this reason charged with this same right to have it remain where it is. The defendants were as ignorant as the original creditors of any fact that could affect the validity of the payments.

If the plaintiffs seek to recover under the principle of subrogation, they encounter at the outset the doubtful question whether that principle can be applied to payments of stolen money, made by a thief. Assuming in their favor that it can, their right of subrogation is to the rights of the credit-

ors against the party who was primarily bound to make payments, namely, Berry. The plaintiffs can ask to be permitted to proceed against Berry for the collection of these debts. Berry would be estopped from setting up that the debts had been paid; for the payments were made with money that he stole from the plaintiffs, and as against them he could not avail himself of the payments. But if the plaintiffs seek to go beyond Berry to the defendants, they cannot claim an estoppel against them. Unless the defendants are chargeable with Berry's knowledge, the payments made to the original creditors are completely effectual for the protection of the defendants from an attempt to revive these debts that were legally discharged. The payments were made in money, to persons who received and applied it in the satisfaction of debts which Berry primarily, and the defendants secondarily, were bound to pay.

There is not only this defense growing directly out of the transactions with the original creditors, but the defendants afterwards, in the final settlement of their account with Berry, acting innocently and in utter ignorance of any fact that could affect their rights adversely, treated all these payments to the original creditors as payments by Berry to themselves and allowed a full consideration for them. In this respect their rights are like those of the original creditors. The payment of money to them by Berry in this settlement, by receiving credit for the previous payments with the stolen money, was precisely the same as if he had paid the money into their hands in satisfaction of the debts. Through this settlement of the account, it became, as between Berry and the defendants, an ordinary case of the payment of a debt with stolen money to one who receives it in good faith from a person who is bound to pay it. This was a final settlement of all matters between Berry and the defendants, with a payment to them of a balance due. The payment and settlement were a reaffirmation by both parties of all previous payments entering into the account. The payment and settlement were governed by the same rules of law as the payments and settlements that satisfied the debts of the original creditors of the defendants. The payments covered by this settlement and included in it cannot be got back from the defendants, any more than from the former creditors of the defendants.

There is no evidence in the case that Berry, either as an individual or as a trustee of the Newell trust, ever transferred or attempted to transfer \$6,522.70 of this stolen money, or any other part of

it, to himself as a trustee of the Pickett trust, to be afterwards held and used by him for the benefit of the Pickett trust. There is nothing to indicate that he ever thought of making such a transfer. Upon the facts here shown, if he had attempted to make it by the formal expression of an intention to that effect, in the promotion of his criminal purposes, the attempt would not have imposed a liability upon these defendants, nor have affected the legal rights of anybody. The foundation of the plaintiffs' claim rests entirely upon the specific payments made by Berry to some of the creditors of the defendants, to some of the beneficiaries, and to his cotrustee.

The undisputed facts seem to bring us directly to the question whether we shall overrule the cases already cited, and disregard the universally recognized rule that a principal is not chargeable with the knowledge of his agent, acquired or used while acting adversely to the principal in the commission of a crime against him.

The only cases relied upon in the opinion on this point are *Atlantic Bank v. Merchants' Bank*, 10 Gray, 532, and *Atlantic Cotton Mills v. Indian Orchard Mills*, 147 Mass. 268, 9 Am. St. Rep. 698, 17 N. E. 496. The first of these was decided by three judges, while two others joined in a dissenting opinion. A teller who had embezzled a large sum from the bank where he was employed expected an examination of his accounts upon a particular day. He entered into a conspiracy with a broker and the teller of another bank, to obtain from the other bank bills to be presented and used at the examination of his account, and afterwards to be returned to the other bank. Accordingly, the broker drew a worthless check on the bank of the embezzling teller, which the teller certified as good. This was then presented at the other bank, and there paid by the conspiring teller, and the bills were taken to the embezzling teller, who put them with the cash of his bank, where they were counted by the officers as a part of the bank's assets, on their examination of his account. The teller committed suicide the next day, the bills not having been returned, and, upon a suit by the bank from which they were obtained against the bank in which the teller left them, it was held that the property in the bills never passed to the defendant bank, that no consideration moved from the bank, that no one representing the bank ever had any knowledge of the matter, or acted in it, except the embezzling teller, and that he did not intend to pass any title to the defendant, or to do anything with the bills except to use them in committing a fraud upon it by

having them counted as if they belonged to the bank, and that therefore the plaintiff could recover. Judges Bigelow and Merrick took a different view of this part of the case, but we assume that the majority were correct, and that the case was rightly decided. After this view of the transaction had been fully elaborated in the opinion, and the decision put upon this ground, the writer of it, Chief Justice Shaw, said: "There is another aspect in which the case may be considered;" and he then proceeded to argue that the defendant bank had constructive notice of the facts through its defaulting teller, and that it was chargeable on that ground. In this opinion there is no reference to the doctrine that the knowledge of an agent engaged in the commission of a crime for his own benefit against his principal is not imputable to the principal, and seemingly the writer did not consider it. But two of the judges asserted it in their dissenting opinion. In my judgment there never was a stronger case than this for the application of the doctrine that, if the transaction had otherwise been of a kind to give the defendant important rights in the money, it could not have been deprived of those rights by reason of the knowledge of its defaulting teller. Upon the facts of the case there was no occasion to consider the question of imputed knowledge, and in no event could the bank be deprived of any rights by knowledge of this criminal in connection with the crime that he was committing against it. This part of the opinion of the majority seems to me not only to be wrong, but to be everywhere contradicted by later decisions.

In the case of *Atlantic Cotton Mills v. Indian Orchard Mills*, *ubi supra*, it appeared that the same person was the treasurer of both the plaintiff and the defendant corporations, and was a defaulter to a very large amount. It was found that the checks in dispute did not represent real transfers of money, or attempts really to transfer money. They were a part of the fictitious transactions intended to enable the treasurer to cover up his defalcations. A committee of the directors of each corporation made periodical examinations of his accounts. In anticipation of an examination, he would draw checks upon the other corporation, payable to the one whose assets were to be examined, and make false entries in his books, which checks and entries were intended simply to show assets and deceive the committee. There was no consideration for them. They had no other purpose than to prevent discovery of the embezzle-

ments. No officer of either corporation, except the thief, ever had any connection with them or knowledge of them. The decision of the court was unquestionably right, that there was no transfer of property from one corporation to the other by these checks and entries. In this respect the case is precisely like the procurement of bills in the other case, for no other purpose than to exhibit them and have them counted and then return them. The decision was put upon the ground that no property passed.

In this case, as in the former one, the writer of the opinion took up the question whether the plaintiff was, for any purpose, chargeable with notice of the facts upon which the defaulting treasurer was acting while committing these crimes upon the plaintiff, and in some parts of the discussion he used language implying that it might be so chargeable. In my view, it is plain that the corporation could not be deprived of any of its rights by charging it with the knowledge of its officer or agent engaged in the commission of a crime against it for his own benefit. If the opinion is intended to show that the defendant corporation had constructive notice of the facts known to the treasurer while he was committing these crimes against it, I think it in conflict with the later cases in Massachusetts, and in all other jurisdictions of which I have knowledge.

I think the writer of the opinion had in mind, and was trying to meet, a question of a very different kind. If the defaulting treasurer, acting alone, did that which, on the books of the company, purported to create a debt, but which did not in fact create a debt without participation or subsequent action of the corporation or of some other representative of it, and if the corporation afterwards attempted to adopt his act and give it effect, when it was ineffectual, it could not do this without also adopting his knowledge. The judge said in the opinion: "Under these circumstances, if the plaintiff would adopt the intention to make it a payment, it must also adopt the fraud. It cannot adopt so much of Gray's act as was beneficial, and reject the rest." This was undoubtedly correct. If the unauthorized or ineffectual act of an agent is to become effectual through the ratification of the principal, the ratification must be of the act as it is. If the principal afterwards says he was ignorant of certain features of the act which affect its quality and that he is not bound by these features of it, this is equivalent to saying that, by reason of his ignorance, there was no effectual ratification or adoption, and he can-

not take advantage of the act at all. As the judge said in this opinion (page 281 of 147 Mass.: "It cannot blow hot and cold." In reference to such an attempt of a principal, his agent's knowledge would be imputable to him. I think this is all the judge meant in this part of the opinion. But this is very different from a statement that a corporation which, acting innocently, has received the benefit of a transaction that has taken complete effect through its agent's own act, and that from its point of view is entirely valid, like the payment of one of its debts for which payment it has given full consideration, is chargeable with the knowledge of its agent who received money to make the payment, and who then made it with stolen money, for his own benefit, as a part of a course of crime which he was pursuing against the corporation. It is not in conflict with the proposition above quoted, that a principal cannot be deprived of the act of an agent which is complete, and legally and equitably valid from the standpoint of the principal's rights, because of the knowledge of the agent in the commission of a crime against the principal.

In each of these two cases there was nothing that has any relation to the present case, except the discussion as to constructive notice. In each the discussion was upon a point outside of the principles on which the decision rests. In each of them it was decided that the title to the property never passed. In the present case, in the payment of every debt, there was both an intentional and an actual transfer of the money for a valuable consideration. The different interests in the transaction were represented by different contracting parties qualified to act. Berry represented himself primarily, and the defendants secondarily, in making the payments. The creditors represented themselves in receiving the payments; and in discharging the debts, they acted for themselves, but primarily for Berry's benefit, and secondarily for the benefit of the defendants. The effect of Berry's acts in making the payments originally, and the effect of his subsequent act in settling with the defendants, was not suspended to await ratification or adoption by the defendants long afterwards.

The plaintiffs have proceeded upon an assumption that the title to the money passed to the persons to whom the payments were made, and they ask to be subrogated to the rights of those persons. I think it would be unfortunate to adopt into our law any *dicta* from either of these cases that are in conflict with the general course of decision both here and elsewhere.

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I think that the decision in *Craft v. South Boston R. Co.* 150 Mass. 207-210, 5 L.R.A. 641, 22 N. E. 920, covers exactly the questions in this case. See also *Allen v. South Boston R. Co.* 150 Mass. 200, 5 L.R.A. 716, 15 Am. St. Rep. 185, 22 N. E. 917. It was made upon grounds that are as applicable to a suit in equity as to an action at law. The attempt, in the opinion of the majority, to distinguish it from the present case, does not seem to me successful. I think the sentence, "Whether it was a benefit to the company that he was able to obtain and use money for this purpose is necessarily uncertain," is merely an incidental remark, and not a statement of a ground of the decision. If there was this uncertainty by reason of the fact that the defaulter afterwards continued his stealing, that did not affect the plaintiffs' right to recover. This right was to be determined as of the time when the payment was made, and it could not be affected by the fact that the embezzler did or did not steal more money afterwards. I do not think that the court decided or thought of deciding that the rights of the parties depended upon the results of Reed's transactions taken as a whole, those that occurred after the payments made with the plaintiffs' money, as well as those that occurred at the times of the payments or previously.

Moreover, in this particular the facts in the present case are the same. Berry continued his embezzlements from the defendants afterwards, until they amounted to more than \$8,000, in addition to those made before. By the payment of these debts, presumably he was enabled to steal more money from the defendants. In the present case no benefit inured to the defendants from all of the defaulter's transactions taken as a whole. Berry never paid a dollar for the benefit of the defendants beyond the amount of the defendants' money which was in his hands for that purpose, and for which the defendants were entitled to credit and received credit in the settlement with Berry. In the language of the present opinion: "No benefit can be said to inure to a defendant because one of its debts was paid in the course of a series of thefts which the defaulter was enabled to continue by the payment in question."

The case of *Title Guarantee & T. Co. v. Haven*, 196 N. Y. 489, 25 L.R.A. (N.S.) 1308, 89 N. E. 1082, 1085, relied upon in the opinion, seems to me to support the contention of the defendants. It holds that there can be no subrogation where there was no lien, but only a personal liability for a debt. What is far more important than this, it distinctly holds that in a case like the present there can be no recovery. The court said in

the opinion: "It must be distinctly understood that this view is predicated upon the assumption that the payment of the assessments was purely gratuitous, and in no wise in discharge of any real or supposed obligation upon the part of the estate of Andrew H. Green or of the unknown forger, but was brought about solely by mistake induced by the forgery. Upon this assumption, we think that the plaintiff, on proof of the facts stated in the complaint, would be entitled to be subrogated to the lien of the city, as against the proceeds of the sale of the land in the hands of the defendants. If, however, it should be made to appear that the payment was not thus gratuitous, we are of opinion that the right of subrogation could not successfully be asserted." In the present case the payments were not gratuitous, but made by one who was legally bound to make them.

The cases from the English courts relied upon in the opinion, I do not consider important. *Bannatyne v. MacIver* [1906] 1 K. B. 103, was an action upon a bill of exchange for money borrowed by the defendant's agent, in excess of his authority. The money was deposited in the defendant's bank account, and much of it was used in his business, in payment of his debts. There was no charge of criminality against the agent, nor any contention that in doing the business and paying the debts he acted otherwise than in the name of the principal, or that any debt was paid as one for which the agent was primarily or legally liable. So far as appears, there was no reason why the defendant should not be charged with the knowledge of his agent that money furnished by the plaintiff was being used in making the payments. There were no facts upon which to raise the questions that I have principally discussed, and they were not considered.

The decisions that one lending money to a married woman or a minor, to be used in paying for necessities, may take advantage in equity of the fact that the money was actually used in buying necessities, stand, in my judgment, upon equities of a different kind. The same is true of the decisions which hold a corporation to payment for money borrowed without authority of law, if the money was afterwards appropriated and used by the corporation for its benefit. These illustrate equitable limitations of the common doctrine of *ultra vires*. Moreover, none of these cases, in my judgment, has any relation whatever to the vital question in this case, that arises when a payment of a debt has been made in money, by a person who ought to make it, to one

who receives the money in good faith and discharges the debt for the benefit of the payer, and of the defendants who are liable secondarily for it, and when, subsequently, the defendants in good faith have settled the payer's account with him, and have given him credit for the payment, they having formerly furnished him money with which to make it, and when, long afterwards, it is discovered that the payer misappropriated the money furnished by the defendants, and then paid the debt with money stolen from another person. This question is whether the debt, once satisfied, can then be revived in favor of that other person, and the defendants be compelled to pay it a second time.

I think that the defendants are entitled to retain the benefit of these payments for which they gave full value, just as the original creditors are entitled to retain the benefit of them, and for the same reason.

Petition for rehearing denied.

UNITED STATES CIRCUIT COURT OF APPEALS, THIRD CIRCUIT.

MANUEL BROMMER, Plff. in Err.,
v.
PENNSYLVANIA RAILROAD COMPANY.
PENNSYLVANIA RAILROAD COMPANY,
Plff. in Err.,
v.
CHARLES D. HENDERSON.
SAME, Plff. in Err.,
v.
LILLIAN S. BLOCKSON.
(— C. C. A. —, 179 Fed. 577.)

Railroad — grade crossing — duty of automobile driver.

1. One who drives an automobile over a railroad crossing at grade, without stopping his machine to look and listen at the only point where he could get a clear view

Note. — Care required of driver of automobile at railroad crossings.

In the case of *Louisville & N. R. Co. v. Eckman* (Ky.) 125 S. W. 729, the plaintiff's automobile came into collision with one of the defendant's trains as he was crossing the latter's tracks, with resulting injury to himself and his car. It appears that the crossing was protected by gates, and that they were elevated as the plaintiff approached and entered upon the crossing. After passing over the first of several tracks, it was noticed that the opposite gate

of the track, is guilty of negligence which will prevent his holding the railroad company liable for injuries received through collision with a train, although such point was within 30 or 40 feet of the track.

Negligence — injury at railroad crossing — invited guest.

2. An invited passenger in an automobile who fails to request the driver to stop for the purpose of looking and listening when approaching a railroad crossing is guilty of negligence which will prevent his holding the railroad company liable for injuries caused by collision with a train, due to the attempt to cross without stopping.

Same — presence of flagman — effect on traveler's duty.

3. The presence at a railroad crossing of a flagman who makes no attempt to warn the driver of an approaching automobile that a train is also approaching does not relieve such driver of the duty to stop, look, and listen to ascertain for himself the safety of attempting to cross the tracks.

Same — duty of invited passenger ignorant of crossing.

4. The mere fact that an invited passenger on the rear seat of an automobile made no attempt to ascertain whether or not a railroad track could be crossed in safety does not render him guilty of negligence as matter of law, so as to prevent his holding the railroad company liable for injury due to a collision with a train at the crossing, if there is nothing to show the construction of the vehicle, or that he

knew of the proximity of the crossing, or could have known of it by the exercise of reasonable care.

(June 10, 1910.)

ERROR to the Circuit Court of the United States for the District of New Jersey, to review judgments in consolidated actions brought to recover damages for personal injuries alleged to have been caused by defendant's negligence; plaintiff Brommer seeking review of a judgment entered upon a directed verdict for defendant, and defendant seeking review of judgments in favor of plaintiffs Henderson and Blockson. Judgments in Brommer Case and Blockson Case affirmed. Judgment in Henderson Case reversed.

The facts are stated in the opinion.

Argued before Buffington and Lanning, Circuit Judges, and Archbald, District Judge.

Messrs. Wescott & Wescott for plaintiffs.

Messrs. Joseph H. Gaskill and Thomas L. Gaskill, for defendant:

The negligence of a flagman will not excuse the traveler who attempts to cross the track of a railroad from looking both ways and listening. He must not rely entirely on the flagman.

New York C. & H. R. R. Co. v. Maidment, 21 L.R.A. (N.S.) 794, 93 C. C. A. 413, 168

was descending, and that a train was approaching on the farthest track. The automobile was immediately stopped, and, because of its situation, was obliged to remain where it stood. Before the first train had passed, a second one approached on the track immediately in front of the automobile, and, as claimed by the plaintiff, the vibration caused by the engine started his machine, with the resulting collision. In affirming a verdict for the plaintiff, the appellate court thus formulated the rules applicable to the situation: "If by keeping up the crossing gates when they should have been down, appellant's servants induced appellee to go upon the crossing when it was not safe for him to do so, and while hereon he was injured by a train, also in charge of appellant's servants, which in passing gave him no warning of its approach, such acts would undoubtedly constitute negligence. It is equally true that, by the negligence of appellant's servants in failing to lower the gate, appellee was induced to run his automobile upon the crossing, and while thereon, and awaiting the raising of the west gate in order to save the crossing, appellant's train passed so near the automobile that the vibration of the ground therefrom caused the automobile to move and run against the train, thereby inflicting appellee's injuries or making his automobile, it would manifestly be but right to conclude that the L.R.A. (N.S.)

negligence of appellant's servant in failing to lower the east gate in time to warn appellee not to go upon the crossing was the proximate cause of the injuries sustained; and this would be true although the passing train with which the automobile collided in approaching the place of the collision gave the usual signals of its coming. On the other hand, if, as claimed by appellant's counsel, appellee, notwithstanding his having been induced to go upon the crossing by the negligence of appellant's servant in failing to lower the gate in time to warn him not to do so, after getting thereon, knew, or, by the exercise of ordinary care, could have known, of the approach of the train, and thereafter negligently started his automobile, or negligently permitted it to be put in motion, and by reason thereof it ran into or against the train, there should have been no recovery, although appellant's servants in charge of the train may have been guilty of negligence in failing to give the usual signal of its approach; for in such case appellee's own negligence would have been the proximate cause of the injuries to his person and machine."

No other decisions upon this question have been reported since the preparation of the note accompanying New York C. & H. R. R. Co. v. Maidment, 21 L.R.A. (N.S.) 794.

W. A. S.

Fed. 21; *Berry v. Pennsylvania R. Co.* 48 N. J. L. 141, 4 Atl. 303; *Conkling v. Erie R. Co.* 63 N. J. L. 338, 43 Atl. 666.

Plaintiffs Henderson and Blockson were guilty of contributory negligence because of their failure to look and listen, and communicate the results of their observation to Brommer, the driver of the car.

New York C. & H. R. R. Co. v. Maidment, *supra*; *Davis v. Chicago, R. I. & P. R. Co.* 16 L.R.A. (N.S.) 424, 88 C. C. A. 488, 159 Fed. 10; *Dean v. Pennsylvania R. Co.* 129 Pa. 514, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 718; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 64 Am. Rep. 126; *Shultz v. Old Colony Street R. Co.* 193 Mass. 309, 8 L.R.A. (N.S.) 597, 118 Am. St. Rep. 502, 79 N. E. 873, 9 A. & E. Ann. Cas. 402; *Colorado & S. R. Co. v. Thomas*, 33 Colo. 517, 70 L.R.A. 681, 81 Pac. 801; 3 A. & E. Ann. Cas. 700; *Tolledo & O. C. R. Co. v. Eatherton*, 20 Ohio C. C. 297; *Hajsek v. Chicago, B. & Q. R. Co.* 5 Neb. (Unof.) 67, 97 N. W. 329; *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643, 11 S. W. 127; *Koehler v. Rochester, & L. O. R. Co.* 66 Hun, 568, 21 N. Y. Supp. 844; *Brickell v. New York C. & H. R. R. Co.* 120 N. Y. 290, 17 Am. St. Rep. 648, 24 N. E. 449; *Illinois C. R. Co. v. McLeod*, 78 Miss. 334, 52 L.R.A. 954, 84 Am. St. Rep. 630, 29 So. 76; *Smith v. Maine C. R. Co.* 87 Me. 339, 32 Atl. 967; *Lake Shore & M. S. R. Co. v. Boyts*, 16 Ind. App. 640, 45 N. E. 812; *Read v. New York C. & H. R. R. Co.* 123 App. Div. 228, 107 N. Y. Supp. 1068.

Buffington, Circuit Judge, delivered the opinion of the court:

This opinion deals with three cases tried together in the lower court and so argued in this. One Brommer was driving his automobile over the Westfield avenue grade crossing in Camden, New Jersey, of the Pennsylvania Railroad Company, when it collided with a train. In the automobile were Mr. and Mrs. Henderson and Mrs. Blockson, all of whom Brommer had invited to ride with him. Mrs. Henderson was killed and the other three occupants injured. These three brought suits. In the trial the court below held Brommer guilty of contributory negligence, and directed a verdict against him. Verdicts and judgments were recovered by Henderson and Mrs. Blockson. To the entry of the judgment against him Brommer sued out a writ, and to the judgment entered against it in favor of Henderson and Mrs. Blockson the railroad sued out writs also.

We turn out attention first to the case of Brommer. A study of the entire testimony thereof and the fact that the tire marks

on the ground, noted immediately after the accident, showed a deep swerve made by the automobile at the crossing, leaves us under the strong impression that Brommer attempted to make a flying dash over this crossing at a high rate of speed, and that this was the cause of the accident. We must, however, dispose of the case, on the evidence given on the plaintiff's side, and on that alone we are clear the court below was right in holding Brommer guilty of contributory negligence. The crossing in question was a grade street one in the city of Camden, and Brommer had no previous knowledge of the approaches thereto. He came in sight of it when he passed over an elevation on Westfield avenue, 170 feet back, and from there the avenue sloped to the crossing, to the sides thereof. The track, however, was shut out by hedges and houses on either side of the avenue from his sight.

Henderson, a nephew of the plaintiff Henderson, who was called by plaintiff to prove the location, testified, in answer to the court's question: "You could not see a train coming the way this train was coming until you got within 40 feet of the track."

McMullen, called by plaintiff for the same purpose, testified:

"As you approached the railroad track, how far down could you see on the left?"

A. I made no measurements. I should say that probably 30 feet from the railroad track you could see them for some distance; that is, down the track.

Q. About what distance?

A. Within about 30 feet of the railroad track, probably 500 or 600 feet, or maybe more. I don't know; I did not measure it.

And, as summed up by Brommer's counsel, "the evidence on both sides showed obstacles to vision up to within 30 or 40 feet of the track." Actual measurements and photographs testified to by defendant's witnesses show that at a point 30 feet back from the track there was a clear view to the left down the track for 1,400 feet. But taking the estimate made in plaintiff's proofs, there was a view point within 30 or 40 feet of the track for 500 or 600 feet.

Now, what was the duty of the driver of an automobile approaching a railroad crossing under such conditions? The question is, in a way, new, and we may therefore repeat in part what this court said in *New York C. & H. R. R. Co. v. Maidment*, 2 L.R.A. (N.S.) 794, 93 C. C. A. 415, 168 Fed. 23: "With the coming into use of the automobile, new questions as to reciprocal rights and duties of the public and the vehicle have and will continue to arise. No place are those relations more important

ant than at the grade crossings of railroads. The main consideration hitherto with reference to such crossings has been the danger to those crossing. A ponderous, swiftly moving locomotive, followed by a heavy train, is subjected to slight danger by a crossing foot passenger, or a span of horses and a vehicle; but, when the passing vehicle is a ponderous steel structure, it threatens not only the safety of its own occupants, but also those on the colliding train. And when to the perfect control of such a machine is added the factor of high speed, the temptation to dash over a track at terrific speed makes the automobile, unless carefully controlled, a new and grave element of crossing danger. On the other hand, when properly controlled, this powerful machine possesses capabilities contributing to safety. When a driver of horses attempts to make a crossing, and is suddenly confronted by a train, difficulties face him to which the automobile is not subject. He cannot drive close to the track or stop there, without risk of his horses frightening, shying, or overturning his vehicle. He cannot well leave his horse standing, and if he goes forward to the track to get an unobstructed view and look for coming trains, he might have to lead his horse or team with him. These precautions the automobile driver can take, carefully and deliberately, and without the nervousness communicated by a frightened horse. It will thus be seen an automobile driver has the opportunity, if the situation is one of uncertainty, to settle that uncertainty on the side of safety, with less inconvenience, no danger, and more surely than the driver of a horse. Such being the case, the law, both from the standpoint of his own safety and the menace his machine is to the safety of others, should, in meeting these new conditions, rigidly hold the automobile driver to such reasonable care and precaution as to go to his own safety and that of the traveling public. If the law demands such care, and those crossing make such care, and not chance, their protection, the possibilities of automobile crossings accidents will be minimized."

Now, the plaintiff, by his own showing, had a vantage point 30 or 40 feet from the track where he could have stopped and seen a train at least 500 feet away. And it is equally clear that, if he had stopped and looked, this accident would not have happened. In the *Maidment Case*, *supra*, we said: "The duty of an automobile driver approaching tracks, where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty."

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This rule is conducive to safety, and observation and experience have deepened our conviction of its soundness. We therefore adhere to it and now restate it, and the court below was clearly right in holding it was conclusive of this case. Here, as there, the driver of the machine, when stopping, looking, and listening, would have prevented the accident, made chance, not stopping, the guaranty of his safety. It will not avail to say he looked and listened as he approached the crossing, and therefore there was no call to stop, for it is manifest either that he was going at such high rate of speed as to necessitate a deep swerve to avoid striking the flagman, or, if he was approaching at the slow, 2-mile an hour rate his witness says he was, he did not look, for if he had, he would have seen this train 500 feet up the track, and with his machine under control, as the witness said it was, he would have stopped. "If a traveler," says Wharton's Law of Negligence, quoted with approval in *Pennsylvania R. Co. v. Richter*, 42 N. J. L. 186, by looking along the road, could have seen an approaching train in time to escape, it would be presumed in case of collision, that he did not look, or, looking, did not heed what he saw." To the same effect are authorities cited in *Elliott on Railroads*, § 1165. And the presumption of the law that he did not look when he came to this 30-foot vantage point is confirmed by the proof he produced. Helen Waters, who was about 100 feet from the crossing, and saw the automobile coming, says that Brommer was about 15 feet from the track when he rose up on his seat and looked both ways. Mrs. Mowitz, another witness of plaintiff, was near the crossing, and saw the automobile coming up to it. She shouted a warning just before it crossed. Her testimony, in explanation of why she did not do so sooner, clearly shows that she recognized the prudent and natural course was for Brommer to stop.

Her testimony was:

Q. Why was it, Mrs. Mowitz, that you did not holler when you saw the automobile going right up towards the track, and saw the train coming along?

A. Why, because I did not realize what was going to happen.

Q. You thought the automobile was going to stop? Would you go across a railroad if you knew a train was coming?

A. I thought it was—

Q. (Repeated by stenographer.) You thought the automobile was going to stop?

A. I thought it would, naturally; there being a railroad there. . . .

Q. They acted as if they did not see any railroad tracks, did they not?

A. They did.

The plaintiff in error Brommer was clearly guilty of contributory negligence, and the court rightly gave binding instructions against him. His failure to stop, look, and listen, at a point where stopping and where looking and where listening would have prevented the accident, directly contributed thereto.

Brommer, then, being culpably negligent, was Henderson, who sat on the seat beside him, any less so? It is true there are cases, but this is not one of them, where a person hires a supposedly capable driver, and being regarded by the law as a passenger for hire, and as having no part in the management or control of the vehicle, is visited with no duty to help safeguard it. But this is a different case. Henderson was not a passenger, and Brommer was not a quasi carrier; but the whole party were united for a common purpose and had a common object in view. Brommer had no greater duty or obligation toward the others than they toward him. It is true he was running the machine; but if anything threatening the general safety of the party came within the knowledge of any of them, and he or she by timely warning was able to warn Brommer of such danger, and as a direct and proximate result of not doing so he or she suffered damage, how can it be said this was not negligence, and that thereby he or she did not contribute to causing the accident? The cases in each of the states in this circuit would hold such conduct negligent. "The fact that the plaintiff was a guest did not relieve her from exercising ordinary care." *Mittelsdorfer v. West Jersey & S. R. Co.* 77 N. J. L. 702, 73 Atl. 540. "The testimony is wholly to the effect that the plaintiff [in the vehicle by invitation] committed himself voluntarily to the action of Fields [the owner and driver], that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by *Crescent Twp. v. Anderson*, 114 Pa. 643, 60 Am. Rep. 367, 8 Atl. 379." *Dean v. Pennsylvania R. Co.* 129 Pa. 524, 6 L.R.A. 143, 15 Am. St. Rep. 733, 18 Atl. 721. "It is no less the duty of the passenger, where he has the opportunity to do so, than of the driver, to learn of danger, and to avoid it if practicable." *Farley v. Wilmington & N. C. Electric R. Co.* 3 Penn. (Del.) 584, 52 Atl. 543.

Now, as we have before noted in Brommer's Case, the proof is that Brommer was approaching the crossing at a 2-mile gait (slower than a slow walk); that he was

slowing up; that the machine was under control; that there was a place 30 or 40 feet back from the track where it could be seen for 500 or 600 feet. It is therefore clear that Henderson could safely have called on Brommer to stop, and that if he chose to allow him to make a running crossing, without knowledge of what he might encounter, he in fact joined him in testing the danger. Such being the situation, was Henderson under any obligations in the premises? The court below thought not, and, in effect, held that Henderson and the rest of the party with Brommer, being there "by invitation," cannot be charged with his negligent act; adding thereto: "Hence, as I have said, in order to have the negligence of Mr. Brommer imputed to the plaintiffs, the plaintiffs must have in some measure actively participated by word or deed therein, so as in a sense to make his act there own; otherwise his negligence cannot be charged against or imputed to them."

But in our view the question before us is not whether Brommer's negligence is to be imputed to other occupants of the car, but whether they or any of them omitted that due care—and negligence is lack of due care—which, under the circumstances, they were bound to take. And to our view, the court, in making the test of contributory negligence that "the plaintiffs must have in some measure actively participated by word or deed therein, so as in a sense to make his act their own," erred, for in *Little v. Hackett*, 116 U. S. 371, 29 L. ed. 654, 6 Sup. Ct. Rep. 391, the Supreme Court held that acts of omission as well as commission might constitute contributory negligence, saying: "That one cannot recover damages for an injury to the commission of which he has directly contributed is a rule of established law and a principle of common justice. And it matters not whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong."

It follows, therefore, that Henderson was under obligations to take due care of his own safety. He was not a passenger for hire. He was engaged in the common purpose of a pleasure ride with the driver of the machine. He knew they were approaching a railroad crossing. Being free from the engrossing work of operating the machine, and occupying a seat beside the driver, he was in an even better situation than Brommer to look out for the safety

of the machine. His own safety and the instinct of self-preservation should have led him to do so. Under the circumstances his duty was well stated in *Davis v. Chicago, R. I. & P. R. Co.* 16 L.R.A. (N.S.) 424, 88 C. C. A. 496, 159 Fed. 18, where it was said: "Under the facts of this case, the relation that plaintiff sustained to his companion, Pfeutze, did not permit him to sit dumb and inert in the vehicle, taking no heed of a known danger, permitting Pfeutze to drive him into a pitfall or onto a deadly railroad track, implicitly trusting his life and limbs to the discretion of his companion without a word of warning or protest. It is now the better-recognized rule of law that, as to such a person, situated as was the plaintiff, riding in a vehicle in mere companionship with his friend, engaged upon a mutual adventure, it is as much his duty as that of the driver to take observation of dangers, and to avoid them, if practicable, by suggestion and protest. In other words, he is required to exercise ordinary care to avoid injury."

Measured by this standard, and the rule is founded on sound reason and is conducive to safety, we see no escape from the conclusion that Henderson was equally culpable with Brommer. He knew they were approaching a railroad crossing. As he approached, he saw the view was shut off from the track. Thus ignorant of the safety or danger of the crossing, prudence, self-preservation, and the positive demand of the law called on him to stop before attempting the passage. The machine was under control, by his own account, only moving at a 2-mile rate. Under the circumstances he was called on to act, or, if he chose to keep silence and join in chancing the crossing, the law will not hold him faultless of his share of bringing about the accident. The power, speed, and control of automobiles are new factors in the crossing of railroads. They tempt a reckless driver to make flying crossings. On the other hand, they afford elements of safety and convenience to a careful one. The law contributes to the rational enjoyment of the automobile, to the safety of its occupants, and to the welfare of the railroad traveling public, when, in these early cases, it holds the automobile drivers rigidly to the rule laid down in the *Maidment Case*, that "the duty of an automobile driver approaching tracks where there is restricted vision, to stop, look, and listen, and to do so at a time and place where stopping and where looking and where listening will be effective, is a positive duty."

And because Henderson joined with Brommer in a deliberate violation of this salutary rule, we must hold him guilty of 29 L.R.A. (N.S.)

contributory negligence. We have not overlooked the fact that there was a flagman at the crossing. But, in any view of the case, his presence does not change our conclusion as above. If the proofs of the defendant are true, the flagman saw in time both train and automobile approaching, and stood in the center of the crossing, waiving his flag; but, in spite of this warning, the driver came on and over the crossing at so high a rate of speed that his car made a deep swerve from its course to avoid striking him. On the other hand, if the evidence *contra* be accepted, the flagman who was standing near the crossing, with his flag rolled up and his back to the approaching automobile, in no way misled Henderson, or relieved him of his duty of due care. Indeed, as we view the situation, the plain neglect of duty by the flagman did not relieve the persons attempting to cross from the duty on their part of looking and listening (*Berry v. Pennsylvania R. Co.* 48 N. J. L. 141, 4 Atl. 303), while his presence made it possible for them to call to him, and ascertain that the crossing was safe.

It remains to notice the case of Mrs. Blockson. While holding her to a due measure of care, in so far as her situation and surroundings enabled her to exercise it, we have no proof she did not exercise it, or that anything she saw or failed to see contributed in any way to the accident. On that the trial judge, in refusing a new trial, well summed up the situation: "As to Mrs. Blockson, she frankly admits that she did not look, for the reason that she was sitting in the back seat of the automobile, and, as it appears, on the opposite side from that from which the train approached. The only implication, if any, that can be drawn from this testimony, is that, because she was on the back seat, she could not see. There is no evidence to show she knew that they were approaching a railroad crossing, or that, from the position she occupied, sitting behind the men on the front seat, she could have known it by the exercise of ordinary care. The construction of the automobile does not appear. It was not shown whether the front seat was higher or lower than the rear seat, or whether the automobile had a top, or whether the top, if there was one, was up or down, or had side curtains or not, or, if it had, whether they were up or down."

To this we may add there was no proof as to whether the rear of the car was shut off from communication with the driver. Under this state of the proofs, we have no facts upon which we can say, as a matter of law,

Mrs. Blockson was guilty of contributory negligence.

The judgment in her favor must therefore be affirmed.

KANSAS SUPREME COURT.

A. B. COOPER

v.

JOHN RHEA, Impleaded, etc., Appt.

(82 Kan. 109, 107 Pac. 799.)

Judgment — vacation — misapprehension as to pleadings.

1. Under the provision (Civ. Code, § 568, subd. 3, Gen. Stat. 1901, § 5054, subd. 3) that a judgment may be set aside at a subsequent term, "for mistake, neglect, or omission of the clerk, or irregularity in obtaining" it, a court may vacate a judgment

Headnotes by MASON, J.

Note. — Applicability of statute of limitations to suit to remove cloud from title.

Although many cases may be found that discuss the question whether a certain statute of limitations is applicable to a suit to remove a cloud from title, as well as many others in which it is finally concluded that the particular suit to remove a cloud from title is not barred, even conceding or assuming that the statute of limitations is applicable at all, but very few have been found which directly discuss the question whether the statute of limitations is available in any event as a defense to remove a cloud from title.

The majority of cases found, however, agree with COOPER v. RHEA, in holding that the statute of limitations has no application in a suit by one in possession to remove a cloud from title. See *Miner v. Beekman*, 50 N. Y. 337; and *Batty v. Hastings*, 63 Neb. 26, 88 N. W. 139,—sufficiently set out in the COOPER CASE.

In addition to the above cases this rule seems also to have been recognized in *Payne v. Anderson*, 80 Neb. 216, 114 N. W. 148; and *Mutual L. Ins. Co. v. Corey*, 54 Hun. 493, 7 N. Y. Supp. 939, reversed on other grounds in 135 N. Y. 326, 31 N. E. 1095.

So, in *Schoener v. Lissauer*, 107 N. Y. 111, 13 N. E. 741, where an action was brought to procure the cancelation and discharge of a certain mortgage, it was held that a suit to remove a cloud from title was never barred by the statute of limitations.

In *Meier v. Kelly*, 22 Or. 136, 29 Pac. 265, it was held that a suit to remove a cloud from title is never barred while the adverse claim or interest exists. The court said: "While the owner in fee continues liable to an action, proceeding, or suit upon the adverse claim, he has a continuing right to the aid of a court of equity to ascertain

rendered on the pleadings because of a misapprehension as to what allegations they in fact contained.

Limitation of action — action to quiet title — applicability of statute.

2. The right to maintain an action to remove a cloud from a title is a continuing one to which the statute of limitations is not applicable.

Mortgage — foreclosure — against other than mortgagor.

3. In an action brought to foreclose a mortgage, in order to establish a ground of recovery against a defendant who does not claim under its maker, the plaintiff is required to show that the mortgagor had title to the property, so that the mortgage created a lien.

(March, 12, 1910.)

APPPEAL by defendant, Rhea, from a judgment of the District Court for Trego County in plaintiff's favor in an action brought to recover the amount alleged to

and determine the nature of such claim and its effect upon his title, or to assert any superior equity in his favor; and a suit by him for this purpose cannot be barred by the statute of limitations, because it is a continuing right." To the same effect is *Katz v. Obenchain*, 48 Or. 352, 120 Am. St. Rep. 821, 85 Pac. 617.

In *Bailey v. Hopkins*, 152 N. C. 748, 67 S. E. 569, it was said that a landowner cannot be expected to bring action against every man who, while not in possession, shall declare he claims an interest in the property, under penalty to the owner after the lapse of ten years of being barred of action for a latter assertion of title.

So, in *Quinn v. Kellogg*, 4 Colo. App. 157, 35 Pac. 49, it was said: "We have no statute which limits the time within which a party in possession shall proceed to remove a cloud from his title, and as no lapse of time can restore vitality to a mortgage which has been paid and extinguished, so no lapse of time will bar a mortgagor from proceeding to cause the fact of its extinguishment to appear upon the record."

In *Peck v. Sexton*, 41 Iowa, 566, it was held that so long as the owner remains in possession, and a tax title is outstanding as a cloud upon his title, the statute of limitations cannot bar his action for a removal of the cloud thus created.

Combs v. Combs, 30 Ky. L. Rep. 873, 90 S. W. 919, seems also to hold that, in a suit to quiet title, if the plaintiff or the one through whom he holds has never been out of possession, the statute of limitations has no application. To the same effect are *Cameron v. Lewis*, 59 Miss. 134; *Kennedy v. Sanders*, 90 Miss. 524, 43 So. 913; *American Emigrant Co. v. Fuller*, 83 Iowa, 509, 50 N. W. 48.

In *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409, it was held that the right of a grantor to have his title quieted as to land

be due on certain coupons and to foreclose a mortgage on real estate given to secure the bond from which they had been clipped. Reversed.

The facts are stated in the opinion.

Messrs. S. M. Hutzler and A. D. Gilkeson for appellant.

Mr. W. E. Saum for appellee.

Mason, J., delivered the opinion of the court:

A. B. Cooper began an action upon several coupons more than five years past due, asking the foreclosure of a real estate mortgage given to secure the bond from which they had been clipped. The mortgagors, who are not shown to have otherwise encumbered or conveyed their title, were named as defendants; the petition alleging that they had been absent from the state long enough, so that the bar of the statute of limitation had not fallen. They do not appear to have been served, and the

included in a deed by mistake, as against the claim asserted by the purchaser, cannot become barred while the former remains in actual possession, claiming to be the owner and the actual owner, as against the purchaser, of all interest therein except the mere naked title.

However, the rule that the statute of limitations is not available as a defense to remove a cloud from title can only be invoked by a complainant when he is in possession. *Sage v. Winona & St. P. R. Co.* 7 C. C. A. 237, 19 U. S. App. 1, 58 Fed. 297. The court in this case said: "There are obvious reasons why the holder of the legal and equitable title to lands, who is in possession of the same, should not be confronted with the plea of laches when he files a bill to cancel some void or invalid conveyance which operates as a cloud upon his title. Possession of the premises by the true owner is good and sufficient notice to the world of his rights therein, by reason of which third parties need not be prejudiced by any dealings they may have with the holder of the invalid conveyance, while the existence of the cloud is a continuing injury like a public nuisance. Under such circumstances, no harm can result in holding that no period of delay on the part of the owner in asserting his right to have the cloud removed will bar him of his remedy. But the case is far different when the person filing such a bill is out of possession, and the person proceeded against is in possession, or, if not in actual possession, is the holder of a record title that is without any apparent flaw or defect. In such cases the doctrine that neither laches nor limitations can be invoked as a defense to a bill filed to remove a cloud upon a title has no just application, and, if tolerated, would frequently lead to gross injustice."

So, in *Casserly v. Alameda County*, 153 Cal. 170, 94 Pac. 765, where an action was brought by L.R.A. (N.S.)

plaintiff dismissed the case as to them. John Rhea was made a defendant under the allegation that he claimed an interest in the mortgaged property, but that any right he had therein was inferior to the lien of the plaintiff. He filed an answer, alleging, among other matters, that the plaintiff's cause of action had not accrued within five years prior to the commencement of the suit. The plaintiff demurred to this part of the answer. On December 17, 1906, the court overruled this demurrer, and, as the plaintiff declined to plead further, gave judgment for Rhea. After the lapse of the term, the plaintiff filed a motion to open this judgment on the ground that he had misunderstood the character of the answer when he elected to stand upon his demurrer. On November 8, 1907, the court sustained the motion and set aside the judgment. Thereafter Rhea filed an amended answer consisting of a general denial and a plea of the five years' statute of limitation. A

brought to quiet title to a fractional interest in certain public squares, which had been in the open and notorious possession of the city for more than twenty years and afterwards of the county for many more years, the court took occasion to say that undisputably the claim of plaintiff was barred by the statute of limitations.

It should be noted that in some jurisdictions a suit to quiet title or remove cloud from title is maintainable only when the complainant is in possession, and such suit cannot be brought when the complainant is out of possession; of course in those jurisdictions this question cannot arise.

There are a number of cases, however, in which, although the court did not expressly pass upon the question whether the statute of limitations was applicable to a suit to remove a cloud from title, evidently assumed or recognized such to be so.

Thus in *Eve v. Louis*, 91 Ind. 457, where a purchaser under an execution sought to quiet his title derived under the sheriff's sale and conveyance, the court said: "His right to recover possession accrued when he received that title, and would continue for twenty years from that time. To have his title quieted, if out of possession, his right to recover possession must not be barred by time. . . . If in possession, he could, at any time, have his title quieted against any adverse, invalid claim of title or interest asserted at the commencement of his suit to quiet title, or at any time within fifteen years before the institution of such suit. At any time for twenty years after the accruing of his right to recover possession, he, if still out of possession, had a right to have his title quieted against any adverse, invalid claim of title or interest asserted at or within fifteen years before the commencement of his suit."

In *Caress v. Foster*, 62 Ind. 145, it was said that since the statute of limitations

trial was then had. The plaintiff introduced the coupons. No other evidence was offered by either party. Judgment was rendered for the plaintiff, ordering a sale of the property and barring all claims of Rhea, who appeals.

The first question presented is whether the court erred in vacating the original judgment. The plaintiff made affidavit that at the time the judgment was rendered he understood that the parties and the court had agreed that the answer was to be amended so as to set out a tax deed, and that it was to be treated at the hearing on the demurrer as though such amendment had already been made. He also introduced an affidavit of the former judge of the court, who presided when the judgment was rendered, stating that he had understood that to be the situation and had acted upon that understanding. It therefore was shown that the judgment was rendered on the pleadings while the court and the losing party were under a mistaken impression as to what issues they presented. The power of the court to correct such an error, even at a subsequent term, is so essential to the orderly administration of justice that it ought not to be denied unless in virtue of legislation admitting no other reasonable construction. A judgment so rendered does not express the real purpose of the court. The situation it presents is analogous to that arising when the record made does not conform to the action really taken. It is as necessary that a speedy remedy should be afforded in the one case as in the other. In many states a mistake of fact is recognized as an independent ground for vacating a judgment after the term has lapsed. 23 Cyc. Law & Proc. p. 931; 15 Enc. Pl. & Pr. p. 245. Here authority for such action must be found, if at all, under the provision that a court may vacate or modify its own judgment, "for mistake, neglect, or omission of the clerk, or irregularity in obtaining" it. Civ. Code, § 568, subd. 3; Gen. Stat. 1901, § 5054, subd. 3. Assuming that the "mistake" referred to in the language quoted can only be that

of the clerk, the word "irregularity" must be given a broad enough meaning to cover a case where the court has acted upon an erroneous understanding of the facts. Such has been the practical construction placed upon it. *Small v. Douthitt*, 1 Kan. 335; *Tobie v. Brown County*, 20 Kan. 14; *Murphy v. Swadner*, 34 Ohio St. 672. A specific objection is made to the order opening the judgment, on the ground that the plaintiff did not, as required by the statute (Civ. Code, § 572; Gen. Stat. 1901, § 5055; *Schuler v. Fowler*, 63 Kan. 98, 64 Pac. 1035), make a showing that he had a valid cause of action. His affidavit set out that he believed he had a complete defense to the answer. Under the circumstances of the case—the real issue being one of law—this must be deemed sufficient.

The defendant maintains that his plea of the statute of limitation was good. He could not, however, take advantage of the fact that the coupons were more than five years overdue, unless he claimed under their makers. *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862. His answer was silent as to the nature of his interest in the land, and therefore did not show that he was not in privity with the mortgagors; but, in order to avail himself of the plea that the mortgage was barred, he was required affirmatively to show that he held under them. *Lincoln Mortg. & T. Co. v. Parker*, 65 Kan. 819, 70 Pac. 892; 27 Cyc. Law & Proc. p. 1562. Inasmuch as he did not place himself in a position to assert that the coupons were outlawed, the five years' statute of limitation did not protect him. If he did not claim through the mortgagors, the fact that the action accrued five years before it was brought was no defense. In that case it was, as to him, in effect an action to remove a cloud from the title, and the statute of limitation was not applicable. "It is an acknowledged branch of equity jurisdiction to remove clouds from the title at the suit of the owner of the fee. Such owner has a right to invoke this aid. But must he do it within ten years after the commencement of the cloud, or

prescribes no certain time in which actions to remove cloud from title shall be commenced, such actions are limited only by a statute providing that all actions not limited by any other statute shall be brought within fifteen years. To the same effect are *Detwiler v. Schultheis*, 122 Ind. 155, 23 N. E. 709; *Stonehill v. Swartz*, 129 Ind. 310, 28 N. E. 620; *Irey v. Markey*, 132 Ind. 546, 32 N. E. 309.

So, in *Royse v. Turnbaugh*, 117 Ind. 539, 20 N. E. 485, the above statute of limitations was held a good answer to a complaint to quiet title.

In *Haarstick v. Gabriel*, 200 Mo. 237, 98 29 L.R.A. (N.S.)

S. W. 760, it was said that since a suit to determine and quiet title to land falls under the head of real actions, the limitations applicable thereto govern, and the suit is not governed by the statute of limitations which relates to personal actions.

There are also many cases concerning suits to quiet title or remove a cloud from title when the particular facts of the case cause them to be governed by special statutes of limitations. These cases of course are not included in this note. The question of laches in connection with suits to remove a cloud from title has been expressly excluded.

G. V.

may he do it at any time during its existence while he continues such owner? . . . This is a continuing right that may be asserted at any time during the existence of the cloud; never barred by the statute of limitations while the cloud continues to exist. This results from the continuing character of the right, which is equally as potent after the lapse of eleven years as it was during the first ten." *Miner v. Beekman*, 50 N. Y. 337, 343. "While a cause of action clearly accrues to the owner of real property in possession thereof whenever a cloud upon his title is created or an adverse title asserted, we do not think it necessarily follows that such cause of action accrues then once for all, so as to start the statute of limitations from that date. A cloud upon a title must always continue to operate as such during the period of its existence, and, as its effect upon the title is continuing, the cause of action resting on the right of the owner to have it removed would seem to be continuing also, and to be available at all times while the cloud remains." *Batty v. Hastings*, 63 Neb. 26, 29, 88 N. W. 139, 140. See also *Smith v. Matthews*, 81 Cal. 120, 22 Pac. 409; *Schoener v. Lissauer et al.*, 107 N. Y. 111, 117, 13 N. E. 741; *Anderson v. Akard*, 15 Lea, 182; *Wagner v. Law*, 3 Wash. 500, 15 L. R. A. 784, 28 Am. St. Rep. 56, 28 Pac. 1109, 29 Pac. 927.

The dismissal of the case as to the mortgagors gave rise to an anomalous situation. It left the plaintiff prosecuting what was nominally the foreclosure of a mortgage without the mortgagor or any successor to his title being a party,—with no defendant in court excepting one presumably claiming under an adverse title. Such a proceeding could only be in effect an action to protect the lien of the holder of the mortgage,—analogous to a suit to quiet title. Under some circumstances, a remedy of that kind might be necessary. For instance, before an action to foreclose a mortgage accrued, a tax deed might be taken out, good on its face, but in fact voidable. If the mortgagor refused to act, probably the mortgagee might invoke the aid of a court of equity to set aside the deed before the passage of time made it invulnerable. Possibly conditions not disclosed by the petition justified the plaintiff in maintaining a separate action against Rhea. But he failed in his proof. By introducing the coupons in evidence he sufficiently showed that he owned them; and their execution, as well as that of the mortgage and bond, was admitted. But he made no attempt to establish that the mortgagors ever had any title to the mortgaged property, a fact that was essential to the claim of a lien on his 29 L.R.A. (N.S.)

part. Therefore he made out no case whatever, and was not entitled to the judgment rendered, or to any other judgment, against Rhea. *Ordway v. Cowles*, 45 Kan. 447, 25 Pac. 862.

The litigation was conducted on each side with such finesse that the court is not greatly enlightened as to the claims of either party. The plaintiff dismissed the mortgagors from this case, and so left it to proceed without the owner of the fee,—generally regarded as the one indispensable party to a foreclosure suit (*Britton v. Hunt*, 9 Kan. 228),—probably under the impression that their presence in some way made the statute of limitation a menace, possibly for fear that they might answer and plead it. The defendant refrained from disclosing the nature of his claim, perhaps because by doing so he would have shown affirmatively that he had no standing to assert that the coupons were outlawed. Neither gave evidence of having any interest in the property; but, as the burden of proof was on the plaintiff, rather than on the defendant, he was not entitled to relief.

The judgment is reversed, and the cause remanded for further proceedings in accordance herewith.

All the Justices concur.

ALABAMA SUPREME COURT.

ALICE MURPHREE, Impleaded, etc.,
Appt.,
v.

MRS. F. W. R. CLISBY.

(— Ala. —, 52 So. 907.)

Subrogation — loan to insane person — right against person receiving the money.

1. One lending money to an insane person with which to purchase real estate, which is paid over to the vendor, cannot be subrogated to the rights of his debtor against the vendor, so as to compel the vendor to return the purchase money to him.

Fraud — loan to insane person — rights against his vendor.

2. One who lends money to an insane person with which to purchase real estate cannot, where both he and the vendor act

Note. — The question raised in the above case, whether one who lends money to an insane person, which, through some transaction, falls into the hands of a third person, can be subrogated to the rights of the insane person against the third party, so as to compel the latter to return the money to him, seems to be one of first impression.

independently and without knowledge of the insanity, compel the vendor to return the money to him on the ground of fraud.

(June 1, 1910.)

APPEAL by defendant Murphree from a decree of the City Court of Montgomery overruling demurrers to a bill filed to foreclose a mortgage on certain real estate. Reversed.

The facts sufficiently appear in the opinion.

Mr. John V. Smith for appellant.

Messrs. Ball & Sanford for appellee.

Sayre, J., delivered the opinion of the court:

Appellee filed her bill to foreclose a mortgage which had been made to her by W. T. and Clara Jackson, husband and wife, to secure the debt of the former, the wife joining merely to release her dower right. When answers were filed it appeared that the defendants would rely upon the fact that the husband was insane at the time of the execution of the mortgage, to defeat foreclosure. Later the death of Jackson was suggested, and leave had to revive against his heirs and representatives. There was, however, no effort to revive; but an amendment was filed, which brought in appellant as a party defendant, and prayed that a decree be rendered against appellant for the mortgage debt, together with an attorney's fee, as provided in the mortgage, and that a lien for the same be declared upon the property. As establishing appellee's right to this relief against the appellant, the amendment showed that prior to the execution of the mortgage, Jackson had agreed to purchase the mortgaged property from appellant; that to piece out his own funds to the amount of the agreed purchase price, he borrowed money of appellee, and executed the mortgage in question to secure the same; that Jackson paid the money he had in hand to appellant, and directed appellee to pay to appellant the sum secured by the mortgage as the balance of the purchase money, which complainant did, whereupon appellant executed a deed to Jackson, and Jackson executed the mortgage to appellee; that appellant understood the purport of the entire transaction; and that Jackson was at the time insane. It does not appear that either appellant or appellee knew of Jackson's lunacy. Appellant demurred to the amended bill generally and

specially, and, upon her demurrer being overruled, prosecuted this appeal.

There are a number of difficulties in appellee's position. Among them, her assertion of equity against the appellant is fundamentally unsound. She states her equity as one of subrogation in some sort. Assuming the nullity of deed and mortgage, that the legal title to the land is still in appellant, and that Jackson's representatives are entitled to have back the money paid by him, the contention is that since appellant, with knowledge of the circumstances,—not, however, a knowledge of Jackson's insanity, if that would make any difference,—received appellee's money, knowing that appellee, in paying it, relied upon the security of the mortgage, appellee ought to have a decree against appellant for her money, and a lien upon the land. We need not concede that the efficacy of an absolute deed without conditions depends upon the legal capacity of the grantor to transfer an estate by deed. *Concord Bank v. Bellis*, 10 Cush. 276. However that may be, the fact is that appellant received no money of the appellee, or, at most, the receipt was manual only. The consideration for the deed moved from Jackson to appellant. The consideration for the mortgage moved from appellee to Jackson. Appellant and appellee acted in entire independence of each other. The doctrine of subrogation is that where one, not voluntarily, but to protect his own rights, satisfies a debt for which another is primarily liable, he may enforce against the person primarily liable all the securities, benefits, and advantages held by the creditor. A statement of the case has shown that appellee is in no position to appeal to this doctrine. Appellee's contention seems rather to squint at fraud. But the bill is totally inadequate along that line. There were no relations of contract, trust, or confidence between appellant and appellee. Both acted in good faith and in ignorance of Jackson's lunacy. To permit appellee to maintain her bill would be to hold appellant as a warrantor of her grantee's sanity. It is clear that she did not assume that burden, and there is no principle of law by which it may be imposed upon her. Appellant's demurrer for want of equity should have been sustained.

Reversed and remanded.

Simpson, Anderson, and McClellan, JJ., concur.

THE RULE IN SHELLEY'S CASE.

Where an estate is granted or devised to one for life with remainder to his heirs, the fee vests in the grantee named, and the words "for life" are without effect to curtail his enjoyment or right to alienate.

NORTH CAROLINA SUPREME COURT.

B. A. PRICE et al., Appts.,

v.

G. O. GRIFFIN and Wife.

(150 N. C. 523, 64 S. E. 372.)

Deed — Shelley's Case — surviving heirs.

A deed to one for life, and at his death to his surviving heirs, vests a fee in the first taker, the word "surviving" not being sufficient to prevent an application of the rule in Shelley's Case, at least, where the warranty runs to him and to his assigns forever.

(April 21, 1909.)

APPEAL by plaintiffs from a judgment of the Superior Court for Wayne County in defendants' favor in an action brought to partition certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. M. T. Dickerson and H. L. Stevens for appellants.

Messrs. Isaac F. Dortch, F. A. Daniels, and Aycock & Winston for appellees.

Walker, J., delivered the opinion of the court:

This is an action for the partition of land. In March, 1879, Jesse Price, Sr., who was then the owner of the land in controversy, conveyed the same by deed to his son, John C. Price, during the term of his lifetime, and at his death to his surviving heirs, reserving to Jesse Price, Sr., the grantor, an estate for life in the land. Jesse Price, Sr., died in 1879, and John C. Price, on January 15, 1883, conveyed the land by deed to W. P. Price in fee simple. John C. Price died on April 6, 1906, leaving as his heirs four children, B.

A. Price, E. H. Price, A. B. Price, and Bettie Pearsall, who are the plaintiffs, and W. P. Price, Lewis H. Price, John T. Price, and C. D. Price. The defendant G. O. Griffin has acquired the interest of W. P. Price and C. D. Price by deeds duly executed to him in 1884, before this proceeding was commenced. If the deed from Jesse Price, Sr., to John C. Price conveyed a fee-simple estate to the latter, the plaintiffs are not entitled to recover, so that the only question in the case is whether it conveyed a fee or only a life estate, with remainder to his children surviving him. The difficulty presented in the cases arises from the use of the word "surviving," prefixed to the word "heirs," but we do not think this is sufficient to render inapplicable the rule in Shelley's Case to this limitation. It is said that, as one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance, it only applied to those limitations in which the word "heirs (or some equivalent word of inheritance) is used, on account of the maxim, *Nemo est hæres viventis*. As under this maxim no one can be heir to a living person, the word "heirs" must necessarily refer to those who survive the ancestor; and the word "surviving," therefore, is mere surplusage, just as we have held that the word "lawful" in a limitation to the "lawful heirs" of a person has no significance, and does not restrict the ordinary meaning of the word "heirs." *Wool v. Fleetwood*, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785.

In *Criswell's Appeal*, 41 Pa. 288, Judge Strong (afterwards a justice of the Supreme Court of the United States), for the court, said: "It is said there could be no other heirs than such as were living at the death of the ancestors; that the words 'then living' would be superfluous, unless the testator intended children by 'heirs;' and that, in order to give meaning to those words, the technical words of limitation

Note. — See note, post, 963.

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must give way, and be treated as only description of persons. We are not convinced by the argument. Let it be admitted that the words 'then living' are strictly of no legal meaning when applied to heirs, this is no sufficient reason for holding that the testator, in the use of technical words of limitation, intended to depart from their ordinary legal meaning. It is not so easy to overcome the contrary presumption. The words 'heirs' and 'heirs of the body' will retain their significance, though the effort be to make unmeaning other words in the will not technical, and even though there may be inconsistent expressions. If the words are repugnant, why should the word 'heirs' give way, rather than the words 'then living'? In the will of an unlettered man, however, they can hardly be called repugnant. Lawyers may understand that there are no heirs of a living person, or that the phrase 'living heirs' is a superfluous addition to a gift to heirs; but laymen may not." He adds that the books are full of cases in which it has been held that superfluous expressions in a will do not suffice to reduce the words "heirs" or "heirs of the body" into words of purchase, so as to make them the root of a new inheritance, or the stock of a new descent or *descriptio personarum*. Chancellor Kent (4 Kent, Com. 13th ed. 226) says that Mr. Hargrave, in his observations on the rule, is for giving it a most absolute and peremptory obligation. "He considered that the rule was beyond the control of intention when a fit case for its application existed. It was a conclusion of law of irresistible efficacy when the testator did not use the word 'heirs' or 'heirs of the body' in a special or restrictive sense, for any particular person or persons who should be the heir of the tenant for life at his death, and in that instance inaptly denominated 'heir,' and when he did not intend to break in upon and disturb the line of descent from the ancestor, but used the word 'heirs' as a *nomen collectivum* for the whole line of inheritable blood. It is not nor ought to be in the power of a grantor or testator to prescribe a different qualification to heirs from what the law prescribes when they are to take in their character of heirs; and the rule, in its wisdom and policy, did not intend to leave it to the parties to decide what should be a descent and what should be a purchase."

The heirs of a man are his descendants who survive him and are capable of inheriting at the time of his death. At no other time can it be ascertained who his heirs will be. They may be his lineal descendants, or those only who are related to him 29 L.R.A.(N.S.)

collaterally. *Hardage v. Stroope*, 58 Ark. 306, 24 S. W. 490. In the case of *Watts v. Clardy*, 2 Fla. 389, 390, where the limitation was very much like the one in this case, it is said: "The term 'surviving heirs' is one of unusual occurrence in the books: for, whilst we have 'survivors,' 'surviving children,' 'sons,' 'issue,' and 'daughters,' there is in the books no such word attached to heirs, as far as we have been able to discover, and we are inclined to the opinion that, so connected, it is without meaning, neither enlarging nor contracting the estate. The heirs of Mrs. Clardy from necessity are those who survive her at her death. They could not have preceded her. *Nemo est hæres viventis*. There is no heir until the death of the ancestor. The fair import of the clause, then, would seem to be that the estate is to go to the heirs of her body at her decease. If this view be correct, the case is freed from difficulty, and the deed is a naked grant to the heirs of the body. . . . Obviously, those who take as surviving heirs claim as heirs to the mother at her death, and, taking as heirs, they take by descent. According to our view, the property would descend to the whole class of heirs of Mrs. Clardy, and they would become entitled to the estate in the same manner, and to the same extent and with the same descendible qualities, as if the grant had been simply to her and her heirs." The same conclusion was reached by the court in *Hiester v. Yenger*, 166 Pa. 445, 31 Atl. 122, in which the court said that "there is no distinction between the expressions 'his then surviving heirs' and 'heirs then living' or 'heirs living at the time of their deaths.' In each case the word 'heirs' refers to those who, under the intestate laws, would inherit from the first taker *qua* heirs." In *May v. Lewis*, 132 N. C. 115, 43 S. E. 550, this court construed the following devise: "I loan unto my son Benjamin May my entire interest in the tract of land [describing it], to be his during his natural life, and at his death I give said land to his heirs, if any, to be theirs in fee simple forever; and if he should die without heirs, said land to revert back to his next of kin." We held that the rule in *Shelley's Case* did not apply, because of the closing words, which changed the ordinary course of descent; but it was said that "if the deviser had concluded the limitation with the words 'to his heirs, if any, to be theirs in fee simple forever,' the rule would have applied and given to Benjamin May a fee simple. In other words, that the expression "if any" would not, in such a case, prevent the application of the rule. By the words "if any," the deviser evidently meant if any living or

surviving; or, to state it differently, to the "living" or "surviving" heirs, "if any." The court further said in that case that the person designated by the technical word "heir" is he on whom the law casts an inheritance at the time of the ancestor's death, citing *Croom v. Herring*, 11 N. C. (4 Hawks), 393, where Henderson, J., so defines the word.

The limitation in this case cannot be differentiated from one to a person, and, at his death, to his heirs; for his heirs must be ascertained at that time. They are those upon whom at his death the inheritance or descent is cast. In the case of *Richards v. Bergavenny*, 2 Vern. 324, the estate was limited to the Lady Bergavenny and such heirs of her body as should be living at her death, and, in default of such heirs of her body, the remainder over. The court held that the Lady Bergavenny took an estate in fee tail, and did not attach any importance to the words "living at her death," as having the effect to restrict the words "heirs of her body" so as to cut down her estate to one for life. This case has often been cited as an authority in support of the position that such words cannot be allowed to reduce the quantity of the estate or to free the limitation from the operation of the rule in *Shelley's Case*. We are authorized to examine the context of the deed in order to ascertain the true meaning of words which we are required to construe when they are ambiguous. *Gudger v. White*, 141 N. C. 507, 54 S. E. 386; *Atlantic & N. C. R. Co. v. Atlantic & N. C. Co.* 147 N. C. 368, 23 L.R.A. (N.S.) 223, 125 Am. St. Rep. 550, 61 S. E. 785, 15 A. & E. Ann. Cas. 363. In this way we may determine whether the words "surviving heirs" were used as *designatio personarum* or as descriptive of those persons upon whom the law casts the inheritance under the canons of descent as heirs of John C. Price, and not as purchasers from Jesse Price, or as those who take under the law, and not under the deed.

Looking at the instrument in its entirety, we find that, in addition to the words we have already taken from the deed, the clause of warranty contains a covenant for quiet enjoyment which runs not to John C. Price for life, and then to his "surviving heirs," but "to him and to his heirs and assigns forever." This may be slight evidence of what the grantor meant when he used the words "surviving heirs;" and, while this may be so, it is not to be disregarded, but may be considered as shedding some light upon the question in controversy. The form of the covenant is in perfect harmony with the interpretation we have given to the words of the limitation "to

him during the term of his lifetime," and, at his decease, "to the surviving heirs of the said John C. Price." It evinces a purpose to give him the fee, and not merely a life estate, by the use of proper words of inheritance which are sufficient for the application of the rule of law laid down in *Shelley's Case*. We believe our conclusion to be supported by recent decisions of this court as to the application of the rule in *Shelley's Case*. *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657; *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459; *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111.

As John C. Price acquired by the deed from his father a fee-simple estate, he conveyed the same estate to the defendant G. O. Griffin by the deeds executed in 1884, and the plaintiffs consequently have no interest in the land as tenants in common with the defendants.

The ruling of the court was therefore correct.

No error.

ILLINOIS SUPREME COURT.

JEWELL H. BAILS et al., Appts.,

v.

HENRY DAVIS et al.

(241 Ill. 536, 89 N. E. 706.)

Shelley's Case—joint life tenancy—effect.

A conveyance to a man and his wife during their natural lives, and after their death to his heirs, vests the fee in him, under the rule in *Shelley's Case*, subject to her life estate.

(October 26, 1909.)

A PPEAL by complainants from a decree of the Circuit Court for Macon County, dismissing a bill filed to partition certain lands. Reversed.

The facts are stated in the opinion.

Mr. A. C. Anderson, for appellants:

The rule in *Shelley's Case* applies where there is a devise or grant to two or more persons as tenants in common or as joint tenants, and there is a limitation over to the heirs of one of them.

Tudor, Real Prop. 4th ed. 344; 2 Washb. Real Prop. p. 556; Fearn, Contingent Remainders, p. 209; Kepler v. Reeves, 7 Ohio Dec. Reprint, 34; Bullard v. Goffe, 20 Pick. 252.

It makes no difference as to the opera-

Note.—See note, post, 963.

tion of the rule, whether the remainder is one in expectancy or in possession.

Fearne, *Contingent Remainders*, p. 209; 2 Washb. *Real Prop.* p. 556.

Dunn, J., delivered the opinion of the court:

A demurrer was sustained to a bill for partition filed in the circuit court of Macon county, the bill was dismissed for want of equity, and the complainants have appealed.

The complainants deraign title from Jonas Nye. He conveyed the premises by a statutory quitclaim deed "to Joseph Kretzer and Mora Kretzer, his wife, during their natural lives, and after their death to the heirs of said Joseph Kretzer." The Kretzers were afterward divorced, and Mora Kretzer conveyed all interest in the premises to Joseph Kretzer, whose title by subsequent conveyances has become vested in the complainants. Joseph Kretzer has two sons, one of whom conveyed his interest in the premises to the other, who was made a party to the bill and filed the demurrer.

Appellants claim to be seised of the premises in fee simple. Whether they are so seised depends upon the question whether the title conveyed by Jonas Nye to Joseph Kretzer was a fee or only a life estate. The language of the deed purports to convey the premises to the grantees during their joint lives, and, after their death, to the heirs of Joseph Kretzer. Appellants claim that this deed is within the rule in *Shelley's Case*, and conveyed a fee to Joseph Kretzer, subject only to the life estate of Mora Kretzer as a tenant in common of the premises, and that, by the conveyance of her interest, the whole estate vested in Joseph Kretzer. No brief has been filed on behalf of the appellees. Under the rule in *Shelley's Case*, which is in force in this state, if an estate for life is granted by any instrument, and the remainder is limited by the same instrument, either mediately or immediately, to the heirs of the life tenant, the life tenant takes the remainder as well as the life estate. The rule is one of the most firmly established rules of property, and is unshaken in this state. In determining whether it is applicable in a given case, the question does not turn upon the quantity of estate intended to be given to the first taker, whether a life estate or more, but upon the nature of the estate intended to be given to the heirs, whether by inheritance or otherwise. *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974; *Ward v. Todd*, 239 Ill. 462, post, 942, 88 N. E. 189. When the heir takes in the character of heir, he must take in the quality of heir, 29 L.R.A. (N.S.)

and all heirs taking as heirs must take by descent. *Baker v. Scott*, 62 Ill. 86. The limitation to heirs by that name as a class, to take in succession from generation to generation, requires the estate of inheritance imported by that limitation to vest in the first taker. The language of the deed clearly indicates the nature of the estate intended to be given to the heirs of Joseph Kretzer. He is given an estate for life, with remainder in fee to his heirs as a class, without reference to individuals or any other condition. The estate thus given to the heirs by the operation of the rule vests in the life tenant.

The requisites of the rule are stated to be, first, a freehold estate; second, a limitation of the remainder to the heir or heirs of the body of the person taking the freehold estate, by the name of heirs as a class, and without explanation, as meaning sons, children, etc.; third, the estates of freehold and in remainder must be created by the same instrument; fourth, the estates must be of the same quality,—that is, both legal or both equitable. *Baker v. Scott* and *Ward v. Todd*, supra. All these requisites are present here; viz., a life estate to Joseph Kretzer and a remainder in fee simple to his heirs,—both legal estates created by one deed. Two reasons suggest themselves which might be urged against the application of the rule: (1) The life estate is in one half the property only, while the remainder is in the whole; (2) the life estate might be determined by the death of Mora Kretzer in the lifetime of Joseph, thus destroying the remainder by determining the particular estate before the happening of the contingency which would determine the persons who would succeed to the remainder. Neither of these reasons, however, is a valid objection to the application of the rule. It is not a requisite that the estate given to the ancestor, and that to the heirs, shall be of the same quantity. *Ward v. Todd*, supra. The rule has no effect upon the estate given to the ancestor. It affects only the remainder given to the heirs, and causes such remainder to vest in the ancestor, and not in the heirs. If there is a merger in the ancestor, it follows, not as a necessary result of the operation of the rule, but from the operation of another independent rule of law in regard to separate estates which in any manner become vested in one person. In regard to the destruction of the supposed contingent remainder to the heirs of Joseph Kretzer, who cannot be known in his lifetime, by the termination of the particular estate before his death, the rule that contingent remainders are destroyed

which do not vest at or before the termination of the particular estate has no application. There is no contingency, because the remainder which is expressed to be to the heirs of Joseph Kretzer the law declares to be a remainder to Joseph Kretzer, the same as if it had been made expressly to him and his heirs. Where there is a limitation to several for their lives, with a remainder in fee to the heirs of one of them, the estate in remainder vests at once in the ancestor to whose heirs it purports to be given. *Fuller v. Chamier*, L. R. 2 Eq. 682; *Bullard v. Goffe*, 20 Pick. 252. The limitation to the heirs must be to the heirs of a person taking a particular estate of freehold; but, if it is confined to such heirs, then it is immaterial whether there be several ancestors taking the particular estate or only one; nor whether their estates be several, provided they all take, or joint; nor whether the remainder be to the heirs of all or only of some or one of such ancestors; nor whether the estate to the ancestor be such as may possibly determine in the lifetime of such ancestor or not. *Watkins, Descents*, 162-164; *Fearne, Contingent Remainders*, 4th ed., 23-30; 1 *Preston, Estates*, 313-320; *Rogers v. Downs*, 9 Mod. 292; *Merrill v. Rumsey*, 1 Keble, 888. *Fearne* states the rule as follows (page 25): "Whensoever the ancestor takes any estate of freehold, whether for his own life or the life of another, or whether it be of such a nature that it may determine in his lifetime or not, and there is afterwards, in the same conveyance, a limitation to his right heirs or heirs in tail (either immediately, without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such mean estate), there such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor, and does not remain in contingency or abeyance, with this distinction: That, where such subsequent limitation is immediate, it then executes in the ancestor and becomes united to his particular freehold, forming therewith one estate of inheritance in possession; but, where such limitation is mediate, it is then a remainder vested in the ancestor who takes the freehold, not to be executed in possession till the determination of the preceding mean estates."

The deed of Jonas Nye conveyed to Joseph Kretzer and Mora Kretzer an estate, as tenants in common, during their joint lives, with a remainder in fee to Joseph Kretzer. The conveyance of Mora Kretzer to Joseph Kretzer vested the latter with the whole title.

29 L.R.A. (N.S.)

The court erred in sustaining the demurrer to the bill, and the decree will be reversed and the cause remanded to the Circuit Court, with directions to overrule the demurrer.

SOUTH CAROLINA SUPREME COURT.

SUSAN A. STEELE et al., Respts.,

v.

ALICE SMITH et al., Appts.

(84 S. C. 464, 66 S. E. 200.)

Deed — covenant to stand seised — trust.

1. A deed to one, his heirs and assigns, in trust, to stand seised and possessed of a certain portion of the property for the use and benefit of a certain person for life, and at his death to transfer it to certain other persons, provided that the grantor is to have the use and enjoyment of the property during his lifetime, is not a covenant to stand seised to uses, but is an executory trust.

Shelley's Case — executory trust — nonapplication.

2. A conveyance in trust, to stand seised to the use and benefit of a certain person for life, and at his death to transfer the property to such persons as he shall direct, or, in default of direction, to his heirs in fee, does not vest a fee in the first taker, under the rule in *Shelley's Case*, since it is an executory trust.

Same — statute of uses — execution of fee — effect.

3. Although in case of a conveyance in trust for the life of a designated person, and at his death to convey the property to his appointees, or to his heirs in case the appointment is not made, the statute would execute the fee in the heirs immediately upon the death of the life tenant without appointment, such estate could not coalesce with that of the first taker, so as to vest the fee in him.

(November 30, 1909.)

APPEAL by defendants from a judgment of the Common Pleas Circuit Court for York County in plaintiffs' favor in a suit to partition certain lands. Affirmed.

The facts are stated in the opinion.

Messrs. Spencers & Dunlap and Wilson & Wilson for appellants.

Messrs. Finley & Jennings for respondents.

Jones, Ch. J., delivered the opinion of the court:

This appeal involves the construction of

Note. — See note, post, 963.

the deed executed November 16, 1860, in the presence of three witnesses, by John Steele, Sr., to Joseph A. Steele, as trustee, conveying a tract of 494 acres in York county. The deed recites that it is in consideration of love and affection for his sons and grandson named, and conveys to Joseph A. Steele, his heirs and assigns forever, with covenants of warranty, the land in question: "In trust as to the one half of said piece, parcel, or tract of land, to stand seised and possessed of the same, for the use and benefit of my grandson, the above-mentioned John G. Steele, for and during the term of his natural life; and at his death to transfer and convey the same to such person or persons as he, the said John G. Steele, may by his will direct, or, in fault of such will and direction, to the heirs of his and the said John G. Steele, in fee: Provided, however, and the estate above mentioned is hereby given and conveyed upon the express condition and understanding, that I am to have and continue in the use and enjoyment of said premises during my natural life; and upon the further condition that the said Joseph A. Steele and John G. Steele, each contributing equally, pay or cause to be paid to my son, James B. Steele, above mentioned, within a reasonable time after my death, the sum of \$1,666.66 2-3, with interest thereon from the date of my death." It appears that the grantor, John Steele, Sr., died soon after the execution of the deed, and the grantee, Joseph A. Steele, trustee, died within a few years thereafter. John G. Steele, the grandson of the grantor, married the plaintiff Susan A. Steele January 4, 1866, and their first-born child, plaintiff John Atkinson Steele, was born December 17, 1866, and the remaining plaintiffs are children of John G. and Susan A. Steele subsequently born. On August 3, 1868, John G. Steele conveyed to R. Paterson & Company lands embracing the land in controversy, and defendants are in possession, claiming title by successive conveyances under John G. Steele. John G. Steele died intestate in 1905.

Plaintiffs claim that John G. Steele had only a life estate, and, having died without executing the power of appointment by will, they are entitled to partition of the land (now in the exclusive possession of defendants) as heirs of John G. Steele and remaindermen under the deed of John Steele, Sr. The circuit court sustained this contention. The defendants-appellants contend that under the rule in Shelley's Case John G. Steele had a fee-simple estate in the land, which they acquired. The instrument is not a covenant to stand seised to use, as contended by respondents, as the fee *in presenti* is conveyed to grantee, charged

with the usufruct for life in favor of the grantor. *Cribb v. Rogers*, 12 S. C. 564, 32 Am. Rep. 511; *Ellen v. Ellen*, 16 S. C. 142. It is in form and substance an ordinary deed, conveying real estate in trust, and must be construed as such. Preston's statement of the rule in Shelley's Case, as quoted in *Porter v. Doby*, 2 Rich. Eq. 52, is: "When a person takes an estate of freehold legally or equitably under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." The case of *Porter v. Doby*, supra, shows that executory trusts are exempt from the operation of the rule in Shelley's Case, and that the test of an executory trust is whether the trustee has some duty to perform for the performance of which it is necessary that the title be regarded as abiding in him. It is unnecessary to refer to the cases on the subject. A number of them are mentioned in *Reynolds v. Reynolds*, 61 S. C. 250, 39 S. E. 391.

Appellants concede that the rule does not apply to trusts which are strictly executory, as where the trust is imperfectly or defectively declared, or where same discretion is left with the trustee, but does apply where the trust is perfect and finally declared, and no room is left for the exercise of discretion by the trustee. The argument to this point is keen and forceful, and there is some high authority for the view. But we think it is clear that the trust in this case is such an executory trust as will prevent the application of the rule in Shelley's Case. In order to convey the fee to the appointee of the life tenant, it was essential to the performance of his duty that the trustee retain the title in fee until it was ascertained that there was default of such appointment at the termination of the life estate. The trust was not a perfect trust, as it involved for its full execution the exercise or failure to exercise a discretionary power of appointment by the life tenant. True, the discretion was not directly left to the trustee, but it was left to another, by which the trustee was to be guided in the event of its exercise. The discretionary power of the life tenant to designate a beneficiary of the trust by will necessarily affected the certainty and completeness of the trust, with respect to its beneficiaries. Hence the case clearly falls within the definition of an executory trust in *Perry on Trusts*, § 359, relied upon by appellants as

stating the correct principle: "But in order that technical words may receive their legal signification, and in order that the rule in Shelley's Case may be applied to limitations of equitable estates, the trusts must be executed, and not executory. All trusts are executory in one sense of the word; that is, the trustee must have some duty, either active or passive, to perform, so that the statute of uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee. But such is not the meaning of judges when they speak of executed trusts and executory trusts. These words refer rather to the manner and perfection of their creation than to the action of the trustee in administering the property. Thus, a trust created by a deed or will so clear and certain in all its terms and limitations that a trustee has nothing to do but to carry out all the provisions of the instrument according to its letter is called an executed trust. In these trusts technical words receive their legal meaning, and the rules applicable to legal estates govern the equitable estates thus created. On the other hand, an executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the direction thus given. They are called executory, not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator."

The trust in the case at bar would be executory with respect to the statute of uses. The test whether the trust is active or passive is: Has the trustee any duty to do the performance of which requires that the legal title shall remain in him? If so, the trust is active and executory under the statute. If not, it is passive and executed under the statute. *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82. The duty of the trustee to convey to the appointee by the will of the life tenant required that the trustee hold the legal title at least until it was ascertained that there was default of appointment. While there are authorities elsewhere that a simple direction to "convey" in a trust fully and plainly declared does not make the trust executory, the authorities in this state warrant the conclusion that the duty to "convey" in a case like this will prevent the execution of the trust in the remaindermen under the statute until after the death 29 L.R.A. (N.S.)

of the life tenant. *McCaw v. Galbraith*, 7 Rich. L. 80; *Huckabee v. Newton*, 23 S. C. 295; *Ayer v. Ritter*, 29 S. C. 136, 7 S. E. 53. See also *Wilson v. Cheshire*, 1 M'Cord, Eq. 233, and *Holmes v. Pickett*, 51 S. C. 280, 29 S. E. 82, which recognize the duty to convey as an active duty, requiring that the legal title shall remain in the trustee, at least for the performance of the duty to convey the fee upon the termination of the life estate. It may be conceded that the statute executed the use for life in the life tenant, and that the equitable estate of the life tenant was thereby, immediately on the execution of the deed, transformed into a legal estate for life, with general power of appointment by will, but it was necessary for the fee to remain in the trustee to execute the trust, dependent on the contingency of the life tenant designating the beneficiary by his will. As the trust would be executory under the statute of uses, we see no good reason for holding it not executory when considering the application of the rule in Shelley's Case. The case of *Cushing v. Blake*, 30 N. J. Eq. 689, cited by appellants, strongly supports their contention, but in New Jersey, as well as in some other jurisdictions, it is held that the duty of the trustee to convey is not sufficient to render the trust executory in the true sense, whereas in this state such duty is regarded as active and executory, and the trend of our cases is to regard that which is executory under the statute as executory when considering the applicability of the rule in Shelley's Case. Further, in order for the rule in Shelley's Case to apply, the estate for life and the estate in remainder must be of the same quality, both legal or both equitable; otherwise they cannot coalesce. Our cases show that the statute may execute the use in either the life tenant for life, or the remainderman in remainder, according as it may be determined whether the trustee has any active duty to perform with respect to either, rendering it necessary that the life estate or the fee should remain in the trustee. *Howard v. Henderson*, 18 S. C. 184; *Young v. McNeill*, 78 S. C. 150, 59 S. E. 986; *Breeden v. Moore*, 82 S. C. 539, 64 S. E. 604. The trustee having no duty to perform with respect to the life tenant in this case, immediately on the execution of the deed, the equitable estate of the life tenant becomes legal by the "potential magic" of the statute; but, it being necessary for the trustee to retain the legal fee in remainder during the lifetime of the life tenant to carry out the purpose of the trust, the estate in remainder, not being executed, remained executory and equitable; hence the rule in Shelley's Case could not apply when the deed was delivered, because

of the difference in the quality of the two estates. If we consider whether the rule should apply on the death of the life tenant without exercising the power of appointment, and should hold that the statute then executed the use in those who answered the description of heirs at law of John G. Steele, it would only follow that such heirs then became vested with the fee in remainder as a legal estate which had not previously coalesced with the estate for life, and could not then coalesce with an extinct estate. In such case the intention of the settlor is not defeated by the rule, but those answering the description of heirs of John G. Steele at his death take, not by inheritance from the ancestor, but as purchasers under the grant of John G. Steele, Sr., in accordance with the manifest intention of the grantor.

The judgment of the Circuit Court is affirmed.

ILLINOIS SUPREME COURT.

WILLIAM E. WARD et al.

v.

BENJAMIN TODD et al.

LOUISE M. BUTLER et al., Impleaded,
etc., Appts.

(239 Ill. 462, 88 N. E. 189.)

Will—Shelley's Case—division of estate.

A devise of real estate to testator's wife for life, and after her death one half of the fee to her heirs and the other half to another person named, gives, under the rule in Shelley's Case, a fee to half the estate to testator's widow.

(April 23, 1909.)

APPEAL by defendants Louise M. Butler et al. from a judgment of the Circuit Court for St. Clair County in plaintiffs' favor in an action brought to partition certain real estate. Reversed.

The facts are stated in the opinion.

Messrs. L. P. Zerweck and Dill & Pfingsten, for appellants:

The rule in Shelley's Case is not a rule of interpretation, but a rule of property, and must prevail whenever a devise, by the terms of the will, falls within it, regardless of the otherwise-expressed intention of the testator.

Deemer v. Kessinger, 206 Ill. 62, 69 N. E. 28; Engelthaler v. Engelthaler, 196 Ill.

230, 63 N. E. 669; Vangieson v. Henderson, 150 Ill. 119, 36 N. E. 974; Carpenter v. Van Olinder, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868; Hageman v. Hageman, 129 Ill. 164, 21 N. E. 814; Ewing v. Barnes, 156 Ill. 61, 40 N. E. 325; Davis v. Sturgeon, 198 Ill. 520, 64 N. E. 1016; Rissman v. Wierth, 220 Ill. 187, 110 Am. St. Rep. 243, 77 N. E. 108.

The application of the rule in Shelley's Case does not depend on the quantity of the estate given to the ancestor, but upon the estate devised to the heirs.

Rissman v. Wierth, 220 Ill. 181, 110 Am. St. Rep. 243, 77 N. E. 108; Carpenter v. Van Olinder, 127 Ill. 47, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868; Deemer v. Kessinger, supra; Hageman v. Hageman, 129 Ill. 168, 21 N. E. 814.

Under the will, the widow took an undivided half in fee simple.

Carpenter v. Van Olinder, 127 Ill. 53, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868; Preston, Estates, pp. 321-334; Baker v. Scott, 62 Ill. 91.

Mr. James O. Miller, for appellees Ward et al.:

The wife was entitled by the terms of the will to a life estate only.

Jackson ex dem. Livingston v. Robins, 16 Johns. 588; Girard Life Ins. & T. Co. v. Chambers, 46 Pa. 490, 86 Am. Dec. 513; Andrews v. Brumfield, 32 Miss. 115.

The nature of the use intended by the deviser to be made of the property devised will define the estate given, and if it be given for the purpose of subsistence of the devisee, as where provision is made for the wife of the donor, the right to use the property is in the nature of a power rather than an ownership, and a devise over would be good as an executory devise.

Upwell v. Halsey, 1 P. Wms. 652; Surman v. Surman, 5 Madd. Ch. 123; Smith v. Bell, 6 Pet. 68, 8 L. ed. 322; Watkins Descents, 2d ed. 241; 2 Washb. Real Prop. 4th ed. 599.

In order to bring the rule in Shelley's Case into operation, the heirs who are to take the subsequent estate must be deduced exclusively from the person who, as ancestor, takes the prior freehold.

25 Am. & Eng. Enc. Law, p. 645; Flournoy v. Flournoy, 1 Bush, 515.

Where the circumstances take a case out of the letter of the rule of property in Shelley's Case, the rule becomes subservient to the intention of the testator.

Anderson v. Jackson, 16 Johns. 382, 5 Am. Dec. 330; Fosdick v. Cornell, 1 Johns. 440, 3 Am. Dec. 340; Jackson ex dem. Bowman v. Christman, 4 Wend. 277.

Mr. Fred B. Merrills for appellees Todd et al.

Hand, J., delivered the opinion of the court:

This was a bill in equity, filed in the circuit court of St. Clair county, for the partition of an 80-acre farm situated in said county, of which Jackson Todd died seised, between the heirs at law of Martha A. Todd, deceased, the widow of Jackson Todd, and the heirs at law of Nathan Todd, deceased, a brother of Jackson Todd. The bill alleged that the undivided one half of said premises belonged to the heirs of Nathan Todd, deceased, in equal parts (naming said heirs), and that the undivided one half of said premises belonged to the heirs of Martha A. Todd, deceased, in equal parts (naming said heirs). Louise M. Butler and Katheryn S. Ziegler (formerly Katheryn Sharp), two of the heirs of Martha A. Todd, answered the bill, and filed a cross bill, in which they alleged they were the owners in fee, in equal parts, of the undivided one-half part of said premises as devisees under the will of Martha A. Todd, deceased, and that the heirs of Nathan Todd, deceased, were the owners of the undivided one half of said premises, and that the heirs of Martha A. Todd, other than themselves, had no interest in said premises. The case was tried, and a decree was entered dismissing said cross bill for want of equity, and a decree of partition was entered, ordering partition of said premises according to the prayer of the original bill, from which decree Louise M. Butler and Katheryn S. Ziegler have prosecuted this appeal.

Jackson Todd and Martha A. Todd each died testate, and Nathan Todd died intestate prior to the death of Martha A. Todd. The provisions of the will of Jackson Todd, so far as they are involved herein, read as follows:

"Second. I devise to my beloved wife all my real estate during her life, to use and lease the same, and after paying the taxes that may accrue thereon, to apply the surplus for her support and for her use and benefit, as she may think proper.

"Third. On the death of my wife I direct that her heirs have, in fee simple, the undivided half of said real estate, and my brother, Nathan Todd, the other undivided half thereof, to him and his heirs forever.

"Fourth. In case my said wife is unable to lease advantageously my said real estate, or if from any cause she thinks proper, she is hereby authorized to sell and convey said real estate in fee simple, and during her life to apply to her own use the interest of the proceeds of such real estate, and at her death the principal sum realized by such sale shall go one half to her heirs and the other half to the said Nathan Todd or his heirs, if he dies before my wife."

(L.R.A. (N.S.)

And the provisions of the will of Martha A. Todd, so far as they are involved herein, read as follows:

"Third. I devise to my two nieces, Louise M. Butler and Katheryn K. Sharp, to be divided equally between them, my undivided half of the real estate bequeathed me, as per clause three (3) of the last will and testament of my late husband, Jackson Todd.

"Fourth. In case the real estate is sold before my death, I direct that one half of the principal sum realized by such sale shall, as per clause four (4) of the last will and testament of my late husband, Jackson Todd, be equally divided between my two nieces, Louise M. Butler and Katheryn K. Sharp."

The appellants contend that the provisions of the will of Jackson Todd, hereinbefore set forth, fall within the rule in Shelley's Case, and that Martha A. Todd took the fee to the undivided one half of said 80-acre farm, and that the title to said undivided one half of said farm vested in them, upon the death of Martha A. Todd, by virtue of the provisions of the will of Martha A. Todd. It has been repeatedly held by this court that the rule in Shelley's Case is in force in this state as a rule of property; and that, in determining whether it applies to a given case, its application does not turn upon the quantity of the estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs (*Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974); and it has often been said that the rule established in that case often defeats the intention of the testator (*Carpenter v. Van Olinder*, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751; *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325). In *Fowler v. Black*, 136 Ill. 363, 375, 11 L.R.A. 670, 26 N. E. 596, 597, it was said: "This rule is said to be a rule of property which overrides even the expressed intention of the testator or grantor that it shall not operate, or which rather raises a conclusive presumption that, where a devise or grant is made to a man and his heirs, the testator or grantor intends to use the word 'heirs' as a word of limitation, and not of purchase." In *Carpenter v. Van Olinder*, supra, on page 47 of 127 Ill. the following language is quoted from *Preston on Estates*, with approval: "Neither the express declaration, first, that the ancestor shall have an estate for his life and no longer; nor, secondly, that he shall have only an estate for life in the premises, and that after his decease it shall go to his heirs of his body, and, in default of such heirs

vest in the person next in remainder, and that the ancestor shall have no power to defeat the intention of the testator; nor, thirdly, that the ancestor shall be tenant for his life, and no longer, and that it shall not be in his power to sell, dispose, or make away with any part of the premises . . . will change the word 'heirs' into a word of purchase." In *Ryan v. Allen*, 120 Ill. 648, 653, 12 N. E. 65, 66, the rule was thus announced: "That where the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or, immediately, to his heirs, in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase. The remainder is immediately executed in possession in the ancestor so taking the freehold."

In this case, Jackson Todd, by the third paragraph of his will, gave to his wife, Martha A. Todd, the use of said 80-acre farm during her natural life, which created in her a freehold estate (*Ryan v. Allen*, supra), and by the provisions of his will, on the death of Martha A. Todd, he gave to her heirs the undivided one half of said farm, and to his brother, Nathan Todd, and his heirs, the other undivided half of said farm. We think it clear, if Jackson Todd had given the entire farm to the heirs of Martha A. Todd upon her death, all must concede that Martha A. Todd would, upon the probate of the will of Jackson Todd, have, under the rule announced in *Shelley's Case*, become immediately seised in fee of said 80-acre farm.

In *Baker v. Scott*, 62 Ill. 86, the testator divided his lands into three parts. As to one part he provided: "It is my desire that my daughter, Mary Sophia, shall receive so much of her share of the rents and profits as shall be necessary for her education until she is twenty-three years of age, after which she may come into possession of the full amount of rents and profits, the principal to descend to her heirs,"—and it was held that said daughter took the fee. In *Wicker v. Ray*, 118 Ill. 472, 8 N. E. 835, the testator devised the undivided one fourth of his estate to his daughter for life, at her death to go to her heirs forever. It was held the daughter took an estate in fee. In *Carpenter v. Van Olinder*, supra, the testator devised his estate to his three daughters, each an undivided one third, providing that none of his real estate should be sold, "but be kept sacred for their heirs." It was held the daughters took the estate in fee simple, as tenants in common. In *Ryan v. Allen*, supra, the testatrix provided: "I give and bequeath to my stepson, Omar H. Allen, the

use or rents accruing from my house, and 1 acre of land that the said house stands upon, after his father's decease, provided his father does not sell said property, which privilege I grant him, provided it is necessary for his maintenance. After the said Omar H. Allen's decease, the said house and land is to go to his nearest heirs." It was held Omar H. Allen took the fee. In *Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. 28, the testator provided: "I give and bequeath to my son, William L. Deemer, and to his lawful heirs, the following described lands," and by a codicil to said will: "In regard to former will, in bequest to my son, William L. Deemer, I desire to change to read, to wit: That he shall have use, benefit, and control of [same lands described in foregoing provision of will] during his lifetime only, and that at his death said lands shall go to his lawful heirs,"—and it was held William L. Deemer took the fee.

The question here, then, arises: the testator having given Martha A. Todd a life estate in the whole 80-acre farm, and only given one half thereof to her heirs, is the rule in *Shelley's Case* defeated in its application to the half of the farm given to Martha A. Todd and her heirs, by reason of the fact that the other half of the farm is given to Jackson Todd's brother, Nathan Todd, and his heirs, instead of to the heirs of Martha A. Todd, in whom he had created a life estate in the entire farm? In the *Baker Case*, which is a leading case the court undertook to state the requisites of the rule, and it was there pointed out that four things must concur in order that the rule may apply, and the fee title to the estate vest in the life tenant named in the will or grant: (1) There must be a life estate,—a freehold; (2) there must be a limitation of the remainder to the heirs or heirs of the body of the person taking the freehold estate; (3) the freehold estate and the remainder must be created by the same instrument, deed, or will; and (4) the interest given must be of the same quality,—that is, the freehold and the remainder must be both legal or both equitable estates. All these requisites are found in this case: (1) Martha A. Todd was given a life estate—that is, a freehold estate—in the entire farm; (2) the remainder in one half of the farm was limited to the heirs of Martha A. Todd; (3) the freehold in the entire farm and the remainder in half of the farm were both created by the same instrument,—that is, by the will of Jackson Todd,—and (4) the freehold in the entire farm given to Martha A. Todd and the remainder in half of the farm given to her heirs were both legal estates.

The appellees urge, however, that a fifth requisite must be found before the application of the rule can be invoked, *viz.*, the estate given to the heirs must be of the same quantity as that given to the ancestor; that is, if a freehold is given in the entire estate, a remainder in one half thereof cannot be given to the heirs of the party in whom the freehold rests, and the residue in the other half given to a stranger, without destroying the application of the rule. The solicitors for the appellees have not been able, nor have we been able, after diligent search, to find any text-writer or adjudicated case where such limitation upon the application of the rule has been recognized. Nor do we think the element of quantity of estate a logical requisite of the application of the rule. In the Baker Case it is said: "One of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance." It is conceded that the title to the half of the estate given to Nathan Todd vested in him immediately upon the death of Jackson Todd. The title to the fee of that portion of the farm was not, therefore, in abeyance or suspension during the life of Martha A. Todd, and the reasons for the establishment of the rule could therefore only logically be invoked as to the half of the farm which he did not take, the fee of which would remain in abeyance or suspension until the death of Martha A. Todd, as during her life she would have no heirs, if the rule was not applied to that part of the farm. If, however, the rule is applied to the half of the farm which was given to the heirs of Martha A. Todd, the entire estate in that part of the farm would vest immediately in Martha A. Todd, and the title to no part of the farm would remain in abeyance or suspension; one half thereof being vested in Nathan Todd, and the other half vested in Martha A. Todd in fee.

As the requisites of the application of the rule as to the half given to Martha A. Todd and her heirs are all present, and by applying the rule the entire estate would vest immediately upon the death of Jackson Todd, and the principal reasons for establishing the rule would be fully satisfied, and the law, which favors the vesting of estates, be complied with, we are disposed to hold that the devise to Martha A. Todd and her heirs, as to the portion of the estate which was not devised to Nathan Todd in fee, falls within the application of the rule established in Shelley's Case, the result of which holding is that Martha A. Todd took the fee to the undivided one half of said farm, and that Nathan Todd took the fee in the other half of said farm, subject to her life estate, and the title to the 29 L.R.A. (N.S.)

undivided half of the farm held in fee by Martha A. Todd under the provisions of her will, upon her death, passed to the cross complainants, Louise M. Butler and Katheryn S. Ziegler.

The decree of the Circuit Court will be reversed, and the cause remanded to that court for further proceedings in accordance with the views herein expressed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

NEWTON PEER, *Err.*, etc., of
Jacob N. Peer, Deceased,
v.

MARTIN HENNION
and
ROBERT LUCAS, *Plff. in Err.*

(77 N. J. L. 693, 76 Atl. 1084.)

Will — construction — Shelley's Case.

A testator, after devising certain pieces of land to his daughter Catherine, provided thus: "The said lands heretofore given by me to my daughter Catherine are given for and during her natural life; and after her decease I do give and devise the said lands to such person or persons as shall be her heir or heirs of land held by her in fee simple." Held, that the words "heir or heirs" are *designatio personarum* who should take the remainder; that those persons do not take by descent as heirs of Catherine, but take by purchase from the testator; that the rule in Shelley's Case does not apply; and that Catherine takes only an estate for life.

(June 15, 1909.)

ERROR to the Supreme Court to review a judgment in plaintiff's favor in an action brought to establish title to certain real estate to which plaintiff alleged title under the will of Jacob N. Peer, deceased. Affirmed.

The facts are stated in the opinion.

Mr. Charlton A. Reed, with Mr. Joshua R. Salmon and Robert Lucas, for plaintiff in error:

The rule in Shelley's Case is of such force that though the estate is expressly limited for life to the first taker, and it appears from the whole will that the testator only intended the first taker to have an estate for life, yet he would take a fee, unless it appears that, in the use of the word "heirs," the testator intended to use it in some other than its technical sense.

Lippincott v. Davis, 59 N. J. L. 241, 28

Headnote by REED, J.

Note. — See note, post, 963.

Atl. 587; *Martling v. Martling*, 55 N. J. Eq. 782, 39 Atl. 203.

The words in the devise, "and after her decease I do give and devise the said lands," do not show that the remainder was to pass by direct gift from the testator to the heirs of the person to whom the prior freehold estate is given.

Lamprey v. Whitehead, 64 N. J. Eq. 408, 54 Atl. 803.

Mr. Elmer King, with Messrs. Vreeland, King, Wilson, & Lindabury, for defendant in error:

If, in defining the qualifications of the remaindermen, the testator intended to describe and point out the persons who were to take by direct gift from himself, then the rule in *Shelley's Case* does not apply, and testator's daughter Catherine would take only a life estate.

Zane v. Weintz, 65 N. J. Eq. 217, 55 Atl. 641; *Hargrave's Law Tracts*, 574, 576; *Doe ex dem. Gallini v. Gallini*, 5 Barn. & Ad. 621; *Kennedy v. Kennedy*, 29 N. J. L. 187.

Reed, J., delivered the opinion of the court:

The judgment brought up by this writ of error was entered upon the finding of the trial judge in an action brought in the supreme court, a jury having been waived by the parties. The action was for trespass *quare clausum fregit*, and involved the right of possession flowing from title to the *locus in quo*. The solution of the question of title rests upon the construction to be given to a clause in the will of one Jacob N. Peer. Jacob N. Peer died, leaving a daughter, Catherine. To this daughter he devised, with other property, the *locus in quo*. Catherine died, having by her will devised the same to Robert Lucas, a defendant, the other defendant claiming possession as the licensee of Lucas. The defendants, therefore, claim under the devise by Catherine. The plaintiffs claim under the will of Jacob N. Peer; they insisting that Catherine took only an estate for life in the *locus in quo* under the will of her father, and that after her death the property, by the terms of that instrument, became theirs as devisees designated in the will of Jacob N. Peer to take the property after the death of Catherine. The provisions of the will of Jacob N. Peer to be construed are substantially as follows: The testator first gives to his daughter Catherine certain parcels of land, including the property in question, in general terms. Then follows this clause: "The said lands hereinbefore given by me to my daughter Catherine are given for and during her natural life; and after her decease I do give and devise the said lands to

such person or persons as shall be her heir or heirs of land held by her in fee simple." The plaintiff represents the interest of Jacob N. Peer, being one of those who, in the language of the above clause, was, at the time of the death, of Catherine, her heir of lands held by her in fee simple. The defendants, as has been stated, represent whatever interest Catherine took under her father's will.

That the intention of the testator was that Catherine should take a life estate only is manifest. The testator says so in express, unequivocal language. That the testator's intention was that the property after her death should go to the class of which Jacob N. Peer was one is equally manifest. The testator says so in clear, unambiguous language. The court, in its judgment below, effectuated this clear testamentary intention.

But it is insisted by the plaintiff in error that, by a certain judicial rule of construction, known as the rule in *Shelley's Case*, the actual testamentary intention is of no account, as the courts have fixed a constructive intention upon a grant or devise couched in the language employed by the testator in this case. The rule in *Shelley's Case*, as defined by law writers and judges, need not be now restated. The purport of the rule, in the language of Mr. Justice Depue, employed in his opinion delivered in *Martling v. Martling*, in this court, 55 N. J. Eq. 771, 782, 39 Atl. 203, 204, is stated to be this: "Where lands are given to A for life, with a limitation over of an estate, which in terms is expressed to be given to his heirs, the estate of the ancestor, though expressly given for life, is by force of this rule enlarged to a fee; the remainder over being executed immediately in the ancestor." Therefore, when it appears that there is a grant or devise of a freehold estate to a person for life, with a limitation over to the heirs of that person, the rule applies as a rule of property. It does not matter that it appears that the testator or the grantor meant that the rule should not apply, or that he asserts that the word "heirs" shall be words of purchase, or that the tenant for life shall in no case convey a greater estate, nevertheless the rule in *Shelley's Case* is controlling. To epitomize the words of Mr. Hargraves: When it is once settled that the testator has used words of inheritance according to their legal import; has applied them intentionally to comprise the whole line of heirs of a tenant for life; has really made him the terminus or ancestor by reference to whom the succession is to be regulated,—it is immaterial whether the testator meant to

avoid the rule or not. On the other hand, before the rule in Shelley's Case can be brought into play, it must appear that the condition upon which the rule rests exists. One of these conditions is that the testator when using the term "heirs" employed the words of inheritance according to their legal import, and made the tenant for life the ancestor by reference to whom the succession is to be regulated. What the testator meant by "heir or heirs" should be first adjusted, without the least reference to the thought of the rule in Shelley's Case. Hargrave's Law Tracts, 574, 576. The word "heirs" following an estate of freehold indicates succession to the estate of the ancestor by his descendant; but it may be a succession by descent creating an estate in fee or in tail in the ancestor; or the selection of those persons who, by the canons of descent, would be heirs, as a mere *descriptio personarum* of the object of the testator's bounty, in which event the heirs take by purchase. Martling v. Martling, *supra*.

The question, then, is whether the words "heir or heirs" were used by Jacob N. Peer for the purpose of limiting the estate given to Catherine to her heirs as heirs, or were used to point out those persons who were to take the property after Catherine's death under his will. If the testator in the present case had said "after her (Catherine's) death I do give and devise the said land to her heirs, it would have unmistakably created a fee in Catherine under the rule in Shelley's Case; but the devise was not to her heirs. The devise of the remainder was to certain persons, to be ascertained at the time of Catherine's death. These persons were to be ascertained by a standard erected by the testator; namely, by discovering who were, at the time of Catherine's death, the persons who would be her heirs of land held by her in fee simple. This language of the testator seems to indicate that the persons to whom the remainder was devised were to take by purchase from the testator himself, and not by descent from Catherine, the life tenant.

Again, there seems to be significance in the fact that the testator, after declaring that Catherine's interest should endure during her natural life, should then employ the words: "I do give and devise the said land to such persons," etc. While it is true that if the devise had been to the heirs of Catherine, the employment of these words would not have been significant, yet, used as they are, as a separate devise to certain designated persons, it would seem to indicate that the testator was creating a remainder by purchase.

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We are of the opinion that the testator used the words "heir or heirs" as *designatio personarum* who should take the remainder; that those persons did not take by descent as heirs of Catherine, but by purchase from the testator; that the rule in Shelley's Case does not apply; and that Catherine took an estate for life only.

The judgment should be affirmed.

IOWA SUPREME COURT.

LEON F. WESTCOTT et al.

v.

F. L. MEEKER et al., Appts.

(— Iowa, —, 122 N. W. 964.)

Shelley's Case — will — effect on intention.

1. The rule in Shelley's Case, in its application to wills, will not be permitted to override the intention of the testator clearly expressed by language indicating his purpose that the devisee for life shall not have the power to convey any interest in the property which shall extend beyond the term of his life.

Same — life tenant.

2. A devise to one to hold real estate for life and to have the use, rents, and profits thereof, with no power to convey or dispose of the same for any longer period than during his natural life, and at his death to pass to his heirs, who shall have absolute title to the property, vests a life estate only in the first taker.

Will — life tenant — defeating remainder.

3. One to whom a life estate in real property is devised, with remainder to his heirs, by terms which vests the fee in them, cannot defeat the remainder by conveying the property before any children are born.

Limitation of actions — contingent remainder — protection.

4. The statute of limitations does not commence to run in case of a conveyance in fee by a life tenant, as against the right to recover the property belonging to his heirs, to whom the fee is given at his death, under conditions which prevent it from vesting in him under the rule in Shelley's Case, until his death, although children were born to him who would presumably be his heirs, since, until his death, they acquire no vested interest which will entitle them to bring an action to quiet title.

Estoppel — standing by — remaindermen.

5. Heirs of a life tenant who are given a remainder in the property are not estopped from recovering the property from grantees of the life tenant, by permitting them to take possession and make valuable improve-

Note. — See note, post, 963.

ments on the property, and by failing to bring an action to assert their rights until the death of the life tenant, where they had no interest in the property which would entitle them to bring such action until the death of the life tenant.

(October 27, 1909.)

APPEAL by defendants from a decree of the District Court for Marshall County in plaintiffs' favor in a suit to quiet title to certain real estate. Affirmed.

Statement by McClain, J.:

Action to quiet title. Plaintiffs' demurrer to portions of defendants' answer was sustained, and, on the election of defendants not to plead over, a decree was entered for the plaintiffs under a stipulation to that effect, with the reservation of the right of defendants to subsequently make claim for improvements under the occupying claimants act. The defendants appeal from the decree.

Messrs. F. L. Meeker and Dudley & Coffin, for appellants:

The words "heirs" and "descend" must be taken in their strict legal sense, and herein as words of limitation, and must have their legal effect, unless it clearly appears they are not so used.

Wescott v. Binford, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18; Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18; Kepler v. Larson, 131 Iowa, 438, 7 L.R.A. (N.S.) 1109, 108 N. W. 1033; Brokaw v. Brokaw (Iowa) 113 N. W. 469; Daniels v. Dingman, 140 Iowa, 386, 118 N. W. 373.

The sale and conveyance of the fee by the father extinguished the interest of the remaindermen, as they were contingent remaindermen, and the grantees, Timothy Brown and J. F. Meeker, acquired the fee-simple title to the premises.

2 Washb. Real Prop. 4th ed. 559, 560; Tiedeman, Real Prop. 1885 ed. § 411; Anthracite Sav. Bank v. Lees, 176 Pa. 402, 35 Atl. 197; Robinson v. Palmer, 90 Me. 246, 38 Atl. 103; Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71; Kepler v. Larson, 131 Iowa, 438, 7 L.R.A. (N.S.) 1109, 108 N. W. 1033; Shafer v. Tereso, 133 Iowa, 342, 110 N. W. 846.

The remainder must have a preceding particular estate to support it, and must vest during the continuance of this estate or *eo instanti* upon its determination. In the absence of a statutory provision or the interposition of a trustee to preserve the remainder, if the particular estate is determined or is defeated before the happening of the contingency upon which alone the 29 L.R.A. (N.S.)

remainder can vest, the contingent remainder therein will be defeated.

16 Cyc. Law & Proc. p. 655; Madison v. Larmon, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556; Bond v. Moore, 236 Ill. 576, 19 L.R.A. (N.S.) 540, 86 N. E. 386; Myers v. Carney, 171 Ind. 379, 86 N. E. 400; Taylor v. Taylor, *supra*; Eddy v. San Francisco, 89 C. C. A. 327, 162 Fed. 441.

A contingent remainder may be extinguished by a tortious conveyance by a tenant of the preceding particular estate, as where he makes a conveyance of the estate by means of a feoffment, with livery of seisin, fine, or common recovery.

Archer v. Jacobs, 125 Iowa, 467, 101 N. W. 195; 16 Cyc. Law & Proc. p. 655; People's Loan & Exch. Bank v. Garlington, 54 S. C. 413, 71 Am. St. Rep. 800, 32 S. E. 513; Tiedeman, Real Prop. 3d ed. §§ 314, 317; Gray, Rule against Perpetuities, 2d ed. § 285; 2 Washb. Real Prop. 4th ed. pp. 589, 590; Smith, Real & Pers. Prop. 1896 ed. 184, 237.

An adverse possession against a remainderman can be predicated upon a conveyance of the life tenant, and the remainderman may be barred by the statute of limitations.

Kinney v. Slattery, 51 Iowa, 353, 1 N. W. 626; Murray v. Quigley, 119 Iowa, 6. 97 Am. St. Rep. 276, 92 N. W. 869; Crawford v. Meis, 123 Iowa, 610, 66 L.R.A. 154, 100 Am. St. Rep. 337, 99 N. W. 186; Wenger v. Thompson, 128 Iowa, 750, 105 N. W. 300.

A conveyance with covenants of warranty and possession thereunder and improvements thereon work an ouster of any other claimant to said property, otherwise a title by adverse possession could not be established.

Elder v. McClaskey, 17 C. C. A. 251, 30 U. S. App. 1, 199, 70 Fed. 529; Murray v. Quigley; Crawford v. Meis; and Wenger v. Thompson, *supra*.

The remaindermen were bound to know that the person in possession of the premises was asserting a right to such possession as the owner in fee, under his duly acknowledged and recorded deed, and if they desired to question his title and interest in said premises, they should have done so within the statutory period after such unequivocal assertion of the full and exclusive ownership was made, if then under no disability; but if under disability, one year after its removal. Otherwise, after the statutory period has expired within which the cause of action accrued, they will be barred by the statute.

McCarthy v. Colton, 134 Iowa, 653, 10 N. W. 217.

When plaintiffs without objection sue by, and permitted the deviser of defendant under color of title and claim of absolute

ownership in fee simple to the premises, to make valuable and permanent improvements thereon, knowing that they were made under the claim of a fee-simple title to said premises, and under the claim that plaintiffs had neither any interest therein nor any right thereto, they became, by nonassertion of any interest, equitably estopped to question defendants' title after the statutory period.

Bullis v. Noble, 36 Iowa, 618; Peters v. Jones, 35 Iowa, 512; Campbell v. Mayes, 38 Iowa, 9; Des Moines & Ft. D. R. Co. v. Lynd, 94 Iowa, 368, 62 N. W. 806; Schafer v. Wilson, 113 Iowa, 475, 85 N. W. 789; Iowa R. Land Co. v. Fehring, 126 Iowa, 1, 101 N. W. 120; Sioux City v. Chicago & N. W. R. Co. 129 Iowa, 694, 113 Am. St. Rep. 501, 106 N. W. 183.

Messrs. Struble & Stiger, for appellees:

No interest vested in the heirs at law of Charles A. Westcott until his death, for until then it could not be known who at his death would constitute the class designated as "heirs."

Wescott v. Binford, 104 Iowa, 654, 65 Am. St. Rep. 530, 74 N. W. 18; McClain v. Capper, 98 Iowa, 146, 67 N. W. 102; Taylor v. Taylor, 118 Iowa, 407, 92 N. W. 71; Wilhelm v. Calder, 102 Iowa, 342, 71 N. W. 214.

The rule in Shelley's Case does not apply.

Wescott v. Binford, *supra*.

A right cannot be barred before any action can be brought to establish and enforce it. Hurleman v. Hazlett, 55 Iowa, 256, 7 N. W. 600.

When the remainder is limited to those that survive or are living at the termination of a particular estate, it is contingent by reason of uncertainty as to the remaindermen, they being regarded as incapable of ascertainment until the expiration of the prior estate.

Gardner, Wills, p. 509; Haward v. Peavey, 128 Ill. 431, 15 Am. St. Rep. 120, 21 N. E. 503; Thomson v. Ludington, 104 Mass. 193; Olney v. Hull, 21 Pick. 311; Nash v. Nash, 12 Allen, 345; McClain v. Capper, 98 Iowa, 145, 67 N. W. 102; McGillis v. McGillis, 154 N. Y. 532, 49 N. E. 145; L'Etourneau v. Henquenet, 89 Mich. 428, 28 Am. St. Rep. 310, 50 N. W. 1077; Armstrong v. Armstrong, 54 Minn. 248, 55 N. W. 971; Re Hoadley, 101 Fed. 233.

If a gift by the testator is in remainder to the heirs of another, the testator will be presumed to mean those who are the heirs of that person at the time of his death, and the remainder is therefore contingent during the life of the ancestor.

2 Underhill, Wills, p. 814; Healy v. Healy, 70 Conn. 469, 39 Atl. 793; Teets v. 29 L.R.A. (N.S.)

Weise, 47 N. J. L. 154; Van Tilburgh v. Hollinshead, 14 N. J. Eq. 32.

The possession of the grantee of a tenant for life does not become adverse to the contingent remainderman or reversioner until after the death of the life tenant, and the estate in remainder vests. And this is true whether the deed by the life tenant purports to convey only the interest which the life tenant had, or the title in fee simple to the premises.

1 Cyc. Law & Proc. p. 1058, § 36; Mettler v. Miller, 129 Ill. 630, 22 N. E. 529; Merman v. Caldwell, 8 B. Mon. 32, 46 Am. Dec. 537; Stevens v. Winship, 1 Pick. 318, 11 Am. Dec. 178; Dugan v. Follett, 100 Ill. 581.

McClain, J., delivered the opinion of the court:

John Westcott, under whose will plaintiffs claim title to an undivided three-fourths interest in the premises in controversy, a described parcel of lot 8, block 11, in the city of Marshalltown, died in 1865, leaving surviving him a widow and certain children named in his will. The provisions of this will, which was duly probated, so far as they affected the title to the premises in controversy, were that the widow should have a life estate therein, and that said premises should pass at her decease to his son, Charles Alfred Westcott, "to have and to become possessed of the same at the death of my wife, Anna Westcott, and to hold the same during his, Charles Alfred Westcott's, natural life." Other parcels of said lot, as well as of lot 7 in the same block, disposed of in similar manner by the will, were devised in similar terms to other children, and the will contained this concluding paragraph: "My said children are to have the use, rents, and profits of their portions of said lots numbered seven and eight in block No. eleven of the town of Marshall, respectively, during the terms of their natural lives. They are to have no power to convey or dispose of the same, their respective portions, for a longer term than during their natural lives respectively. At the death of my children aforesaid, their respective portions of said lots numbered seven and eight descend to their heirs respectively, said heirs to have absolute title unto their respective portions." Charles Alfred Westcott died intestate in December, 1906, leaving surviving him four children, William, born in 1876, Clare, born in 1879, Leon, born in 1881, and Bernice (now Mrs. Nall), born in 1883. Prior to the commencement of this suit, William had conveyed any interest which he had in the premises to Leon, and Clare had conveyed his similar interest to defendant

F. L. Meeker. In 1875 Anna Westcott conveyed her life estate to Timothy Brown and J. F. Meeker, and on the same date Charles Alfred Westcott, then a single person and in possession of the premises in controversy, purported to convey the same in fee, with usual covenants of warranty, to said Brown and Meeker, who thereupon entered into possession, which continued until 1876, when Brown sold his interest to Meeker, after which date Meeker continued in exclusive possession until his death, in 1908. The defendants are the widow and heirs of J. F. Meeker, claiming through him the absolute and unqualified ownership of the premises. The claim of plaintiffs is that on the death of their father, Charles Alfred Westcott, the contingent remainder which their grandfather in his will had declared should descend to their father's heirs became absolutely vested in them to the extent of an undivided three fourths thereof, the other one fourth having, as already stated, been acquired in the meantime by one of the defendants.

Three propositions are relied upon for appellants: First, that while John Westcott described the estate devised to his son, Charles Alfred Westcott, as a "life estate," to take effect after the life estate given to his widow, and directed that at the death of said son the remainder in fee should vest in his heirs, the legal effect of such direction was to vest in Charles Alfred Westcott a remainder in fee simple after the termination of the widow's life estate, notwithstanding the specific language of the will that his said son should have 'the use, rents, and profits of the premises during the terms of his natural life, with no power to convey or dispose of the same for a longer term than during his natural life; second, that, even though the will should be construed as creating a contingent remainder in the heirs of said son, such remainder was cut off by the conveyance of the son before the birth of children; third, that the heirs of the son are barred and estopped from asserting any title to the premises after ten years of open, notorious, and adverse possession by them and those under whom they claim title.

1. The first proposition relied upon for appellants amounts simply to this: That by the rule in Shelley's Case the language of the will, purporting to create a life estate in Charles Alfred Westcott, and a remainder in fee in his heirs, must be construed as creating a fee-simple estate in the devisee named, notwithstanding the explicit statements in the concluding paragraph of the will that such devisee should have no other rights in or power over the property than those which pertain to life

tenancy. This identical question was before this court in the case of *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18, involving another parcel of property devised by testator to another child by similar language. In that case the court referred to two of its previous decisions, in which, as contended by counsel in argument, the rule had been recognized as in force in this state, and pointed out the fact that both of those cases involved deeds of conveyance, and not wills; and it then proceeded to say that there is a material distinction between wills and deeds of conveyance in the application of the rule in those jurisdictions in which the rule is recognized to be in force. Authorities are cited in the opinion to the proposition that the rule should not be so applied as to defeat the intention of the testator as expressed by other language than that employed in creating a remainder over in heirs after a life estate in the ancestor. If we are to adhere to the views expressed in *Wescott v. Binford*, further discussion of the applicability in the rule in Shelley's Case is unnecessary. But in the *Wescott-Binford* Case the court expressly held that there was no controlling decision in this state as to whether the rule in Shelley's Case should be recognized as a rule of property, and assumed only to hold that it was not applicable in the controversy before the court, avoiding any announcement of opinion as to whether it was applicable in this state to conveyances. Since that case was decided we have expressly held that the rule is in force in this state as to conveyances. *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18. And it is now contended that this decision overrules the decision in *Wescott v. Binford*; that the adoption of the rule in Shelley's Case as to conveyance necessarily results in its application to wills; and that we must now hold that, as a rule of property, Charles Alfred Westcott had a fee under his father's will, and not a life estate with remainder to his heirs. We are not able to reach this conclusion.

The rule in Shelley's Case had unquestionably been recognized as a rule of property in the courts of England for three or four centuries before those courts determined the question whether it was a rule in the construction of wills; and when, in 1769, the question was directly and definitely presented to the court of King's bench, then presided over by Lord Mansfield, in *Perrin v. Blake*, 4 Burr. 2579, s. c. 1 W. Bl. 672, 10 Eng. Rul. Cas. 689, the chief justice, with the concurrence of two of the justices, held that the rule should not be so applied as to defeat the manifest inten-

tion of the testator. From this conclusion one of the justices dissented. The case was taken on appeal to exchequer chamber, where six of the justices agreed in reversing the decision of the court of King's bench, while two of them favored an affirmance. An appeal was taken to the House of Lords, but no decision was ever reached in that court; the appeal having been dismissed in 1777 as the result of a compromise between the parties. The controversy as to whether the rule in Shelley's Case should be recognized as a rule of property, which has given rise to elaborate discussion in the opinions of courts and in law treatises, seems to have commenced with the division of the court in *Perrin v. Blake*. But the only question in that case, as appears from the published reports we have, purporting to give the views of the justices as announced at the time, was whether the language in the will in question, in substance the same as that found in the will of John Westcott, prohibiting alienation by the children of the testator, who were, by the language of the will, to have a life estate only, was a sufficient indication of an intention on his part that the devise to such children, with remainder over to other heirs, should not, in accordance with the then recognized doctrine of the rule in Shelley's Case, create a fee estate in such children. As appears by the brief statement of the case in Burrow's Report (and the statement in W. Blackstone's Reports is even briefer and less specific), counsel for plaintiff argued that, though the intent of the testator be ever so plain from other parts of the will, the rule holds that the inheritance must vest in the ancestor; while counsel for defendant contended that, if the testator's intent was manifest from other parts of the will, the word "heirs" might be construed as word of description, and the heirs should take the inheritance as purchasers. The majority of the court of King's bench agreed with the contention for defendant, while in exchequer chamber the majority held with the plaintiff. The opinion of Mr. Justice Blackstone, which was posthumously published in Hargrave's Law Tracts, 489, as expressing the views of the majority of the justices in exchequer chamber (see 10 Eng. Rul. Cas. 689), included a discussion of the reason and propriety of the rule itself, and it seems to be assumed that Lord Mansfield's statement of the views of the majority of the justices in King's bench threw discredit on the rule in Shelley's Case as a rule of property. But the actual decision of a majority of the justices in the court of King's bench was that the intention of the testator as expressed in his will should be regarded as controlling, while a majority of

the justices in exchequer chamber thought his intent should be disregarded, in view of the fact that he attempted to create a life estate with remainder over to the heirs of the devisee, which it was thought he could not do. See 6 Cruise's Digest (Greenleaf's ed.) 313. Even Mr. Justice Blackstone conceded that if the intent of the testator manifestly and certainly appeared (by plain description or necessary implication from other parts of the will), "that the heirs . . . should take by purchase, and not by descent," then the devise for life to the ancestor did not create in him a fee; but he thought that the mere description by the testator of an intent that the ancestor should not dispose of the property for a longer period than his life was not sufficient to control the application of rule.

It is to be noticed that the date of the decision in *Perrin v. Blake* does not make it an authority as to what the common law was on this question at the time the common law was brought to this country. This decision and subsequent decisions of the English courts adhering, though with constant difficulty, to the decision in exchequer chamber, are of no greater weight with us than the decisions on the same question which have been announced by the courts of our sister states in which the same question has been considered. Conceding, as we have expressly held in *Doyle v. Andis*, supra, that the rule in Shelley's Case is a part of the common law in determining the effect of conveyances, and therefore a rule of property in all the states of the Union in which the common law on that subject was accepted, so far as not modified by statute, it is open to us, and it is our plain duty, notwithstanding the final determination in *Doyle v. Andis*, that the rule in Shelley's Case is a part of the common law, to decide whether that rule is conclusive in the construction of wills, and overrides the intention of the testator clearly expressed by language indicating his purpose that the devisee for life shall not have the power to convey any interest in the property which shall extend beyond the term of his life. A decision at this time that the expressed intention of the testator shall control, as against the rule in Shelley's Case, applied to the construction of a conveyance, would be in no way inconsistent with our recent decision in *Doyle v. Andis*, that such rule as applied to conveyances has been with us a part of the common law, and a rule of property binding upon the courts of this state in determining the rights under conveyances made prior to the recent repeal of the rule by statute. See Acts 32 Gen. Assem. chap. 159, p. 157. In other words, we can still adhere to the conclusions ex-

pressed in *Wescott v. Binford*, supra, without in any way impairing or modifying the views since expressed in *Doyle v. Andis*. Although the conclusions of the English courts adhering to the decision of exchequer chamber in *Perrin v. Blake* were quoted in our opinion in *Doyle v. Andis*, they were so quoted only as indicating the continued recognition by the English courts of the rule as applied to conveyances, and nothing is said in that case to indicate an intention to overrule the case of *Wescott v. Binford*, or to accept the conclusions of the English courts relating to the application of that rule, to defeat the expressed intention of the testator.

Even in the English courts it has been conceded by all the judges from Mr. Justice Blackstone to the present time that, if the intention of the testator was expressed in appropriate language, such intention would control as against the application of the rule in *Shelley's Case*. Thus, in *Jordan v. Adams*, 9 C. B. N. S. 483, and *Van Grutten v. Foxwell* [1897] A. C. 658, it was practically conceded in all the opinions handed down that the intention of the testator should control; the controversy being only as to whether the language in the will descriptive of the person's intent by using the word "heirs" was a sufficient indication of an intention inconsistent with the application of the rule in *Shelley's Case*. The various opinions in the English courts to the effect that language expressly limiting the power of disposal on the part of the devisee to whom, under the language of the instrument, only a life estate is given, to such disposal as he might make of a life estate, are not inconsistent with the recognition of the paramount importance of the description of the testator's intent. The general rule recognized in all the courts that the testator's intent shall be carried out when it is ascertainable from the language used by him, taking the will as a whole, is uniformly applied, even as against the construction which would be given under the rule in *Shelley's Case*, to the specific description of the estates devised to the life tenant and his heirs, respectively. For this purpose, wills are to be construed more liberally than deeds. Page, *Wills*, § 561; 1 Jones, *Real Prop.* § 606; 2 Underhill, *Wills*, § 658.

Thus, in *Ware v. Minot*, 202 Mass. 512, 88 N. E. 1091, the court uses this language: "The rule for the construction of wills, followed by courts in recent times, is to ascertain the intent of the testator from the whole instrument, attributing due weight to all its language, and then give effect to that intent, unless prevented by some positive rule of law, rather than to try to make the

interpretation of particular words or phrases in one instrument square with that before given to somewhat similar words used by someone else under other surroundings to accomplish a more or less different end. *McCurdy v. McCallum*, 186 Mass. 464, 72 N. E. 75. A few combinations of words have become so fixed in their meaning, by long and unvarying use, as to be rules of property. But ordinary canons for the interpretation of wills, having been established only as aids for determining testamentary intent, are to be followed only so far as they accomplish that purpose, and not when the result would be to defeat it." And see *Schmidt v. Jewett*, 195 N. Y. 486, 133 Am. St. Rep. 815, 88 N. E. 1110. In *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012, the court recognizes the intent of the testator as controlling, though it limits itself in ascertaining that intent to a technical interpretation of the terms used in describing the interests devised, and manifestly thereby defeats the real intent of the testator, a learned lawyer (the late Harvey B. Hurd of the Chicago bar), thus throwing discredit, as it seems to us, upon the correctness of the application of such technical rules in ascertaining the testator's intent. In addition to the authorities cited in *Wescott v. Binford*, supra, to the effect that testator's intention will be carried out, even as against the result otherwise indicated by the strict language of the rule as applied to the granting clause of the will, see *Chelton v. Henderson*, 9 Gill, 432; *Findlay v. Riddle*, 3 Bin. 139, 5 Am. Dec. 355; *Swain v. Rascoe*, 25 N. C. 200, 38 Am. Dec. 720.

We are perfectly content, therefore, to adhere to the construction of this will given in *Wescott v. Binford*, supra, and we are satisfied that the opinion of the majority of the court in the more recent case of *Doyle v. Andis*, supra, is not inconsistent with the conclusion there reached. Therefore we hold that Charles Alfred Wescott had only a life estate in the premises in question, and that he did not have a fee title when he executed his conveyance to Brown and Meeker.

2. The contention for appellants that, even though Charles Alfred Wescott took under the will only a life estate, nevertheless his conveyance by warranty deed to defendants' ancestor cut off the remainder to his heirs, is expressly based by counsel on the views of this court announced in *Archer v. Jacobs*, 125 Iowa, 467, 101 N. W. 195. But in that case the remainder after the life estate created by the will was to the children of the life tenant, who had children living at the time the will took effect, and the court held that the remainder was vested, although there was an uncertainty as

to the extent of the interests which such children would come into enjoyment of on the death of the life tenant, owing to the uncertainty as to whether other children should not be subsequently born. The distinction between that case and the one before us is manifest. There the children in being took a vested remainder subject to a condition subsequent, which might lessen the extent of their interest therein on the one hand, or possibly enlarge it on the other, and we held that a combination of the life estate and this vested remainder subject to condition subsequent, and the possible reversionary interest, all in one person, cut out any remote contingent interest of children yet unborn; while in this case the remainder, instead of being vested, remained, and was necessarily, contingent, until the termination of the life estate of Charles Alfred Westcott, for until that time no one could claim as his heir.

We do not deem it necessary to go into any elaboration on the subject of contingent remainders. Contingencies may be of various characters, and the kind of contingent remainder referred to in *Archer v. Jacobs* is quite different in its characteristics than that involved in this case. It is sufficient to say that in the case before us there was a remainder entirely contingent, and necessarily remaining contingent, until the termination of the life estate, as to what particular person or persons should be entitled to enjoy it. It could only be rendered certain in that respect by the termination of the life estate. It was perfectly valid, for the contingency on which its enjoyment depended must necessarily arise in time; that is, Charles Alfred Westcott must die, and must, as presumption of law, leave heirs surviving him; but the contingency as to what particular person or persons should turn out to be his heirs was one inherent in the very nature of the remainder, and impossible of determination until his death. Birth of children to Charles Alfred Westcott was not at all essential to the ultimate vesting of the remainder. He would have heirs when he died, whether he had children or not. To hold that a conveyance by Charles Alfred Westcott during his lifetime would cut off the remainder to his heirs would be simply to hold that a remainder to heirs could not be created. When we have reached the conclusion that the rule in *Shelley's Case* does not apply, to merge the remainder to heirs in the life estate of Charles Alfred Westcott, we have necessarily decided that a conveyance by Charles Alfred Westcott during his lifetime would not defeat the remainder. The cases relied on for appellants are not in point, because all of them involve remainders to

children of the life tenant, with the result that the remainder became vested at once if there were living children (subject of course to a condition subsequent), or might vest before the termination of the life estate by birth of children to the life tenant. See especially *Anthracite Sav. Bank v. Lees*, 176 Pa. 402, 35 Atl. 197; *People's Loan & Exch. Bank v. Garlington*, 54 S. C. 413, 71 Am. St. Rep. 800, 32 S. E. 513; *Hubbird v. Goin*, 70 C. C. A. 320, 137 Fed. 822. It is plain that under the devise to Charles Alfred Westcott with remainder to his heirs, such remainder to heirs being valid, though contingent, a conveyance by Charles Alfred Westcott during his lifetime, although he purported to convey the fee title, could not cut off the remainder.

3. The claim for appellants based on the statute of limitations is that, conceding Charles Alfred Westcott to have had only a life estate (following the life estate to his mother), and that there was a remainder in fee to his heirs, such remainder, though contingent at the death of testator, became vested on the birth of children to him, and that these plaintiffs, his children, could have brought an action to quiet title against those under whom defendants claim title, holding adversely under a deed from Charles Alfred Westcott purporting to convey the fee title; and that such action, not having been brought within the statutory period, nor within one year after the plaintiffs attained their majority, cannot now be maintained. If the remainder had been to the children of Charles Alfred Westcott, the argument would have been pertinent to the facts. Whether it would have been sound we need not determine, for there is a fundamental difference between a remainder to children of the devisee for life, and a remainder to the heirs of such devisee. If the remainder provided for in this will had been to the children of Charles Alfred Westcott, there would have been no occasion to discuss the applicability of the rule in *Shelley's Case*, for that rule has no reference to a grant for life with remainder over to the children of the life tenant. *Brown v. Brown*, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81; *Hubbird v. Goin*, supra. It is not pretended that there is anything in the language in the will under consideration to indicate that, by reference to the heirs of Charles Alfred Westcott the testator intended to designate his children, or that the usual meaning of the word "heirs" was to be restricted so as to apply only to his children as such heirs. If he had remained unmarried, he would have had heirs at the time of his death. But during his lifetime he had no heirs, on the fundamental principle that there are no heirs to a living

person. In other words, the remainder to the heirs of Charles Alfred Westcott was contingent in this sense, that until his death it could not be determined what person or persons corresponded with that description, so as to be entitled to enter into the property on the termination of his life estate. But instantly on his death the remainder vested in those persons who at that time were entitled to take his property as his heirs. It is plain, therefore, that his children, when they were born, acquired no vested interest. They had no right in possession nor in expectancy, which they could assert as against defendants' ancestor in possession of the property under a deed from their father, the life tenant. Had the remainder been devised to Charles Alfred Westcott's children, then it might well be that the possession under his deed should be regarded as adverse to them, under the reasoning adopted in the case of *Elder v. McClaskey*, 17 C. C. A. 251, 37 U. S. App. 1, 199, 70 Fed. 529, to which counsel have called our attention. But until the determination of the life estate, it was impossible to know who would take as heirs, and therefore no interest became vested until that time under the devise to heirs. *Robinson v. Palmer*, 90 Me. 246, 38 Atl. 103; *Madison v. Larmon*, 170 Ill. 65, 62 Am. St. Rep. 356, 48 N. E. 556; 2 Underhill, Wills, § 610. We have no occasion, therefore, to discuss the question whether, on the vesting of a contingent remainder during the life estate upon which it is limited, the remainderman may bring an action to quiet title against a grantee of the life tenant, and may be barred by the statute of limitations on his failure to do so within the prescribed period of limitation for such actions. If, prior to the death of Charles Alfred Westcott, these plaintiffs had brought an action to quiet title against defendants' ancestor in possession of the premises, a complete answer would have been that as yet no interest had vested in them, that they might not be the persons coming within the description "heirs" of Charles Alfred Westcott at his death, and that they had no interest in the property to sustain any such action. We have no occasion, therefore, to discuss the cases of *Murray v. Quigley*, 119 Iowa, 6, 97 Am. St. Rep. 276, 92 N. W. 869; *Crawford v. Meis*, 123 Iowa, 610, 66 L.R.A. 154, 101 Am. St. Rep. 337, 99 N. W. 186, and *Hubbard v. Goin*, supra, on which counsel rely.

The same considerations dispose of the contention that plaintiffs became estopped to assert any claim to the property, by failure to assert such claim against defendants, or those from whom they took title, knowing them to be in possession, making valu-

able improvements under a claim of title. As already said, until the death of their father, they had no interest in the property. They had not yet come within the description of his "heirs." Their father died only within one year preceding the institution of this action, and it is not contended that anything which occurred subsequent to his death would give rise to an estoppel as against the rights of plaintiffs to maintain such action.

The decree of the lower court is therefore affirmed.

MARYLAND COURT OF APPEALS.

CARRIE V. HALL, Appt.,

v.

SARAH W. GRADWOHL et al.

(— Md. —, 77 Atl. 480.)

Will — Shelley's Case — legal heirs.

A bequest of stock to be invested and the income paid to testator's daughter during the term of her natural life, and at her death to be equally divided among her children or legal heirs, does not, under the rule in *Shelley's Case*, vest a fee in the daughter, since the plain intent of the testator is to use the words "legal heirs" as a particular designation of individuals who are to take as purchasers at the death of the first taker.

(April 20, 1910.)

APPEAL by defendant from a decree of the Circuit Court for Baltimore City enforcing specific performance of a contract to purchase certain ground rents. Reversed.

The facts are stated in the opinion.

Mr. Henry W. Fox, for appellant:

The rule in *Shelley's Case* does not apply, and Sarah Gradwohl only took a life estate in the ground rents in question.

Merritt v. Disney, 48 Md. 352.

The rule in *Shelley's Case* is a rule of real property, and not a rule of construction.

Thomas v. Higgins, 47 Md. 439; *Clarke v. Smith*, 49 Md. 106; *Ware v. Richards*, 3 Md. 505, 56 Am. Dec. 762; *Horne v. Lyeth*, 4 Harr. & J. 433; *Chelton v. Henderson*, 9 Gill, 432; *Tongue v. Nutwell*, 13 Md. 423; *Lyles v. Digges*, 6 Harr. & J. 363, 14 Am. Dec. 281.

Mr. Arthur L. Jackson, for appellees:

The rule in *Shelley's Case* applies as fully in cases of personal property as it does in cases of real property.

Hughes v. Nicklas, 70 Md. 484, 14 Am.

Note. — See note, post, 963.

St. Rep. 377, 17 Atl. 398; Butterfield v. Butterfield, 1 Ves. Sr. 154.

Under the rule in Shelley's Case, a fee-simple title in the rents in controversy vested in the complainants.

Shapley v. Diehl, 203 Pa. 566, 53 Atl. 374; Cook v. Councilman, 109 Md. 640, 72 Atl. 404; Sheeley v. Neidhammer, 182 Pa. 163, 37 Atl. 939; Mason v. Ammon, 117 Pa. 127, 11 Atl. 449.

Burke, J., delivered the opinion of the court:

On December 10, 1909, the appellant entered into a contract with the appellees to purchase certain property in the city of Baltimore. This property is particularly described in the contract of purchase, wherein it is declared that all its terms and provisions shall be null and void unless the vendors had a good and merchantable title to the property. The appellant refused to complete the purchase upon the ground that the appellees could not convey a good title. They thereupon instituted a suit for the specific performance of the contract, and from the decree of the lower court, which required her to complete the purchase, the appellant has brought this appeal.

The facts are undisputed, and those that need be stated are: That on the 10th day of August, 1868, Philip Weitzler of Baltimore city executed his last will and testament, by which he disposed of his estate as follows: "I give to my wife, Caroline Weitzler, all the property of which I may be possessed at the time of my death, whether real, personal, or mixed, with power to dispose of and have absolute control of the same during the term of her natural life, and at her death to be disposed of as follows: Five hundred dollars and my piano to my daughter Mena Weitzler; five hundred dollars to my daughter Henrietta Weitzler; the balance of my estate to be equally divided among my five children or their heirs, share and share alike, with this proviso: That the portion to which my daughter Sarah Gradwohl may be entitled shall be invested in some safe stocks or other securities, the said Sarah Gradwohl to receive the income from the same during the term of her natural life, and at her death to be equally divided among her children or legal heirs." After the death of the testator this will was proven and admitted to probate by the orphans' court for Baltimore city. By the final account of Samuel J. Harman, the administrator *d. b. n.* of Philip Weitzler, the sum of \$1,061.77 was distributed to Sarah Gradwohl, and this sum was deposited by Mr. Harman, under an order of the orphans' court for Baltimore city, in the Central Savings Bank, the interest to be subject to the

order of Sarah Gradwohl for life, and the principal subject to the further order of the court. On the 14th day of November, 1884, upon the petition of Sarah Gradwohl, the orphans' court ordered that she withdraw this money, and authorized her to invest it in the purchase of two ground rents issuing out of two contiguous lots of ground in the city of Baltimore, on the southwest side of Chew and Chappel streets. The order provided that the "investment shall not be deemed made as herein directed, until there be executed, acknowledged, and delivered in due form of law a good and sufficient deed conveying and assuring to Sarah Gradwohl, tenant for life with a remainder over to her children or legal heirs, the fee-simple property hereinbefore mentioned." By the authority of this order Sarah Gradwohl purchased from Riley E. Wright and wife, on November 17, 1884, the two ground rents or reversions in fee mentioned in her petition and involved in this suit. The deed recited that the property is granted and conveyed under the order of the orphans' court of Baltimore city, dated November 14, 1884, "unto Sarah Gradwohl for and during the term of her natural life, and at her death to be equally divided among her children or legal heirs." Caroline Weitzler, the widow, is dead.

The single question involved in this appeal is what interest or estate passed to Sarah Gradwohl under the will of her father, Philip Weitzler. If she took an absolute interest in the property devised or bequeathed to her by the will, it is conceded that the decree must be affirmed. If, however, she took a life estate only, the decree must be reversed, because, in that event, she cannot convey a good and merchantable title to the vendee. The position of Sarah Gradwohl is that, under the rule in Shelley's Case, she took an absolute interest in all the property which passed to her under her father's will. Judge McSherry in *Travers v. Wallace*, 93 Md. 512, 49 Atl. 417, said that "it is a settled and inflexible rule of property, so firmly imbedded in our jurisprudence as to be beyond modification or repeal except by legislative enactment, that when a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate. 1 Preston, Estates, 263. This doctrine is called the rule in Shelley's Case, 1 Coke, 104. It has nothing to do with

the testator's intention. It is a rule of property, and overrides the intention. In fact, wherever applicable, it may be said that it disregards the intention altogether; for, whilst the intention may confessedly have been to give but a life estate, the rule converts that life estate into a fee, by treating the terms of the gift over to the heirs as a limitation of the estate, and not as words of purchase."

But this rule has some well-recognized exceptions, and is never to be applied in total disregard of the sense in which the testator has used technical words of inheritance. Mr. Hargrave in his *Observations Concerning the Rule in Shelley's Case*, 1 Hargrave's Law Tracts, 575-577, states that when it is once settled that the donor or testator has used words of inheritance according to their legal import, has applied them intentionally to comprise the whole line of heirs to the tenant for life, and has really made him the terminus or ancestor by reference to whom the succession is to be regulated, then it will appear that, being considered according to those rules of policy from which it originated, it is perfectly immaterial whether the testator meant to avoid the rule or not, and that to apply it, and to declare the words of inheritance to be words of limitation, vesting the inheritance in the tenant for life as the ancestor and terminus to the heirs, is a matter of course. But, on the other hand, if it be decided that the testator or donor did not mean by the words of inheritance after the estate for life, to use such words in their full and proper sense, nor to involve the whole line of heirs to the tenant for life, and include the whole of his inheritable blood, and make him the ancestor or terminus for the heirs, but intended to use the word "heirs" in a limited, restrictive, and untechnical sense, and to point at such individual person as should be heir of a tenant for life at his decease, and to give a distinct estate of freehold to such single heir, and to make his or her estate of freehold the groundwork for a succession of heirs, and constitute him or her the ancestor terminus and stock for the succession to take its course from, in every one of these cases the premises are wanted upon which only the rule in Shelley's Case interposes its authority, and that rule becomes quite extraneous matter. 2 Col. Litt. 150 (note). In *Clarke v. Smith*, 49 Md. 116, it is said to be "a well-settled rule of construction that technical words of limitation used in a devise, such as 'heirs' generally, or 'heirs of the body,' shall be allowed their legal effect, unless from subsequent inconsistent words it is made perfectly plain that the testator meant otherwise. Or, to use the language of Lord Eldon in *Wright v. 29 L.R.A. (N.S.)*

Jesson, 2 Bligh, 1, 10 Eng. Rul. Cas. 714, the words 'heirs of the body' will indeed yield to a particular intent that the estate shall be only for life, and that may be from the effect of superadded words or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal." And in *Fulton v. Harman*, 44 Md. 264, it is said that "where the limitation of the remainder is to the issue or heirs of him to whom the preceding estate for life is limited, if the term 'issue' or 'heirs' is clearly intended as descriptive merely of the persons to take in succession, and thus become the root of a new inheritance, the individuals embraced by such descriptive terms take as purchasers, and do not, therefore, come within the rule in Shelley's Case. When the word 'heirs' is taken as a word of limitation, it is collective, and signifies all the descendants in all generations; but, when it is taken as a word of purchase, it may denote particular persons answering the description at a particular time, and in a special sense, according to circumstances." In the recent case of *Reilly v. Bristow*, 105 Md. 332, 66 Atl. 264, where all the cases relied upon by the appellees on this record are considered, Judge Pearce said: "There is no more doubt under the Maryland than under the Pennsylvania cases that where there is no expression to rescue the case from the application of the rule, it does not matter that the testator's intention may be defeated, as is clearly shown in *Clarke v. Smith*, 49 Md. 106-120; but the courts of this state have always struggled against the application of the rule, and have searched the will or deed for some inconsistent provision or word which would exclude its application." He further said that this rule is not one "of universal or imperative application, and depends upon whether it will support or defeat the intention of the testator as deduced from the whole will."

Applying these principles to the will before us, it is manifest that the application of the rule in Shelley's Case to the bequest to Sarah Gradwohl would wholly defeat the expressed will of the testator. If that rule be applicable to the bequest to her, the words "children or legal heirs" must be treated as words of limitation; that is to say, words marking out the extent and duration of her interest. By that construction her "children or legal heirs" would take nothing under the will, and the whole portion which the testator intended his daughter to take for life would be taken by her absolutely. Such a construction, which has neither reason, policy, justice, nor equity to support it, can only be sustained by giving to the words "legal heirs," which

are superadded to the word "children," the arbitrary meaning placed upon them "by an artificial rule of law." We think it plain from the language and dispositions of the will that the testator did not intend to use the words "legal heirs" in their full technical sense, and that the language and provisions of the will plainly manifest a particular intent to use those words, in the bequest to his daughter Sarah, as mere *descriptio personarum* or a particular designation of individuals who were to take as purchasers at her death. Such being the testator's particular intent in the use of the words "legal heirs" immediately succeeding the word "children" in the bequest to her, that intent will limit the strict, technical import of the words, and will also limit Sarah to a life estate in the portion bequeathed to her. As appears from the will, which we have quoted, the testator first gave a life estate to his wife in his whole estate. He then made certain bequests to two of his daughters. He then directed that the balance of his estate should be equally divided among his five children or their heirs, share and share alike. Sarah Gradwohl was one of the testator's five children, and, if he had concluded his will at this point, a different situation would have been presented. But he modified the preceding provision of his will, so far as it related to his daughter Sarah, by adding a proviso that her portion should be "invested in some safe stocks or securities, the said Sarah Gradwohl to receive the income from the same during the term of her natural life, and at her death to be equally divided among her children or legal heirs." His intention, therefore, to make a special provision as to Sarah's portion is plain.

The rule in Shelley's Case is not a favored rule in the law of Maryland, although the court will never refuse to apply it in a proper case. But where, as here, the particular intent of the testator was not to use the words of inheritance in their full legal sense, those words, in the connection in which they are used in the will of Philip Weitzler, should yield to that intent, thereby withdrawing the case from the application of the rule. We decide that by the true construction of the will, Sarah Gradwohl took only a life estate in the property thereby bequeathed or devised to her. It therefore follows that the appellees cannot convey to the appellant a good and merchantable title to the property mentioned in the contract of December 10th, 1909.

The decree appealed from will be reversed and the bill dismissed.

Decree reversed, with costs to the appellant above and below, and bill dismissed.

A motion for reargument having been filed, Burke, J., on June 23, 1910, handed down the following response:

The appellees have filed a motion for a reargument of this case and have assigned three grounds why the motion should be granted. (1) Because the decision impliedly, but not distinctly, overruled the case of *Cook v. Councilman*, 109 Md. 622, 72 Atl. 404. (2) Because, while so apparently overruling that case, it failed to refer to it, and therefore leaves counsel in doubt whether or not the Councilman Case is to be considered as overruled. (3) Because this case is identical in language with the deed in the case of *Shapley v. Diehl*, 203 Pa. 568, 53 Atl. 374, which case was quoted with approval by this court in case of *Cook v. Councilman*, *supra*.

It is stated in the motion "that the failure of the court in this case to notice the decision of *Cook v. Councilman*, above quoted, has resulted in two cases, one decided to be within the rule in Shelley's Case, and one decided not to be within that rule, when the two cases were identical. If it be intended by the court to overrule the decision of *Cook v. Councilman*, of course, this motion will be denied; but if it is not the intention of the court to overrule that case, the appellees respectfully submit that the two cases cannot be reconciled, and that this motion should therefore be granted. The prolongation of this brief could simply amplify, but add nothing to, the decision of this court already made in the *Cook* and *Councilman* Case, and counsel therefore considers that it is simply a question as to whether that case will be overruled or sustained, and, as that is a matter that is not opened for argument, will not prolong the brief further." It would be most unfortunate, indeed, if there were anything in the record to justify this criticism. This court is not in the habit of overruling cases without stating that it intends to do so, and it is hardly conceivable that it would without mentioning the fact overrule so recent and important a case as *Cook v. Councilman*, *supra*. The writer decided that case in the lower court; but the language of the will of James B. Councilman, the elder, was so unlike the will in this case that it is difficult to conceive how anyone could imagine that the decision in that case had been overruled, or was intended to be overruled, by anything that was said in the opinion in this case. That case was not overlooked, but was not discussed in the opinion, because the language employed in the two wills was so widely dissimilar that the case afforded very little, if any, aid in the decision of the question before us. This will be apparent to anyone who will read

the clause of Mr. Councilman's will with which the court was dealing, and which will be found on page 637 of 109 Md. We will merely say that the two cases were not identical, as asserted by the appellees; that the case of Cook v. Councilman, supra, was not overruled, nor was it intended to be overruled; and that nothing has been said in the opinion in this case in conflict with the familiar rule announced in that case.

Judge Briscoe in the Councilman Case said: "In Shapley v. Diehl, 203 Pa. 568, 53 Atl. 375, land was conveyed 'to Shapley for the term of his natural life and at his death to his children or heirs.' The court in that case held that the phrase 'children or heirs' means heirs of the grantee of the life estate, the word 'heirs' being used as a synonym to enlarge and explain the preceding word, which might otherwise fail of its real intentment. The words therefore naturally and properly seem to express the intent that the donees in remainder should take not from the donor directly as purchasers, but in succession by inheritance from the grantee of the life estate." It is stated in the motion that "this language would seem to be so clear that there could be no doubt as to its meaning, and it was upon the authority of this paragraph that the counsel for the appellees advised them to bring this suit. The court in its opinion in this case has neither affirmed nor overruled this language, and counsel will be more in doubt, therefore, in the future, as to which of these case is to be the controlling one. Since this language was completely ignored by the court in its opinion, counsel for the appellees take the liberty to assume that in some way it was overlooked, and especially since the deed in the Shapley Case and the deed in this case are almost identical."

The question before the court in this case was the construction of the last will and testament of Philip Weitzler, and not the construction of the deed from Riley E. Wright and wife to Sarah Gradwohl. The rents conveyed by that deed were simply taken as an investment under the order of the orphans' court of Baltimore city, to be held according to the provisions of the will of Philip Weitzler, and therefore it would appear to be rather a misuse of the Shapley Case to apply it to that deed. We venture to think that a comparison of the language used in the Shapley grant with that employed in the will of Philip Weitzler will show that the cases are not "almost identical." Shapley grant: "For value received, I hereby convey and transfer all my right, title, and interest to the property within mentioned to Joseph S. Shapley for the term of his natural life and at his death to his

children or heirs." The Weitzler will: At the death of his wife, the testator disposed of his estate as follows: "Five hundred dollars and my piano to my daughter Mena Weitzler; five hundred dollars to my daughter Henrietta Weitzler; the balance of my estate to be equally divided among my five children or their heirs, share and share alike, with this proviso: That the portion to which my daughter Sarah Gradwohl may be entitled shall be invested in some safe stocks or other securities, the said Sarah Gradwohl to receive the income from the same during the term of her natural life, and at her death to be equally divided among her children or legal heirs." It was because of this special provision as to the share of Sarah Gradwohl that we held, upon the authority of the cases cited in the opinion, that the testator did not use the words "legal heirs" immediately succeeding the word "children" in the bequest to his daughter, in their full technical sense; but that the language and provisions of the will manifest a particular intent on his part to use those words as mere *descriptio personarum* or particular designation of individuals who were to take as purchasers at his death. In such a case, under all the authorities, the rule in Shelley's Case does not apply.

It is true the Shapley Case was not expressly mentioned, but the opinion shows that it was not "completely ignored," or "overlooked," as it states that all the cases relied upon by the appellees (among which was the Shapley Case) were considered by Judge Pearce in Reilly v. Bristow, 105 Md. 332, 66 Atl. 262. Whether that case has been adopted as the law in this state or not, it is obvious, from the language employed in the Weitzler will, that it is not a controlling authority in this case, because the facts of the two cases are widely different.

Motion overruled.

PENNSYLVANIA SUPREME COURT.

JACOB E. KEMP, Appt.,
v.

VALERIUS S. REINHARD et al.
(228 Pa. 143, 77 Atl. 436.)

Will — life estate — issue — location of fee.

A devise to one for and during his lifetime, and after his death to his issue in fee, and, should he die without issue, to another person designated, does not create a fee in the first taker, since the purpose of testator to pass the remainder directly from himself to the issue is manifest.

(May 2, 1910.)

Note. — See note, post, 963.

APPEAL by plaintiff from a judgment of the Court of Common Pleas for Berks County in defendants' favor in an action brought to recover the purchase price of certain real estate alleged to have been sold. Affirmed.

The facts are stated in the opinion.

Mr. Isaac Hiester, for appellant:

A gift to one for life, and upon his death to his issue in fee, creates an estate tail.

Shelley's Case, 1 Coke, 104; Angle v. Brosius, 43 Pa. 189; Grimes v. Shirk, 169 Pa. 78, 32 Atl. 113; Elliott v. Pearsohl, 8 Watts & S. 38; McIntyre v. Ramsey, 23 Pa. 317; Philadelphia Trust, S. D. & Ins. Co's Appeal, 93 Pa. 209; Potts's Appeal, 30 Pa. 168; Allen v. Markle, 36 Pa. 117; Wynn v. Story, 38 Pa. 166; Auman v. Auman, 21 Pa. 343; Steacy v. Rice, 27 Pa. 82, 67 Am. Dec. 447; Kleppner v. Laverty, 70 Pa. 70; Bassett v. Hawk, 118 Pa. 94, 11 Atl. 802.

Superadded words of limitation alone are not sufficient to convert a word of limitation to a word of purchase, and therefore the words "in fee" following the limitation to the issue do not make the issue purchasers.

Fearne, Contingent Remainders, 180; Carter v. M'Michael, 10 Serg. & R. 429; Paxson v. Lefferts, 3 Rawle, 59; George v. Morgan, 16 Pa. 95; Price v. Taylor, 28 Pa. 108; Grimes v. Shirk, 169 Pa. 74, 32 Atl. 113; Graham v. Abbott, 208 Pa. 68, 57 Atl. 178.

The words "die without leaving issue" do not import a definite failure of issue, under the act of July 9, 1897, when a contrary intention appears by the will, and such contrary intention does appear where the preceding gift, without any implication arising from such words, is a limitation of an estate tail to the first taker.

2 Jarman, Wills, *863; Re O'Bierne, 1 Jones & L. 352; Dawson v. Small, 10 Eng. Rul. Cas. 851, note; Dilworth v. Schuylkill Improv. Land Co. 219 Pa. 530, 69 Atl. 47; Hastings v. Engle, 217 Pa. 422, 66 Atl. 761; Loddington v. Kime, 1 Salk. 224; Lewis v. Link-Belt Co. 222 Pa. 139, 70 Atl. 967.

The word "issue" in a will means heirs of the body, unless there are words therein which are inconsistent with or control the construction. The rule in Shelley's Case must therefore prevail.

Doe ex dem. Canno v. Rucastle, 8 C. B. 876; Price v. Taylor, 28 Pa. 107; Ralston v. Truesdell, 178 Pa. 429, 35 Atl. 813; 2 Jarman, Wills, *445; Wall v. Maguire, 24 Pa. 248; Hackney v. Tracy, 137 Pa. 53, 20 Atl. 560; Nicholson v. Bettie, 57 Pa. 384; Siegwarth's Estate, 33 Pa. Super. Ct. 622.

Even if the words "living at his death" were expressly found in the will, they would

not be considered as explanatory of the species of issue included in the prior devise, and thereby prevent the prior devisee taking an estate tail under it.

Simpson v. Reed, 205 Pa. 53, 54 Atl. 499; Pifer v. Locke, 205 Pa. 616, 55 Atl. 790; Schrecongost v. West, 210 Pa. 7, 59 Atl. 269; Xander v. Easton Trust Co. 217 Pa. 485, 66 Atl. 759; Sechler v. Eshleman, 222 Pa. 35, 70 Atl. 910; Smith v. Lindsey, 37 Pa. Super. Ct. 171.

A devise over on a definite failure of issue, like one on an indefinite failure, is a remainder.

Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565.

Messrs. F. A. Marx and C. H. Ruhl, for appellees:

The rule in Shelley's Case has no application, as the testator plainly expressed his intent that Jacob should have a life estate, and no more.

Guthrie's Appeal, 37 Pa. 9; Butler's Co. Litt. 370-a note; Findlay v. Riddle, 3 Binn. 149, 5 Am. Dec. 355; Ingersoll's Appeal, 86 Pa. 245; Wood v. Schoen, 216 Pa. 428, 66 Atl. 79; Shaner v. Wilson, 207 Pa. 550, 56 Atl. 1086; Mulliken v. Earnshaw, 209 Pa. 226, 58 Atl. 286; Todd v. Armstrong, 213 Pa. 570, 62 Atl. 1114.

The word "issue," which prima facie means heirs of the body, which are words of limitation, will be construed as a word of purchase or limitation, as will best effectuate the intention of the testator.

Woelpper's Appeal, 126 Pa. 568, 17 Atl. 870; Chew's Appeal, 37 Pa. 23; Gerhard's Estate, 160 Pa. 253, 28 Atl. 684; Paxson v. Lefferts, 3 Rawle, 75; Parkhurst v. Harrower, 142 Pa. 432, 24 Am. St. Rep. 507, 21 Atl. 826.

There is a less degree of presumption against construing the word "issue," a word of purchase, than against construing the words "heirs of the body" to be words of purchase; and a still less degree of presumption against that construction of the word "issue," than against the same construction of the word "heirs" generally; so that, prima facie, the word "issue" is more likely to be a word of purchase than the words "heirs of the body," and still more likely than the word "heirs" generally.

Smith, Executory Interests, pp. 255, 261, § 528; Taylor v. Taylor, 63 Pa. 483, 3 Am. Rep. 565.

Where there is enough on the face of the will to show that "issue" was intended to have a less extended meaning, and to be applied only to children, or to descendants of a particular class or at a particular time, it is to be construed as a word of purchase, and not of limitation.

Robins v. Quinliven, 79 Pa. 335; Todd v.

Armstrong, 213 Pa. 572, 62 Atl. 1114; Reimoehl v. Shirk, 119 Pa. 113, 12 Atl. 806; Taylor v. Taylor, 63 Pa. 484, 3 Am. Rep. 565.

Testatrix expressed, unequivocally, her desire that the estate to Jacob E. Kemp should be for life, and no longer.

Daley v. Koons, 90 Pa. 249.

The devise of the remainder to "his issue in fee" created a contingent fee.

Lodddington v. Kime, 1 Salk. 224; Backhouse and Wells, 1 Eq. Cas. Abr. 184; Fearn, Contingent Remainders, p. 152; Findlay v. Riddle, 3 Binn. 156, 5 Am. Dec. 355; Smith, Executory Interests, p. 255; Powell v. Domestic Missions, 49 Pa. 46; Buzby's Appeal, 61 Pa. 114; Sheets's Estate, 52 Pa. 269; Grimes v. Shirk, 169 Pa. 80, 32 Atl. 113; McCann v. McCann, 197 Pa. 459, 80 Am. St. Rep. 846, 47 Atl. 743; O'Rourke v. Sherwin, 156 Pa. 285, 27 Atl. 43; Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565.

"Issue," as used by testatrix, is limited to the issue of the life tenant living at the death of the life tenant, the time designated as the time when the estate in remainder shall vest.

Doe ex dem. King v. Frost, 3 Barn. & Ald. 546; 2 Jarman, Wills, pp. 516, 517; Ex parte Davies, 2 Sim. N. S. 114; Parker v. Birks, 1 Kay & J. 156; Coltsman v. Coltsman, 15 Ir. C. L. Rep. 185; Beckley v. Riegert, 212 Pa. 92, 61 Atl. 641.

By the words "die without leaving issue living," a definite failure of issue is contemplated, the failure to occur at the death of the life tenant.

Pells v. Brown, Cro. Jac. 590; 2 Jarman, Wills, 5th Am. ed. p. 508; Hauer v. Shitz, 3 Yeates, 221; Nicholson v. Bettie, 57 Pa. 386; Nes v. Ramsay, 155 Pa. 628, 26 Atl. 770; 4 Kent, Com. *277; Taylor v. Taylor, supra; Kleppner v. Laverty, 70 Pa. 70; Morris v. Morris, 17 Beav. 198, 21 L. T. 190, 1 Week. Rep. 377; Dilworth v. Schuylkill Improv. Land Co. 219 Pa. 527, 69 Atl. 47; Lewis v. Link-Belt Co. 222 Pa. 139, 70 Atl. 967; Hastings v. Engle, 217 Pa. 419, 66 Atl. 761; Mifflin v. Neal, 6 Serg. & R. 461; Rapp v. Rapp, 6 Pa. 45.

Brown, J., delivered the opinion of the court:

The testatrix gave to her son, Jacob E. Kemp, the use and income of seven enumerated properties "for and during his lifetime." Immediately after this provision for him, there is the following separate clause in the will: "And immediately after the decease of the said Jacob E. Kemp, I give and devise the above-described seven tracts or pieces of land, devised to him herein for life, to his issue in fee. Should he, how-

ever, die without leaving issue living, I give and devise the same unto my son Pierce G. S. Kemp, his heirs and assigns in fee." The judgment of the court below on the case stated to determine whether the appellant had a fee simple in the properties was that he took but a life estate, and that the testatrix had herself devised the remainder to the stock of a new inheritance, who, upon his death, would take from her as purchasers.

Though the intention of the testatrix may have been to give only a life estate to the appellant, if in the devise there was a limitation of the estate to his heirs to take by devolution from him at his death, her intention is overridden by the rule in Shelley's Case; but in every case in which the application of that rule is involved, the first question is whether the deviser or grantor intended a limitation of the remainder in fee or in tail as such to the heirs of the first taker, or that there should be the root of a new succession taking directly from the deviser or grantor as purchasers. When the latter intention appears the rule has no place, and the intention must be given effect.

The rule in Shelley's Case is not a means of ascertaining the intention of a testator, nor is it one of the construction of a will. It is one of law, unbending in its application, when the intention of the testator is ascertained that the heirs of his devisee of a freehold estate are to take from the devisee *qua* heirs. When such intention is ascertained, the heirs take by descent from the devisee, and there is therefore vested in him an estate of inheritance. Doeblers Appeal, 64 Pa. 9; Shapley v. Diehl, 203 Pa. 566, 53 Atl. 374. "It is therefore always a precedent question in any case to which it is supposed the rule is applicable, whether the limitation of the remainder is made to the heirs in fee or in tail, as such, and in solving this question the rule itself renders no assistance. It is silent until the intention of the grantor or deviser is ascertained. But if that intention is found to be that the remaindermen are to take as heirs of the grantee or devisee of the particular freehold, instead of becoming themselves the root of a new succession, the rule is applied, though it may defeat a manifest intention that the first taker should have but an estate for life. It is very carefully to be noted that, in searching for the intention of the donor or testator, the inquiry is not whether the remaindermen are the persons who would have been heirs had the fee been limited directly to the ancestor. The thing to be sought for is not the persons who are directed to take the remainder, but the character in which the donor in-

tended they should take. In the very many cases in which the question has arisen whether the rule was applicable, the difficulty has been in determining whether the intention was that the remaindermen should take as heirs of the first taker, or originally as the stock of a new inheritance." *Guthrie's Appeal*, 37 Pa. 9.

That the testatrix intended to devise a life estate to her son, and nothing more, most clearly appears. The devise is to him "for and during his lifetime," and this intention is repeated in the clause following the description of the properties, in which she refers to them as "devised to him herein for life." This twice-expressed intention receives emphasis from a comparison of the devisees to Jacob with those to her other son, Pierce. Those to the latter are to him, "his heirs and assigns;" and still further emphasis comes from the residuary clause of the will, in which the residue of the estate of the testatrix is given to her two sons, Pierce and Jacob E., "their heirs and assigns in equal shares." But what defeats the application of the rule in *Shelley's Case* is the unmistakable intention of the testatrix, not only that Jacob was to get only a life estate, but that after his death the remainder should not pass by devolution from him to his heirs, but directly from her to a designated class or to a designated individual. Her words are: "After the decease of the said Jacob E. Kemp, I gave and devise the above-described seven tracts or pieces of land, devised to him herein for life, to his issue in fee. Should he, however, die without leaving issue living, I give and devise the same unto my son Pierce G. S. Kemp, his heirs and assigns in fee." From a reading of the entire will, the conclusion is not to be avoided that the testatrix had two independent thoughts in her mind when she devised the seven properties: First, that she would give them to Jacob for life, and for life only, and she did so give them to him; and, second, that she would pass the remainder to be enjoyed by devisees from her, and she did so pass it in her words just quoted. As the remainder in these properties will pass to the issue of Jacob or to Pierce as purchasers from the testatrix, the rule in *Shelley's Case* has no place in this controversy, and the learned and discriminating judge below correctly so held.

Judgment affirmed.

29 L.R.A. (N.S.)

KENTUCKY COURT OF APPEALS.

L. S. HAMILTON et al., Appts.,

v.

R. J. SIDWELL et al.

(131 Ky. 428, 115 S. W. 204.)

Deed — construction similar to rule in *Shelley's Case*.

A deed to a woman, habendum to her in fee providing that if she die without heirs, then to her husband, should he be living; and in case he is dead, then a share to vest in the next legal heirs of the grantee, the remainder to vest in the next legal heirs of the husband, creates a conditional fee in the first taker, with an absolute fee to her husband, should she die without heirs; and their deed will therefore convey the whole estate, since the words to "the next legal heirs" are used as words of inheritance, and not of purchase.

(January 20, 1909.)

APPPEAL by defendants from a judgment of the Circuit Court for Clark County requiring them to accept a deed to certain real estate in compliance with a contract entered into by them for the purchase thereof. Affirmed.

The facts are stated in the opinion.

Mr. J. M. Stevenson for appellees.

Settle, Ch. J., delivered the opinion of the court:

Appellees by a written contract sold appellants, for the consideration therein recited, a parcel of real estate in the city of Winchester, for which they executed a deed in conformity to the contract, and made a tender thereof to appellants. Appellants refused to accept the deed thus tendered, and appellees thereupon brought suit against them in the court below for a specific performance of the contract. The answer of appellants made no objection to the form of the deed tendered, and admitted that it was executed in conformity to the contract, but denied that it conveyed a fee-simple title to the land, or that appellees had or could pass such title. The court, however, held that the deed would pass a fee-simple title to appellants, and entered judgment requiring them to accept it and otherwise specifically perform the contract. Appellants, being dissatisfied with the judgment, have appealed.

Note. — See note, post, 963.

The title appellees attempted to convey by the deed tendered was derived through and under a deed made to the appellee Theresa N. Sidwell by James T. Ecton and wife, which reads as follows:

This indenture made and entered into this 15th day of August, 1892, by and between James T. Ecton and Alice Ecton, his wife, parties of the first part, and Mrs. T. N. Sidwell, wife of R. J. Sidwell, party of the second part, all of the county of Clark and state of Kentucky, witnesseth: That, for and in consideration of \$700, to be paid as follows: \$400 cash in hand paid, the receipt of which is hereby acknowledged, and the further sum of \$300, due and payable in twelve months after date hereof, bearing 6 per cent interest from date until paid, as evidenced by a note of even date herewith, with a hen retained for the unpaid purchase money. The parties of the first part hereby alien, sell, and convey unto the said Mrs. T. N. Sidwell, party of the second part, the following described property, to wit: A certain lot in Winchester, Kentucky, in Robinson's addition, and known as lot number 3, lying between Winn avenue and the Kentucky Union Railroad, and is bounded as follows:

Beginning at a point in the center of said avenue corner to Goodpaster's lot No. 2; thence with a line of said lot N. 64° W. 358 feet to a stone in a line of the right of way of said R. R.; thence with said right of way N. 74° E. 81.7 feet to a stone corner to Mrs. Theodore Ecton's lot No. 4; thence with a line of said lot S. 64° E. 363 feet to the center of said avenue; thence with center line of said avenue 80 feet front to the beginning.

Said first parties warrant the title hereto generally free from the claim or claims of any and all persons whomsoever.

To have and to hold unto the said Mrs. T. N. Sidwell with its appurtenances there-to belonging, free from any claim or debt of her husband, forever in fee simple, with a covenant of general warranty, provided, however, that should the said Mrs. T. N. Sidwell die without heir or heirs, then, in that event, the title to the above described and conveyed land, with improvements thereon, to vest in her husband, R. J. Sidwell, should he be living; should said R. J. Sidwell be dead, then a share of the land and improvements thereon, to the amount of \$1,000, to vest in the next legal heirs of said Mrs. T. N. Sidwell, the remainder of the said property to vest in the next legal heirs of the said R. J. Sidwell. On testimony whereof the party of the first part

hereunto subscribed our names the day and year aforesaid.

James T. Ecton,
Alice E. Ecton.

The only question presented by the appeal is as to the proper construction of the foregoing deed. It will be observed that the appellee Theresa N. Sidwell is the only person named in the deed as a grantee, and by its premises and granting clause it seems to convey her a fee-simple title to the lot therein described. It will further be observed that the habendum clause also purports to convey her a fee-simple title with covenant of general warranty, but with the proviso: "That should the said Mrs. T. N. Sidwell die without heirs, then, in that event, title to the above described and conveyed land, with the improvements thereon, to vest in her husband, R. J. Sidwell, should he be living; should said R. J. Sidwell be dead, then a share of the land and improvements thereon, to the amount of \$1,000, to vest in the next of legal heirs of said Mrs. T. N. Sidwell, the remainder of the said property to vest in the next legal heirs of said R. J. Sidwell." If the proviso of the habendum clause is to be given any effect at all, it would necessarily introduce in that clause R. J. Sidwell as a party, and make him a grantee in the deed, though not expressly named as such. It is contended by appellees that this cannot be done, and that the attempted limitation in the habendum of Mrs. Sidwell's estate is ineffective, because inconsistent with and repugnant to the grant made to her in the premises. We are not prepared to say that the alleged inconsistency exists, or that the grant to the appellee R. J. Sidwell is for that reason void. We are of opinion that the deed from the appellees, T. N. and R. J. Sidwell, to appellants, and which the latter refused to accept, will pass to the grantees the absolute fee to the lot in question, for the reason that, by giving full effect to the habendum of the Ecton deed, the conclusion would seem to result that Mrs. Sidwell was vested with a conditional fee, and, should she die leaving no heirs at law, her husband, R. J. Sidwell, would take an absolute estate in the remainder. Therefore the two, by the deed tendered, could pass to appellants a good title. Perhaps it would make our meaning plainer to say that the limitation placed on Mrs. Sidwell's estate by the language of the habendum of the Ecton deed is on condition that she die without heirs. In which event the title is to vest in her husband, should he be living, and, should he be dead, then a part of the property to the amount of \$1,000 to vest in the "next" legal heirs of Mrs. Sidwell, and the remainder in the "next" legal heirs of R. J. Sidwell.

The last-attempted limitation to the heirs of Mrs. Sidwell can, it would seem, have no effect whatever, because, by the terms of the deed, her estate is absolute if she dies without heirs, and, leaving those surviving her as heirs, they would take the estate by descent, and not as purchasers under the Ecton deed. The further provision, "the remainder of said property to vest in the next legal heirs of said R. J. Sidwell," does not create a remainder in the heirs of the latter; the word "heirs" being used as a word of inheritance, and not of purchase.

The deed under consideration is, in meaning and effect, much like that construed in the case of *White v. Clark County Nat. Bank*, 22 Ky. L. Rep. 932, 59 S. W. 505. In

the latter case, it was held that a remainder to John E. Burke, in fee simple, or, if he should not be living at the death of Mamie E. Burke, then to his heirs, created in John E. Burke a vested estate in remainder, and that his heirs would take by inheritance, and not by purchase. The construction we have given the deed from the Ectons to appellees is not free from doubt; but, on the whole, we think it the most reasonable one we can adopt. In our opinion therefore appellants should have been satisfied with the deed tendered them by appellees, and the Circuit Court did not err in requiring them by the decree rendered to accept it.

Wherefore the judgment is affirmed.

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I. Introduction.

The attitude of the modern lawyer toward the rule in Shelley's Case is generally one of marked hostility. Even in jurisdictions where this ancient rule still flourishes, many judges and lawyers seem to think that if the courts had to decide the question anew, they would come to a different conclusion. All the justices of England were summoned to pass upon the issues raised in Shelley's Case, and the decision was not reached without a profound examination into the laws of the realm, and a most painstaking consideration of the justice of the claims of the adverse parties. Nevertheless, many modern judges do not hesitate to ridicule or heap abuse on the rule applied in that case, deeming it an example of the absurd results often reached by the artificial reasoning of the times; an unblest heritage of feudal customs; a technical decision that long since survived its usefulness, if indeed it ever had any. It is frankly admitted by several of these critics, and the suspicion appears to be well grounded in the case of some, at least, of the others, that they have made their assaults upon the rule without having read Shelley's Case itself, and without having made any very careful examination of the leading cases in which the rule is discussed and applied. The truth is that familiarity with the rule in Shelley's Case does not breed contempt; but rather, it may be said, as in the case of Goldsmith's village parson, that those who come to scoff, remain to pray.

An idea of how the subject is regarded as to its perplexities, difficulties, and intricacies, and how differing are the views as to the soundness and wisdom of the rule, may be gathered from some of the comments of courts and law writers.

A few years ago, a young lawyer, seeking more light upon the subject, addressed a request to the American Law Review, then edited by Seymour D. Thompson and Leonard A. Jones, both eminent law writers, asking for "a plain, common-sense, easy-to-be-understood definition of the rule 29 L.R.A. (N.S.)

in Shelley's Case," and received an answer as follows: "Not having the capacity to understand the rule in Shelley's Case, or to acquire an understanding of it by any degree of diligence within the limits of a lifetime, we find ourselves unable to comply with the modest request of our esteemed correspondent."¹ On the other hand, the rule has been said to be one in itself simple enough, but which, from the conflicting results and the obscurely technical character of the many cases in which it has been discussed, is sometimes regarded as a sort of monster with frightful presence, and confined in a worse than Cretan labyrinth of intricate construction and tedious technical learning.²

There perhaps is no branch of law that has given rise to more conflicting decisions or a greater display of legal learning.³ By some courts the rule is regarded as sound and beneficial, more approved as it is better understood; one which is not at all technical, but rather of substance, designed to give effect to the intention of

¹ 27 Am. L. Rev. 622.² Robert v. West, 15 Ga. 124.³ Patrick v. Morehead, 85 N. C. 62, 39 Am. Rep. 684.

No question connected with the law has elicited more learning and discussion than that which relates to the nature and operation of this rule as a principle of law for the interpretation of wills and deeds, and none occupies a more permanent place in the history of the law of real property. Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762.

The rule in Shelley's Case has happily been swept away, and with it the prevalence of a subtle and artificial reasoning which marked its birth, and the intense refinements which were resorted to in its defense, all yielding to the assaults made upon it, resulting in its abolition. Spader v. Powers, 56 Hun, 153, 9 N. Y. Supp. 39.

No principle or rule of the common law has occupied so much of the time, or called into active effort so much of the learning and ability of the profession, as the rule in Shelley's Case. Settle v. Settle, 10 Humph. 474.

In King v. Beck, 12 Ohio, 390, it is said: "In our endeavor to grasp these principles while exploring fields beyond our common studies, where the foundations as well as the superstructure of reasoning are so artificial and so nice, we have found what we had a right, and felt it a privilege, to expect, that in the *magnum mare* of law which the books contain upon the rule of Shelley, few points can arise which have not been the subject of positive adjudication."

The rule has been productive of an almost incredible amount of controversial disquisition, and a wilderness of decisions, in this and in the mother country. Hess v. Lakin, 7 Ohio S. & C. P. Dec. 300.

grantors or devisors.⁴ By others it is thought to be highly artificial, based upon subtle reasoning, and absurd and unjust in its working, always defeating the plain intention of the writer of the instrument.⁵

"Every rule of construction save one,"

⁴In *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013, the court said: "In its substance the rule is not arbitrary, but logical and apparently necessary in any system of law which is self-consistent; for the distinction between descent and purchase is radical and fundamental; and while a group of individuals, though they be heirs of another, may take by purchase the same as those who are not his heirs, yet they cannot as heirs take otherwise than by descent; and to take by descent at all, they must take from him whose heirs they are, and not from him who conveyed the property and nominated them to succeed in its ownership."

In *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 593, 102 N. W. 177, 4 A. & E. Ann. Cas. 18, it is said that "the objections to the rule have been based largely on sentiment, and few, if any, cases of actual hardship will be found in the books. Planting themselves on the premises that its operation worked the defeat of the real intention of the grantor or testator, as expressed in the conveyance or will, its detractors have assailed it with vituperation and invective, forgetting that numerous other rules of real-estate law, accepted without question, have precisely the same effect, and that the intention, to be effective, must be consistent with the rules of law. A man cannot by will create a perpetuity, nor could he put a freehold in abeyance at the common law, nor can he limit a fee with a fee, nor make a chattel descend to heirs, no matter how clearly his intention to do so be expressed.

It is denounced as an anachronism handed down from the feudal ages, but this criticism applies as well to many of the most cherished principles of the common law. Again, it is said that men ignorant of the rule may, in preparing wills or deeds, unintentionally employ language which will compel its application. Such persons are quite as likely to overlook the forms prescribed for the execution of such instruments, and thereby defeat the purposes of the testator or grantor, and yet no one has demanded that the statutes prescribing these shall be repealed. So, too, language is often incorporated in a will, possibly in ignorance of the accepted canons of construction, which this court has deemed itself bound to follow, notwithstanding the protests that the testator must have intended otherwise."

In *Peirce v. Hubbard*, 10 Pa. Co. Ct. 63, affirmed in 152 Pa. 18, 25 Atl. 231, it is said that perhaps there is no rule of law more just and reasonable than the rule in *Shelley's Case*, when it is confined to cases in which the facts are the same as in that case, and yet there is no other rule which

says a North Carolina judge, "is properly invoked to carry out the evident intention of the grantor. . . . This single exception is the rule in *Shelley's Case*, the Don Quixote of the law, which, like the last knight errant of chivalry, has long sur-

has done more injustice and received more condemnation because of the injury done or accomplished in the majority of cases in which it has been applied.

The wisdom of the rule is more approved as it is better understood. *Williams v. Foster*, 3 Hill, L. 193.

In *Bowen v. Lewis*, L. R. 9 App. Cas. 890, Earl Cairns was of the opinion that the rule in *Shelley's Case* was not only not a technical rule, but that it was the very opposite of a technical rule. It was a rule that had been established through a long course of decisions extending over a great many generations, and upon the ground that it was desirable to avoid the effect of technicality; it was a rule of substance, in order to give effect to the intention.

In *Parker v. Clark*, 1 Jur. N. S. 605. Sir J. Stuart, V. C., said: "I think the rule in *Shelley's Case* is of the highest importance, and that it is always to be treated as a guiding principle of the law of real property. It ought in every case to which it properly applies to be rigidly adhered to. It is equally important that no attempt should be made to endanger the existence of the rule by endeavoring to extend it to cases to which it is not legitimately applicable."

⁵In *Gross v. Sheeler*, 7 Houst. (Del.) 280, 31 Atl. 812, the rule in *Shelley's Case* is said to be a rule which has done more to produce litigation, and, when sustained, to thwart the actual purpose of a testator, than all the other arbitrary rules combined.

In *Van Grutten v. Foxwell*, 77 L. T. Rep. N. S. 170, Lord Macnaghten said that he could not help thinking that much of the "profound" and "animated" discussion about the rule in *Shelley's Case*, in which the greatest lawyers of the day contended for victory, was little more than a verbal controversy.

A rule of unblest memory. *Daniels v. Dingman*, 140 Iowa, 386, 118 N. W. 373.

Shelley's Case was decided upon very subtle and artificial reasons. *Lytle v. Beveridge*, 58 N. Y. 592.

The rule in *Shelley's Case* is at best an artificial one. *Turley v. Turley*, 11 Ohio St. 173.

It is at best a mere artificial technicality, and just in proportion as it lacks reason, it appears to have won the affections of the profession. *King v. Beck*, 15 Ohio, 559.

Wills have been turned upside down by the rule in *Shelley's Case*. *Blair v. Miller*, 30 W. N. C. 486.

The rule was once characterized by Judge Reese as a Gothic column found among the remains of feudalism. *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056.

vived every cause that gave it birth, and now wanders aimlessly through the reports, still vigorous, but equally useless and dangerous." ⁶ Bar associations even have taken the subject up, and recommended the abolition of the rule, the great point of complaint always being that it thwarts this "evident intention."⁷

It has been said that if the rule in Shelley's Case, or its principles, had never existed, there would have been no principle in the English law which prevented an estate from being effectually given to one for life, with remainder to his heirs, general or special, to take as purchasers at his death; that it was that rule, or the

principle embodied in it, which determined that the estate of inheritance intended to vest in the heirs should vest in the ancestor to whom an estate for life was given by the same conveyance, so that he would have the fee, either immediate or in remainder, and in tail or in fee simple, according as the limitation in remainder was immediate upon his life estate or otherwise, and was to the heirs of his body or to his heirs general.⁸

One court thinks that the rule is not regarded as it once was, as one of the wonders of the wisdom of the law, but more in the nature of a freak, to worry and astonish beginners and the uninitiated in the

⁶ *Stamper v. Stamper*, 121 N. C. 251, 28 S. E. 20.

In *Loving v. Hunter*, 8 Yerg. 4, the court said, in speaking of the rule: "Memorable for its antiquity, and for the patient cultivation and discipline which it has received, still, as it is a rule purely 'arbitrary and technical, and calculated to defeat the intention of those who are ignorant of technical language,' and as it had its origin and reasons in a state of things at war with our institutions and policy, we cannot perceive that there are just grounds to join Chancellor Kent in his lament over the learning which he says has been devoted to destruction by the statute of New York by which the operation of the rule has been abolished. On the contrary, when we take into view the intricacies and subtleties into which the numerous disquisitions on this subject have descended, involving it, as Chancellor Kent admits, in 'involutions wild' . . . and giving birth, as it has, to so much vexatious litigation as to afford, according to Mr. Hays (p. 93), a strong *prima facie* argument for the abolition of the rule, we would rather recommend it to the legislature of this state to follow the example of that of New York."

⁷ In an address before the Illinois State Bar Association, in 1893, "Precedent v. Justice," by Mr. Lyman Trumbull, of national fame as a lawyer and statesman, then president of the association, the speaker, in commenting on the rule in Shelley's Case, said: "We find the supreme court of Illinois to the present time enforcing a rule of construction that has contributed more than all other causes combined to defeat the wishes and purposes of persons who have attempted to dispose of their estates by will. A rule coming down from the dark ages, and promulgated by some judge in the case of one Shelley, declaring that the word 'heirs' in a will or deed was, in certain cases, a word of limitation, and not of purchase, whatever that means. Where and for what purpose this rule was promulgated, nobody exactly knows, and its meaning nobody except one learned in black-letter law understands, and it is doubtful if he does. To the common mind the rule is nonsense. Nevertheless, the supreme court

of Illinois, in disregard of the fundamental rule requiring all legislative acts and instruments to be construed according to their intent, has held, in repeated decisions, that the antiquated rule of construction in Shelley's Case is to be followed, and that the declaration in a deed, that it was the intent and meaning of said instrument that the party of the second part should have and hold an estate only during his natural life, and that upon his death the estate should be held in fee simple by his heirs, was wholly ineffectual to limit the estate of the party of the second part to an estate for life, because the word 'heirs' in that connection, according to the rule in Shelley's Case, was not a word of purchase. In other words, this rule in Shelley's Case is made to override the expressed intention of the testator or grantor, that it shall not operate. Could anything be more absurd than that the intention of the parties should be overridden and made to give way to a rule of construction adopted centuries ago, under conditions very different from ours?" 27 Am. L. Rev. 325.

In a report of the proceedings of the Pennsylvania State Bar Association it is said: "It matters not what hardships are inflicted, what injustice is done, or how it may frustrate the plans of the testator, this relic of barbarism is in supreme control, and its power will continue until abridged by legislation. So long as this imperious rule is permitted to hold sway, there will be uncertainty as to the effect of grants and devises on this line, and the result must be contention in the courts to ascertain whether the intention of the testator falls under the guillotine of that rule." *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 593, 102 N. W. 177, 4 A. & E. Ann. Cas. 18. In this case, Weaver, J., dissenting, said that the centuries of the history of the rule in Shelley's Case had been insufficient for its advocates to find common ground on which to stand in its practical application, and that the lawyer who set out to discover the weight of authority upon any of its phases soon found himself lost in an impenetrable forest of varying precedents and discordant opinions.

⁸ *Stephenson v. Hagan*, 15 B. Mon. 282.

mysteries of the law,⁹ and a judge with a still more humorous turn, in applying the rule, said: "Notwithstanding I am not well satisfied with either the justice or the reason of the rule, yet I must be content to say '*ita lex scripta*,' and console myself by what is said by one of the great masters of the science of the common law, 'that at some other time, in some other place, and on some other occasion, the wisdom of the rule may appear.'" ¹⁰ And even where the rule is recognized as binding, it is very commonly deemed unjust.¹¹

It will be shown in the course of this note, that the rule in Shelley's Case is no more artificial and technical than the statutory rule which in many jurisdictions has replaced it; that the object of each of these rules is to give effect to the intention of grantors and devisors; that Shelley's Case was very probably decided as Shelley himself would have decided it; but that it was not decided as an American grantor or testator living in the present century, and limiting an estate for life to a person, with remainder to his heirs, would decide, since the intent of an English grantor or testator is quite likely to be different with respect to the course of descent of the property conveyed from that of an American testator; in other words, that the rule in Shelley's Case is suitable to give effect to the paramount intention of the authors of deeds or wills according to English ideas of the transmission of property to descendants and heirs, but that the statutory rule is more likely to give effect to the intention of Americans as to the disposition of property after death.

It will also appear that much of the difficulty with which the subject has been surrounded is not properly chargeable to the rule itself; that the bulk of the litigation arises from the use of ambiguous language in deeds and wills, which the courts are called upon to interpret,—a difficulty which in no wise has passed away with the abolition of the rule in Shelley's Case.

And finally, attention will be called to the fact that modern statutes aimed at abolishing the rule in Shelley's Case have created no new kind of an estate, as was done in the case of the statute *de donis*, and that therefore grantors and testators are to-day confronted with the same difficulty in creating estates that they were

when Shelley's Case was decided; that they cannot create to-day the kind of an estate that it was determined Shelley tried to create, without vesting the fee in the ancestor, any more easily than they could then; that the controversy, instead of being merely verbal, was vital, and that modern statutes have not removed the difficulty.

II. The facts and the law of Shelley's Case.

It is impossible to understand the scope and effect of the rule in Shelley's Case¹² without knowing the facts in Shelley's Case itself. The situation which confronted the judges in that celebrated case must constantly be borne in mind.

It appeared that Edward Shelley and Joan, his wife, were seised of certain land in special tail, that is to say, to them and to the heirs of their two bodies lawfully begotten, with remainder to Edward Shelley and his heirs. While so seised they had issue, two sons, Henry Shelley, the elder, and Richard Shelley, the younger. Then Joan Shelley, the wife, died. Their eldest son, Henry Shelley, married and had issue, a daughter, Mary Shelley. Then this son, Henry Shelley, died leaving his father, Edward Shelley, his younger brother, Richard Shelley, his daughter, Mary Shelley, and his wife, who was *enconcinate*.

Then Edward Shelley, the ancestor, suffered a recovery pursuant to covenant that it should be to the use of himself, Edward Shelley, for life, without impeachment of waste, and, after his death, to the use of others for a term of twenty-four years, and then to the use of the heirs male of the body of the said Edward Shelley lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten; and for default of such issue, over.

On October 9th of the year in which the recovery was had, Edward Shelley died; and, afterwards, on the same day the recovery passed with a voucher over; and, immediately after judgment was given, an habere facias seisinam was awarded. On the 19th of October the recovery was executed, and on the 4th of December following Henry Shelley, the grandson of Edward Shelley, was born. Richard Shelley, the second son of Edward Shelley, entered and

⁹ Kirby v. Brownlee, 13 Ohio C. C. 86, affirmed without opinion in 55 Ohio St. 676, 48 N. E. 1114.

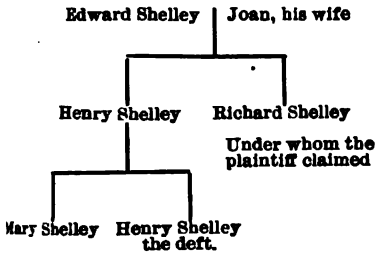
¹⁰ O'Neill, J., in Myers v. Pickett, 1 Hill, Eq. 35.

¹¹ In Richardson v. Harrison, L. R. 16 Q. B. Div. 85, Lord Esher, M. R., said: "I shall not say much about the rule in Shelley's Case."

I have heard some judges say that in their opinion it was the most unjust decision that ever was come to. I shall not give that as my view; but it is a decision which I never could understand how anybody could come to."

¹² 1 Coke, 93b.

made a lease to the plaintiff, and afterwards Henry, the grandson, entered and ejected the lessee. The action in Shelley's Case was brought by the lessee claiming through Richard Shelley, the second son of Edward Shelley, to recover from Henry Shelley, the grandson of Edward Shelley. The following pedigree will make the situation plain:



At the time of Edward Shelley's death, as has been seen, his only living descendants were Richard Shelley, his second son, and Mary Shelley, his granddaughter by his first son, Henry Shelley, deceased. In addition to the question which made Shelley's Case famous in legal history, three other important questions were discussed, two of them dealing with the effect of the circumstance that Edward Shelley died before judgment in recovery was passed and executed. It is unnecessary, however, to notice these questions. The third question raised, which was the great question in the case, was as follows: "If tenant in tail having issue two sons, and the elder dies in the lifetime of his father, his wife *privement enceinte* with a son, and then tenant in tail suffers a common recovery to the use of himself for term of years, and after his death to the use of himself and C, for twenty-four years, and after the use of the heirs male of his body lawfully begotten, and of the heirs male of the body of such heirs male lawfully begotten, and presently after judgment an *abere facias seisinam* is awarded, and before the execution, that is to say, between seven and six in the morning of the same day in which the recovery was suffered, tenant in tail dies, and after his death and before the birth of the son of the elder son, the recovery is executed by force, whereof Richard the uncle enters, and after the birth of the elder son is born, if his entry upon the uncle be lawful or not?"

Upon this point it was argued in part behalf of the plaintiff as follows: "And further it was said by the plaintiff's counsel that although the recovery had been executed in the life of Edward Shelley, yet ought the heir male to take by purchase; they said that the manner of the limitation of the uses is to be observed in this case, which is first to Edward Shelley, for the term of his life and after his death to the use of others for the term of twenty-four years, and after the twenty-four years ended, then to the use of the heirs male of the body of the said Edward Shelley lawfully begotten, and of the heirs male of the body of the said heirs male lawfully begotten; in which case they said that if 'the heirs male of the body of Edward Shelley' should be words of limitation, then the subsequent words, *viz.*, 'and of the heirs male of the body of the said heirs male lawfully begotten' would be void: for words of limitation cannot be added and joined to words of limitation, but to words of purchase. And they said that forasmuch as those words 'heirs male of the body of Edward Shelley' might be words of purchase, that in this case the law will construe and take them as words of purchase, for otherwise the said subsequent words 'and of the heirs male of their bodies' would be void. And such construction is always to be made of a deed that all the words (if possible) agreeable to reason and conformable to law may take effect according to the intent of the parties, without rejecting of any, or by any construction to make them void. And therefore Anderson put this case, If a man makes a feoffment in fee to the use of himself for life, and after his decease to the use of his heirs, in this case the fee simple executed; but in the same case if the limitation be to the use of himself for life and after his decease to the use of his heirs, and of their heirs female of their bodies, in this case these words 'his heirs' are words of purchase, and not of limitation, for then the subsequent words, 'and of their heirs female of their bodies,' would be void."

Replying to this point the defendant's counsel answered: "*That it is a rule in law when the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail; that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase. And that appears in 40 Edw. III., fol. 9, a, b, in the Provost of Beverley's Case 12a; in 38 Eliz. fol. 31, b, 24 Edw. III. 36b, 27 Edw. III., fol. 87, a, and in divers other books. So, inasmuch as in this*

12a In this case, which was decided in the year 1366, it was put by Candish as a rule of law: "If the lease was to your father for the term of his life with remainder to his right heirs he has a fee." For a still earlier case decided in 1325 and cited by Blackstone, see *infra*, V.

case Edward Shelley took an estate of freehold, and after an estate is limited to his heirs male of his body, the heirs male of his body must of necessity take by descent, and cannot be purchasers; otherwise is it where an estate for years is limited to the ancestor, the remainder to another for life, remainder to the right heirs of the lessee for years; there his heirs are purchasers. Or if the remainder be limited to the heir in the singular number, upon a lease for life, there the heir takes an estate for term of life by purchase. And if it should be admitted that in regard of the said subsequent words, the right heirs male should have by purchase to them and the heirs male of their bodies, then a violence would be offered as well to the words as to the meaning of the party; for if the heir male of the body of Edward Shelley should take as purchaser, then all the other issue male of the body of Edward Shelley would be excluded to take anything by the limitation; and it would be against the express limitation of the party. For the limitation is to the use of the heirs male of the body of Edward Shelley and of the heirs male of their bodies begotten, and for default of such issue to divers other persons in remainder; so, if Richard Shelley, being the heir male of the body of Edward Shelley at the time of his death, should take by purchase, then the heirs male of the body of Richard Shelley only would be inheritable, and no other of the sons of Edward Shelley, nor their heirs male; and consequently if Richard Shelley should die without issue male, the land would remain over to strangers, and all the other sons of Edward Shelley, which he then had and might afterwards have, and their issues, would be utterly disinherited; because the words were in the plural number, 'heirs male of the body of Edward Shelley,' the former construction will be against the very letter of the indentures, for by that means the plural number will be reduced to the singular number, that is to say, to one heir male of the body of Edward Shelley only; and forasmuch as the first words, *viz.*, heirs male of the body of Edward Shelley, include the subsequent words, *viz.*, the heirs male of their bodies, for every heir male begotten of the body of the heir male of Edward Shelley is in construction of law an heir male of the body of Edward Shelley himself; for this reason the subsequent words are words declaratory, and do not restrain the former words."

After the case had been argued three days by the counsel of each side in the King's bench, the Queen, hearing of it ("for such," says Coke, "was the rareness and difficulty of the case being of importance

that it was generally known) of her gracious disposition to prevent long, tedious, and chargeable suits between parties so near in blood which would be the ruin of both, . . . directed her gracious letters to Sir Thomas Bromley, Knt. Lord Chancellor of England, who was of great and profound knowledge and judgment in the law, thereby requiring him to assemble all the justices of England before him, and, upon conference had between themselves touching the said questions, to give their resolutions and judgments thereof."

All the justices and barons were assembled, and the case twice argued before them, and finally, after great study and consideration, pronounced judgment that the plaintiff should take nothing by his bill, and the chief justice, upon being asked to state upon which of the points raised in the case the resolution depended, declared that "all the justices of England and barons of the exchequer, except one of the justices of the common pleas, were agreed as to the third point, that the uncle was in, in course and nature of a descent, although he should not have his age, nor be in ward, etc.: First, because the original act, *viz.*, the recovery out of which all the uses and estates had their essence, was had in the life of Edward Shelley, to which the execution after had a retrospect; secondly, because the use and possession might have vested in Edward Shelley if execution had been issued in his life; thirdly, the recoverers by their entry, nor the sheriff by doing of execution, could not make whom they pleased inherit; fourthly, because the uncle claimed the use by force of the recovery and of the indentures by words of limitation, and not of purchase." It was the fourth reason given for the opinion on the question raised that made the case famous, and this is the only one with which this note is concerned.

III. Definitions of terms used.

Part of the difficulty in understanding the rule in Shelley's Case, experienced by students at least, is probably due to confusion as to the meaning of certain of the terms employed. The fact that the word "limitation" is used in the sense of boundary, as well as in the sense of restriction, is often overlooked, as well as the fact that an estate may be acquired by purchase, although title may not pass by sale. And when a prominent lawyer of extensive practice confesses that he does not know the difference in meaning between the expression "word of limitation" and "word of purchase" it is very plain that an explanation of the sense in which these terms are

employed will not be out of place in a note of this kind.

The word "limitation," then, as used in this note, and in the rule in Shelley's Case, must be understood as a word of boundary, that is, as a word describing the extent or quality of the estate conveyed,¹³ and the word "purchase," as used in this

note and in the rule in Shelley's Case, must be understood to mean an estate acquired in a manner to take it out of the ordinary course of descent, that is, as designated certain persons who are to take the estate.¹⁴ So understood or translated, Coke's definition of the rule would be:

When the ancestor by any gift or con-

¹³ The word "limitation" has two well defined and distinct meanings. In the one, the primary meaning signifies the marking out the bounds or limits of an estate created. In the other it signifies simply the creation of an estate. *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011.

Words of limitation are those measuring the duration and defining the extent of the estate of the taker of the freehold. *Doyle v. Andia*, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18.

Words of limitation are such as do not give the estate imported by them, originally to the heirs, etc., described, but only extends the ancestor's estate to an estate of inheritance descendible to the heirs described. *Ball v. Payne*, 6 Rand. (Va.) 73.

By the rule in Shelley's Case under the common law, by which if an estate was granted to one for his life, and by the same instrument the remainder was granted to his heirs general, or the heirs of his body, the word "heirs" was a word of limitation, and not of purchase, that is, the word "heirs" simply indicated the character of the estate transferred to the grantee. *Fullagar v. Stockdale*, 138 Mich. 363, 101 N. W. 576.

When the words "heirs," etc., operate only to expand an estate in the ancestor so as to let the heirs described into its extent, and entitled them to take derivatively through or from him as the root of succession or person in whom the estate is considered as commencing, they are properly words of limitation; but when they operate only to give the estate imported by them to the heirs described originally and as the persons in whom that estate is considered as commencing, and not derivatively from or through the ancestor, they are properly words of purchase. . . . In general, words of purchase are those by which taken absolutely, without reference to or connection with any other words, the estate first attaches or is considered as commencing in the person described by them; whilst words of limitation operate by reference to or connection with other words, and extend or modify the estate given by those other words. *Fearne, Contingent Remainders*, 79.

¹⁴ Descent or hereditary succession is the title whereby a man, on the death of his ancestor, acquires his estate by right of representation as the heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor; and an estate so descending to the heir is in law called the inheritance. 2 Bl. Com. 201.
29 L.R.A. (N.S.)

"Purchase, *perquisitio*, taken in its largest and most extensive sense, is thus defined by Littleton (§ 12): The possession of lands and tenements which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. In this case it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate but merely that by inheritance; wherein the title is vested in a person not by his own act or agreement, but by the single operation of law." Continuing, the author of the Commentaries says: "Purchase, indeed, in its vulgar and confined acceptation, is applied only to such acquisitions of land as are obtained by the way of bargain and sale for money, or some other valuable consideration. But this falls far short of the legal idea of purchase; for if I give land freely to another he is, in the eye of the law, a purchaser, and falls within Littleton's definition, for he comes to the estate by his own agreement; that is, he consents to the gift. A man who has his father's estate settled upon him in tail before he was born is also a purchaser; for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir at law by will with other limitations, or in any other shape than the course of descents would direct, such heir shall take by purchase. But if a man seised in fee devises his whole estate to his heir at law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with encumbrances, this being for the benefit of creditors and others who have demands on the estate of the ancestor." 2 Bl. Com. 201.

Purchase in law is used in contradistinction to descent, and is any other mode of acquiring real property, *viz.*, by a man's own act and agreement, by devise, and by every species of a gift or grant, and, as the land taken by purchase has very different inheritable qualities from that taken by descent, the distinction is important. *Christian*, 2 Bl. Com. 201, note.

In *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716, it is said: "By the common law there are but two modes of acquiring title to real estate, *viz.*: descent and purchase. Where a person takes as heir at law, he is in by descent; the law casts the estate upon him at the death of his ancestor; but when he acquires title to land by his own act or agreement, he is a purchaser; not that in the common acceptation of the term he has

veyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, that always in such cases "the heirs" are words describing the extent or quality of the estate conveyed, and not words designating the persons who are to take it.

For example, in the ordinary case of the limitation of a fee, not connected in any way with the rule in Shelley's Case,—as a conveyance to A and his heirs,—the word "heirs" is a word of limitation. This does not mean that A takes an estate of a limited or restricted nature; it means that he is to take a well-known estate, that is, a fee simple. At common law a conveyance to A would have given him but a life estate; but if the words "and his heirs" were added, this indicated that more than a life estate was intended; it indicated that a fee simple was intended. Therefore the word "heirs" described the extent or quality of the estate, or marked out the limits or bounds of the estate conveyed to A. By such a description A takes an estate of a kind or quality which if he should die intestate would descend in a certain course marked out by the law. If the word "heirs" were deemed a word of purchase in a conveyance to A and his heirs, it would be considered not as describing the extent of A's estate, but as designating who were to take the estate. As A could have no heirs while living he would take an estate for life, and at his death the persons an-

swering to the description of his heirs would take. The word "heirs" is therefore a word of limitation, not only when used in a remainder after a life estate,—the situation covered by the rule in Shelley's Case,—but it is a word of limitation, and not of purchase in the ordinary form employed in conveying a fee, that is, where the conveyance is to A and his heirs. The word "heirs" is technically a word of limitation, and not of purchase. In short, it refers to estates, and not to persons, and this is all that is meant by the distinction between the expressions "words of limitation" and "words of purchase" as used in the rule in Shelley's Case.

It should also be remembered that there is a material difference in effect between an estate acquired by descent and an estate acquired by purchase, both as to its descendible quality and as to the burdens to which it is subject; that one may hold the fee to two different parcels of land which may descend in different courses from him, one of which may escheat before the other, and one of which may be subject to an ancestor's debts and the other not,—if one parcel was acquired by descent and the other by purchase.¹⁵

There is a peculiarity about the effect of the words "heirs male of the body" when operating as words of purchase which may be mentioned, although, strictly speaking, the point is not within the scope of the note. These words, when they give the estate to the heir by purchase, never-

paid a consideration for it, for if it is given to him he is still, in contemplation of law, a purchaser. A devisee who takes an estate different from what the law would cast upon him as heir is a purchaser, and as such was exempt from the restraints imposed upon heirs in their minority, such as wardships and the right of marriage."

Words of purchase are those pointing out and designating the objects of the conveyance or gift of the remainder, to whom it passes directly from the grantor or deviser. *Doyle v. Andis*, 127 Iowa, 38, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18.

Words of purchase are such as to give the estate originally to the heirs, etc., and not through the medium of, or by descent from, the ancestor. *Ball v. Payne*, supra.

¹⁵ "The difference in effect between the acquisition of an estate by descent and by purchase consists principally in these two points: (1) That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, and not the blood only of some particular ancestor; for when a man takes an estate by purchase he takes it not *ut feudum paternum* or *maternum*, which would descend only to the heirs by the father's or the mother's side; but he takes it *ut feudum*

antiquum as a feud of indefinite antiquity whereby it becomes inheritable to his heirs general, first of the paternal and then of the maternal line. (2) An estate taken by purchase will not make the heir answerable for the acts of the ancestor, as an estate by descent will; for if the ancestor by any deed, obligation, covenant, or the like bindeth himself and his heirs, and dieth, this deed, obligation, or covenant shall be binding upon the heir so far forth only as he (or any other in trust for him) had any estate of inheritance vested in him by descent from, or any estate *pur autre vie* coming to him by special occupancy as heir to, that ancestor sufficient to answer the charge whether he remains in possession or hath alienated it before action brought; which sufficient estate is in the law called assets; from the French word *asset* enough." 2 Bl. Com. 240.

Where the fee simple vests in the heir by purchase, the heirs *ex parte paterna* succeed in *infinitum* in preference to the heirs on the mother's side; but the former line of heirs failing, the latter line comes in; and till this also is exhausted, the lord's title by escheat *propter defectum sanguinis* cannot attach. *Hargrave's Law Tracts*, 551.

theless impart to it a quality which causes it to descend in the same course as if it had been acquired by descent through the ancestor.¹⁶ This is styled a descent *per formam doni*. The estate has also been called a quasi tail.

IV. Varying statements of the rule.

It has already appeared that the rule is stated by counsel for the defendant in *Shelley's Case* to be as follows: "It is a

rule in law when the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately to his heirs in fee or in tail, that always in such cases 'the heirs' are words of limitation of the estate, and not words of purchase."¹⁷

This ancient definition of the rule has been often repeated with slight modification in phraseology.¹⁸ One addition to the original model, making it a little more ac-

¹⁶ Mr. Fearné in this connection says: "Though they give the estate to the special heir originally, and not through or from his ancestor, yet the estate which he so takes has such a reference to the ancestor as to pursue the same course of succession in the same extent of duration or continuance through the same persons as if it had attached in and descended from the ancestor. Thus a limitation to the heirs male of the body of B (where no estate is in or given to B himself), though it originally attaches in his heir male under that special description, and so far operates as words of purchase, yet it not only gives such heir an estate in tail male without any express words of limitation to the heirs male of his own body, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B in the same course as if the estate tail had descended from B himself. And indeed this effect of words of limitation seems to be included in the import of the descriptive words; because heirs male of the body of B equally comprehend in point of description heirs male of the body of such heir male, who after his death will be heirs male of the body of B. This virtually involves a limitation in tail male to such special heir; and as the same description equally comprehends other male heirs of the body of B, who, upon the decease and failure of issue male of the first special heir, will become heirs male of the body of B, there is the same reason to consider them and their issue male as comprised in the limitation, as there was to entitle the first special heir and his issue male under it." Fearné, *Contingent Remainders*, 80, citing *Mandeville's Case*, Co. Litt. 26b.

Where there was a limitation in a will to the right heirs of a person deceased by a particular wife forever, it was held that this created an estate tail, and that this estate devolved by descent to all persons successively answering the description of right heirs of the deceased ancestor by the designated wife. Sir R. T. Kindersley, V. C., relied on the doctrine stated by Mr. Fearné, that where, without any estate of freehold limited to the ancestor, lands are limited to his heirs special, the terms used to designate the class of special heirs to whom the lands are given have a two-fold operation, viz., first, they serve to point out who is to be the first taker; and, secondly, they serve also to specify and prescribe

what estate such first taker is to have. By virtue of their first operation the first taker must be the person who answers the description of the special heir at the time when the gift comes into operation, and such person must take by purchase; and by virtue of their second operation the estate which such first taker is to have must be such an estate as will descend to the whole series of persons who shall successively answer the description of the special heirs of the ancestor named, in the same manner as if the limitation to the heir special had been preceded by an estate of freehold limited to the ancestor, and so the estate tail had originally vested in and had descended from the ancestor. *Wright v. Vernon*, 2 Drew. 439.

¹⁷ 1 Coke, 104a.

¹⁸ When the ancestor, by any gift or conveyance, takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, in such cases the word "heirs" is a word of limitation, and not of purchase. *Kennedy v. Kennedy*, 29 N. J. L. 185.

The rule is, when the ancestor takes an estate of freehold by any gift or conveyance, and in the same gift or conveyance there is a limitation, either mediate or immediate, to his heirs, or heirs of his body, the word "heirs" is a word of limitation of the estate, and not of purchase. The remainder is immediately executed in possession in the ancestor so taking the freehold. *Baker v. Scott*, 62 Ill. 86.

When the ancestor, by any gift or conveyance, taketh an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to her heirs in fee or in tail, the word "heirs" is a word of limitation of the estate, and not of purchase. *Siceloff v. Redman*, 26 Ind. 251.

Statements of the rule in one or the other of these forms will be found in the following cases: *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. ed. 661; *Green v. Green*, 23 Wall. 486, 23 L. ed. 75; *Price v. Price*, 5 Ala. 578; *Machen v. Machen*, 15 Ala. 373; *Ewing v. Standefer*, 18 Ala. 400; *Goodrich v. Lambert*, 10 Conn. 448; *Edmondson v. Dyson*, 2 Ga. 307; *Dudley v. Mallery*, 4 Ga. 52; *Tucker v. Adams*, 14 Ga. 548; *Jones v. Jones*, 20 Ga. 699; *Brislain v. Wilson*, 63 Ill. 173; *Ryan v. Allen*, 120 Ill. 648, 12 N.

curate, is to the effect that the limitation to the heirs must be by way of remainder.¹⁹

The most elaborate and scientific definition of the rule, however, is that made by Mr. Preston, which is as follows: "First. When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and afterward in the same deed, will, or writing, there is a limitation by way of remainder, with or without the interposition of any other estate, of an interest of the same quality, as legal or equitable, to his heirs generally or his heirs of his body by that name in deeds

or writings of conveyance, and by that or some such name in wills, and as a class or denomination of persons to take in succession, from generation to generation, the limitation to the heirs will entitle the person or ancestor himself to the estate or interest imported by that limitation. . . . Secondly, thus: Whenever the ancestor takes an estate of freehold or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs or heirs in tail, such remainder is immediately executed in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance."²⁰

E. 65; Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012; Bonner v. Bonner, 28 Ind. App. 147, 62 N. E. 497; Snyder v. Greendale Land Co. (Ind. App.) 91 N. E. 819; Lee v. Lee (Ind. App.) 91 N. E. 507; Slemmer v. Crampton, 50 Iowa, 302; Zavitz v. Preston, 96 Iowa, 52, 64 N. W. 668; Calmes v. Caruth, 12 Rob. (La.) 660; Hall v. Gradwohl (Md.) 77 Atl. 480; Sands v. Old Colony Trust Co. 195 Mass. 575, 81 N. E. 300, 12 A. & E. Ann. Cas. 837; Fraser v. Chene, 2 Mich. 81; Tesson v. Newman, 62 Mo. 198; Muldrow v. White, 67 Mo. 470; Brown v. Lyon, 6 N. Y. 419; Dennett v. Dennett, 40 N. H. 498; Badgley v. Hanford, 12 N. J. L. J. 75; Schoonmaker v. Sheely, 3 Denio, 485; Rogers v. Rogers, 3 Wend. 503, 20 Am. Dec. 716; Tanner v. Livingston, 12 Wend. 83; Brown v. Wadsworth, 168 N. Y. 225, 61 N. E. 250; Williams v. Holly, 4 N. C. (2 Car. Law Repos. 286), 6 Am. Dec. 561; Payne v. Sale, 22 N. C. (2 Dev. & B. Eq.) 455; Mills v. Thorne, 95 N. C. 362; Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459; Britt v. Rowland Lumber Co. 136 N. C. 171, 48 S. E. 586; Smith v. Proctor, 139 N. C. 314, 2 L.R.A.(N.S.) 172, 51 S. E. 889; Perry v. Hackney, 142 N. C. 368, 115 Am. St. Rep. 741, 55 S. E. 280, 9 A. & E. Ann. Cas. 244; Crandell v. Barker, 8 N. D. 263, 78 N. W. 347; Davis v. Saunders, 11 Ohio S. & C. P. Dec. 259; Crosby v. Davis, 2 Clark (Pa.) 408; Miller v. Lynn, 7 Pa. 443; Guthrie's Appeal, 37 Pa. 9; Carroll v. Burns, 108 Pa. 386; Grimes v. Shirk, 169 Pa. 74, 32 Atl. 113; Simpson v. Reed, 205 Pa. 53, 54 Atl. 499; Sechler v. Eshleman, 222 Pa. 35, 70 Atl. 910; Peirce v. Hubbard, 152 Pa. 18, 25 Atl. 231; Masurie v. Pennsylvania Annuity Co. 11 Phila. 208; Porter v. Doby, 2 Rich. Eq. 49; Buist v. Dawes, 4 Rich. Eq. 423; Williams v. Williams, 10 Heisk. 566; Polk v. Farris, 9 Yerg. 209, 30 Am. Dec. 400; Collins v. Williams, 98 Tenn. 525, 41 S. W. 1056; Chipps v. Hall, 23 W. Va. 504.

¹⁹ See also *infra*, IX. d.

Whenever the ancestor, by any gift or conveyance, takes an estate of freehold in lands or tenements, and in the same gift or conveyance an estate is afterwards limited by way of remainder to his heirs, or the heirs of his body, the words "heirs" or "heirs of his body" are words of limitation of the estate carrying the inheritance to 29 L.R.A.(N.S.)

the ancestor, and not words of purchase creating a contingent remainder in the heirs. Hurst v. Wilson, 89 Tenn. 270, 14 S. W. 778; Milhollen v. Rice, 13 W. Va. 567.

Wherever a freehold estate is limited to the ancestor, and in the same conveyance an immediate or mediate remainder is limited thereon to his heirs, the word "heirs" shall be a word of limitation, and not of purchase, and the heirs shall take by descent. Warnock v. Wightman, 1 Brev. 331.

Where an estate of freehold in realty is limited to one, and in the same instrument there is a limitation in remainder, whether mediately or immediately, to the heirs of his body as such, the first taker has thereby an estate in fee conditional. Markley v. Singletary, 11 Rich. Eq. 393.

If an estate of freehold is given to the ancestor, and a remainder is therein limited to his heirs or the heirs of his body, such remainder is immediately executed in possession in the ancestor so taking the freehold, and he takes an estate in fee or in tail, according to the terms of the limitation. Smith v. Smith, 24 S. C. 304.

If an estate for life, or any other particular estate of freehold, be given to one with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent, and not by purchase. Tiedeman, Real Prop. § 433; Lacy v. Floyd (Tex. Civ. App.) 84 S. W. 857; Brown v. Bryant, 17 Tex. Civ. App. 454, 44 S. W. 399.

²⁰ 1 Preston, Estates, 263, as cited in Baker v. Scott, 62 Ill. 86.

Chancellor Kent condensed Mr. Preston's language, and put the rule as follows: "When a person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of another estate, of an interest of the same legal or equitable quality, to his heirs or heirs of his body, as a class of persons to take in succession from generation to generation, the limitation to the heirs entitles the ancestor to the whole estate." 4 Kent, Com. 215.

This statement of the rule in its full or

Other outlines will be found to be nothing but variations of the foregoing definitions. In some of the cases the broad term "freehold" is used in describing the

ancestor's estate;²¹ in others the estate is more exactly described as one for life.²² In most of the short statements of the rule, where the term "freehold" is used, the fact

condensed form, sometimes with very slight modifications in phraseology, is to be found in the following cases: Daniel v. Whartenby and Green v. Green, *supra*; McArthur v. Allen, 3 Ohio L. J. 471, Fed. Cas. No. 8,659; Russ v. Russ, 9 Fla. 105; Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90; Kiene v. Gimble, 85 Iowa, 312, 62 N. W. 232; Zavitz v. Preston, *supra*; Wescott v. Binford, 104 Iowa, 645, 66 Am. St. Rep. 530, 74 N. W. 18; Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18; Ault v. Hillyard, 138 Iowa, 239, 115 N. W. 1030; Lyles v. Digges, 6 Harr. & J. 364, 14 Am. Dec. 281; Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762; Fulton v. Harman, 44 Md. 251; Stump v. Jordan, 54 Md. 619; Henderson v. Henderson, 64 Md. 185, 1 Atl. 72; Waller v. Pollitt, 104 Md. 172, 64 Atl. 1040; Cook v. Councilman, 109 Md. 622, 72 Atl. 404; Carroll v. Renich, 7 Smedes & M. 798; Hampton v. Rather, 30 Miss. 193; Tesson v. Newman, *supra*; Wood v. Burnham, 6 Paige, 513; Tayloe v. Gould, 10 Barb. 388; Smith v. Proctor, *supra*; Connecticut Mut. L. Ins. Co. v. Skinner, 2 Ohio C. D. 688; Davis v. Saunders, *supra*; Mack v. Champion, 11 Ohio Dec. Reprint, 327; Miller v. Lynn, *supra*; Eaton v. Tillinghast, 4 R. I. 276; Porter v. Doby, *supra*; Cooper v. Coursey, 2 Coldw. 116; Williams v. Sneed, 3 Coldw. 533; Turner v. Ivie, 5 Heisk. 222; Williams v. Williams, 11 Lea, 652; Loving v. Hunter, 8 Terg. 4; Hancock v. Butler, 21 Tex. 804; Scott v. Brin, 48 Tex. Civ. App. 500, 107 S. E. 565; Seay v. Cockrell, 102 Tex. 280, 115 S. W. 1160, affirmed in (Tex. Civ. App.) 16 S. W. 652; Romanes v. Smith, 8 Ont. T. Rep. 323; Goodtitle ex dem. Sweet v. Lerring, 1 East, 264.

²¹ Where the ancestor takes an estate of rehold with remainder, either mediately or immediately, either to his heirs or the heirs of his body, the word "heirs" is a word of limitation of the estate, and not of purchase. Brant ex dem. Provoost v. Melston, 2 Johns. Cas. 384.

To the same effect, Martling v. Martling, 5 N. J. Eq. 771, 39 Atl. 203; Stokes v. an Wyck, 83 Va. 724, 3 S. E. 387.

When the ancestor takes an estate of rehold, and in the same conveyance an estate is limited to his heirs, the word "heirs" is a word of limitation, and not of purchase. Baughman v. Baughman, 2 Bates, 410.

Whenever the ancestor takes an estate freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs, either in fee or in tail, the word "heirs" is one of limitation of the estate, not of purchase, and the ancestor takes the fee. Vangieson Henderson, 150 Ill. 119, 36 N. E. 974.

To the same effect: Deemer v. Kessinger, 6 Ill. 57, 69 N. E. 28; Johnson v. Buck, L.R.A. (N.S.)

220 Ill. 226, 77 N. E. 163; Miller v. Mowers, 227 Ill. 392, 81 N. E. 420; Lord v. Comstock, 240 Ill. 492, 88 N. E. 1021; Prescott v. Prescott, 10 B. Mon. 56; Dennett v. Dennett, 43 N. H. 499; McFeely v. Moore, 5 Ohio, 464, 24 Am. Dec. 314; Brockschmidt v. Archer, 64 Ohio St. 502, 60 N. E. 623; Kepler v. Reeves, 7 Ohio Dec. Reprint, 34; Nash v. Coates, 3 Barn. & Ad. 839.

²² Whenever the ancestor takes an estate for life, and in the same conveyance a remainder is limited to his heirs or the heirs of his body, he will be vested with the fee, and his heirs will take by descent, and not by purchase. Riggins v. McClellan, 28 Mo. 23.

When the ancestor by any conveyance takes an estate for life with remainder, mediately or immediately, to his heirs, in fee or in tail, the estate shall vest absolutely in the first grantee or devisee, and no estate remain which is secured by the deed to the heirs. In other words, the term "heirs" in such case is to be regarded as one of limitation, and not of purchase. Smith v. Hastings, 29 Vt. 240.

Whosoever the ancestor by any gift or conveyance takes an estate for life (though limited by any restrictive words whatsoever), and after in the same gift or conveyance, a limitation is made to his heirs, in fee or in tail, the heirs shall not be purchasers. Smith v. Chapman, 1 Hen. & M. 240.

Whenever the ancestor takes an estate for life with a limitation in the same instrument to his heirs, the heirs take by descent, and not by purchase. Bradley v. Mosby, 3 Call (Va.) 50.

When the ancestor takes an estate for life, and afterwards in the same conveyance a remainder is limited, mediately or immediately, to his right heirs or to the heirs male or female of his body, in such case his right heirs or heirs male or female shall not be considered as purchasers, but shall take by descent. Smith v. Chapman, *supra*.

Where a freehold is limited to one for life, and by the same instrument the inheritance is limited, either mediately or immediately, to his heirs or heirs of his body, the first taker takes the whole estate, either in fee simple or fee tail, and the words, "heirs," or "heirs of the body," are words of limitation, and not of purchase. Doe ex dem. Patterson v. Jackman, 5 Ind. 283.

To the same effect: Andrews v. Spurlin, 35 Ind. 262; Taney v. Fahnley, 126 Ind. 88, 25 N. E. 882; McIlhinny v. McIlhinny, 137 Ind. 411, 24 L.R.A. 489, 45 Am. St. Rep. 186, 37 N. E. 147; Teal v. Richardson, 160 Ind. 119, 66 N. E. 435; Burton v. Carnahan, 38 Ind. App. 612, 78 N. E. 682; King v. Beck, 12 Ohio, 300; Norris v. Hensley, 27 Cal. 449.

that the limitation to the heirs must be by way of remainder is not brought out.²³ The courts, in setting out the rule, seem to lay stress upon one or more of the conditions requisite to bring it into operation, omitting others, being guided generally by the circumstances of the particular case pre-

sented for decision; the estate, for example, must be of the same quality and limited to the heirs of the person taking the preceding life estate,²⁴ or the heirs must take as heirs.²⁵

So emphasis may be laid on the method in which the rule operates to vest the

²³ When an estate of freehold is limited to a person, and in the same instrument there is a limitation, either mediate or immediate, to his heirs or the heirs of his body, etc., the word "heirs" is to be taken as a word of limitation, or, in other words, the ancestor takes the whole estate; if the devise be to the heirs of his body, he takes a fee tail; if to heirs general, a fee simple. *Lytle v. Beveridge*, 58 N. Y. 592.

To the same effect: *Spader v. Powers*, 56 Hun, 153, 9 N. Y. Supp. 39; *Chrystie v. Phyle*, 19 N. Y. 344; *Canedy v. Haskins*, 13 Met. 389, 46 Am. Dec. 739; *Trumbull v. Trumbull*, 149 Mass. 200, 4 L.R.A. 117, 21 N. E. 366; *Robert v. West*, 15 Ga. 124; *Lippincott v. Davis*, 59 N. J. L. 241, 28 Atl. 587; *Henderson v. Walthour*, 2 Monaghan (Pa.) 224, 15 Atl. 893; *Austin v. Payne*, 8 Rich. Eq. 9; *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137; *Moore v. Brooks*, 12 Gratt. 135; *Taylor v. Cleary*, 29 Gratt. 448; *Walker v. Lewis*, 90 Va. 578, 19 S. E. 258; *Tunis v. Passmore*, 32 U. C. Q. B. 419.

If a freehold is conveyed to a man, and by the same conveyance an estate is limited to his heirs or the heirs of his body, he will be vested with the fee or inheritance, and his heirs will take by descent, and not by purchase. *Turman v. White*, 14 B. Mon. 560.

Where a freehold estate is limited, either mediately or immediately, to the heirs in fee, the word "heirs" is a word of limitation of the estate, and not a word of purchase. *Bond v. McNiff*, 6 Jones & S. 83, affirmed in 9 Jones & S. 543.

²⁴ Where an estate is limited for life to a person, and the same instrument contains a limitation of an estate of the same legal or equitable quality, to the heirs of the same person, or the heirs of his body, the word "heirs" is a word of limitation, and not of purchase, and the whole estate of inheritance, whether a fee simple or fee tail, vests in the ancestor. *Crockett v. Robinson*, 46 N. H. 454. To the same effect, *Handy v. McKim*, 64 Md. 560, 4 Atl. 125.

²⁵ Where an estate for life is given to one, and by the same conveyance the property is given to his heirs in such a manner that the same persons are to take the same estate as they would have taken by the operation of the law, had the whole estate been given to the tenant for life, he shall take the whole estate, and such persons shall take by operation of law, and not as purchasers, notwithstanding the express intention was that the one should take a life estate only, and the others should take as purchasers. *Williams v. Houston*, 57 N. C. (4 Jones, Eq.) 277. 29 L.R.A. (N.S.).

Where a devise is to one for life with remainder to his heirs, general or lineal, in substance, even though not in form, such heirs shall be ascertained by the laws of inheritance, general or lineal, and shall be treated as taking by descent from the devisee, and not by purchase from the deviser. *Price v. Taylor*, 28 Pa. 102, 70 Am. Dec. 105.

The rule is that wherever an estate for life is given to the ancestor, or propositus, and a subsequent gift is made to take effect after his death in such terms as to embrace, according to the ordinary principles of construction, the whole series of his heirs or heirs of his body, or whole inheritable issue taking in a course of succession, the law requires that the heirs or heirs male of the body or issue shall take by descent, and will not permit them to take by purchase, notwithstanding any expression of intention to the contrary. *Lord Macnaghten in Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

In any instrument, if a freehold be limited to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate; if it be limited to the heirs of his body, he takes a fee tail; if to his heirs, a fee simple. Statement of rule by counsel in *Perrin v. Blake*, 4 Burr. 2579, 10 Eng. Rul. Cas. 689.

To the same effect: *Shriver v. Lynn*, 2 How. 55, 11 L. ed. 177; *Butler v. Huston*, 68 Ill. 594, 18 Am. Rep. 589; *Dick v. Ricker*, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823; *Doe ex dem. Ross v. Toms*, 15 N. C. (4 Dev. L.) 376; *Ham v. Ham*, 21 N. C. (1 Dev. & B. Eq.) 598; *Waters v. Lyon*, 141 Ind. 170, 40 N. E. 662.

Whenever, in the same instrument, there is a limitation to the ancestor for life, and one to his heirs, general or special, the heirs shall not take by purchase, but by descent. *Ball v. Payne*, 6 Rand. (Va.) 73.

Where, in any instrument, an estate for life is given to the ancestor, and afterwards by the same instrument the inheritance is limited, either mediately or immediately, to his heirs or heirs of his body as a class, to take in succession as heirs to him, the word "heirs" is a word of limitation, and not of purchase, and the ancestor takes the whole estate. *Brown v. O'Dwyer*, 35 U. C. Q. B. 354.

Where, by the same conveyance that passes an estate of freehold from one person to another, the heirs of the latter are appointed to take as heirs an estate of inheritance in the same property, they can take only by inheritance, and will not take as purchasers. *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013.

fee.²⁶ An examination of these and similar expressions,²⁷ however, will show that in each of them some of the elements mentioned by Mr. Preston and Chancellor Kent are missing. As a short statement of the rule, that set out by counsel in Shelley's Case itself has not been bettered. As a full and scientific definition, that of Mr. Preston and Chancellor Kent has not been improved upon.

V. Antiquity of the rule; Perrin v. Blake controversy.

The rule in Shelley's Case "was applied as early as A. D. 1325, in a case cited in

Perrin v. Blake, *infra*, and Lord Coke, in the margin of his Commentaries on Littleton, refers to numerous decisions in the Year Books of Edward III., which, in the words of Blackstone, 'do most explicitly warrant the doctrine extracted from them by that great and learned judge.' Though the principle had long been recognized, it appears not to have attracted general attention until A. D. 1590, when definitely stated by Lord Coke in the case from which its name is derived. 1 Coke, 93b. The discussion then became 'so vehement and so protracted,' according to the celebrated requiem of Chancellor Kent [see *infra*, XX.] 'as to rouse the specter of haughty Eliza-

²⁶ Where, in the same instrument, the ancestor takes an estate of freehold with remainder, mediately or immediately, to his heirs or heirs of his body, the word "heirs" is a word of limitation of the estate, and not of purchase; or, in other words, such remainder vests in the ancestor himself, and the heirs, when they take, take by descent from him, and not as purchasers from the grantor or deviser. Thus, if the limitation be to his heirs in general, a fee simple is given to the ancestor; if to the heirs of his body, he takes a fee tail, according to the common law. Sims v. Georgetown College, 1 App. D. C. 72. To the same effect, Vogt v. Vogt, 26 App. D. C. 46.

Where one takes an estate by grant or devise, and the deed or gift by its terms gives him a life estate only, with remainder immediately thereafter or after the expiration of an intermediate estate, to his heirs or the heirs of his body, then, if there should be such heirs, the tenant for life would become seised of an estate in fee simple, and those in remainder would take as heirs, and not as purchasers. Duffy v. Jarvis, 84 Fed. 731.

The rule, in substance, is simply this, that whenever there is an estate for life, and remainder over to the heirs of the first taker, the estate is absolute in the first taker, since an estate to a man for life, and then to his heirs, is the largest estate one can have in land. Varner v. Boynton, 46 Ga. 508.

The rule in Shelley's Case is, in substance, that if an estate of freehold be limited to A. with remainder to his heirs, general or special, the remainder, although importing an independent gift to the heirs as original takers, shall confer an inheritance on A. the ancestor. 1 Hayes, Conveyancing, 542; Johnson v. Buck, 220 Ill. 234, 77 N. E. 163.

The rule in Shelley's Case is simply that a devise of a freehold to one, with a limitation, either mediately or immediately, to his heirs generally, vests the whole estate in the ancestor, the particular devisee; the word "heirs" being one of limitation, and not of purchase. Perkins v. McConnell, 136 Ind. 384, 36 N. E. 120.

If a devise is to be for life, and after-

wards in the same instrument there is a limitation, either immediately or mediately, to his heirs general or the heirs of his body, he takes an estate in fee simple or fee tail in possession in the one case, and in remainder in the other. Timanus v. Dugan, 46 Md. 418.

Where the same instrument which gives an estate for life by express words, in a subsequent part, gives the same property at or after the death of the life tenant to his heirs or the heirs of his body, the grantee or donee for life takes an estate of inheritance in fee or in fee tail, and his heirs at his death do not take as purchasers, but inherit by virtue of the limitation. Quick v. Quick, 21 N. J. Eq. 13.

Under Shelley's rule, where a prior estate of freehold is given to the ancestor, and a subsequent limitation contained in the same instrument is expressed to be to his heirs, whether general or special, the general rule is that no estate is taken by the heirs, but an estate of inheritance corresponding in quantum to the class of heirs specified is taken by the ancestor. Challis, Real Prop. 124; Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203.

Where land is given by deed or will to a person for life, and after his death remainder to his heirs, the word "heirs" is to be construed as a word of limitation merely, and vests the fee of the estate in the first taker. Tallman v. Wood, 26 Wend. 9.

The rule is, in substance, that when a freehold is given to one, and by the same gift a limitation is made to his heirs or the heirs of his body, the inheritance vests in him, and not in his heirs. King v. Utley, 85 N. C. 59.

²⁷ Whenever there is a limitation to a man which, if it stood alone, would convey to him a particular estate of freehold, followed by a limitation to his heirs or to the heirs of his body (or equivalent expressions), either immediately or after the interposition of one or more particular estates, the apparent gift to the heirs or heirs of the body is to be construed as a limitation of the estate of the ancestor, and not a gift to his heirs. Digby, Real Prop. 195; Seaman v. Harvey, 16 Hun, 71.

If, by any instrument, a freehold be limit-

beth.' The agitation then seems to have subsided somewhat for nearly one hundred years, when it was again awakened in 1770, by *Perrin v. Blake*. That case arose in Jamaica, and was brought before the Privy Council of England at a time when Lord Mansfield was the only law lord who attended. He deemed the question involved of too great importance to be decided by his single opinion, and a feigned case was prepared and submitted to the King's bench. After being twice argued, three of the judges, including Mansfield, agreeing that the case was within the rule in Shelley's Case, were for repudiating it, while one, Yeates, was for applying it. A fierce controversy arose. Pamphlets were written assailing and in defense of Lord Mansfield, one of those in his behalf evoking a bitter reply from Mr. Fearn, author of the great work on Remainders, and Junius, in his envenomed letters, accused him of attempting to subvert the laws of England. It is said by Lord Campbell in the 'Life of Chief Justices' that the

bar of the entire kingdom was divided into factions for several years, known as 'Shelleyites' and 'Anti-Shelleyites.' An appeal was taken to the exchequer chamber, where, after being several times argued, seven of the justices, including Sir William Blackstone, sustained and applied the rule, and one, Chief Justice De Gray, concurred in the views of Lord Mansfield. That decision was followed by *Jesson v. Wright*, 2 Bligh, 1, 10 Eng. Rul. Cas. 714, decided shortly afterwards, which has since been regarded as confirming the rule as a part of the laws of England, though in *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, determined as late as 1858, there were several dissenting opinions. In *Jordan v. Adams*, 9 C. B. N. S. 483, it was severely criticized by Chief Justice Cockburn, but adhered to as a rule of property."²³

"As to the antiquity of the rule in question," says Sir William Blackstone, "it hath been said that in Shelley's Case it is only urged by the counsel for the defendant in their argument, and not relied on

ed to the ancestor for life, and the inheritance to his heirs, either mediately or immediately, the first taker takes the whole estate. *Wells v. Ritter*, 3 Whart. 217.

The rule has a double aspect. The first may be thus expressed: A devise to one for life with remainder to his heirs creates a fee simple; and the second, a devise to one for life with remainder to the heirs, general or special, of his body, creates a fee tail, general or special. *Price v. Taylor*, 28 Pa. 102, 70 Am. Dec. 105.

Where, by the same instrument that gives the life estate, a limitation is made to the heirs general of the devisee, his estate becomes thereby an estate in fee simple. If limited to the heirs of the body, his estate is enlarged to an estate in fee tail, and, by the same rule, if limited to the heirs male of his body or to the heirs female of his body, the devisee takes an estate in special tail, according as the limitation be to the male or female heirs, and the limitation may be still more special as to one of the heirs male. *Brownell v. Brownell*, 10 R. I. 509.

When, by a deed or will, real estate is conveyed or devised to a person for life, and then in the same instrument to his heirs or to the heirs of his body after him, the words "heirs" or "heirs of his body" are to be construed as simple words of limitation, which mark out the quantity of the estate, and the person named takes not for life merely, but according to the limitation, either in fee simple or in tail. *Burges v. Thompson*, 13 R. I. 712.

The rule is that when the word "heirs" is used in a conveyance or devise so as to mean the whole class of those on whom the descent may be cast, however remote, it is a word of limitation, and not of purchase, and the first taker has the entire estate, no matter how clearly the intention may ap-

pear that he should take a less estate. *Ware v. Sharp*, 1 Swan, 489.

If one makes a limitation to another for life with a remainder over, immediately or mediately, to his heirs or heirs of his body, the heirs do not take remainders at all, but the word "heirs" is regarded as defining or limiting the estate which the first taker has, and his heirs take by descent, and not by purchase. *Robinson v. Blankenship*, 116 Tenn. 394, 92 S. W. 854.

If an estate for life, or any other particular estate of freehold, be given to one with remainder to his heirs, the first taker shall be held to have the fee, and the heirs will take by descent, and not by purchase. *Pearce v. Carrington* (Tex. Civ. App.) 124 S. W. 469.

Sir William Blackstone, in *Perrin v. Blake*, 6 Greenleaf's Cruise, Real Prop. 313, in his opinion in the exchequer chamber, says that where the ancestor takes an estate of freehold with remainder to his heirs or heirs of his body, the word "heirs" is a word of limitation of the estate, and not of purchase; that is, in other words, that such remainder vests in the ancestor himself, and the heir, when he takes, shall take by descent from him, and not as a purchaser.

²³*Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18.

A similar outline of the history of the celebrated case of *Perrin v. Blake*, infra, and the controversy that followed, will be found in *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762. To the same effect as to the antiquity of the rule, *Fraser v. Chene*, 2 Mich. 81; *Guthrie's Appeal*, 37 Pa. 9; *Baker v. Scott*, 62 Ill. 86; *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011; *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. 490; 4 Kent, Com. 216.

by the court. But the determination of the court is grounded on this rule, as well in Shelley's Case as in *de Bedford's Case*, F. Moore, 720, where the same rule is likewise argued from by the counsel as a known and undeniable maxim. And Lord Coke, in his commentary on Littleton (the great result of all his experience), has often adopted and relied upon it; and has cited in his margin, to support it, a long list of authorities from the Year Books; chiefly those of Edward III. I have looked into all these, and into some besides; and shall only say, that they do most explicitly warrant the doctrine extracted from them by that great and learned judge. There is one case which I have never seen cited, and which is by far the earliest of any that have occurred to me upon a diligent search. In this the question before the court was whether an estate thus circumstanced (that is, settled on a man for life, and after an immediate remainder in tail, to the right heirs of the tenant for life) was, on failure of the remainder in tail, liable to the debts of the tenant for life; and it was determined to be liable, upon the ground of its being a fee simple vested in the ancestor; and therefore vested in him, in order to prevent the inheritance from being in abeyance. This, I believe, is the very first case in our books wherein this principle was established. It is in the Year Book of Edward II. published by Serjeant Maynard, M. 18 Edw. II., fol. 577.⁸⁰ The rule of law deducible from hence is well and emphatically collected by Fitzherbert, in his Abridgment, t. Feoffment, pl. 109, who refers (I presume) to this case (though it was not then in print) when he says that it was resolved in M. 18 Edw. II., that 'if a man give land to B for term of life, remainder to C in tail, remainder to the right heirs of B in fee, this remainder in

fee vests in B as much as if the remainder was limited to B and his right heirs in fee; and the right heir of B shall have this by descent, and not as purchaser.' And from all these authorities I infer that the rule in question is a rule of the highest antiquity; not merely grounded on any narrow feudal principle, but applied, in the first instance we know of, to the liberal and conscientious purpose of facilitating the alienation of the land by charging it with the debts of the ancestor."⁸⁰

It has been said that the rule was not firmly established until it was announced in Shelley's Case, and hence it has been entitled "The Rule in Shelley's Case."⁸¹ The rule, however, was undoubtedly established as a fixed rule of law long before Shelley's Case was decided. It was, in fact, only one of the incidental questions in that case, and was passed upon by a mere statement of the court that one of the reasons for the decision was that the uncle could not take, since he was claiming under words of limitation. But the case was of unusual prominence, all the justices of the realm being summoned to decide upon the issues raised, and this probably gave the rule the name by which it is now known.

The adoption of the principle that the word "heirs" is a word of limitation, and not of purchase, undoubtedly led up to the application of the rule in Shelley's Case.⁸²

VI. *Supposed objects of the rule.*

a. *In general.*

What the real reason for the adoption of the rule in Shelley's Case was is not known. The origin and object of the rule are alike involved in great obscurity. Some very plausible reasons, however, have been given in support of it, but they are all speculative.

recognizances all the lands which John Abel had in fee, except the manor of Fortysgray, in which he had only an estate for term of life. Upon this return it was argued that John, the father, had only the freehold for term of life, the fee simple being limited to his heirs, who therefore took by purchase, and not by descent. But the court held the contrary, for which this reason (among others) is given by Stonor, J., viz., because otherwise the fee and the right, after the death of Walter, the eldest son, would have been in nobody. And therefore Beresford, Ch. J., gave the rule, that execution should be awarded upon this manor of Fortysgray."

⁸⁰ Perrin v. Blake, Hargrave's Law Tracts, 502.

⁸¹ Hess v. Lakin, 7 Ohio S. & C. P. Dec. 300.

⁸² Thurston v. Allen, 8 Haw. 392.

⁸³ The case referred to was this, in Blackstone's own language: "John Abel, having two sons, Walter and John, purchased the manor of Fortysgray in Kent; to hold to himself and Matilda, his wife, and Walter Abel, his eldest son, and to the heirs of the body of Walter begotten; and, if Walter died without heir of his body, the manor should remain to the right heirs of John, the father. Matilda, the wife, died; and Walter, the son, also died without heir of his body. John, the father, became bound in a statute merchant to pay £100 to B at a day certain and died, leaving his younger son, John, his heir. After the day of payment was elapsed, the creditor sued out a writ to the sheriff of Kent, to extend and deliver to him all the lands which John Abel, the father, had on the day of acknowledging the statute. The sheriff returns that he had delivered to other creditors upon

Mr. Petersdorff, in his Abridgment, states the reasons for the origin of the rule to be that "if the construction had been made according to the strict meaning of the words, A would have taken only an estate for life, the remainder to the heirs, etc., of A would have been considered as words of purchase, giving a contingent remainder to the heirs, etc., of A, according to the rule of law that *nemo est hæres viventis*; but such a construction would have been attended with these inconveniences: 1st. The lord of the fee would have been deprived of the wardship and the marriage of the heir; because, in that case, the heir would have taken as a purchaser without claiming anything from his ancestor by descent. 2dly. The remainder to the heir or heirs of the body being contingent until the death of the tenant for life, the inheritance would have been in suspension or abeyance, which was never allowed except in cases of absolute necessity; because the abeyance of the inheritance created a suspension of various operations of law, particularly of the remedies for the recovery of land by real actions; and 3dly. If the remainder in those cases had been construed to be contingent, no alienation could have taken place during the life of the ancestor." Vol. 14, p. 222.³³

b. Preservation of feudal reliefs.

The theory as to the object of the rule in Shelley's Case considered most reasonable is that it was adopted to protect the lords from the loss of certain perquisites attending the passing of an estate by de-

scend, which they did not receive when an estate went by purchase. It was as important, however, to the tenant as to the lord, that the distinction between descent and purchase should be rigidly maintained; as important that an estate which was really acquired by purchase should not be deemed an inheritance, as that an estate which was really an inheritance should not be deemed a purchase.³⁴

Lord Macnaghten said, in reference to this question: "The rule has a curious history. No one can tell who its author was. It may be traced in the Year Books as far back as the time of Edward II., but no one can fix the date when it was first recognized. No one knows for certain how it came to be laid down. Even the purpose of its being has been the subject of controversy. The better view seems to be that it is a rule of tenure founded on feudal principles, and that its purpose was to prevent the lord being defrauded of the chief fruits of seignory. It has been said that the rule was intended to protect the inheritance from abeyance, which either means the same thing or else means very little. Others—rather, I think, in anticipation of the course of events and the development of modern ideas—have discovered that it was designed to facilitate the alienation of property and the satisfaction of the ancestor's debts; while one very learned writer is of opinion that its main object was to exclude the possibility of creating 'an amphibious species of inheritance,' calculated to introduce confusion and disorder into the system of our law."³⁵

Such an attempt to vest what was in re-

³³ Siceloff v. Redman, 26 Ind. 251.

³⁴ An "important inducement to render impracticable the blending of the effects of purchase with the title by succession," says Mr. Hargrave, "[was] that the consequence must have been a continual source of fraud upon feudal tenure. When the heir came in by succession or descent, and was under age, the lord of the fee was entitled to those grand fruits of military tenure,—wardship and marriage. But if the heir took by purchase, only the trifling acknowledgment for a relief was due to the lord. It was therefore an object of the first magnitude in the consideration of feudal polity in England, not to leave it to the intention and choice of the tenant what should be a descent, what a purchase; for that would have placed the most valued rights of the lord at the mercy of him to the disadvantage of whose family they operated; and would therefore have been as absurd as to have authorized the lord to make what he pleased a descent for the sake of augmenting his seignorial profits. Thus, to enforce justice between lord and tenant, and to guard the former against fraud, the latter against oppression, 29 L.R.A. (N.S.)

it became essential to both that the boundary between descent and purchase should be raised on a standard of discrimination wholly independent of and unalterable by either." Hargrave's Law Tracts, 551.

³⁵ Van Grutten v. Foxwell, 77 L. T. Rep. N. S. 170. See *infra*, VI. c and d.

In *Sayer v. Masterman*, 1 Ambl. 344, Wilmot, Lord Commissioner, said that the reason of the rule in Shelley's Case, that where one takes an estate of freehold, and after an estate is limited to the heirs male of his body, the heirs male must take by descent, and not by purchase, so as to secure the lord his fruits on descent, had long since ceased, but that it had been better if that rule had never been broken in upon.

The principle which gave rise to the rule was founded on a feudal maxim that an heir should not take a contingent remainder of an estate as a purchaser, where his ancestor took a freehold estate by the same conveyance, because the lord might be defrauded of the fruits of his tenure. Warnock v. Wightman, 1 Brev. 331.

In *Mason v. Pate*, 34 Ala. 379, it is said: "One ground on which the rule in Shelley's

ality an estate of inheritance in the grantee or devisee and his heirs would undoubtedly have operated as a fraud upon the feudal lord,—a practice which in the days when the lord was entitled to his fees it would be policy to prevent.³⁶ But it is well to note that Mr. Blackstone pointed out that he had never met with a single trace of such a reason in any feudal writer.³⁷

c. Prevention of abeyance of fee.

"It is by no means clear," says Mr. Blackstone, "that this rule took its rise merely from feudal principles. I am rather inclined to believe that it was first established to prevent the inheritance from being in abeyance. For, though it has been

Case is supposed to rest may with propriety be here mentioned. We allude to the feudal doctrine of reliefs, or composition, exacted in feudal times by the lord paramount from the heir, as the price or purchase of his right to take possession of the fee on the death of his ancestor. This source of profit to the feudal lord depended on the nature of the heir's title; whether he took by descent or by purchase. The former conferred the right to demand reliefs, while the latter did not. A desire to foster the landed aristocracy, it is thought, entered into the policy of inclining to regard titles as acquired by descent rather than by purchase."

It has been said that the rule was established by the courts of England in subserviency to the feudal policy prevailing at that time, and to the interest of the lords, whose feudal rights of relief, wardship, marriage, etc., would attach upon an estate devolving by descent, but would not attach upon a transmission by purchase. *Baker v. Scott*, 62 Ill. 86.

In *Turman v. White*, 14 B. Mon. 560, it is said: "This celebrated rule, which is evidently one of policy, and not of construction, seems to have been established by the courts of England in subserviency to the feudal policy prevailing at the time, and to the interest of the lords, whose feudal rights of relief, wardship, marriage, etc., would attach upon an estate devolving by descent, but would not attach upon a transmission by purchase; and it may have been considered as a fraud, or as tending to produce frauds upon the rights of the lord, if land could be given to one for life, and afterward in the same conveyance a further estate in the same land could be given to his heirs, to take as purchasers under the gift, and not as heirs by descent; and when the rule was adopted, heirs of the body were not deprived of all interest by putting the inheritance in the ancestor."

In *Chrystie v. Phyfe*, 10 N. Y. 344, it said that "the reason of the rule was that, if the heir should take as a purchaser, he would defraud the lord of the fruits of his tenure, to which he would have been entitled upon a succession as heir. Upon the subsequent

the doctrine of modern times, in order to effectuate executory devises, that where a limitation of the inheritance depends in contingency, an interim estate may descend to the heir until the contingency happens, yet it is manifest to anyone the least conversant in our ancient books, that during the pendency of a contingent remainder in fee or in tail, the inheritance was formerly always (and in some cases is to this day) held to be in abeyance, or in *nubibus*, as they then expressed it. Thus, if a gift be made to one for life, remainder to the right heirs of J. S. then living, the fee simple is in suspense or abeyance during the life of J. S. Bro. t. Done. 6. And so is Co. Litt. 342b. But this state of abeyance was always odious in the law; and

abolition of feudal tenures, the reason for the rule no longer existed, but the rule itself remained. As it had become a rule of property, it would have been wrong to abolish it; but the reason for it having ceased, courts have not been inclined to extend it, as in most cases it was opposed to the actual intent of the testator. Hence, it has not been applied to any case except where the words used to designate the secondary devisees were words of limitation, such as 'heirs,' or 'issue of the body;' and even in cases where those words were mentioned, the rule was inapplicable if the devise was only to a designated portion of them."

³⁶ One ground for the adoption of the rule was the prevention of fraud upon feudal tenures, for when the heir came in by descent, and was not of age, the lord was entitled to the grand fruits of military tenure,—wardship and marriage; but if the heir took by purchase, then the lord could only claim the acknowledgment of a relief. *Edmondson v. Dyson*, 2 Ga. 307.

It is an unbending rule of law, originally springing from the principle of the feudal system, and though the original reason of it, the preservation of the rights of the lord to his relief primer seisin, wardship, and marriage, has passed away, it is still maintained as a part of the system of real property which is based on feudalism, and as a rule of policy. *Doebler's Appeal*, 64 Pa. 9.

The rule originated in the policy of the feudal tenures, and was adopted to favor the lord, by subjecting the heir to the burdens incident to a descent, from which, as purchaser, he would have been exempt. *Loving v. Hunter*, 8 Yerg. 4.

This extreme rule of construction in favor of the absolute right of the ancestor to alienate the property is obviously a rule of policy merely, and has been supposed to derive its chief support from considerations having their origin in feudal tenures of the realm. *Smith v. Hastings*, 29 Vt. 240.

The rule was adopted for the prevention of fraud. *Williams v. Houston*, 57 N. C. (4 Jones, Eq.) 277.

³⁷ *Perrin v. Blake*, 6 Greenleaf's Cruise, Real Prop. 313.

therefore the whole freehold or frank tenement could not be in abeyance, except in the single case of the death of a parson, or other corporation sole. Dyer, 71, Hobart, 338. For in that interval there could be no seisin of the land, no tenant to a præcipe, no one of ability to protect it from wrong or injury, or to answer its burthens or services. And this is one principal reason why a particular estate for years is not allowed to support a contingent remainder; that the freehold may not be in abeyance, as is laid down in Hobart, 153. But when the first or particular estate was a freehold, there, in some cases, the law allowed the inheritance to be put in abeyance, by the creation of a contingent remainder; but this very sparingly and with great reluctance. For, during such abeyance of the inheritance, many operations of law were totally suspended. The particular tenant was rendered dispunishable for waste; for the writ of waste can only be brought by him who is entitled to the inheritance. The title, if attacked, could not be completely defended, for there was no one in being of whom the tenant of the freehold could pray in aid to support his right. The mere right itself, if subsisting in a stranger, could not be recovered in this interval; for, upon a writ of right patent, a lessee for life cannot join the mise upon the mere right. 1 Rolle. Abr. 686. For these among other reasons, the law was extremely cautious of admitting the inheritance to be in abeyance, unless in very particular cases; as is laid down by Hobart and Doddridge, 2 Rolle Rep. 502, 506; Hobart, 338. Indeed, where the particular estate was made to A for life, with remainder to the right heirs of B, then living, there, till the death of B, the inheritance was necessarily in abeyance; for B, the ancestor, was entitled to nothing. But, where the ancestor had already an estate of freehold limited to him, the law (to prevent such abeyance) adjudged that a subsequent remainder to his heirs (who, during his life, are uncertain was a remainder vested in the ancestor himself, and that his heirs shall claim by descent from him. For, as Hankford, J., says in 11 Hen. IV., 74, 'If land be given to a man for a term of his life, the remainder in tail, and for default of issue the remainder to the

right heir of the first tenant, the remainder in fee simple takes its being by the possession which the first tenant hath.' And though in this case it was argued at the bar that the fee was *in nubibus* or in suspense, yet this was strongly denied both by him and by Hill, another of the judges. And indeed, if we consider it attentively, the whole of this rule amounts to no more than what happens every day in the creation of an estate in fee or in tail, by a gift to A and to his heirs forever, or to A and to the heirs of his body begotten. The first words (to A) create an estate for life; the latter (to his heirs, or the heirs of his body) create a remainder in fee or in tail, which the law, to prevent an abeyance, refers to and vests in the ancestor himself; who is thus tenant for life, with an immediate remainder in fee or in tail; and then, by the conjunction of the two estates, or the merger of the less in the greater, he becomes tenant in fee or tenant in tail in possession. Hence, therefore, I am induced to think that one principal foundation of this rule was to obviate the mischief of too frequently putting the inheritance in suspense or abeyance."³⁸

According to Mr. Hargrave, a third class of persons interested against the permission of legal succession without the consequences appropriated to it by law consisted of persons having rights of action for recovery of the inheritance of land. There is inherent in our ancient law a strong aversion to having either the freehold or inheritance of land in a state of abeyance. At this moment an abeyance of the freehold is not endured by our law for one moment, except in a few special cases of extreme necessity. . . . The reasons of this odium to abeyance plainly are, that during a suspension either of freehold or inheritance, there is necessarily also a suspension of various operations of law, more especially of the several denominations of remedies for the recovery of land by real actions. Mr. Hargrave, however, was not ready to classify the mischiefs from abeyance above all other reasons for the rule, but concurred in thinking that those mischiefs might well be ranked among some of the chief reasons for the policy against suffering heirs who succeeded as such to take as purchasers."³⁹

³⁸ Perrin v. Blake, Hargrave's Law Tracts, 498.

In Evans v. Evans [1892] 2 Ch. 173, Kay, L. J., said that one of the most plausible reasons for the rule was that given by Mr. Justice Blackstone in Perrin v. Blake, *supra*, that it was established to prevent the inheritance being in abeyance, and from the desire to facilitate the alienation of land, and throw it into the track of commerce 29 L.R.A. (N.S.)

one generation sooner by vesting the inheritance in the ancestor. See *infra*, d.

³⁹ Hargrave's Law Tracts, 551.

One of the principal reasons for establishing the rule was to prevent the abeyance or suspension of the inheritance. Baker v. Scott, 62 Ill. 86. To the same effect, Edmondson v. Dyson, 2 Ga. 307.

The words "heirs or heirs of the body" create a remainder in fee or in tail, and

d. Facilitation of alienation.

Sir William Blackstone also suggested that one foundation of the rule might be the facilitation of the alienation of land. "Another foundation might be, and was probably," said he, "laid in a principle diametrically opposite to the genius of the feudal institutions; namely, a desire to facilitate the alienation of land, and to throw it into the track of commerce one generation sooner by vesting the inheritance in the ancestor, than if he continued tenant for life, and the heir was declared a purchaser. Therefore, where an estate was limited to the ancestor for life, and afterwards (mediately or immediately) to his heirs, who are uncertain till the time of his death, the law considered the ancestor as the first principal object of the donor's bounty; and therefore permitted him (who, as it is said, Co. Litt. 22, beareth in his body all his heirs, and who had the only visible and notorious freehold in the land) to sell it, devise it, where the custom would permit, or charge it with his debts and encumbrances. And

however narrow and illiberal the original establishment of this rule, or the adhering to it in later times, may have been represented in argument, I own myself of opinion that those constructions of law which tend to facilitate the sale and circulation of property in a free and commercial country, and which make it more liable to the debts of the visible owner, who derives a greater credit from that ownership,—such constructions, I say, are founded upon principles of public policy altogether as open and as enlarged as those which favor the accumulation of estates in private families, by fettering inheritances till the full age of posterity now unborn, and which may not be born for half a century." 40

This has proved to be the most popular of all the reasons given for the application of the rule in the modern decisions; 41 but Weaver, J., in a dissenting opinion in the Iowa case mentioned in preceding note 41, said: "The final argument of every apologist for that rule is that it is intended to prevent the tying up of estates, and is therefore in accord with the general policy of

the theory of the rule is that the law, to prevent an abeyance, vests the remainder in the ancestor who is the tenant for life, and by conjunction of the two estates, the estate for life is swallowed up or merged in the remainder which is executed on the estate for life, and the tenant for life thereby becomes tenant in fee or in tail. Siceloff v. Redman, 26 Ind. 251.

The foundation of the rule rests upon the aversion of the common law to the inheritance being in abeyance, and its adoption facilitates the alienation of land by vesting the inheritance in the ancestor, thereby enabling him to convey the property at once, without the delay attendant upon contingent remainders. Nichols v. Gladden, 117 N. C. 497, 23 S. E. 459.

The rule in Shelley's Case, it was said, was first established to prevent the inheritance from being in abeyance,—from being tied up dependent upon future contingencies; and to facilitate the alienation of lands,—reasons equally good and operative at this day as when the rule was first established. Sims v. Georgetown College, 1 App. D. C. 72.

40 Perrin v. Blake, Hargrave's Law Tracts, 500.

41 The rule facilitates the alienation of lands, and throws them into the track of commerce one generation sooner than if the ancestor were regarded as only tenant for life, and the heirs as purchasers of the inheritance. Hess v. Lakin, 7 Ohio S. & C. P. Dec. 300.

In Evans v. Evans [1892] 2 Ch. 173, Lindley, L. J., said that, unsatisfactory as the rule is if attempted to be defended upon the ground that it gives effect to a settlor's or testator's intentions, it must not be forgotten that the rule produces a very 29 L.R.A. (N.S.)

beneficial practical effect by rendering property more marketable than it otherwise would be.

Chancellor Kent, in speaking of the effect of the abolition of the rule in Shelley's Case, said: It will tie up property from alienation during the lifetime of the first taker and the minority of his heirs. 4 Kent, Com. 232.

In Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18, it is said in the majority opinion: "Certain it is that the power of alienation and that of vested estates were favored doctrines of the common law, and as such were promoted by the rule in Shelley's Case. If of feudal origin, its purpose must have been to defeat in part the feudal policy that every grantee or devisee should take his estate *per forma doni*, the terms of which were to be construed *stricti juris*, in conformity with the idea of the ancient Roman law, contained in the Twelve Tables, by which a man, in conveying an estate to another, created all his rights by the terms of the conveyance. All estates were regarded, under the feudal system, as mere gifts or concessions on the part of the lords or barons to their vassals, and in the centuries it held sway and as a result of this policy many of the tenures became extremely burdensome, combining, as has been well said, the strangest comminglings of liberty and oppression to be found in any age. In irrepressible conflict with these conditions was the common law, favoring the fullest investigation and ample in its elasticity to devise a remedy for every wrong. In the necessities of those times, for a principle which would unfetter these estates and defeat the indeterminate tenures, the rule in Shelley's Case may have originated."

our laws. A little reflection will reveal the fallacy of the argument. It is not the policy of our laws to restrict, invalidate, or discourage the creation of life estates. On the contrary, we have by express statute provided not only that the property owner may suspend the power of sale for the lifetime of a person in being, but for twenty-one years thereafter. Neither has it ever been the policy of the common law to discourage or destroy life estates for the purpose of 'removing clogs' upon the alienability of lands. During all the years since the rule in Shelley's Case came into being the right to create life estates in almost every conceivable method (save only the one form at which that rule is aimed) has been recognized, upheld, and enforced by the courts with unvarying regularity. Thus it happens that, while forbidding the donor to give a life estate to A, with a remainder to A's heirs, he has been at perfect liberty to give a life estate to A, with remainder to the heirs of A's wife, or to the heirs of A's mother-in-law, or to the heirs of an entire stranger. The same common law permitted the piling of one life estate upon another in the most puzzling confusion. It created life estates for the benefit of the surviving wife and husband, and for the tenant in tail after the possibility of issue had ceased. It construed every deed which omitted the magic word 'heirs' as conveying a mere life estate. It upheld the entailment of estates and the law of primogeniture, and all the other elaborate and multifarious devices by which the alienability of lands was held in check and the estates of great families preserved, even at the expense of their creditors. In view of this history, the faith which can discover in the rule in Shelley's Case a benevolent design to facilitate transfers of title comes clearly within St. Paul's definition: 'The substance of things hoped for; the evidence of things not seen.' Even in England, with all its conservative adherence to the traditions of the law, the lawyers are ceasing to deceive themselves by this sort of sophistry." He also said that "when the law undertakes to say to the donor that his gift of a life estate to A, with remainder to his heirs, shall be defeated and distorted into a gift to A of the entire fee, but that a life estate to A, with remainder to B, or to the children of B, will be respected and enforced, it is transparent folly to pretend that the result in the first instance is to be justified upon the assumption of some deep underlying purpose to hasten the 'unfettering of estates.' If a deed or will be obscure or ambiguous, and

there is a manifest uncertainty whether the estate given was intended as a life estate or fee, then the supposed policy to which the inquiry refers may lead the court to decide in favor of the latter construction; but where there is no ambiguity there is no policy of the law which inclines the courts to disregard or defeat a clearly expressed intention."

The observation of Judge Weaver, to the effect that the unfettering of estates is an in adequate reason to account for the rule in Shelley's Case, seems unanswerable; but the views of this severe critic as to the operation of the rule upon the intention of grantors or devisors will be shown later in the note to be based upon an imperfect conception of its nature and of the object it was designed to accomplish. See *infra*. IX. c, 1; XII.

e. Preservation of creditors' rights.

Where the succession was to a fee simple, Mr. Hargrave points out, it was of consequence to the specialty creditors of the tenant, who died so seised, that his heir should not have the benefit of the title by descent or succession, and at the same time evade its disadvantages under color of taking as a purchaser. So long, indeed, as the feudal restraints of alienation continued in full vigor, the tenant was disabled from charging the land with his debts of any kind; and so long it was indifferent to his creditors in what way the heir took the estate upon his ancestor's death. But the restraints of alienation were broken through and in a great measure dissolved in the reigns of our first and third Edwards; and thenceforward it became a justice due to the specialty creditor, that the descent to the heir should not operate with the qualities of a purchase. If, on the ancestor's death, the heir succeeded with the effect of descent, the land descended, was assets to satisfy the demands of specialty creditors; whereas, if it had been allowed to the heir to succeed to the estate as a purchaser, such creditors would have been injured, it being clear that land vesting by purchase was not assets, and therefore not liable to their demands. This difference to creditors between purchase and descent is notorious; and in consequence of it, even a devisee of land was not liable to his testator's specialty debts, till the case was relieved by the 3rd of William and Mary, chap. 14, which corrected the hardship, by making devisees chargeable for debts equally with heirs.⁴²

⁴² Hargrave's Law Tracts, 551.

In England title by descent was favored by the courts, first, because the land in the 29 L.R.A. (N.S.)

hands of the heirs at law by descent was chargeable with the payment of the ancestor's debts, and then again, because it

1. Maintenance of distinction between descent and purchase.

It has been said that one of the most important objects of the rule in Shelley's Case was to maintain the distinction between estates by descent and estates by purchase.⁴³ In fact, if it is admitted that it was the intention of Shelley, the ancestor in Shelley's Case, *supra*, II., that the whole line of his heirs should take the remainder as by descent, then it would have been impossible for the court to have given effect to that intention, and still have held that the ancestor had only a life estate, without creating a species of estate unknown to the law. Such an estate might have been created by statute, but such an estate has not been created to this day. Therefore, it is as impossible now as it was when Shelley suffered his recovery, for A to limit an estate to B for life, and follow it by a limitation of the remainder to the whole line of B's heirs, to take in succession from generation to generation. The statutes have not helped the matter any, for under the statutes, which it will be shown are as arbitrary as the rule in Shelley's Case itself, the word "heirs" is declared, in express terms or in effect, to be simply a word of purchase, where under the rule in Shelley's Case it would be deemed a word of limitation. So, in this year, 1911 A. D., in jurisdictions where the rule in Shelley's Case is abolished, if A wishes to convey an estate remainder to B's heirs, to take in succession from generation to generation as the law would cast the descent, he cannot precede

it by a life estate in B. The reason is that there is no such estate known to the law. The estate must be either one of inheritance or of purchase. If the estate in the heirs is to be one of inheritance, then the ancestor must have the fee, whether the rule in Shelley's Case is abolished or not. When, under statutes, effect is given to the intention to give the first taker a life estate, the intention to give the inheritance to the heirs, if there be such an intention, must be disregarded, unless, as before stated, a new species of estate is created. If the first taker takes the life estate, the heirs must take the remainder by purchase, which is a very different estate, as is well known, from an estate by descent,—an estate which has different incidents and involves different consequences. Mr. Hargrave was the first to call attention to this point in his essay on the Rule in Shelley's Case.

"It is a positive rule of our law," says Mr. Hargrave, "that a man cannot raise a fee simple to his own right heirs as purchasers, either by legal conveyance, by conveyance to uses, or by devise. By this it is meant that where the ancestor, by any sort of conveyance, appoints that at his death his heirs shall, by gift from him, come to that very inheritance which the law of descent or succession throws upon the heirs at law, it is construed as a vain and fruitless attempt to give that to the heirs which the law itself vests in them; it is speaking what the law speaks; and to give effect to such a designation by every ancestor, and so to enable him to convert the title to

brought the right of escheat upon the failure of heirs on the part of the ancestor from whom the land descended. On the other hand, land acquired by purchase was not liable for debts, and upon the death of the owner it descended, first, to the heirs on the paternal side, and, upon failure of such heirs, then, to the heirs on the part of the mother. Title by descent was considered the worthier title, and where the will gave the devisee the same estate in quality and quantity which he would have taken as heir at law, he was adjudged to take not under the will, but by descent or operation of law. *Donnelly v. Turner*, 60 Md. 81.

As to the reason sometimes given for the rule, that it subjected the land in the hands of the heir to the debts of the ancestor, the court, in *Turman v. White*, 14 B. Mon. 560, said that it seemed to have no foundation in justice, except in those cases in which the ancestor had actually expended his means in the purchase of the land, which therefore ought not to be taken from his creditors for the benefit of his heirs. "For instance," said the court, "the creditors of Solomon White would not have been injured, and would have had no right to complain,

if his father, instead of giving him a life estate in the land, had given the whole estate at once to his children or heirs; and if Solomon were the purchaser of the fee, it would not at this day require the rule in Shelley's Case to make the land liable for his debts."

⁴³ The genuine source of the rule in Shelley's Case is an ancient policy of our law, the aim of which was to guard against the creation of estates of inheritance with qualities incident and restrictions foreign to their nature. *Hargrave's Law Tracts*, 551.

The rule in Shelley's Case is simply one branch of a policy of law adopted to prevent annexing to a real descent the qualities and properties of a purchase, and so is calculated to render impossible the creation of an amphibious species of inheritance; that is, an estate of freehold with a perpetual succession to heirs, without the other properties of inheritance; in other words, an inheritance in the first ancestor, with the privilege of vesting in his heirs by purchase; the succession of heirs to an ancestor, without the legal effects of a descent; a compound of descent and purchase. *Ibid.*

his heirs by descent into a purchase, might lead to a gradual undermining of the whole law of inheritance. . . . But if our law had stopped here, its policy against blending the effect of purchase with descent would have been imperfectly guarded; for the last-mentioned rule applies only to the acts of an ancestor as between him and his own heirs. It was therefore requisite to have a like barrier as to acts between persons not standing towards each other in the relations of ancestor and heir. Otherwise, upon every new gift or conveyance of an inheritance by its owner to a new proprietor, it might have been made a part of the original terms of the donation, that it should be incident to the estate passed to the donee and his heirs that his heirs should, notwithstanding, come in by purchase. It is for prevention of this latter evasion of the policy against confounding the law's distinction of descent with purchase, that the rule in Shelley's Case was calculated. For what is the short amount of it? It is simply this, that no man shall raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers. . . . In fact, the rule in Shelley's Case is nothing more than a negative upon an indirect mode of introducing a real heir in the assumed form of a purchaser. If it had been attempted directly to make a purchase of a descent by giving a fee simple or fee tail, and then qualifying either estates by appointing that the heirs should take by purchase, it would have been too rank a contradiction of our law to have had a chance of succeeding. The rule in Shelley's Case was calculated to defend the law of descent against an indirect

evasion of its effects. Is it not the very essence of an estate of such species of inheritance, that it should be enjoyed by the person seised of it for his life, with a benefit of a succession at his death to his heirs, general or special, according to the nature of the inheritance? Is not then the expression that the ancestor shall have for his life only, with a succession to his heirs at his death, a mere nominal difference from an estate to one and his heirs or the heirs of his body, except that it aims to qualify the inheritance by refusing powers of alienating which the law has inseparably annexed to such estates? Is it not also the plain meaning of the rule to resist the possibility of constituting a real estate of inheritance under the show and disguise of a lesser estate? Thus, then, at last it is discovered, that there is latent in the rule in Shelley's Case, a principle which constitutes it one of two great barriers or outworks provided by our law to guard descent from being confounded with purchase, and to obstruct annexing to the essence of the former the discordant effect of the latter. In other words, the rule in Shelley's Case, that words of inheritance grafted upon a preceding estate for life shall operate by limitation, and not by purchase, with the rule that the ancestor shall not raise a fee simple to his own right heirs, is the grand fortification for defending our law of descents against all invasion by private intention. Singly, each of these rules would have been an inadequate and incomplete defense, because each protects only one half of the citadel. Operating conjunctively, they so guard the policy of descent in all its essential branches as to make it unassailable at all points."⁴⁴

⁴⁴ Hargrave's Law Tracts, 551.

Another reason for the rule was that it preserved the marked distinction between descent and purchase. *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300.

The policy of the rule was that no person should be permitted to raise in another an estate which was essentially an estate of inheritance, and at the same time make the heirs of such person purchasers. 4 Kent, Com. 216; *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90.

In *Buist v. Dawes*, 4 Strobb. Eq. 37, it is said that, though this celebrated rule had its origin in feudal ages, and was doubtless based in part on feudal usages and principles, the inexorable operation which has been given to it by modern judges may be vindicated not only by the necessity of adhering to a rule of property which has been so long established, but of adhering to the manifest "distinctions between descent and purchase," and to prevent title by descent from being stripped of its proper incidents, and disguised with the qualities and properties of purchase.

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But on appeal in 4 Rich. Eq. 423, O'Neill Judge, said that in South Carolina, since the act of 1824, there was no necessity to appeal to the rule in Shelley's Case. For unless the devise cut the estate down to less than a fee, it was to be so regarded. There was therefore no artificial rule which compelled the court to give any construction against the plain meaning to the words of the testator.

The theory was that in cases which come within the rule, the heirs take by descent from the ancestor, and they cannot do so unless the whole estate is united and vests as an executed estate of inheritance in the ancestor. *Hardage v. Stroope*, 58 Ark. 303. 24 S. W. 490.

The reason given is that, as the heirs or heirs male, etc., could not take as purchasers, not being *in esse*, and could only take through the ancestor, the estate for life was enlarged for their benefit. *Smith v. Chapman*, 1 Hen. & M. 240.

The fact that the grantor or deviser does not intend the first taker to dispose of his estate, and that the rule in Shelley's Case permits him to do so, has always made the rule the target of bitter attacks, often-times, it is to be feared, by enemies who have not fully understood its object or effect. The reason why a fee cannot be granted to a person, with a proviso that he shall not have the power to alienate it during his life, is that, if effect be given to the proviso, the grantee has not the fee. There is no such estate known to the law as an inalienable fee. When A limits an estate to B for life, remainder to his heirs, the heirs cannot take the fee by descent, if B is given a life estate. The fee descends from the ancestor, and the ancestor having the fee must have power to alienate it. There is nothing more arbitrary in holding this than in holding that A cannot limit a fee-simple estate to B, and then provide that he shall not alien it during his life.⁴⁵

g. The true reason for the rule in Shelley's Case.

The approved common-law formula for passing a fee estate was to convey to the "grantee and his heirs." The characteristic feature of the estate was that when the descent was cast, the estate would not escheat as long as one could be found who bore the relation of heir to its owner. The use in the grant of the word "heirs" was what indicated that this kind of estate was intended to pass. In the above formula, therefore, the word "heirs" designated the quality or extent of the estate conveyed. In other words, it was a word of limitation. When analyzed, the formula means that, barring alienation, the grantee is to take for life,

remainder to his heirs. Therefore, when a grant expressly states that it is to the grantee "for life," remainder to "his heirs," nothing more has been accomplished than would have been accomplished if the words "for life" had been omitted, except to restrict the grantee's enjoyment of the estate. One of the inherent qualities of a fee estate is that it is subject to the absolute dominion of the owner. The law permits no interference on the part of the grantor with the enjoyment or disposal of the estate by the grantee, by way of conditions, directions, or otherwise. Therefore the law said, having used the formula for the creation of a fee, and merely added thereto the words "for life," which have no force whatever except to curtail the enjoyment of the first taker, which the law will not permit, those words will be disregarded, leaving the fee in the grantee untrammelled. What the grantor could not do directly, he will not be permitted to accomplish by such an easy method of evasion. In other words, having in legal effect granted a fee, the grantor will not be heard to say that he intended to put an illegal restraint upon the grantee's enjoyment of the property, because then it would not be a fee. It is not probable that any legislature which has abolished the rule in Shelley's Case, any judge who has refused to follow it, or any lawyer who has criticized it, would advocate a measure permitting a grantor to fetter his grantee's enjoyment of and dominion over the estate, and yet, in the final analysis, that is just what all the attacks on the rule amount to.

There appears to be a tendency in modern times to regard the decision in Shelley's Case as a mere triumph in the art of hair-splitting, but from what has already been

⁴⁵ "It is one of the properties of an estate in fee simple," says Mr. Hargrave, "that it may be alienated by the party seised; and this power, with some little exception, has been inseparably incident to such an estate ever since the statute of *quia emptores terrarum*, in the 18th of Edw. I., removed the ancient shackles of alienation. If, therefore, a gift or devise is made to one and his heirs with condition not to alien, the condition is void at law. On the establishment of common recoveries in the reign of Edw. IV., it became an incident to an estate in fee tail that the party seised of it should have power to bar the entail, not only as against the issue in tail, but also as against all persons in remainder or reversion. By force also of statutes made in the reign of Henry the Seventh and Henry the Eighth, tenants in tail gained a power of barring their own issue by a fine with proclamations, without resorting to the more extensive operation of a common recovery. These incidental powers being thus 29 L.R.A. (N.S.)

annexed to estates in tail, it becomes a rule that, if an estate be given or devised to one and the heirs of his body, on condition not to bar the entail by a recovery or fine, the condition shall be reprobated and have no effect; which, in the instance of the common recovery, is the stronger, because that, originally, and before its being sanctioned by long practice and by statutes to regulate it, was a fiction contrived in fraud of the law of entails as protected by the statute *de donis*. Curtesy and dower are by appointment of law incidents to estates of inheritance, whether in fee simple or in fee tail. If, therefore, a gift or devise is made of such estates, with an express declaration that there should be neither curtesy nor dower out of them, it would be a vain attempt to control a quality which is adherent to them by the bounty of the law in favor of husbands and wives, and for the encouragement of matrimony." Hargrave's Law Tracts, 551.

shown, this is plainly a mistake. What was done in Shelley's Case is what would have to be done to-day, in order to pass an estate of inheritance to the heir; and it is what in fact is being done everyday when the limitation is in another form, that is, where there is a direct grant of the fee to one and his heirs, with a proviso that he shall not alienate it, commit waste, etc. In such a case the intention of the grantor as to alienation would be disregarded.

Moreover, a point generally overlooked is that a fee acquired by descent and a fee acquired by purchase are estates having different incidents. This fact has already been referred to. See *supra*, III. A grantor may desire to limit the descent of a fee to the heirs of A, or he may not. If, however, he does intend that the property shall descend to the heirs of A, the heirs must be given an estate by descent, and not by purchase, for if an estate be given to the heirs of A by purchase, the property may descend in a different course. See *supra*, III. If it is certain then that the grantor intends the heirs of A to take by descent, the only method by which this can be accomplished is by vesting the fee in A. The trouble is not banished by giving the heirs of A an estate by purchase. The difficulty is this: A fee acquired by descent is one kind of an estate; it has various incidents; it is alienable; it is taken subject to certain burdens; it goes in descent in a certain course, and escheats when certain heirs fail. An estate acquired by purchase is a different kind of an estate; it is not

taken subject to the same burdens; it goes in descent in a different course, and therefore escheats when a different group of heirs fail; and this is so, even if the same person holds the two estates, one of which comes to him by descent and the other by purchase. It was impossible when Shelley's Case was decided, and so it is now,—even where the rule in Shelley's Case is not in force,—to create an estate by descent without making it descend, and without subjecting it to the incidents of such an estate. To descend the fee must be in the ancestor, and the fee being in the ancestor, the ancestor must have the power of alienation. This is due to the nature of the estate itself, and not to any policy as to the unfettering of estates. The difficulty is structural. The rose, no matter what may be its name, is still a rose. What the court decided in Shelley's Case was that Shelley, the ancestor, intended to create an estate of inheritance in the heirs, limiting the descent to his own heirs, and not to the heirs of his descendants. Having reached this conclusion, it had to hold that the fee vested in Shelley himself. In the next subdivision the question whether the conclusion of the court was reasonable under the circumstances will be considered.

VII. Reasonableness of rule.

The rule has been largely vindicated in modern times, especially in this country, on the ground that it facilitates the alienation of property.⁴⁶ This is what is de-

⁴⁶ In *Hammer v. Smith*, 22 Ala. 433, Chilton, Ch. J., said: "For my own part, I think the rule in Shelley's Case founded in wise and sound policy. It furnished a solid and stable rule of property, cut off strife and litigation resulting from the pursuit of loose and conjectural intentions, by giving a fixed and determined meaning to certain expressions; and, while it contributed to the free circulation of property, by divesting it of clogs which prevented its alienation, at the same time it afforded ample scope for attention to future provisions to meet family exigencies, which the interest of society required should not be wholly overlooked."

In *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. 490, it is said that the operation of the rule has been to facilitate the alienation of land by vesting the inheritance in the ancestor, instead of allowing it to remain in abeyance until his decease, and that its operation in this respect has commended it to the favorable construction of the most learned and able men of Great Britain and the United States, and doubtless contributed to its preservation and continuance, and enabled it to survive the innovation of legislation and the changes and fluctu-

ations of centuries. Based upon the broad principles of public policy and commercial convenience, which abhor locking up and rendering inalienable any class of property, it has ever been in harmony with the genius of the institutions of our country and with the liberal and commercial spirit of the age.

In *Baker v. Scott*, 62 Ill. 86, it is said that the rule in Shelley's Case has become a rule of property, and is, "we believe, in harmony with the genius of our institutions and with the liberal and commercial spirit of the age; which alike abhor the locking up and rendering inalienable real estate, and has challenged and received the willing obedience and support of the most able minds of England and the United States."

In discussing the question whether the rule should be rejected as defeating the intention of the parties, it is said in the majority opinion in *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18, that this question was settled in England long after the period of the special usefulness of the rule in curtailing the wrongs of feudal tenures, or its alleged application for the protection of the lord and barons in their profits, had passed

clared to have made it in harmony with American institutions.⁴⁷ In this connection it has been strikingly referred to as a

Gothic column found among the remains of feudality, preserved to aid in sustaining the fabric of the modern social system.⁴⁸

away. "Undoubtedly the doctrine of *stare decisis* played an important part," said the court, "but in the decisions and numerous pamphlets the merits were thoroughly discussed. Throughout the long controversy, the argument most persistently urged was that it was out of harmony with the spirit of the laws of England, in that it tended to defeat the manifest intention of the instrument to which applied. If anything in the habits of our people or in the genius of our institutions essentially differentiates their situation from that of the English people in the time of *Perrin v. Blake*, *Jesson v. Wright*, or *Roddy v. Fitzgerald*, in respect to this rule, it has not been called to our attention. Undoubtedly, there are differences which bear somewhat upon the consequences of its application, but it may be safely asserted that there are none which have enlarged or re-enforced the objections in principle then pressed with such learning and skill. Will anyone contend that it is not the policy of the law now, as in the days of *Coke* and *Blackstone*, to favor unfettered inheritances, the free alienation of property, and its subjection according to equitable liability to the debts of ancestors? Is it not still the policy of the law that inheritances shall vest, rather than be held in abeyance? Do we not yet favor those incidents of estates in fee, that the widow be accorded her dower and the husband his curtesy? Is there a single reason for rejecting the rule now and in this state that was not pressed by the great lawyers and jurists when it was finally inbedded in English jurisprudence as a part of the common law? We have discovered none."

"In *Dennett v. Dennett*, 43 N. H. 499, the court said: "We are unable to discover that this rule of construction, which has constituted a part of the common law for centuries, is in any respect inapplicable to our institutions or to the circumstances of the country, or repugnant to the Constitution."

In *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011, it is said: "That this result accords most thoroughly with the general tendency of juridical evolution is apparent from the progress of the law, and the gradual falling away of entails and other restraints on alienation, from the times of *Henry I.* to the present. It seems clear that in a highly complex state of society, with greatly diversified industries and immense commercial activities, it would be desirable to remove every clog on the free and easy alienability of all kinds of property, and that such has been the spirit of the legislation in this state is manifest from a perusal of the various statutes enacted upon the subject."

In *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300, it is said that "this rule, when carried to its fullest extent, completely accords with the fundamental conception of 29 L.R.A. (N.S.)

our American jurisprudence concerning real property, with the tendencies of state legislation, and with the sentiments of the American people in regard to landed ownership. These are all hostile to tying up estates. They are disposed to overturn the superiority of real over personal property, and to establish them upon an equality. They are all opposed to the feudal dogmas. They all recognize that experience teaches that the prosperity of a community depends, in a large degree, upon the freedom with which property may be transferred from hand to hand; and that any obstruction to such freedom of transfer is a hindrance to the general well-being. The rule in *Shelley's Case* is in harmony with them on all these points; and it is therefore strange and inexplicable why so many American courts have been unwilling to accept and adopt a rule which so fully expresses the conceptions and tendencies of our own civilization."

In *Hileman v. Bouslaugh*, 13 Pa. 350, 53 Am. Dec. 474, *Gibson*, Ch. J., said: "The rule in *Shelley's Case* ill deserves the epithets bestowed on it in the argument. Though of feudal origin, it is not a relic of barbarism or a part of the rubbish of the dark ages. It is part of a system; an artificial one, it is true, but still a system, and a complete one. The use of it, while fiefs were predominant, was to secure the fruits of the tenure by preventing the ancestor from passing the estate to the heir as a purchaser, through a chasm in the descent, disencumbered of the burdens incident to it as an inheritance; but *Mr. Hargrave*, *Mr. Justice Blackstone*, *Mr. Fearne*, *Chief Baron Gilbert*, *Lord Chancellor Parker*, and *Lord Mansfield* ascribe it to concomitant objects of more or less value at this day; among them, the unfettering of estates by vesting the inheritance in the ancestor, and making it alienable a generation sooner than it would otherwise be. However that may be, it happily falls in with the current of our policy. By turning a limitation for life, with remainder to heirs of the body, into an estate tail, it is the handmaid not only of *Taltarum's Case*, but of our statute for barring entails by a deed acknowledged in court; and where the limitation is to heirs general, it cuts off what would otherwise be a contingent remainder, destructible only by a common recovery. In a masterly disquisition on the principles of expounding dispositions of real estate, *Mr. Hayes*, who has sounded the profoundest depths of the subject, is by no means clear that the rule ought to be abolished even by the legislature; and *Mr. Hargrave* shows, in one of his tracts, that to ingraft purchase on descent would produce an amphibious species of inheritance, and confound a settled distinction in the law of estates."

⁴⁸ In *Polk v. Farris*, 9 Yerg. 209, 30 Am.

Irrespective, however, of any benefit which may be derived from facilitating the alienation of property, Lord Davey has said that the neglect of the rule has tended to increase uncertainty in the construction of instruments, and to multiply the difficulty of those who had to advise upon them, and therefore to foster litigation. Instead of interpreting the words of the instrument, the court was too frequently invited to embark

upon a fruitless speculation as to the testator's intention.⁴⁹ And Parker, Ch. J., in applying the rule, said: "I have been the longer in delivering the judgment of the court, because of some late endeavors to invalidate this rule, which, by the way, may make it proper to observe that the altering settled rules concerning property is the most dangerous way of removing landmarks."⁵⁰ But Sir R. T. Kindersley, V. C.,

Dec. 400, the court said: "Whatever may have been the origin of the rule, or how well soever it may seem adapted to attain the selfish objects or gratify the grasping cupidity of the feudal lord, it happens to have been obviously based also upon principles of public policy and commercial convenience sufficiently broad and deep to cause it to survive, for the period of near 500 years, the rage of legislative innovation and all the changes and fluctuations of the most eventful era of the world, and still to challenge the willing obedience and enlightened support of the most learned and able minds of Great Britain and the United States. It is a rule or canon of property which, so far from being at war with the genius of our institutions or with the liberal and commercial spirit of the age,—which alike abhor the locking up and rendering inalienable real estate and other property,—seems to be in perfect harmony with both. It is owing, perhaps, to this circumstance that the rule—a Gothic column found among the remains of feudality—has been preserved in all its strength, to aid in sustaining the fabric of the modern social system."

In *McGregor v. Davidson*, 14 Pa. Super. Ct. 230, the court says: "It would seem to be in harmony with the institutions of a people who have insisted that land shall be freely alienable and an asset for the payment of debts, condemned perpetuities, and made impossible the creation of estates tail. It is not within our province to advise the abolition of a rule which perfectly fits in with a public policy so long and so well established; much less are we called upon to exercise legislative powers."

In *Stephenson v. Hagan*, 15 B. Mon. 282, it is said that the policy of the rule, even in this country, had been vindicated on the ground of its preventing the estate, in cases to which it applied, from being locked up during the period of a life, however long, and then being subjected to a division into minute particles among numerous heirs, the infancy of some or all of whom might render portions or the whole of it still longer inalienable. But this evil, great or small, was not removed by the abolition or rejection of the rule in *Shelley's Case*. The general law of the land, even before the adoption of the Revised Statutes, allowed, as they now do, a limitation after an estate for life, provided it was so constructed as to take effect, if at all, within a life or lives in being at twenty-one years, and the usual period of gestation afterwards. The abolition or re-

jection of the rule in *Shelley's Case* did not either give or enlarge this power of disposition, but only allowed it to be made by words which the parties understood and used for making such a disposition, and supposed to be effectual for that purpose, but which under the rule in question would often so operate as to defeat the manifest intention of giving the first taker a restricted interest and power which would not enable him to destroy the interest intended to take effect in others after his death.

The fact that the rule has been abolished in whole or in part in twenty-seven states is strong confirmation that it was thought not to have been so inconsistent with the conditions existing as not to have been adopted as part of the common law. *Doyle v. Andis*, supra.

But "this policy," said the court in *Waters v. Lyon*, 141 Ind. 170, 40 N. E. 662, "does not seem in harmony with the spirit of our institutions, and, accordingly, the rule in *Shelley's Case* has been abrogated by statute in many of the states. . . . This arbitrary and imperative character of the rule makes it repugnant to our sense of freedom of action, and often also to the principles of justice in the disposition of property. Accordingly, when a grant or devise does not come squarely within the rule, this court will not extend its operation."

⁴⁹*Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

⁵⁰*Goodright v. Wright*, 1 P. Wms. 397.

In *Schoonmaker v. Sheely*, 3 Denio. 453, it is said that in England, where the law of primogeniture prevails, it was necessary to use the word "heirs" in the plural in a limitation in tail, so as to include the whole line or succession of heirs; and the decision in *Shelley's Case* was based upon the principle that if the heirs male of the body of Edward Shelley had been construed to be words of purchase, it would have vested the title in his oldest son or first heir as on original estate tail in him, and would thus have excluded all the other male children and their descendants from inheriting the estate under the settlement, even if the issue of such oldest son had afterwards failed, and that it was necessary, therefore, to construe the word "heirs" first used as a word of limitation only, and to reject the superadded words of limitation as useless. It is contended that a different rule of construction should be applied here, where the law of primogeniture is abolished, although the same words are used in the conveyance

said, in 1857, that if the rule in Shelley's Case were *res integra*, he thought the rule would not at that day be established.⁵¹

On the other hand, it has been said that, had it not been for the good practical results of the rule, the courts would probably have struggled to escape from it, rather than have consistently upheld it, whenever it was technically correct to do so; that no one could study the mass of decisions on this subject without being struck with the extent to which the rule in Shelley's Case had been carried, and with the comparatively few cases in which the doctrine laid down in Archer's Case, 1 Coke, 66 b, had been held practicable; and that this was the more remarkable as the rule in Archer's Case gave effect to, while the rule in Shelley's Case almost always defeated, the particular intention of the settlor or testator.⁵²

It would seem, however, that the mere desire to facilitate alienation of property is not an adequate reason for sustaining the rule, although the desire to have the rules of property settled might be. It is true that the rule does tend to disencumber estates, and facilitate the alienation of property. But there is nothing in English or American institutions or traditions which would prevent the carving of a life estate out of a fee. It is, indeed, desirable that land shall be alienated as freely as possible, but this end is not to be secured, so far as the suspension of a fee for a life is concerned, in violation of the intention of the author of the instrument. A careful examination of all the cases will strongly incline the reader to the view that, of the various reasons given for the adoption of the rule, probably that advanced by Mr. Hargrave, to the effect that the decision was necessary to maintain the distinction between estates by

descent and estates by purchase, comes the nearest to being the true ground for the decision in Shelley's Case. The rule itself probably sprang from feudal policy, but whatever the original policy may have been for the maintenance of the distinction between descent and purchase, that distinction was firmly established when Shelley's Case was decided, and has been maintained in full force even to this day. All speculative reasons to account for this fact may be cast aside; it is important only to remember that an estate acquired by descent is one thing, and an estate acquired by purchase quite another, each having its own incidents, just as an estate in fee simple is one thing, and an estate for life or for years a different thing, each having its own incidents. There can be no doubt, no possible controversy as to the fact, that the two estates are different. No one questioned it when Shelley's Case was decided. No one would question it now.

When, under the rule, it is declared that the word "heirs" is a word of limitation of the estate, it is meant that that word points out the line of succession in which the estate is to go; and when it is said it is not a word of purchase, it results that it is a word of descent, as descent and purchase are the only two modes of acquiring real estate. Hence it follows that, although the estate of the first taker was in form a life estate, the rule vests the entire estate imported by the limitation in him, as no one could take as heir of another in whom there was no descendible estate.⁵³

Bearing this in mind, therefore, we are in a position to determine whether the decision in that case was a just one and in accord with English theories of transmission of property to descendants and heirs, and, also, whether, if it were a new question in

or will here which are there held to give the first tenant of the freehold an estate in fee or in tail. That might be a good reason for abolishing the rule in Shelley's Case entirely, with entails and primogenitures, as we have done by statute in this state. But it would be improper for the courts to attempt to abolish a settled rule of property which has existed for a century and a half, merely because the reasons upon which the rule was originally based no longer exists.

⁵¹ *Grimson v. Downing*, 4 Drew. 125.

⁵² *Lindley, L. J.*, in *Evans v. Evans* [1892] Ch. 173.

⁵³ *Williams v. Williams*, 10 Heisk. 566.

In *Hancock v. Butler*, 21 Tex. 804, it is said: "Without attempting a severely accurate definition, but for purposes of illustration, it may be said that the law does not permit a grantor to create an inheritable estate, divide it up into sections of certain or uncertain periods, and fasten a section thereof upon the first taker, with

the reduced dimensions of a life estate only. That is in violation of the rule by which an inheritable estate is created. For, if a life estate only be clearly granted to the first taker . . . from all the terms of the deed taken together, then his heirs cannot inherit the estate from him, and it cannot be truly said that he takes an inheritable estate. The fact, on the other hand, of its being an estate descending to his heirs in succession, is inconsistent with the fact of the first taker's having a life estate only, and therefore, if it appears from the deed that it is by descent from the first taker that certain persons as his heirs must derive their title, then that forces back on him (that from which alone such a result could flow) an inheritable estate with all its attributes; although other parts of the deed might indicate an effort to confer on the first taker a life estate only."

the United States, it would be likely to be decided in the same way, as in accord with American ideas of the transmission of property to descendants.

It is doubtful whether one who is familiar with English institutions can read Shelley's Case without being convinced that the wishes of Edward Shelley, the ancestor, were carried out by the rule therein applied. Full effect was given to his probable intention with respect to the course the property should take after his death. See *supra*, II. The conclusion the judges reached was that Shelley desired the property to pass to his own heirs in a regular course of descent. Having decided this, they had to hold that the ancestor would take the fee, as they would have to hold to-day. The only other decision the court could have come to was that Shelley, the ancestor, did not want the property to descend to his own male heirs, but to the heirs of his male heir living at his death. Would Shelley be likely to wish the property to go to his grandchild? or, would he want it to descend to the uncle of the grandchild, Shelley's second son? There was nothing to point to Shelley's real intention, except the limitation to the heirs male of his body, after the life estate. Were the judges wrong or right? Did they decide as Shelley would have decided? The fact should be kept in mind that Shelley, the ancestor, who was the life tenant, was dead. The only question before the court was how the remainder should be disposed of.

It should be remembered that in answering this question one must deal with English institutions and English ideas of landed property transmission. It was the English idea to transmit property to descendants or heirs in such a manner as to preserve the dignity of the ancestor's name and family. The Englishman for this purpose looked far into the future, and to him the course that the property was to take from generation to generation was of far more importance than provisions for the maintenance of even his own children, it being the rule to prefer the male blood to the female, and the elder son to the younger. A perusal of the modern English wills shows the prevalence of the same policy to-day. The judges in Shelley's Case, as before stated, had no positive evidence to show how Shelley wanted his property to go after his death; but they decided in a manner to give effect to the English ideas of descent; they, in effect, decided that there was nothing to show that the word "heirs" had not been used in its technical sense; and they, without much doubt, decided, as between Shelley's grandchild, who was then Shelley's heir male, and Shelley's second

son, who was not then his heir male, as Shelley himself would have decided. It has been intimated in some recent English decisions that, if the rule in Shelley's Case were a *res integra*, the decision to-day might be different; but it is exceedingly doubtful whether such a reversal of the rule would be just even to-day in England; for, if the decision were the reverse from what it was in Shelley's Case, there would be great likelihood of thwarting the intention of English grantors or testators, that property conveyed descend in a regular course for many generations to their own heirs.

To say, however, that the decision in Shelley's Case was just and in accord with English ideas of the transmission of landed property, is not to say that it would be just and likely to give effect to the intention of American grantors. In America, the purpose of transmitting property to descendants is quite different from what it is in England. The primary object in this country is to provide for the immediate descendants, without a very distant glance into the future. Therefore if A should devise lands to B for life, remainder to the heirs of B, it would be quite probable, as Chancellor Kent said, to suppose that he intended the heirs to take by purchase, from the very fact that he limited the first taker's estate to an estate for life; since he might be supposed to know that it is impossible to follow a life estate by an estate in fee by descent to the life tenant's heirs. The rule in Shelley's Case gave effect to what has been deemed the paramount intent. See *infra*, XII. b. The paramount intent in England may justly be said to be the intent as to the course the property shall take in succession; but it is doubtful if such would be the paramount intent in America, if it is deemed that two intents are shown by the limitation to B for life and the limitation to his heirs. The paramount intent here would probably be the provision for the life tenant. Indeed, many of the courts in this country state that the rule in Shelley's Case thwarts the intention of a grantor or deviser,—meaning the intention to give the first taker but a life estate, as if this were the only intent.

The statutes in this country abolishing the rule in Shelley's Case seem to be more in accord with American ideas of the transmission of property to descendants, as the rule in Shelley's Case seems to be more in harmony with English ideas. Therefore it would appear that the rule is reasonable when applied to English ideas of transmission of landed property, since it tends to give effect to the paramount intention; but that it is unreasonable when applied to grants or devises of property in America,

since it tends to thwart the paramount intent here.

Neither the rule in Shelley's Case nor the statutes, however, prevent a grantor or testator from disposing of his property in the one way or the other, if he so chooses. If A grants property to B for life, remainder to the heirs of B, the rule in Shelley's case gives the property to B's heirs by descent, necessarily requiring that B take the fee. The statutes under like circumstances give the property to the heirs of B by purchase, necessarily giving B the life estate. But neither the rule nor the statutes prevent A from sending the property in a different channel, if he will only explain that he means to use the word "heirs" in a different sense from that in which the statutes or the rule deem it to have been used if standing alone.

VIII. Operation and effect of rule. a. Entire estates.

"It is just to allow individuals," said Chancellor Kent, "the liberty to make strict settlements of their property in their own discretion, provided there be nothing in such dispositions of it affecting the rights of others nor inconsistent with public policy or the settled principles of law. But this liberty of modifying at pleasure the transmission of property is in many respects controlled, as in the instance of a devise to

a charity or to aliens or as to the creation of estates tail; and the rule in Shelley's Case only operated as a check of the same kind, and to a very moderate degree. Under the existence of the rule, land might be bound up from circulation for a life, and twenty-one years afterwards, only the settlor was required to use a little more explicitness of intention, and a more specific provision. The abolition of the rule facilitates such settlements, though it does not enlarge the individual capacity to make them."⁵⁴ But, as already pointed out, the abolition of the rule does not permit the creation of an estate of inheritance in the heirs, preceded by a life estate in the ancestor.

The operation of the rule is as follows: Whenever the ancestor takes an estate of freehold or frank tenement, and an immediate remainder is thereon limited in the same conveyance to his heirs or heirs in tail, such remainder is immediately executed in possession in the ancestor so taking the freehold, and therefore is not contingent or in abeyance.⁵⁵ The principle is the same as that by which, if one seised in fee in England devised to his eldest son in fee simple, the son shall take by descent, and not under the devise; for although the intention that he shall take by devise is express, yet such intention, being in manifest fraud of the rights of third persons, shall not be carried into effect.⁵⁶ Where the re-

⁵⁴ 4 Kent, Com. 232.

⁵⁵ Fearnie, Contingent Remainders, 28.

The rule means no more than that the words "heirs" and "heirs of the body" are never words of purchase; and where a devise is to them, as they can take only by descent, the latter estate must be in the ancestor. Buist v. Dawes, 4 Rich. Eq. 423.

The effect produced by the rule is that, in all cases coming within its influence, the remainder is merged in the particular estate, which is thereby enlarged or expanded into an estate in fee or in tail, so as to permit those in remainder to take either as heirs general or as heirs of the body of the first taker, which they could not do if the ancestor took an estate only for life. Price v. Price, 5 Ala. 578.

The effect of the rule was, in the case of an estate expressed to be for life, to enlarge such estate, by force of the words "remainder to heirs or heirs of the body," into a fee simple or fee tail in the first taker; while, in the case of an estate not expressed to be for life, the superadded words "remainder to his heirs or heirs of his body" did not cut down the estate to one for life in the first taker, but only determined the character of the fee by prescribing the class of heirs to which the inheritance should descend. Mason v. Pate, 34 Ala. 379.

To the same effect, Ewing v. Standefer, 29 L.R.A. (N.S.)

18 Ala. 400; *Simpers v. Simpser*, 15 Md. 160.

The rule in Shelley's Case, if applied to real property, enlarges the estate for life into an inheritance, and gives to the tenant for life the capacity of a tenant in fee, by which he can defeat the entail or strict settlement intended by the party. If the rule be applied to personal property, it makes the tenant for life absolute owner, instead of being a mere usufructuary, without any power over the property beyond the enjoyment of it for life. 4 Kent, Com. 226; *Edmondson v. Dyson*, 2 Ga. 307.

Where the rule applies, a freehold of inheritance vests in the first taker, notwithstanding the words describing it, apart from those appointing his heirs to succeed him in ownership, would create only a freehold not of inheritance. *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013.

Under the rule in Shelley's Case, if the first taker is given a life estate, and the inheritance passes to his heirs or to the heirs of his body, either mediately or immediately, the first taker receives the whole estate. *Brown v. Brown*, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81.

⁵⁶ *Williams v. Houston*, 57 N. C. (4 Jones, Eq.) 277.

In *Perrin v. Blake*, 6 Greenleaf's Cruise, Real Property, 319, Lord Mansfield, in the King's bench division, said that the real

mainder is given to the very persons who would, without such remainder, take by descent from the life tenant, they are held to take by descent, and not by purchase.⁵⁷

The rule unites the remainder given to the heirs with the life estate in the ancestor, not because this was intended by the grantor, but because by the rule itself the heirs in such a case cannot take by purchase under the designation, but must take by descent from the ancestor, who must therefore have the inheritance in him.⁵⁸

sense and meaning of the rule was this: If the testator gives an estate for life only to A, remainder to the heirs of A's body, if the court had said that A was only a tenant for life, there would have been a contingent remainder to his issue, and then the issue would have been liable to be barred by any forfeiture of the tenant for life; and if he had made an estate *pour autre vie*, the remainder was gone, so that the best way of complying with the intention was to give him an estate tail, by which means the issue were protected by the statute *de donis*; and if an estate only for life was given, as it could have no use in the world but to cheat the lord of the feudal services, the law very prudently said that in such cases it should be an estate tail.

⁵⁷ Smith v. Smith, 24 S. C. 304.

In Evans v. Evans [1892] 2 Ch. 173, Lindley, L. J., said: "The rule in Shelley's Case is a rule of law applicable to deeds or wills, by which real property is given to A for life, with remainder sooner or later to his heirs in fee or in tail; and I take the rule to be that, if in any instrument the word 'heir' or the word 'heirs,' or the two words combined, are used in the sense of all the heirs of a person who, under the same instrument, takes a life estate in real property, and no other heirs, the property given to the heir or heirs of the first taker is in point of law given to him, although it is in terms given to him for life only. In the case supposed the rule requires the heir or heirs to take by descent from him, and not by purchase, as they might if the property were limited to them by name or otherwise than simply as his heir or heirs."

⁵⁸ Berry v. Williamson, 11 B. Mon. 245.

The rule operates by attaching to the estate for life the estate intended to be a remainder limited to the heirs, and by enlarging the estate of the ancestor from a life estate to a fee; it in effect destroys the estate intended for the heirs. Such, at least, is its effect in modern times, as well when the subsequent limitation is to the heirs of the body, as when it is to the heirs general, of the first taker. Turman v. White, 14 B. Mon. 560.

⁵⁹ Fulton v. Harman, 44 Md. 251.

In Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762, it is said that where the words "heirs or heirs of the body" are used, the estate becomes immediately executed in the ancestor, who becomes seised of an estate of inheritance. There are well-recognized 29 L.R.A. (N.S.)

The freehold estate in the ancestor and the remainder limited to the heirs unite and become an entire estate in the ancestor, so that, if the ancestor dies intestate, his heirs shall take by descent from him, and not as purchasers under the original limitation.⁶⁰ The heirs in such case, therefore, take ~~as~~ heirs, and it is not in the power of the testator to prescribe a different qualification to heirs from what the law prescribes when they take in the character of heirs.⁶¹

exceptions to this rule. In the first place, whenever the testator or grantor annexes words of explanation to the word "heirs," indicating that he meant to use the term in a qualified sense, as a mere *descriptio personarum* or particular designation of certain individuals, and that they, and not the ancestor, were to be the points or termini from which the succession to the estate was to emanate or take its start, then, in all such cases, where the word "heirs" is thus explained or restricted, it is to be treated as a term of purchase, and not of limitation. See *infra*, XIV.

Where there is a devise to one for life with remainder to his heirs, the latter clause is not a distinct devise enabling the heirs to take the remainder by purchase, but one which serves only to qualify and enlarge the estate of the first taker; to convert what would otherwise have been an estate for life into an estate of inheritance in fee or in tail, according to the terms of the limitation; and, as a necessary consequence, the first taker may alienate the estate and defeat the title of the heirs. Richardson v. Wheatland, 7 Met. 169.

A remainder limited over to the heirs is executed immediately in possession in the ancestor, and, notwithstanding the express limitation in the devise to the life tenant of an estate for life, he becomes seised of an estate in fee. Den ex dem. Hopper v. Demarest, 21 N. J. L. 525.

When it is ascertained by interpretation that a testator has given a life estate to one, and a remainder of the same quality to the heirs of the same person, the estates necessarily close together and form one estate of inheritance in the so-called life tenant. Williams's Appeal, 83 Pa. 377.

The rule operates to give the ancestor an estate for life in the first instance, and, by force of the devise to his heirs, general or special, the inheritance also, by conferring the remainder on him as the stock from which alone they can inherit, and the source from which alone inheritable blood can spring. Carroll v. Burns, 108 Pa. 386; Vowinkel v. Patterson, 114 Pa. 21, 6 Atl. 470.

⁶⁰ Kuntzleman's Estate, 136 Pa. 142, 20 Am. St. Rep. 909, 20 Atl. 645.

If an estate of freehold be given to the ancestor, and a remainder be thereon limited to his heirs or the heirs of his body, such remainder is immediately executed in possession in the ancestor so taking the free-

The rule has also been thought to operate by merger.⁶¹

b. Joint and successive estates.

Where a freehold estate is either jointly, severally, or successively given to two persons who are capable of having a common heir, with remainder to their heirs, the rule operates, and such persons take a joint inheritance in fee.⁶²

And a grant of a joint freehold to a man

and he takes an estate in fee or in tail, according to the terms of the limitation. *Williams v. Foster*, 3 Hill, L. 193.

Under the rule in *Shelley's Case*, if an estate of inheritance is given to the ancestor, and the remainder is therein limited to his heirs or to the heirs of his body, such remainder is immediately executed in possession in the ancestor, so that the ancestor takes the whole estate in fee simple, if the limitation be to his heirs generally; in fee conditional, if the limitation be to the heirs of the body. *Clark v. Neves*, 76 S. C. 484, 12 L.R.A. (N.S.) 298, 57 S. E. 614.

But for the prevalence of the rule, says the court in *Campbell v. Rawdon*, 18 N. Y. 112, it was always conceded that a limitation to a person for life with remainders to his heirs would give a fee to the latter by purchase, without any other words of perpetuity; and the struggle was between the rule and the contingent remainder,—in other words, between the fee in the heir and the fee in his ancestor; it being never doubted that the limitation to the heirs created an estate in fee in one or the other.

According to the rule, a conveyance or devise to a man for life, and then to his heirs, passes a fee to the ancestor. An exact construction would give him only a life estate, and the remainder to his heirs as purchasers. But the rule in that case united the fee given in terms to the heir to the fee estate of the ancestor, and regarded the whole estate as vested in him, thus forming an admitted exception to the creation of contingent remainders. *Ibid.* The use of the word "exact," however, does not seem very appropriate. The construction in *Shelley's Case* was an exact construction. It is true, however, that if the construction had been different,—the word "heirs" had been deemed to have been used as a word of purchase,—it would have vested a life estate in the ancestor and a contingent remainder in his heirs.

In *Chamblee v. Broughton*, 120 N. C. 10, 27 S. E. 111, it is said that it is true the rule contradicts and thwarts the intent of the grantor or deviser whose express purpose is to confer an estate for life only upon the first taker is enlarged by an arbitrary rule of law into a fee simple, and the express purpose to confer all except a life estate upon the heirs is restricted so as to render them nothing.

The effect of the rule in *Shelley's Case* is that, instead of a contingent remainder in L.R.A. (N.S.)

and wife for life is not taken out of the rule by a limitation over to their heirs, on the theory that nobody can be the heirs of both but their children.⁶³

If, says Mr. Fearne, "the limitation of the freehold be not joint, but successively, as to one for life, remainder to the other for life, remainder to the heirs of their bodies, there, it seems, the ultimate limitation is not executed in possession, but gives them a general remainder in tail."⁶⁴ And if the limitation of the inheritance be to

the heirs, the estate of inheritance is vested in the ancestor. *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300.

⁶¹ The learned writers on the subject are not agreed as to the mode in which the rule operates. On the one hand, it is assumed that the limitation to the heirs, by virtue of some force of attraction, unites and coalesces with the limitation of the freehold to the ancestor, and thus operates to vest in him a fee simple or a fee tail, as the case may be, divided or split by intervening limitations, where there are any. On the other hand, it has been maintained with much plausibility that there is no such union or consolidation, but that the limitation to the heirs is executed in the ancestor, to whom a gift is implied, so as to vest in him another and larger estate in which the particular estate of freehold becomes merged, when there are other intervening limitations. This has, at least, the merit of getting rid of the stumbling block which the opponents of the rule find at the very threshold. If the rule operates by merger, it cannot matter in any view of the rule how anxiously or how strictly the particular estate is tied down and confined to a mere life estate. *Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

⁶² *Walker v. Taylor*, 144 N. C. 175, 56 S. E. 877.

Where there is a joint limitation of the freehold to several, followed by a joint limitation of the inheritance in fee simple to them, as an estate to A and B or for their lives or in tail, and afterwards to their heirs, so that both limitations are of the same quality, that is, both joint, it seems the fee vests in them jointly. And so, if the limitation of the freehold be to baron and feme jointly, remainder to the heirs of their bodies, it is an estate tail executed in them, as they are capable of issue, to whom such joint inheritance can descend. *Fearne, Contingent Remainders*, 35.

⁶³ *Auman v. Auman*, 21 Pa. 343.

But in *Hall v. Hankey*, 98 C. C. A. 173, 174 Fed. 139, a deed of property to a husband and wife during their, or either of their, natural lives, and in fee to the heirs of the husband and his wife, was held not to be within the rule in *Shelley's Case*, since this was declared to limit by unmistakable implication, the heirs to particular bodies.

⁶⁴ *Fearne, Contingent Remainders*, 36.

The rule in *Shelley's Case* does not apply to a devise to a testator's wife for life, then

several men or to several women in tail, instead of fee simple, though the freehold be to them jointly, they take several estates of inheritance, because they cannot have issue between them or among them as a man and woman may. And the same rule extends to other cases where the relative situations of the grantees renders the possibility of issue between or among them more remote than what is termed a simple or common possibility, or else is inconsistent with the laws of marriage.⁶⁵

If the particular estate be to A and B for their lives, and after their deaths to the heirs of B; or to husband and wife and the heirs of the body of the husband; or to two men and the heirs of their two bodies, or the heirs of the body of one of them,—the estates in tail or in fee are said to be executed *sub modo*; that is, to some purposes, though not to all. For though they are so far executed in or blended with the posses-

sion, as not to be grantable away from or without the freehold, by way of remainder, yet they are not so executed in possession as to sever the jointure, or entitle the wife of the person so taking the inheritance to dower; and in the said case of a limitation to husband and wife and the heirs of the body of the husband, his wife having a joint estate of freehold with him, and there being no moieties between them, a recovery against him with single voucher will not bar the issue or remainder; though his estate tail has been held to be so executed in possession that his feoffment was a discontinuance.⁶⁶

o. Life estate in feme; remainder to heirs of body of baron and feme.

If there be a limitation to the *feme* for life, remainder to the heirs of the body of baron and *feme*, this is no remainder in the

to his son for life, then to the son's heirs and their heirs and assigns, so as to vest an estate in inheritance in the testator's son during the life of his mother, and therefore his deed of the premises made during the life of the mother conveys nothing. *Hall v. Nute*, 38 N. H. 422.

⁶⁵ *Fearne, Contingent Remainders*, 36.

The rule applies to a devise in trust for the testator's daughters during their natural life, and for the survivors or survivor for life, with remainder over to the heirs at law of the said daughters, the daughters taking joint estates of inheritance. *Walker v. Taylor*, *supra*.

Where an estate for life was limited jointly to two or more persons incapable of having a common heir, as to a nephew and niece, and the remainder was limited to the heirs of their bodies, it was held that each ancestor would take a several inheritance in fee tail, in such part as would be the share of the heirs of his body, according to the number of joint tenants to whom the freehold is given. *Wright v. Gaskill*, 74 N. J. Eq. 742, 72 Atl. 108.

A devise to two daughters for their lives and the survivor of them, the will providing that, should the daughters both die leaving no issue, the property should go over, was held to create an estate tail in the first takers, enlarged to a fee by statute. *Arnold v. Muhlenberg College*, 227 Pa. 321, 76 Atl. 30.

⁶⁶ *Fearne, Contingent Remainders*, 36.

Where a limitation was to a woman for the term of her natural life, and, in the event that her husband should outlive her, then to him for and during the term of his natural life, and after the termination of the said life estates, then to the heirs of the husband, it was held that the husband took a contingent remainder, and that, until the happening of the contingency, the rule in *Shelley's Case* could not operate so as to vest in him an indefeasible fee. *Starnes* 29 L.R.A. (N.S.)

v. Hill, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011.

Where the grant was to a man and a woman during their natural lives, then to the woman's heirs at law, it was held that the woman took a fee in the whole tract of land, expectant as to one moiety upon the determination of the man's life estate in that moiety, or subject to that life estate. *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300. The court says: "It must be conceded the rule only applies when the subsequent limitation is to the heirs of him to whom the preceding estate was given, but nowhere has it been affirmed in express terms, by either a court or a text writer, that the ancestor must take the whole of the preceding estate, or, if there is more than one preceding estate, that he must have all of them. There is just as much reason for requiring him to have all of them when several antecede the remainder, as there is for requiring him to have the entire preceding estate when only one precedes the remainder. It must be remembered that the rule merely acts upon the words of inheritance, and does not affect the rules for determining the quantity of estate conveyed or the number and connection of the owners of the land."

"Where title to lands is derived by deed limiting it to a person and her husband during their lives, and to the heirs of her body forever, the grantees in the deed take an estate tail under the rule, and the children take by descent, and not by purchase, and the husband is entitled to the estate by curtesy, and there can be no partition." *Patterson v. Patterson*, Dayt. 288, cited in 3 Laning, Ohio Cyc. Dig. 5865.

A grant to a man and his wife, and the survivor of them for life, the remainder to the heirs at law of the wife forever, conveys a fee to the surviving wife, under the rule in *Shelley's Case*. *Kepler v. Reeves*, 7 Ohio Dec. Reprint, 34.

In *Griffiths v. Evan*, 5 Beav. 241, a de-

feme, for the freehold is limited to her alone; and as the person who is to take in remainder must be heir of both their bodies, if the *feme* should die before the baron, there can be no one to answer that description when the particular estate determines, because the baron cannot have an heir during his life; nor could it be involved or flow into the limitation to the *feme* herself, as not being confined to her own heirs; therefore the remainder is in contingency.⁶⁷

view of freehold estates to testator's daughter for life and the life of her husband, and after their deaths to the use of the lawful issue of the body of the wife forever, the testator empowering and authorizing the daughter, for want of such issue, to settle and dispose of the estate as she should think fit by will, was held to create an estate tail in the daughter, with a power of appointment.

Under a deed by which lands were conveyed to a man and his wife during the term of their natural lives, and to the heirs of the wife and her assigns forever, to have and to hold unto the said husband and wife during the term of their natural lives, and to the heirs of the wife and their assigns forever, it was held that the wife took a fee simple. *Badgley v. Hanford*, 12 N. J. L. J. 75. The court said that where the particular estate is granted to two, with a limitation to the heirs or heirs of the body of one of them, the inheritance is executed in the person to whose heirs it is limited.

In *Clithero v. Franklin*, 2 Salk. 567, A. covenanted to stand seised to the use of himself and M., his wife, for their lives, remainder to the heirs male of A. on the body of the said M. begotten, with remainders over. It was held that the wife's estate hindered the entail from executing in A., so that it was only a kind of contingent estate after the death of the wife, and the entail therefore could not be tacked to the estate for life of the husband during the life of the wife, because during her life there was an intervening estate.

For effect of conveyance to man and wife, remainder to his heirs, see also *BAILS v. DAVIS*.

⁶⁷*Fearn*, Contingent Remainders, 38.

In *Frogmorton ex dem. Robinson v. Wharrey*, 3 Wils. 125, A., on the marriage of his son, levied a fine and declared the uses to himself during the joint lives of himself and his son L., and after the death of either of them, to the use of S. for her life, and after her death to the issue male of the said S. and L. and the heirs of their bodies, and, in default of such issue, to the use of the heirs to be begotten on the body of S. by the said L., remainder to the right heirs of A. The marriage took place, and S. died leaving five daughters and no son. A. died leaving L., his son and heir. There was a question as to the estate which L. took, and the court resolved, first, that if he had been joint tenant with his wife

The language of the instrument being ambiguous, the question to be determined in the particular case is whether the heirs of the man and woman, or the heirs of the woman alone, were intended by the limitation in remainder.⁶⁸

d. Intermediate estates.

Intermediate estates between the life estate and the remainder will not prevent the

for life, this would have been an estate tail in both, as the word "heirs" is not applied to anybody in particular; secondly, that neither the husband nor the wife had an estate tail, not the husband, because he had no prior estate for life, nor the wife, because, though she took an estate for life, yet the word "heirs" was not applied to the heirs of her body; thirdly, that it was a contingent remainder to the heirs of both of their bodies.

⁶⁸In *Gossage v. Taylor*, Style, 325, R., upon the marriage of his son L. with S., levied a fine on certain lands to the use of himself during his own life and the life of L., his son, and afterwards during the life of S., the wife of L., remainder to the use of the heirs to be begotten upon the body of S. by L., her husband. The question was whether, by the word "heirs," the heirs of L. and S., his wife, were intended, or whether the estate was intended to be limited to the heirs of S. only, and that L. should have only an estate for life in the lands. It was held that the word "heirs" related to both their bodies. It was urged, among other reasons, that the limitation inclined more to the heirs of the wife than to the husband, for the words "upon her" was as much as to say "of her," but the court held this reason to be of no weight. That the words were the same as if he had said, "to the heirs of the husband and wife begotten upon the wife." It was also urged that the intention of the donor was such, by the circumstances of the entire limitations, that the husband should not have such an estate whereby it would be in his power to deprive his issue, and that therefore the word "heirs" was to be applied to the wife, and not to the husband, for, if it were to both, the husband might destroy the estate of the issue, contrary to the donor's intent. To this it was replied by the court that a meaning was not to be framed against plain words which showed the donor's intent to be against such contention; that the husband could not bar the estate tail, for the wife had an estate for life, and if she should survive, she might revive the remaining estate.

In *Den ex dem. Trickett v. Gillot*, 2 T. R. 431, it was held that where an estate is limited by deed to husband and wife, and the heirs on the body of the wife by the husband to be begotten, both have an estate tail. But it was said that if the remainder were limited to the heirs of the body of the wife by the husband to be be-

rule from operating,⁶⁹ provided the other requisites are present, although they may modify the method in which it operates. There were intermediate estates in Shelley's Case itself. See *supra*, II.

Where the ancestor takes an estate of freehold, and there is in the same conveyance an unconditional limitation to his

heirs, with the interposition of some intermediate estate, either vested or contingent, though the subsequent limitation vests immediately in the ancestor and becomes a vested remainder, yet the two limitations are united and executed in the ancestor only until such time as the intervening limitations become vested, and they then open

gotton, an estate tail vests in the wife solely. The contention in this case, which was upheld by the court, was that the limitation fell within the latter part of the 28th section in Littleton, where it is said that "if lands be given to the husband and wife, and to the heirs which the husband shall beget on the body of the wife, both have an estate tail;" that those words were in substance and legal effect the same as in the present case, "to the heirs on the body of the wife by the husband to be begotten." Lord Coke in his commentary on this section said: "This word, 'heirs,' is *nomen operativum*. To which of the donees it is limited, it createth the estate tail; but if it incline no more to the one than to the other, then both take. And therewith accordeth the case in 3 E. 3, 32, where it appeareth *quod R. S. dedit J. R. & M., uxori ejus, & hæredibus quos idem I. de corpore ipsius M. procrearet*, &c.; and this was adjudged to be an estate tail in them both, because the wife is equally tailed to the heirs of the baron as to the heirs of the wife." The reasons peculiarly applied to the present case, because here the estate was not limited more to the heirs of the wife than to those of the husband. It was said in the argument that though, perhaps, the distinction between the words "of the body of the wife," as in Littleton, and "on the body," as in the present case, might at first appear rather subtle and refined, yet inasmuch as it had been settled and acted upon uniformly from the time of Edw. III. hitherto, it would be extremely dangerous and attended with infinite inconvenience if it were to be shaken.

⁶⁹ It is hardly necessary to observe that it was never doubted that the operation of the rule in Shelley's Case is not to exclude remainders intervening between the prior estate of freehold and the subsequent limitation to the heir or heirs of the body of the tenant for life, although the point was actually argued in *Doe ex dem. Nicholson v. Welford*, 12 Ad. & El. 61, and nothing fell from Lord Kenyon, in *Venables v. Morris*, 7 T. R. 342, to warrant such an argument. Of course, where, as in *Doe ex dem. Nicholson v. Welford*, *supra*, the subsequent limitation is to the tenant for life himself and the heirs of his body, there is no room for the operation of the rule, but he is tenant for life under the first limitation, and, subject to intervening limitations, tenant in tail under the second limitation. Sugden, Powers, 25.

In *Haddelsey v. Adams*, 22 Beav. 266, it was held that under a devise to testator's four granddaughters as tenants in common 29 L.R.A. (N.S.)

during their respective lives, with benefit of survivorship, remainder to the trustees and their heirs, upon trust to preserve contingent remainders, remainder to the issue male of the four granddaughters successively, remainder over, the interposition of the estate to the trustees would not prevent the life estates and the estates in remainder from coalescing.

In a devise to a son for life, and at his death to his widow during widowhood, and no longer, and at her decease to go to the son's heirs, to be divided among them as the law directs in case of dying intestate, the intervening life estate does not affect the operation of the rule. *Quick v. Quick*, 21 N. J. Eq. 13.

Where the life tenant takes a vested remainder in tail, it is not material whether the remainder be mediate or immediate after the estate for life, since in either case the tenant gains the same power over the inheritance and of defeating the entail. *Brant ex dem. Provoost v. Gelston*, 2 Johns. Cas. 384.

In a conveyance in trust to a trustee for the benefit of a person for life, remainder to his children for life, remainder to his heirs, the last remainder would be in legal effect a remainder to the first taker in fee simple. *Sprague v. Sprague*, 13 R. I. 701.

The rule in Shelley's Case applies in a devise to a daughter for life, and after her death and the death of her mother to the daughter's heirs. *Kiser v. Kiser*, 55 N. C. (2 Jones, Eq.) 28.

In *Doe ex dem. Lindsey v. Colyear*, 11 East, 548, a testator gave an estate for life to A, and then, after giving estates in tail male to the first and other sons successively of A, with remainders to B, for life, and to his first and other sons successively in tail male, gave the ultimate remainder to the right heirs male of A forever. It was held that this last limitation to the heirs male of A operated with the estate for life before devised to him, to give him an estate of inheritance, either in fee or in tail male.

But where the devise was to a woman for life; if she had no issue, and died before her mother, or if she had issue who also died before the mother, then to the mother for life, it being provided that after the death of the mother, the property should be converted into money, and the proceeds thereof divided among specific legatees, and that, if the daughter should survive the mother, and die leaving issue of her body, then to said issue, it was held that during the life of both mother and daughter, the daughter took but a life estate, and that

and become separate, in order to admit such limitations as they arise.⁷⁰ The operation of the rule does not cut off the intervening estates.⁷¹

there was no occasion for the application of the rule in Shelley's Case. *Frank v. Frank*, 1 Monaghan (Pa.) 347, 17 Atl. 11.

⁷⁰ *Dennett v. Dennett*, 40 N. H. 498.

Where the devise was to the testator's son, to descend to the youngest son of his body lawfully begotten and from him to the oldest heir male of the said youngest son of his body lawfully begotten, and in failure of such issue, then to the heirs of the testator's son forever, it was held that the devise to the testator's son was not enlarged to a fee so as to cut off the estate of the youngest son at the death of the first taker. *Ibid.*

But under the rule in Shelley's Case, the remainder to the youngest son of the first taker, in that case, was held to end with his life, the first taker being seised in fee, subject to the intervening estate to the youngest son, etc. *Ibid.*

The general rule of law respecting the subsequent limitation to the heirs of the body, etc., vesting in the ancestor where he takes a preceding freehold by the same conveyance, does not operate so as absolutely to merge the particular estate of freehold, where the limitations intervening between the preceding freehold and such subsequent limitation to the heirs, etc., are contingent, because that would destroy such intervening limitations; but the two limitations are united and executed in the ancestor, only until such time as the intervening limitations become vested, and then open and become separated, in order to admit such intervening limitations as they arise. *Fearne, Contingent Remainders*, 36.

In *Bowles's Case*, 11 Coke, 79b, 25 Eng. Rul. Cas. 359, there was a marriage agreement by which T. covenanted that he would stand seised of a certain manor to the use of himself and A., his wife, for the term of their lives, without impeachment of waste, and after their deaths to the use of their first issue male, and to the male of such issue lawfully begotten, and so on to the second, third, and fourth issue male, etc., and, for want of such issue, to the issue of the heirs males of the body of the said T. and A. lawfully begotten, and for want of such issue over. It was held that this was an estate tail executed in T. *sub modo*; that is, so as not to merge the estates for life absolutely, but executed only until the birth of the first son; and that then the estates would become divided by operation of law, and T. and A. become tenants for their lives with remainder to their first and other sons, remainder to T. and A. in tail, with an ultimate limitation to the issue of the heirs of the body of the said T. and A. lawfully issuing.

One seised in fee devised land to A and his issue, remainder to B and his issue, remainder to the heirs of A. A died without issue in the lifetime of the testator, and 29 L.R.A. (N.S.)

The question of when and how the estate in remainder becomes executed in the life tenant may become important in determining the right of the life tenant's wife's dower.

B died in the lifetime of the testator leaving issue, who was defendant in ejectment, the defendant being also the heir of A, while the plaintiff in ejectment was the heir of the testator. The question was whether the issue of B, who was born after the making of the will, and so could not take jointly with the devisees, could take either as heir of the body of B or as right heir of A. It was held that, in regard to the remainder in fee limited to the heirs of A, the heir general could not take, because, notwithstanding the mean remainder, the word "heirs" was a word of limitation and the fee simple vested in the ancestor. Under the rule in Shelley's Case, therefore, he must take by descent; the ancestor having died in the lifetime of the deviser, he could not so take, because the fee was never in the ancestor. It was urged that the ancestor A having died before the testator, A himself never took, but the devise to him was void, and therefore his right heir might take by purchase; but the court said the construction of the will must be according to the import and meaning of the words at the time of making it, which in the present case was plainly to devise a fee simple to the ancestor, and that it would be wrong to interpret it according to any accident *ex post facto*, as here, the dying of the devisee in the lifetime of the deviser. *Goodright v. Wright*, 1 P. Wms. 397.

⁷¹ A life estate and an estate tail cannot unite so as to displace intermediate remainders, and to give the estate tail precedence of vested life estates limited to take effect before it; a recovery, therefore, by the first taker, will not bar the intermediate estates. *Doe ex dem. Nicholson v. Welford*, 12 Ad. & El. 61.

Where, between the life estate of the first taker and a contingent fee given to her right heirs, an estate in fee to her children was interposed, it was held that the children took as purchasers. The court said that during the lifetime of the first taker, the possibility of children continued, so that her life estate and the ultimate devise over to her collateral heirs could not coalesce. *Williams's Appeal*, 83 Pa. 377.

Under a devise to a son for life, and, after his death, to his heirs forever, containing a subsequent clause providing that, if the son should die before his wife, the latter should have one third of the property devised during her life, it was held that the son took a fee, subject to the life estate of the wife in a portion of the lands, should she survive him. *Stafford v. Martin* (Md.) 23 Atl. 734.

In *Richardson v. Wheatland*, 7 Met. 169, it was said that, under the rule in Shelley's Case, where a testator devised land to his daughter for life, and to her husband during his life, and after their deaths to the heirs of the daughter, the daughter would have a

er; ⁷³ or in determining when the remainder can be barred. ⁷³

Where the intervening estates are contingent, and the contingency has happened which destroys the estate, or the possibility of there ever being any person to take it, there is nothing, of course, to prevent the full operation of the rule. ⁷⁴

IX. Requisites of rule.

a. General statement of elements necessary.

Where the rule in Shelley's Case applies, it has been said that these five requisites must concur: (1) There must be an estate of freehold in the ancestor, or, as he has

life estate, remainder to her husband for life, remainder to the heirs in fee; that her life estate and remainder in fee would not merge, on account of the intervening life estate, the consequence being that her child, an heir at law, would take the remainder in fee by descent.

A devise to testator's son for life of the rents and profits of a farm, and at his death "to his children and their heirs, if he has any, if not, to his heirs in fee simple forever," was held to convey the fee, under the rule in Shelley's Case. The court says, however, that, as the estate was liable to be defeated by his dying and leaving children, the union was not absolute, but *sub modo*, so as to open by operation of law when that event occurred; but the event never having occurred, his estate continued. *Stewart v. Kenower*, 7 Watts & S. 288.

In *Melsheimer v. Gross*, 58 Pa. 413, there was a grant to a husband and wife for life, remainder to their children, issue of their bodies, and the heirs of such children, followed by an alternative limitation to the heirs general of the first takers. The court said that in this grant there was a limitation for life with a remainder in fee, to be satisfied before the third limitation could take effect at all, and that unless that took effect, there was no remainder to the heirs of the first takers to unite with their estate for life.

⁷² In *Duncomb v. Duncomb*, 3 Lev. 437, 10 Eng. Rul. Cas. 803, there was an estate for life in A, remainder to B and his heirs for the life of A, remainder in tail to A, viz., to the heirs male of his body, remainder over. The question was whether the remainder to B and his heirs for the life of A was such an interposing estate between the life of A and the remainder to the heirs of his body as to prevent the wife from being endowed. For the wife, it was said that the whole estate was really in A, and that the remainder to B for the life of A was no more than a possibility; so that if A committed a forfeiture, B might take advantage thereof for the preservation of remainders. But that in the meantime the whole estate was executed in A, and that, 29 L.R.A. (N.S.)

sometimes been loosely called, the first taker; (2) the ancestor must take the estate of freehold by or in consequence of the same assurance which contains the limitation to his heirs; (3) the word "heirs" must be used in its technical sense as importing a class of persons to take indefinitely in succession; (4) the interest limited to the ancestor and that to his heirs must be of the same quality, that is, both legal or both equitable; for otherwise they would not coalesce; (5) the estate limited to the heirs must be limited by way of remainder. ⁷⁵ To these requisites it should be added that the limitation of the remainder must be to the heirs of the person to whom the particular estate with which it is to unite is limited: that the word "heirs" or some equivalent

though by this possibility the estate for the life of A was not merged, yet the estate tail was executed to such a purpose that the wife should be endowed. It was held that the wife of A should not be endowed.

⁷³ Where a man covenanted on his intended marriage with his intended wife to stand seised to the use of himself and his heirs to the marriage, and after the marriage to the use of himself for life, remainder to the wife for life, remainder to the heirs males of their bodies begotten, remainder to the daughter of the husband by a former wife, remainder to his own right heirs, it was held that the ultimate limitation was not executed in possession, so that the husband and wife could bar the issue. The argument in support of the contention that the estate tail was executed in the husband and wife was that the interposing estate of the wife could not prevent the execution of the estate tail, for the remainder in tail, being next to the estate for life to the wife, merged it; and it being so merged, nothing then interposed between the estate for life to the husband, and, therefore, that ought to be merged also by the remainder in tail, and so the estate tail was executed. But it was said, on the other hand, that the estate was not executed because there was an intervening remainder between the husband's estate for life and the estate tail, viz., the estate to the wife, and that it could not be intended that, when a remainder for life was limited to the wife, it should instantly merge by the remainder in tail to the heirs of the husband and the wife. *Stephens v. Brittridge*, 1 Lev. 36. See also *Doe ex dem. Nicholson v. Welford*, *supra*.

⁷⁴ Where, after a devise to a son for life, the testator provided, "if he has no son living at the time of his death, then to his heirs and legal representatives," it was held that, having had no son, the will must be read as if the devise to the oldest son had never been written into it, and that the alternative devise brought the gift within the rule in Shelley's Case. *Eby v. Shank*, 196 Pa. 426, 46 Atl. 495.

⁷⁵ *Chippis v. Hall*, 23 W. Va. 504. To the same effect, *Doyle v. Andis*, 127 Iowa, 36.

expression must be used in limiting the remainder; and that the limitation to the heirs must be of an inheritance.

Four situations are given by Sir William Blackstone to which the rule does not apply: (1) Where no estate at all, or where no estate of freehold, is devised to the ancestor; (2) where no estate of inheritance is devised to the heir; (3) where some words of explanation are annexed by the deviser himself to the word "heir" in a will, whereby he discovers a consciousness, distrust, or apprehension that he may have used the word improperly, and not in its legal meaning, and therefore he in a manner retracts it,—he corrects the inaccuracy of his own phrase and tells any reader of his will how he would have it understood; (4)

where the testator hath superadded fresh limitations and grafted other words of inheritance upon the heirs to whom he gives the estate, whereby it appears that those heirs were meant by the testator to be the root of a new inheritance,—the stock of a new descent,—and were not considered as branches derived from their own progenitor.⁷⁶

b. Must be freehold in ancestor.

1. Reason for requirement; illustrative cases.

The first requisite of the rule is that there must be an estate of freehold in the ancestor.⁷⁷ It is apparent that this must be so,

69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18.

The rule can have application only where the following premises exist: (1) A limitation of a prior estate of freehold to the ancestor; (2) an ultimate estate in remainder to the heirs, that is, the whole line of heirs successively and indefinitely; (3) both of the estates must arise under the same instrument; and (4) the estates must be of the same character, that is, either both legal or both equitable. *Garriepie v. Oliver*, 8 B. C. 89.

The requisites of the rule are that there must, in the first instance, be an estate of freehold devised; there must be a limitation to the heirs, or heirs of the body, of the person taking that estate by that name, and not the heirs as meaning or explained to be "sons, children, etc.," that these heirs must be named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or at least so that the estate to arise from the limitation to the heirs, and the estate of freehold in the ancestor, shall both owe their effect to the same deed, will, or writing, and that the several limitations shall give interests of the same quality, both legal or both equitable. 1 *Preston, Estates*, 266; *Baker v. Scott*, 62 Ill. 86.

The conditions which must concur in order that the rule may operate in case of a devise are: first, a freehold must be devised; second, the estate of freehold must be taken by the same instrument which contains the limitation to the heirs, and, for this purpose, a will and codicil will be deemed one instrument; and, third, the interest devised to the ancestor and limited to the heirs must be of the same quality. *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65.

There are two necessary elements in every deed or will to which the rule applies: First, there must be a gift or conveyance of the freehold estate to the ancestor; and, second, there must be a limitation by way of remainder to his heirs. *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Miller v. Mowers*, 227 Ill. 392, 81 N. E. 420.

The rule was applied in all cases where 29 L.R.A. (N.S.)

an estate for life was given to the first taker, and an attempt made after its termination, without other more specific words, to vest an estate by purchase in the heirs, or heirs of the body, of the first taker. *Mason v. Pate*, 34 Ala. 379.

In *Doe ex dem. Wright v. Gooden*, 6 Houst. (Del.) 397, it is said that it is manifest from the very terms of the rule that it can apply in no case except when the devise is of an estate of freehold in the premises to a person for his life, and the same is further limited in the devise, either mediately or immediately, by way of remainder, to the heirs generally, or the heirs of the body of that person who takes the estate of freehold and the particular estate on which the remainder depends, and of no other, because it is only in such a case that the word "heirs" of either description can be construed to be a word of limitation, and not a word of purchase, or that such remainder can unite with and be executed of such particular estate of freehold in him, so as to constitute him owner in fee or in tail, as the case may be, of the premises under the rule.

For statements of requisites of rule in general, see also *WARD v. TODD* and *BAILS v. DAVIS*.

⁷⁶ *Perrin v. Blake*, *Greenleaf's Cruise*, Real Prop. 380.

⁷⁷ The rule has nothing to do where there is no estate of freehold given to the ancestor. *Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

The rule has nothing whatever to do with the limitations to the heirs of a person, unless there is a precedent limitation of a freehold estate to that person. *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011.

Where the limitation was to a woman for life, and to her husband for life should he outlive her, with remainder to the heirs of the husband, it was held that if the husband should fail to survive his wife his heirs would take as purchasers, no estate having been vested in their ancestor, the word "heirs" being *descriptio personarum*. *Ibid*.

for if there were no freehold estate there could be nothing for the words "heirs" or "heirs of the body" to operate upon, or, in other words, to limit.⁷⁸

When terms for years are spoken of, the distinction should be kept in mind between a limitation to A for years, remainder after the expiration of the term to his heirs, and

a limitation of a term for years to A and his heirs, or to A for life, remainder (of the term) to his heirs. In the former case the grantor conveys the whole fee, in the latter case only an estate for years. It is limitations of the former sort that are meant here.⁷⁹ On the question whether a limitation of a term of years to A for life,

And a devise to the right heirs of husband and wife was held to be a devise to a child of both, and as no preceding estate was given to the father and mother the child would take as purchaser. *Roe ex dem. Nightingale v. Quartley*, 1 T. R. 630.

Where, in a marriage settlement, there was a limitation to the wife of A, the grantor, for life, then to trustees and their heirs during the life of A to support contingent remainders, and then to his first, second, etc., and so on to the tenth son of his body in tail male, then to his heirs male by any other wife, and for want of such issue, to the heirs of the body of A, and for want of such issue, to the grantor's own right heirs, it was held that a fine levied by A would not bar the heirs of his body because they took by purchase, there being no life estate in A to support the subsequent limitations. *Tippin v. Coson*, 4 Mod. 380.

Where the bequest of a fund is to a trustee to be held by him until a certain contingency might happen, when he was authorized to pay it to a specified person, the fact that the will provided that in case of the latter's death before the time of payment to him arrived it should go to his heirs, was held not to bring the gift within the rule in Shelley's Case, conceding that that rule applied to personal property. *Bennett v. Bennett*, 66 Ill. App. 28, affirmed in 217 Ill. 434, 4 L.R.A. (N.S.) 470, 75 N. E. 339.

Where there was a devise of real estate in effect to A for life, remainder to B, and, if B should predecease A, a certain portion of the estate to his heirs, etc., it was contended that the devise to B was a devise to him and his heirs, and therefore fell within the rule in Shelley's Case; but the court held that the devise to B was of a vested remainder in fee, it being not necessary under the statute to add words of limitation after a devise. The devise therefore being of the fee, in remainder, instead of a life estate, the rule was inapplicable. *Glendenning v. Dickinson*, 14 West. Law Rep. (Can.) 419.

⁷⁸ Under the rule in Shelley's Case where an estate is given to one for life and then to the heirs of his body, these terms have been held to enlarge the life estate to a fee conditional, being regarded as words of limitation instead of purchase. But where they are not attached to the grant of a previous estate the quantity of which is to be ascertained, there is nothing for them to operate upon, and it cannot be said that in such case they were used as words of limitation. *McCown v. King*, 23 S. C. 232.

⁷⁹ Where no estate of freehold is devised 29 L.R.A. (N.S.)

to the ancestor, or he is dead at the time of the devise, in that case the heir cannot take by descent, when the ancestor never had in him any descendible estate. It is the same thing if the ancestor takes only a chattel interest by the devise; for if there be no vested estate of freehold interposed between the term of the ancestor and the estate of his heirs, the latter can take only by way of executory devise; and if there be such a vested estate, the contingent remainder to the heir is supported by the intermediate estate, and not by the chattel interest of the ancestor. 4 Kent, Com. 221.

"Here it appeareth that where the ancestor taketh an estate of freehold, and after a remainder is limited to his right heirs, that the fee simple vesteth in himself, as well as if it had been limited to him and his heirs; for his right heirs are in this case words of limitation of estate, and not of purchase. Otherwise it is where the ancestor taketh but an estate for years: as if a lease for years is made to A, the remainder to B in tail, the remainder to the right heirs of A, there the remainder vesteth not in A, but the right heirs shall take by purchase if A die during the estate tail; for as the ancestor and the heirs are *correlativa* of inheritances, so are the testate and executor, or the intestate and administrator of chattels." Co. Litt. 319b.

A devise of property to A for ninety-nine years if he should so long live, and subject thereto to trustees and their heirs to support contingent remainders, with remainder to the heirs of the body of A, and for want of such issue, over, was held not to create an estate tail in A. *Coape v. Arnold*, 4 De G. M. & G. 574.

Where the devise was to C for the term of ninety years from the death of the testator, if C should so long live, the premises after the determination of that term to go to the heirs of the body of C, it was held that the estate vested in the heir by purchase. *Harris v. Barnes*, 4 Burr. 2157.

Where a term of years was assigned upon trust for a person for ninety-nine years if he live so long, then to his wife for her life, remainder to the heirs of the first taker begotten on his wife, it was held that the whole term did not vest in the first taker that after the death of the husband and the wife the property should go to their children equally. *Ward v. Bradley*, 2 Vern. 23.

For absence of life estate, see also *infra*, c. 1.

remainder to his heirs, vests the absolute interest in A, see *infra*, XIX.

2. Sufficiency of freehold.

(a) In general.

An estate in a trustee in trust for the joint use and benefit of the intended husband and wife during the term of their joint lives has been held a sufficient freehold to support the rule in Shelley's Case.⁸⁰ And an estate for widowhood to be an estate of freehold within the rule, the possibility that it may terminate in the life of the widow and before there can be an heir being immaterial.⁸¹ But a devise of property to testator's son during his single life, the will providing that if he should marry and have lawful issue he should have a certain portion of testator's real and personal property to be his forever, in addition to what had been before given him, was held not to be within the rule, there being no gift or devise of the property to him for life with a devise over in default of issue, or in the event of his dying without issue.⁸²

It has been held that the freehold need not be one in possession.⁸³

(b) Freehold by implication.

The rule in Shelley's Case will operate even where the life estate is not express but results from implication. This involves the consideration of resulting uses, an intricate branch of the law.

It seems immaterial, says Mr. Fearnce with respect to the operation of the general rule respecting the limitation to the heirs, etc., attaching in the ancestor, whether the ancestor takes the freehold by express limitation or by implication;⁸⁴ in either case the subsequent remainder to the heirs of his body, etc., equally unites with it. As in a case of frequent reference where A seised in fee covenanted to stand seised to the use of his heirs male begotten, or to be begotten, on the body of his second wife; it was upon the principle laid down by Lord Coke, 1 Inst. 23a, that so much of the use as the owner of the land does not dispose of remains in him. Held by Hale, Ch. J., and two other judges, that A took an estate for his own life by implication, the use during his life being undisposed of; and it was held that the subsequent limitation to his heirs male, etc., was executed on the estate for life which he had by implication, and created an estate tail in A.⁸⁵

⁸⁰ Ferris v. Ferris, 9 Ont. Rep. 324.

⁸¹ Curtis v. Price, 12 Ves. Jr. 89.

⁸² Hess v. Hess, 67 Pa. 119.

⁸³ That the ancestor did not have an estate of freehold in possession, as where there was a devise of land to testator's son, the will providing that after his death the property was to descend to his heirs, does not prevent the rule from operating. *Chippis v. Hall*, 23 W. Va. 504.

⁸⁴ Feare, *Contingent Remainders*, 40.

Where A. seised of lands in fee conveyed them to the use of J. and M., his wife, and of the heirs male of the body of J., and afterwards to the use of the right heirs of A., and J. and M. having died without issue, it was held that the land returned to A. as his ancient reversion, and did not vest in his right heir as a remainder by purchase. *Read v. Erington*, Cro. Eliz. pt. 1, p. 321.

And where a fine was levied to the use of the wife of the conusor for life, remainder to the use of B in tail, remainder to the use of the right heirs of the conusor, it was held that the limitation to the use of the right heirs of the conusor was void, as the old use of the wife continued in him as a reversion. *Fenwick v. Mitforth*, F. Moore, 284.

So, where A enfeoffed to trustees in fee to the use of himself for forty years without impeachment of waste during his life, and afterwards to the use of C, second son of A, in tail male, remainder to the use of the right heirs of A forever, it was held that the use limited to the right heirs of A was the old use, that it was void as a re-

mainder and was merely the reversion in A. *Bedford's Case*, F. Moore, 718.

Where an estate was given to the heirs males of the testator's brother N.'s sons in a will, and afterwards in a schedule annexed an estate was expressly given to the sons of the testator's brother N., it was held that the son of N. took an estate by implication, which would unite with the estate given to his heirs male and constitute him a tenant in tail. *Hayes ex rel. Foorde v. Foorde*, 2 W. Bl. 698.

⁸⁵ Fearnce, *Contingent Remainders*, 40.

The case referred to by Mr. Fearnce is *Pibus v. Mitford*, 1 Vent. 372, in which an objection that this could not be an estate tail executed in the covenantor, because the estate for life was not by the same instrument, but by construction of law, was held not tenable, it being held that the case was the same as if the estate for life had been expressly limited to him.

"If a man seised of lands in fee make a feoffment in fee (and depart with his whole estate) and limit the use to his daughter for life, and after her decease to the use of his sonne in taile, and after to the use of the right heires of the feoffer; in this case albeit he departed with the whole fee simple by the feoffment and limited no use to himselfe, yet hath he a reversion; for whensoever the ancestor takes an estate for life, and after a limitation is made to his right heires, the right heires shall not be purchasers. And here in this case when the limitation is to his right heires, and right heire he cannot have during his life (for

But no estate for life can arise by implication by way of a resulting use to the person who was not the owner of the estate granted. As where husband and wife levied a fine on the wife's land to the use of the heirs of the body of the husband on the wife begotten, and, for default of such issue, to the use of the right heirs of the husband; they had issue; the wife died, then the issue died, and then the husband died; and the question was whether the heir of the husband or the heir of the wife should have

the lands, and the court held that no estate for life could arise to the husband by implication, because the estate was the wife's, to which he was a stranger, therefore the limitation to the heirs of the husband, etc., was void for want of a preceding freehold to support it. An implied estate in the wife for her life would not do, as she died before her husband and consequently before the remainder to his heir could commence.⁸⁶ A life estate will not result by implication in the ancestor,

non est hæres viventis); the law doth create an use in him during his life untill the future use cometh *in esse*, and consequently the right heirs cannot be purchasers; and no diversitie when the law creates the estate for life and when the party. And all this was adjudged between Fenwicke and Mitford in the King's bench; and if the limitation had been to the use of himselfe for life, and after to the use of another in taile, and after to the use of his owne right heires, the reversion of the fee had been in him because the use of the fee continued over in him; and the statute doth execute the possession to the use in the same plight, quality, and degree as the use was limited." Co. Litt. 22b.

To bring a conveyance within the class which was governed by the rule in Shelley's Case, and within the class mentioned in § 1025, a life estate and a remainder must be imported by the terms of the grant. It is not necessary, however, that such interests be expressly named. They may sufficiently appear by implication as the legal result of the terms employed. *Wilson v. Alston*, 122 Ala. 630, 25 So. 225.

⁸⁶ *Fearne, Contingent Remainders*, 49, citing *Davis v. Speed*, Shower, P. C. 104.

Where by a deed of settlement a grantor granted certain lands to the use of his eldest son for life with various remainders, followed by an ultimate remainder to the heirs of the body of the grantor, and, by will, devised a certain portion of his property after the death of his eldest son without issue, to his first and second, and all and every other son and sons, etc., and the heirs male of the body and bodies of such son and sons respectively issuing, and for want of such issue to the devisors' heirs male of his body begotten, and for want of such issue to his own right heirs, it was held that the heir of the body of the grantor and testator, on failure of the issue of both sons mentioned, took by descent, and not by purchase. *Wills v. Palmer*, 5 Burr. 2615. The court said that in case a third person had been the grantor it would have thought that the heir would have taken the estate in tail male by purchase, under the description of heir male of the body of the grantor and devisor. The descent in this case must have been founded upon a resulting life use in the grantor and testator. Mr. Fearne, in discussing this case (*Fearne, Contingent Remainders*, p. 48), says that this could not have been an immediate es-

tate for life, but an estate in remainder expectant on the determination of the uses which preceded the limitation to the heirs male of his body. The case of *Pibus v. Mitford*, supra, and *Penhay v. Hurrell*, 2 Vern. 370, admitted the immediate use to result to the grantor for life by implication where no use of freehold was limited to take effect until after his death. The case of *Wills v. Palmer* went a step further on the same principle, and implied the use for life in the grantor in remainder after uses that commenced and might determine in his lifetime. The inference therefore afforded by the several cases seemed to be that when the use was not limited away during the whole life of the grantor, and there was a use limited which could not commence until after his death, as in the case of a limitation to the heirs of his body taken by itself; whether that use were limited in the first instance, as in *Pibus v. Mitford*, or be preceded by limitations for terms of years, as in *Penhay v. Hurrell*, or by uses of the freehold or inheritance that might determine in the grantor's lifetime, as in *Wills v. Palmer*, the use results to the grantor for life; immediately in the first case, and in remainder expectant on the preceding uses in the other; where there was no express use limited to the grantor himself inconsistent with such an implication. This conclusion flowed from a rule laid down by Lord Coke that in a conveyance to use, without valuable consideration, so much of the use as is not disposed of remains in the grantor. For it is evident that the use of the present freehold, where no use at all, or a use for a term of years only, is limited to commence before the grantor's decease, is not disposed of; and that where the use is limited immediately for estates that may determine in the grantor's life, followed by a limitation that cannot take effect until after his death, the intermediate use in remainder for his life is not disposed of; for suppose the preceding use to determine in his lifetime, where, then, is the use during his life if not in himself?

In *Sir Thomas Tipping's Case*, cited in note to *Basset v. Clapham*, 1 P. Wms. 358, it is stated that upon a marriage a settlement was made by a third person to the use of the husband for ninety-nine years, remainder to trustees during the life of the husband to support contingent remainders, remainder to the wife for life. re-

however, if there has been an express limitation to him for years.⁶⁷

(c) Termination of freehold in life of ancestor.

The better conclusion seems to be that the possibility of the freehold's determining in the life of the ancestor who takes it does not keep the subsequent limitation to his heirs from attaching in himself; and that we may consider it as a general rule, that whenever the ancestor takes any estate of freehold, whether it be or be not such as may determine in his lifetime, and there is afterwards, in the same conveyance, an unconditional limitation to his right heir or heirs in tail (either immediately without the intervention of any mean estate of freehold between his freehold and the subsequent limitation to his heirs, or mediately, that is, with the interposition of some such

mean estate) such subsequent limitation to the heirs or heirs in tail vests immediately in the ancestor, and does not remain in contingency or abeyance, with this distinction, that where such subsequent limitation is immediate, it then becomes executed in the ancestor, forming, by its union with his particular freehold, one estate of inheritance in possession; but where such limitation is mediate, it is then a remainder vested in the ancestor, who takes the freehold, not to be executed in possession till the determination of the preceding mean estates,—as, if there be an estate to A for his life, or during the life of C, or any other sole estate of freehold, remainder to the heirs of the body of A, this is an estate tail executed in possession in A; but if there be an estate to A for his life, or during the life of C, or any other estate of freehold, remainder to B for life, remainder to the heirs of the body of A, this is only a present freehold in A,

remainder to the first, etc., son by marriage, remainder to the heirs of the body of the husband, remainder to the right heirs of the husband; and there was no issue of the marriage,—it was held that the remainder in fee was contingent, as the limitation to the husband was for years only, and the estate not moving from the husband, for, if it had, the remainder limited to the right heirs of the husband would have been the old reversion.

⁶⁷ Where A., by marriage settlement, conveyed lands to the use of himself for ninety-nine years if he so long lived, and afterwards to trustees and their executors for two hundred years in trust to raise portions for his children by M., remainder to the heirs male of the body of A., remainder to his right heirs, it was held that the limitation to the heirs male of the body of A. was void, no freehold being limited to any person precedent to that estate, and that no estate of freehold could result to A. for his life by implication, because another estate, viz., for ninety-nine years, if, etc., was expressly limited to him which would be inconsistent with a freehold in him by implication; and that a freehold, either express or implied, was necessary to support such limitation. *Rawley and Holland*, 2 Eq. Cas. Abr. 753.

In *Adams v. Savage*, 2 Salk. 679, A, being seised in fee, conveyed by lease and release to trustees and their heirs, to the use of himself for ninety-nine years, remainder to the use of the trustees for twenty-five years, remainder to the heirs male of his own body, remainder to his own right heirs; and the question was whether A was tenant in tail or only tenant for years. The court held that the limitation to the heirs male of the body was void because there was no preceding estate of freehold limited to support it, and that such an estate should not be implied contrary to the intent of the conveyance. And if it could be implied it must be out of the estate given to the

heirs of the body, which could not be, because this was a new use; whereas a resulting use was always from the old estate and parcel of the old use, and here the estates took effect by a transmutation of possession out of the seisin of the trustees.

In *Goodright v. Cornish*, 1 Salk. 226, K. having two sons, J. and R., devised land to J. for fifty years, if he should so long live, "and as for my inheritance after the said term I devise the same to the heirs males of the body of J., and for default of such issue, then to R." It was held that J. did not have an estate tail by implication upon the words "without issue," because the deviser had given him an estate for years by express words, and the court could not make such a construction against express words when thereby they would also drown the estate for years and make an estate of inheritance.

And where A made a settlement to the use of himself for ninety-nine years, if he should so long live, remainder to trustees and their heirs during his life, etc., remainder to the use of the heirs of his body, remainder to himself in fee, it was held that the limitation to the heirs of the body was a contingent remainder. *Else v. Osborn*, 1 P. Wms. 387.

But commenting on *Sir Thomas Tipping's Case*, supra, Mr. Fearn says that though the first limitation to the husband was only for years and then to trustees during his life, yet if the estate had moved from him the limitation to his right heirs would have been his old reversion; that consequently this difference is to be observed between a subsequent limitation to the use of the heirs special and one to the use of the heirs general, in cases where the freehold is limited away from the grantor during his life; the latter leaves the old use in himself by way of reversion, but the former is a contingent remainder to his heirs special, that is, where the limitation is given by way of use; for by a conveyance at common law the limitation

with a vested remainder to him in tail, to take effect in possession after the determination of B's estate.⁸⁸

c. Freehold and remainder must be created by the same instrument.

1. The general rule.

Where a woman was tenant for life by one deed of settlement, and the estate to the heirs of her body was limited by a second settlement, Lord Keeper Wright was in doubt whether the estate did not consolidate, though by several deeds. He said that the authorities were only in the affirmative that, if by the same deed, it shall consolidate; not negatively, that, if by different deeds, they should not.⁸⁹ There can be no doubt, however, that the rule only applies when the life estate and remainder are created by the same instrument.⁹⁰

Some of the critics of the rule in Shelley's Case have seized upon the fact that the limitation must be in the same instrument, as an evidence of its technicality and ab-

surdity. For example, in an important Iowa case, Weaver, J., said that "about the only method by which the donor can give a life estate to another, with a remainder to the heirs of the donee, and feel reasonably sure that his purpose will not be judicially thwarted, is to create the life estate and the remainder by separate instruments; and this method is probably not open to one who wishes to pass the estate by will instead of by deed. . . . It is but little short of the ludicrous to find that this rule, to which its adherents have for ages invited attention as the product of profound wisdom and as an indispensable safeguard of property rights and promoter of wise public policy, is, when reduced to its lowest terms, a simple declaration that you shall not, by a single written instrument, do that which you may lawfully and effectually accomplish by two."⁹¹ And it has been declared in Nebraska that the desired end might be accomplished by creating a life estate by deed, and devising the reversion.⁹²

The courts, however, in making such statements appear to be under a misapprehension which creates the particular estate of freehold.

In *Collier v. M'Bean*, 34 Beav. 426, there was a devise of real estate to trustees in trust for the life of testator's brother, and until the payment of testator's debts and certain legacies, with the direction to apply the rents in the payment of such debts and legacies, and then to pay them to the testator's brother for life, the estate after the brother's death being devised to the heirs of his body, and in default thereof to testator's own right heirs. The trustees conveyed to the brother the legal estate for life, and the brother then suffered a recovery. It was held that the legal remainder to the heirs of his body was not barred because the legal estate for life in the brother and the legal estate in remainder were created by different instruments.

An estate for life being given by one instrument and the limitation in tail by another, they cannot unite. *Doe ex dem. Fonnereau v. Fonnereau*, 2 Dougl. K. B. 507.

In *Habergham v. Vincent*, 5 T. R. 92, it was said that where there was a limitation to A for life in one deed, and to his heirs in another, they cannot be coupled in order to have the same effect as if both the limitations were contained in the same instrument.

Where the estate for life is given by a deed of settlement and the estate in remainder by will, the two cannot unite. *Moor v. Parker*, 4 Mod. 316.

As to effect of estates created by implication, see *Pibus v. Mitford*, supra, IX. b, 2 (b).

⁹¹ *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18.

⁹² *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29, 99 N. W. 646.

to the heirs special of the grantor would be void, because a donor cannot make his own heir a purchaser, even of the estate tail, without departing with the whole fee. *Fearne, Contingent Remainders*, 51.

⁸⁸ *Fearne, Contingent Remainders*, 33.

In *Merrill v. Rumsey*, 1 Keble, 888, there was a limitation to the use of a man and his intended wife for their joint lives, and after the death of either to her heirs by him begotten, and, for want of such issue, to the wife for life, she surviving, the remainder to the right heirs of the husband forever. The husband died before the wife, and the controversy was then between the wife and the children, whether the wife took an estate tail, or whether the children took a contingent remainder. It was held to be an estate tail in the wife although the freehold determined in her lifetime when she could have no heirs.

On this point see also *BAILS v. DAVIS*.

⁸⁹ *Clifton v. Jackson*, 2 Vern. 486.

⁹⁰ The particular estate and the remainder must be created by the same conveyance. *Badgley v. Hanford*, 12 N. J. L. J. 75.

If there be a limitation to a man's heirs in any deed or instrument, and afterwards he acquires the freehold, etc., by other conveyance or instrument, in this case the two estates will not become united in him; but the limitation to his heirs will still continue what it originally was,—a contingent remainder. *Fearne, Contingent Remainders*, 71.

In *Coape v. Arnold*, 4 De G. M. & G. 574, *Cranworth*, Lord Chancellor, said that while he did not feel called upon to express any decided opinion on the point, nevertheless his understanding of the rule had always been that it applied only to the case of remainders created by the same instrument 29 L.R.A. (N.S.)

hension as to the effect of the operation of the rule. It is not true that the rule means "that you shall not by a single written instrument do that which you may lawfully and effectually accomplish by two," or that "the desired end might be accomplished by creating a life estate by deed and devising the reversion."

For example, if A grants land for life to B, remainder in the same instrument to the heirs of B, the word "heirs" is here, by the rule in Shelley's Case, a word of limitation, and the heirs take by descent, B being the *stirps* or source of the descent. If, on the other hand, A had granted land to B for life, by deed, and afterwards by will devised the remainder to the heirs of B, the heirs would not take by descent, but by purchase, and instead of B being the source from which the inheritance would spring, the heirs of B living at his death would be the source from which a new descent would flow. The result accomplished by the two methods of alienation is entirely different. Now A, seized of land in fee, desiring to dispose of a life estate to B, may have two intentions as to what shall become of the remainder: First, he may desire it to go to the whole line of B's heirs in succession from generation to generation, as the law would cast the descent; or, second, he may desire it to go to those answering the description of heirs of B living at B's death, such heirs to form a new stock of descent.

If he desires to accomplish the first end, he cannot do so by granting a life estate to B by deed, and a remainder to his heirs by will. He may do so by granting these estates by the same instrument, to B for life, remainder to his heirs; or he may do so in another way, that is, by a grant to B and his heirs. If he desires the remainder, after the life estate, to go by purchase, he may do so by granting the life estate in one instrument and the remainder in another; or he may do so in the same instrument if he will only say so; and, if when he uses the word "heirs," he clearly explains that he does not mean by that the whole line of heirs.

When the life estate is created by one instrument and the remainder by another, his is evidence of a different intention with reference to the disposition of the remainder, than where the two estates are created by the same instrument. Therefore a different effect must be given to the words of the limitation. It is a mistake to say that one may do indirectly by two instruments what he cannot do by one under the rule in Shelley's Case; for as it is impossible to create a life estate followed by gift in remainder to the whole line of the life tenant's heirs in succession in a single instrument, 9 L.R.A. (N.S.)

ment, so it is impossible to create such an estate by two instruments, or by any number of instruments. If it is desired to have the heirs take by descent the ancestor must have the fee; for otherwise a descendible estate is not created. This is not due to the so-called technical rule in Shelley's Case, but to the nature of the estate of inheritance, which cannot at the same time begin in a person and descend to him from an ancestor. It is of course conceivable that a new kind of estate might be created by statute which could begin in A, and then descend not to his heirs, but to the heirs of an ancestor as if the estate had come to A by descent; but such a statute has never been passed.

2. Power of appointment.

But it seems that the limitation to the heirs, although required to be made by the same instrument, may be made by a power of appointment contained in the same instrument.

"It may not be improper, in this place, to notice," says Mr. Fearn, "a case which occasionally occurs to professional gentlemen in the course of practice. I mean that of an estate limited to one for life, by deed, and a limitation afterwards, in his lifetime, to the heirs of his body, under an execution of a power of appointment contained in that deed; as a limitation to the use of A for life, and after his decease to such uses as B shall appoint; who afterwards, in A's life, appoints the use to the right heirs of A. Upon which the question arises, whether the limitations unite according to the general rule, or the latter operates by way of contingent remainder to the heir. . . . The only authorities against the union of the estate for life and limitation to the heirs are cases where the two estates were created by or acquired under different deeds or instruments; but if we admit the appointment, made under a power contained in a settlement or conveyance, to be a branch of that settlement, merely directing the operation of it *quoad* the uses appointed, the limitations in such appointment are of consequence part of such settlement or conveyance, and by relation virtually contained therein from the time of the appointment, only declared by way of reference to a subsequent specification thereof. So that the uses immediately contained in the original settlement or conveyance, and those immediately supplied by the appointment, equally owe their creation and effect to, and arise from, and are acquired under, such original settlement or conveyance. If so, the authorities against the incorporation of the two estates when created or acquired

by different deeds or instruments do not apply to such a case; which in truth falls within that class, where the two estates are created or originate in and are acquired by the same deed. The rule expresses no position in respect to identity of time in the declaring, but only of the instrument creating the two limitations; nor does coincidence in time, of the actual specification of the several uses, appear essential to the union of the two estates; since there is no necessity for their both vesting and taking effect at the same time. The common case of an estate to two or more for their lives, remainder to the right heirs of the survivor of them; and the case put 1 Inst. 378, b, that if lands be given to two during their joint lives, remainder to the heirs of him who shall die first, the heir of him who shall die first shall have the land by descent,—are direct authorities that no identity in point of time of vesting of the two estates is requisite to the operation of the rule in Shelley's Case. And if an estate limited under a power of appointment in a deed is by relation to be considered as part of, and to operate in the same manner, from the time of the execution of the power, as if contained in, such deed, then have the original and supplemental limitations every quality of relation and connection that they would have had if both had been specified in the original deed itself, except in regard to their time of vesting or taking effect; which the cases last put prove not to be essential to the operation of the rule. And the only instances that occur to me of an estate limited under a power of appointment in a deed, not operating from the time of the execution of the power, as if contained in such deed, are in some cases where an ap-

pointment by will either fails by the death of the appointee in the testator's lifetime: or is precluded by descent to the appointee, as heir of the appointor; and in some limitations to persons not *in esse*, under a general power of appointment; that seem to be clear of those objections to a perpetuity, which would impeach their validity if limited in the original deed.⁹³

d. Limitations to heirs must be by way of remainder.

1. Absence of life estate.

When it is said that the rule in Shelley's Case requires an estate of freehold in the ancestor, that statement needs explanation. Thus, it must not be such a freehold as to leave nothing to the heirs by way of remainder. A limitation to A and his heirs creates in A a fee simple, and a limitation to A and the heirs of his body creates a fee tail. So, under the rule in Shelley's Case a limitation to A for life, remainder to his heirs, creates a fee simple; and a limitation to A for life, remainder to the heirs of his body, creates a fee tail. The difference between these two sets of limitations is that in the first there is no express limitation of an estate for life, and in the second there is. Where there is an express limitation for life A takes the fee by virtue of the rule in Shelley's Case: where there is no express limitation of a life estate, A takes the fee also, but not by virtue of the rule in Shelley's Case. That rule does not apply unless there is an express or implied life estate with a limitation by way of remainder to the heirs. If a grantor desired to convey a fee to B at

⁹³ Fearn, Contingent Remainders, 73.

Although a limitation to A for life by one instrument, and a limitation to his heirs or heirs of his body by another, cannot unite according to the rule in Shelley's Case, yet a limitation to A for life by deed, and a limitation afterwards in his lifetime to his heirs, or the heirs of his body, under an execution of a power of appointment contained in the deed creating a life estate, will coalesce so as to give the inheritance to A. Sugden, Powers, 24.

In *Milhollen v. Rice*, 13 W. Va. 567, it is said that while the rule in Shelley's Case was in full operation there was one exception to it. If the devise or bequest was to A for life, with the superadded power of appointing to A's heirs in fee simple or absolute property, the life estate of A would be enlarged into a fee simple or absolute property, though the power was never executed by A. If, in such a case, A executed the power and appointed the estate to his own heirs, the rule in Shelley's Case would immediately apply, and A's life estate would be-

come a fee simple or absolute property. And the same result would follow if the estate had been devised or bequeathed to A for life with power to B to appoint the estate in fee simple or absolute property to A's heirs, and such power was executed by B, when so executed A's life estate by the rule in Shelley's Case would at once become a fee simple in A, and his heirs would get nothing by such appointment.

The ancestor by the rule must take an estate of freehold by or in consequence of the same assurance which contains the limitation to his heirs, but this requirement is satisfied if the limitation to the ancestor and to the heirs be parts of the same transaction, although contained in several instruments, as a deed or will creating the power, and the appointment exercising the power. *Ibid*.

An appointment when executed is to be considered in the same light as if it had been inserted in the original deed in which the power of appointment was created. *Venables v. Morris*, 7 T. R. 342.

hension as to the effect of the operation of the rule. It is not true that the rule means "that you shall not by a single written instrument do that which you may lawfully and effectually accomplish by two," or that "the desired end might be accomplished by creating a life estate by deed and devising the reversion."

For example, if A grants land for life to B, remainder in the same instrument to the heirs of B, the word "heirs" is here, by the rule in Shelley's Case, a word of limitation, and the heirs take by descent, B being the *stirps* or source of the descent. If, on the other hand, A had granted land to B for life, by deed, and afterwards by will devised the remainder to the heirs of B, the heirs would not take by descent, but by purchase, and instead of B being the source from which the inheritance would spring, the heirs of B living at his death would be the source from which a new descent would flow. The result accomplished by the two methods of alienation is entirely different. Now A, seised of land in fee, desiring to dispose of a life estate to B, may have two intentions as to what shall become of the remainder: First, he may desire it to go to the whole line of B's heirs in succession from generation to generation, as the law would cast the descent; or, second, he may desire it to go to those answering the description of heirs of B living at B's death, such heirs to form a new stock of descent.

If he desires to accomplish the first end, he cannot do so by granting a life estate to B by deed, and a remainder to his heirs by will. He may do so by granting these estates by the same instrument, to B for life, remainder to his heirs; or he may do so in another way, that is, by a grant to B and his heirs. If he desires the remainder, after the life estate, to go by purchase, he may do so by granting the life estate in one instrument and the remainder in another; or he may do so in the same instrument if he will only say so; and, if when he uses the word "heirs," he clearly explains that he does not mean by that the whole line of heirs.

When the life estate is created by one instrument and the remainder by another, this is evidence of a different intention with reference to the disposition of the remainder, than where the two estates are created by the same instrument. Therefore a different effect must be given to the words of the limitation. It is a mistake to say that one may do indirectly by two instruments what he cannot do by one under the rule in Shelley's Case; for as it is impossible to create a life estate followed by gift in remainder to the whole line of the life tenant's heirs in succession in a single instru-

ment, so it is impossible to create such an estate by two instruments, or by any number of instruments. If it is desired to have the heirs take by descent the ancestor must have the fee; for otherwise a descendible estate is not created. This is not due to the so-called technical rule in Shelley's Case, but to the nature of the estate of inheritance, which cannot at the same time begin in a person and descend to him from an ancestor. It is of course conceivable that a new kind of estate might be created by statute which could begin in A, and then descend not to his heirs, but to the heirs of an ancestor as if the estate had come to A by descent; but such a statute has never been passed.

2. Power of appointment.

But it seems that the limitation to the heirs, although required to be made by the same instrument, may be made by a power of appointment contained in the same instrument.

"It may not be improper, in this place, to notice," says Mr. Fearne, "a case which occasionally occurs to professional gentlemen in the course of practice. I mean that of an estate limited to one for life, by deed, and a limitation afterwards, in his lifetime, to the heirs of his body, under an execution of a power of appointment contained in that deed; as a limitation to the use of A for life, and after his decease to such uses as B shall appoint; who afterwards, in A's life, appoints the use to the right heirs of A. Upon which the question arises, whether the limitations unite according to the general rule, or the latter operates by way of contingent remainder to the heir. . . . The only authorities against the union of the estate for life and limitation to the heirs are cases where the two estates were created by or acquired under different deeds or instruments; but if we admit the appointment, made under a power contained in a settlement or conveyance, to be a branch of that settlement, merely directing the operation of it *quoad* the uses appointed, the limitations in such appointment are of consequence part of such settlement or conveyance, and by relation virtually contained therein from the time of the appointment, only declared by way of reference to a subsequent specification thereof. So that the uses immediately contained in the original settlement or conveyance, and those immediately supplied by the appointment, equally owe their creation and effect to, and arise from, and are acquired under, such original settlement or conveyance. If so, the authorities against the incorporation of the two estates when created or acquired

ror of this view was afterwards discovered and corrected.⁹⁶

The rule, however, is quite frequently er-

roneously thought to apply to a conveyance to one and his heirs.⁹⁷ This error seems to have taken firm root in Indiana.⁹⁸ And

Am. St. Rep. 243, 77 N. E. 108, the rule in Shelley's Case was held applicable to a devise to testator's wife "to hold and to have to her and her heirs and assigns forever." In this case it was contended that the clause did not vest a freehold estate in the wife and a fee in the heirs, which is essential under the rule. The court intimated that a life estate might be either expressly given, or given by implication, and said that if the position of counsel was tenable the rule had application only where, by the express language of the testator, a freehold estate was created in the ancestor—many of the court's former decisions would have to be overruled; but the report of the case does not indicate that counsel took any such position, but merely maintained that in this case no such estate was given.

⁹⁶ In *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163, decided less than two months after the decision in the last-mentioned case, in note 95, the court, without mention of that case, completely reversed itself on this question. The devise here was to specified persons "and their heirs, share and share alike," and the court said: "The will in this case does not come within the rule in any respect. It does not purport to devise to plaintiff in error a freehold estate with a limitation by way of remainder to his heirs, but the devise . . . is to him and defendants in error, and their heirs, which is the proper mode of devising a fee simple. Such words are not the words necessary to be employed to confer a freehold estate upon the ancestor, with a remainder to his heirs, but are words which in a will or conveyance transfer the fee. As the will does not purport to limit a remainder to heirs of the plaintiff in error, but to confer the estate immediately upon him, the rule in Shelley's Case has no application. In some cases where the same result was necessarily reached on other grounds, the rule in Shelley's Case may have been inadvertently applied to a devise like this, but it is clear that the rule has nothing to do with this devise."

⁹⁷ In *Duffy v. Jarvis*, 84 Fed. 731, the court evidently supposes that the rule applies to a devise to A and the heirs of his body. After stating that, to become subject to the rule, there must be by the terms of the grant a life estate in the first taker, with remainder to heirs, or class of heirs, named in the deed, it goes on to say that the result of this was that the first taker, immediately on the birth of heirs such as were mentioned in the grant, would take the remainder also, and thereupon have the whole estate. This he could alienate and thereby disappoint the heirs, who would then be cut out of their estate in remainder.

In *Hubbird v. Goin*, 70 C. C. A. 320, 137 Fed. 822, in holding that a grant to a woman and her children was not within the rule, it would appear from the opinion in the case 29 L.R.A. (N.S.)

that the court deemed that a grant to a woman and her heirs, or the heirs of her body, would have been. That the court fails to distinguish between a case in which an express life estate is granted and one in which it is not, is apparent from the following statement made in the course of the opinion: "The distinction between a grant to A for life and remainder to her heirs, and a grant to A for life with remainder to her children, is marked in the application of the rule in Shelley's Case. Tiffany, in his work on the Modern Law of Real Property (§ 25), in substance, says that a deed to A and his children cannot, at common law, convey an estate tail; and the word 'children' can have no effect as a word of limitation defining the interest A is to take, and must take effect, if at all, as a word of purchase, generally giving the children of A living at the time of the grant a joint estate with A in the property; but generally a devise to A and his children, while there is a presumption that the word 'children' is one of purchase and not of limitation, it is not a conclusive presumption, depending upon whether the context shows that the word was used in the sense of heirs of the body. He furthermore says that in some cases the word 'children' in a conveyance to A and his children is construed as a word of purchase, giving the children a remainder, and not joint interests with A. But he further says: 'By the weight of authority, such a conveyance, without any indication of an intention to the contrary, gives joint interests to A and the children then living.' So that in his view the question is more or less controlled by the intention of the grantor, to be gathered from the instrument."

The rule in Shelley's Case does not embrace a devise to a woman and her children, the rule, when applied to wills, being confined to cases in which the remainder, after a freehold interest, is to go in terms to the heirs of the first taker. *Re Utz*, 43 Cal. 200.

In *Russ v. Russ*, 9 Fla. 105, it is said that the rule in Shelley's Case is not applicable where the testator used the word "heirs" in any other sense than the legal one; but this was a case in which the devise was to testator's daughter and the heirs of her body, and in the event of her death and the death of other persons named, without heirs of their body, that the property be equally divided between the survivors of them.

In *Craig v. Ambrose*, 80 Ga. 134, 4 S. E. 1, the court says: "We think a devise or grant to one and his heirs, to his issue, or to his bodily heirs," conveys the fee to him under the rule in Shelley's Case, and this, according to the laws of England, would create an estate in perpetuity.

⁹⁸ In *Hull v. Beals*, 23 Ind. 25, it is held that where lands are granted to one and his heirs, or to one for life and remainder to

common law, the only way he could do it was by a grant to B and his heirs. It is true that at a very early period of English history, this would be deemed a conveyance of a life estate to B, with remainder to his heirs, B having no power to alienate the estate and defeat the remainder to his heirs; but long before the rule in Shelley's Case was adopted, such a limitation conveyed the fee to B. If words of inheritance were omitted, the fee would not pass. Therefore if A desired to convey a fee to B, he must do so by a grant to B and his heirs. For many years before the rule in Shelley's Case was thought of, there could be no question but that the word "heirs" in such a grant was a word of limitation.

Nevertheless it has often been asserted that a grant to B and his heirs conveys the fee to B by reason of the rule in Shelley's Case. In such cases the decision is of

course right, but the reason given for it wrong. The rule in Shelley's Case has been abolished in many jurisdictions, but no one would be rash enough to assert that in those jurisdictions, therefore, a grant to B and his heirs will not convey the fee. If, in a grant to B and his heirs, at common law, B's estate was enlarged from a life estate to a fee by virtue of the operation of the rule in Shelley's Case, it would seem naturally to follow that, upon the abolition of the rule, B would no longer be deemed to take the fee. No one has ever been bold enough to make such a claim. It is a plain misapprehension of the scope of the rule in Shelley's Case to assert that it applies to a conveyance to a person and his heirs or the heirs of the body.⁹⁴

It was the opinion of the Illinois courts at first that an estate conveyed to A and his heirs would vest the fee in A by virtue of the rule in Shelley's Case,⁹⁵ but the er-

⁹⁴ Where there was a devise of an estate to vest in and to be divided *per capita*, upon a certain contingency, among all the testator's grandchildren at that time living, and to the issue of deceased children taking *per stirpes*, it was held not to be within the rule, since the estate to the first devisees in whom any title was vested was, by the terms of the will, to be a fee simple absolute. The estate intended for the deceased parents was given to their children. *McArthur v. Allen*, Fed. Cas. No. 8,659.

In *De Wolf v. Middleton*, 18 R. I. 810, 31 L.R.A. 146, 28 Atl. 44, 31 Atl. 271, a devise to daughters of the testator, their heirs, and assigns, providing that if the daughters should die leaving no surviving issue the property was to be divided among the heirs of the testator according to the statutes of descent, etc., was held not within the rule, for one reason, because the devisees to the daughters were in form absolute fees, after which no limitation by way of remainder could be made.

In *Warnock v. Wightman*, 1 Brev. 331, an attempt was made without success to apply the rule to a grant to a woman and to the heirs of her body and the survivors of them forever, to have and to hold to her and the heirs of her body and the survivor of them and their heirs and assigns forever.

The rule was held not to apply where the grant was to a woman, "her heirs, and assigns during her lifetime." *Miller v. Mowers*, 227 Ill. 392, 81 N. E. 420.

The rule in Shelley's Case applies only to a case where an estate for life is given to one with remainder, either mediately or immediately, to his heirs, general or special. *Berry v. Williamson*, 11 B. Mon. 245.

A deed between a man and wife of the first part, and a woman and her heirs by her husband of the second part, wherein land was conveyed to the parties of the second part, their heirs and assigns, is not within the rule, there being no freehold estate for life or years in the first taker, and there

being nothing in the deed to indicate that the remaindermen should take as heirs of the first taker. *Schrecongost v. West*, 210 Pa. 7, 59 Atl. 269.

The adoption of the principle that a grant or a devise "to A and his heirs" creates an estate in fee in A does not make it necessary to adopt the rule in Shelley's Case and destroy an estate carved out for life in A, because, after his death, it was devised to his heirs, for thus the testator's intention would be defeated. *Thurston v. Allen*, 8 Haw. 392.

⁹⁵ In *Lynch v. Swayne*, 83 Ill. 330, it is said that a deed, if made to a woman and her heirs forever, would, under the rule in Shelley's Case, vest the title absolutely in her.

In *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751, the devise was to the testator's wife, her heirs, and assigns. The court held that this was a devise in fee to which the rule in Shelley's Case applied.

In *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, where the devise was to one and "his heirs," it was held that, under the rule in Shelley's Case, the devisee took the fee.

In *Davis v. Sturgeon*, 198 Ill. 520, 64 N. E. 1016, it is said that it will be noticed that the granting clause in the deed is to the party of the second part, "her heirs, and assigns," and the habendum is "to have and to hold the said premises above bargained and described, with the appurtenances, unto the said party of the second part, her heirs, and assigns forever," and that this is strictly within the rule in Shelley's Case, and vested a fee simple title in the grantee.

In *Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. 28, it was held that by a devise to testator's son and his lawful heirs the son took a freehold estate, and the estate was limited immediately to his lawful heirs in fee, which fulfilled every requirement of the rule in Shelley's Case, and vested the fee simple title in the son.

In *Rissman v. Wierth*, 220 Ill. 181, 110

ror of this view was afterwards discovered and corrected.⁹⁶

The rule, however, is quite frequently er-

roneously thought to apply to a conveyance to one and his heirs.⁹⁷ This error seems to have taken firm root in Indiana.⁹⁸ And

Am. St. Rep. 243, 77 N. E. 108, the rule in Shelley's Case was held applicable to a devise to testator's wife "to hold and to have to her and her heirs and assigns forever." In this case it was contended that the clause did not vest a freehold estate in the wife and a fee in the heirs, which is essential under the rule. The court intimated that a life estate might be either expressly given, or given by implication, and said that if the position of counsel was tenable the rule had application only where, by the express language of the testator, a freehold estate was created in the ancestor—many of the court's former decisions would have to be overruled; but the report of the case does not indicate that counsel took any such position, but merely maintained that in this case no such estate was given.

⁹⁶ In *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163, decided less than two months after the decision in the last-mentioned case, in note 95, the court, without mention of that case, completely reversed itself on this question. The devise here was to specified persons "and their heirs, share and share alike," and the court said: "The will in this case does not come within the rule in any respect. It does not purport to devise to plaintiff in error a freehold estate with a limitation by way of remainder to his heirs, but the devise . . . is to him and defendants in error, and their heirs, which is the proper mode of devising a fee simple. Such words are not the words necessary to be employed to confer a freehold estate upon the ancestor, with a remainder to his heirs, but are words which in a will or conveyance transfer the fee. As the will does not purport to limit a remainder to heirs of the plaintiff in error, but to confer the estate immediately upon him, the rule in Shelley's Case has no application. In some cases where the same result was necessarily reached on other grounds, the rule in Shelley's Case may have been inadvertently applied to a devise like this, but it is clear that the rule has nothing to do with this devise."

⁹⁷ In *Duffy v. Jarvis*, 84 Fed. 731, the court evidently supposes that the rule applies to a devise to A and the heirs of his body. After stating that, to become subject to the rule, there must be by the terms of the grant a life estate in the first taker, with remainder to heirs, or class of heirs, named in the deed, it goes on to say that the result of this was that the first taker, immediately on the birth of heirs such as were mentioned in the grant, would take the remainder also, and thereupon have the whole estate. This he could alienate and thereby disappoint the heirs, who would then be cut out of their estate in remainder.

In *Hubbird v. Goin*, 70 C. C. A. 320, 137 Fed. 822, in holding that a grant to a woman and her children was not within the rule, it would appear from the opinion in the case 29 L.R.A. (N.S.)

that the court deemed that a grant to a woman and her heirs, or the heirs of her body, would have been. That the court fails to distinguish between a case in which an express life estate is granted and one in which it is not, is apparent from the following statement made in the course of the opinion: "The distinction between a grant to A for life and remainder to her heirs, and a grant to A for life with remainder to her children, is marked in the application of the rule in Shelley's Case. Tiffany, in his work on the Modern Law of Real Property (§ 25), in substance, says that a deed to A and his children cannot, at common law, convey an estate tail; and the word 'children' can have no effect as a word of limitation defining the interest A is to take, and must take effect, if at all, as a word of purchase, generally giving the children of A living at the time of the grant a joint estate with A in the property; but generally a devise to A and his children, while there is a presumption that the word 'children' is one of purchase and not of limitation, it is not a conclusive presumption, depending upon whether the context shows that the word was used in the sense of heirs of the body. He furthermore says that in some cases the word 'children' in a conveyance to A and his children is construed as a word of purchase, giving the children a remainder, and not joint interests with A. But he further says: 'By the weight of authority, such a conveyance, without any indication of an intention to the contrary, gives joint interests to A and the children then living.' So that in his view the question is more or less controlled by the intention of the grantor, to be gathered from the instrument."

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⁹⁸ In *Hull v. Beals*, 23 Ind. 25, it is held that where lands are granted to one and his heirs, or to one for life and remainder to

in Texas the courts seem to be under the same misapprehension.⁹⁹

Similar statements are carelessly made elsewhere by courts or by counsel, or by official reporters,¹⁰⁰ but nowhere, except in Illinois, has the question been fairly presented.

his heirs in fee, under the operation of the rule in Shelley's Case, he to whom the particular estate is thus granted takes the whole.

In *Fountain Co. Coal & Min. Co. v. Beckheimer*, 102 Ind. 76, 52 Am. Rep. 645, 1 N. E. 202, there was a devise to a woman and her present heirs forever. The rule in Shelley's Case was held inapplicable, but on the ground that the use of the word "present" precluded the idea that the word "heirs" had been used in its technical sense, since it is an axiomatic principle that no living person can have heirs.

In *Prior v. Quackenbush*, 29 Ind. 475, there was a grant to a woman and her heirs, as well for the natural love and affection which the grantor bore to her and her heirs, as for the better maintenance and support of her and her heirs, the deed containing an explanatory clause to the effect that at the death of the devisee the property should be in two persons named, who were designated as the natural heirs contemplated in the deed of conveyance. It was held that it was not the intention of the grantor to use the word "heirs" in its technical sense, and that the conveyance was therefore not within the rule in Shelley's Case.

In *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467, the testator, after devising property to his wife, gave the remainder to his five children, naming them, or their children, heirs, or executors, to be equally divided among them, and it was conceded that the estate in possession and in remainder which was created for them gave them a fee under the rule in Shelley's Case. The court said: "We think the authorities require this concession; for where a life estate is created in a devisee named, and the same will devise the remainder to devisees, who are named, and their lawful heirs, they, the devisees, take an estate in fee."

In *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919, a devise to a woman and her heirs forever" was held within the rule in Shelley's Case. The question in the case was whether the word "heirs" was used in other than its technical sense.

In *Lane v. Utz*, 130 Ind. 235, 29 N. E. 772, it was held that the rule in Shelley's Case applied to a grant to a woman and to the heirs of her body.

In *Reddick v. Lord* (Ind.) 30 N. E. 1085, a devise to a woman and her heirs exclusively was held clearly to be within the rule in Shelley's Case, the word "heirs," being used in its technical sense, conveying a fee to the first taker.

⁹⁹ In *Rodgers v. Burchard*, 34 Tex. 452, 7 Am. Rep. 283, it is said that by the rule in Shelley's Case "a deed to A B and his heirs" (L.R.A. (N.S.)

2. Executory devise.

The rule in Shelley's Case is not applicable to executory limitations, because the limitation to the ancestor and to the heir, if they were both of them executory limitations, would not be parts of the same es-

vests the deed in A B and if A B sells the estate he sells that which belongs to him and his heirs, unless by the terms of his deed he leaves the fee to vest as an estate in remainder to his heirs or to any other remainderman."

In *Calder v. Davidson* (Tex. Civ. App.) 59 S. W. 300, the rule was said to apply to a deed to a woman and the heirs of her body by her husband named, so as to vest the title in fee simple in the daughter.

In *Hopkins v. Hopkins* (Tex.) 122 S. W. 15, it seems to be taken for granted that a deed to A and to his heirs, habendum clause to A and his heirs, special warranty to A and his heirs, would have been within the rule in Shelley's Case had not the word "heirs" been qualified by subsequent words and conditions in the deed.

In *Pearce v. Carrington* (Tex. Civ. App.) 124 S. W. 469, a devise to testator's daughters and the heirs of their bodies to be born, followed by a clause directing that on the death of their daughter without heirs of her body the property given her should return to the estate, etc., was held to be within the rule in Shelley's Case, the daughters taking the fee.

In *Hopkins v. Hopkins* (Tex. Civ. App.) 114 S. W. 673, the grantors conveyed property to their son named, and to his heirs, the intention of the conveyance being to vest sufficient title in the son to enable him, during his life, to us, occupy, and enjoy it, and receive therefrom all the benefits as completely as though he had a fee simple title, the deed providing that at his death his children should have a fee-simple title, and that should the son die without issue the title to the property should revert to the grantor. It was held that the deed fairly came under the rule in Shelley's Case, and was not controlled or affected by any clause expressive of intention, the granting, habendum, and warranty clauses of the deed being to the son and his heirs.

¹⁰⁰ In *Seaman v. Harvey*, 16 Hun, 71, a remainder was given to the daughter of a life tenant and the heirs of her body lawfully begotten, and it was held that the rule in Shelley's Case determined what the daughter's estate would be, that is, an estate in fee tail which was changed by statute into an estate in fee simple.

In *Josetti v. McGregor*, 49 Md. 202, it is said that if there is anything settled in the law it is that a devise to a person and the heirs of his body lawfully begotten creates an estate tail in the first taker by the operation of the rule in Shelley's Case.

In *Hampton v. Rather*, 30 Miss. 193, it was said that a conveyance of a slave to a woman "and the heirs of her body for-

tate, but would be distinct and independent dispositions of the subject.¹ But Malins, V. C., in answer to the contention that the rule in Shelley's Case does not apply where the gift to heirs is by way of an executory or conditional limitation, said he should be slow to admit such a doctrine, but did not decide the question, as he was of the opinion that the limitations in that case were contingent remainders.²

c. Remaindermen must take as heirs.

It is well settled that to bring the rule into operation, the whole line of heirs in succession from generation to generation must take, or, as it is sometimes put, they must take as heirs, and not as designated persons.³ The rule applies only where the same persons will take the same estates, whether they take by descent or purchase,

ever" was in such terms that if employed in reference to real estate would, under the rule in Shelley's Case, convey the estate in fee tail to the first taker.

In *Blair v. Miller*, 30 W. N. C. 486, in a devise to testator's sons and their children after them, the word "children" was construed in the sense of "heirs of the body." The court mentions the rule in Shelley's Case in the argument, but it is doubtful if it meant to apply it to the facts in that case, but the following headnote appears: "Held that the testator's intent to devise a fee tail to the sons was clearly indicated; the word 'children' was therefore equivalent to 'heirs of the body,' and under the rule in Shelley's Case and the act of April 27, 1855, the sons took a fee simple."

In *Best v. McClelland*, 19 Pa. Co. Ct. 553, a devise to one and his children was construed as if it had been a devise to one and his heirs, the court saying that the rule in Shelley's Case was applicable.

In *Jack v. Fetherston*, 9 Bligh, N. R. 237, it was urged that the question before the court was whether an estate limited by will to a man and his heirs male fell within the rule of law in Shelley's Case, or whether there was an intention apparent upon the will that he should take an estate for life only, remainder to the first and other sons, etc., successively as purchasers in tail. This was held by the court to create an estate tail, but it was not said that this was a case to which the rule in Shelley's Case applied.

Where there was a devise of real estate in fee with a limitation over in case of the donees dying without issue, it was held that this created an estate tail which by statutes was enlarged to a fee, and the reporter supposed this to be an application of the rule in Shelley's Case. *Graham v. Abbott*, 208 Pa. 68, 57 Atl. 178.

In *Singletary v. Hill*, 43 Tex. 588, there was a conveyance to a woman and the heirs of her body "to have and to hold unto her . . . and her said heirs forever," and it was assumed in the headnote that this was an application of the rule in Shelley's Case.

In *Bowlin v. White*, 244 Ill. 623, 91 N. E. 658, under a devise of lands to a son and daughter and the heirs of their bodies respectively, the counsel contended that the rule in Shelley's Case was applicable. This was manifestly not a case for the application of the rule.

¹ *Chippis v. Hall*, 23 W. Va. 504.

Where the devise, after the life tenant's 29 L.R.A. (N.S.)

estate, was to the life tenant's children, with an ultimate limitation, in case every child born or to be born should die under the age of twenty-one years without leaving issue, to the use of the heirs and assigns of the life tenant as if she had continued unmarried, with remainder to the testator's right heirs, it was contended that the devise being to the children in fee, and if they should die under twenty-one not leaving issue, then over, the devise over must be an executory devise, which could not therefore unite with the previous life estate given to the life tenant by will. The court said that it was conclusively settled that though the express devise over was in case there should be children to take who died under twenty-one and without leaving issue, this would be an executory devise if children survived the testator, yet the implied devise over in case there were no children to take at all would be a remainder, capable of uniting with the previous life estate. *Brookman v. Smith*, L. R. 6 Exch. 291, affirmed in L. R. 7 Exch. 271.

Where there was a devise of lands to trustees upon trust to allow testator's child to have the profits for her sole use and benefit for life, and after her death to the use of the heirs of her body, "such freehold lands . . . and premises to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns forever," it was held that the rule in Shelley's Case would not operate to vest the reversion in the daughter, for one reason, because it was an executory devise. *Foxwell v. Van Grutten*, 78 L. T. N. S. 231.

But a devise to testator's son after the death of testator's wife of certain real estate for life, the will providing that after his death it was "then to descend to his heirs," is not an executory devise, so as to prevent the operation of the rule. *Chippis v. Hall*, *supra*.

² *Re White*, L. R. 7 Ch. Div. 201.

³ The leading principle of the rule is that the limitation must not be to an individual or individuals of the family of the person to whom the life estate is given, as a son, sons, or children, but must be to his heirs general or special, and so extend to and comprise the whole line of described heirs as a class or denomination of persons to take in succession, as that the person who takes after the tenant for life, whoever he

in which case they are considered to take by descent.⁴

It has been pointed out that it should be carefully noted that, in searching for the intention of the donor or testator, the inquiry is not whether the remaindermen are the persons who would have been heirs, had the fee been limited directly to the ancestor. The thing sought for is not the persons who are directed to take the remainder, but the character in which the donor intended they should take, and in very many cases in which the question whether the rule

was applicable has arisen, the difficulty has been in determining whether the intention was that the remaindermen should take as heirs of the first taker, or, originally, as the stock of a new inheritance; the effort in almost all of them has been to show that the words "heirs" or "heirs of the body" were not used in their technical sense as expressive of the nature and extent of the devise and its descent, but as a *descriptio personarum*, designatory of individuals.⁵

may be, must be one who indiscriminately answers the relative description of heir general or special, as the case may be, of the ancestor referred to, and who takes *eo nomine* or technically in that character only; and that there must be nothing in the limitation to restrain the operation of it to the person so first taking or his representatives as such, but that it must reach to and equally comprehend all other persons successively answering the same relative description, and entitle them to take under it *eo nomine* and by virtue only of such relation to the ancestor. *Lyles v. Digges*, 6 Harr. & J. 364, 14 Am. Dec. 281.

The rule does not apply where it unequivocally appears that persons who are to take are not to take as heirs of the grantees or devisees. *Earnhart v. Earnhart*, 127 Ind. 397, 22 Am. St. Rep. 652, 26 N. E. 895.

They who take in remainder must take in the quality of heirs, according to the course of descent established by law. *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 55 S. E. 289, 9 A. & E. Ann. Cas. 244.

In order to bring the rule into operation, the limitation must be to the heirs as heirs of the first taker. *Faison v. Odom*, 144 N. C. 107, 56 S. E. 793.

The inheritance in the remainder must be given to the heirs of the grantee or devisee of the estate for life as heirs, or the rule has no applicability to the case. *Guthrie's Appeal*, 37 Pa. 9.

⁴*Perry v. Hackney*, supra.

If the estate for life created in the devisee or donee is limited precisely as it would descend at law, the rule vests the entire fee in the first devisee or donee. *King v. Beck*, 15 Ohio, 559.

The rule applies when the same persons will take the same estate, whether they take by descent or purchase, in which case they are made to take by descent; but when the persons taking by purchase would be different, or have different estates then they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the heirs, heirs of the body, etc., take as purchasers. *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450, 3 A. & E. Ann. Cas. 397.

The rule applies only when the same persons may take the same estate, whether they take by descent or purchase, in which case they are made to take by descent, as 29 L.R.A. (N.S.)

it is more favorable to the donee, to the feudal incidents of seigniories, to the rights of creditors, and for other reasons, that the first taker should have an estate of inheritance; but when the persons taking by purchase would be different, or have other estates than they would take by descent from the first taker, the rule does not apply, and the first taker is confined to an estate for life, and the "heirs," "heirs of the body," or "issue" in a will, will take as purchasers. *Wool v. Fleetwood*, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785.

Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will be sufficient, unless it be perfectly clear that such heirs are selected on their own account, and not simply as heirs of the first taker. *Price v. Taylor*, 28 Pa. 102, 70 Am. Dec. 105.

⁵*Guthrie's Appeal*, supra.

To bring a devise within the rule in Shelley's Case, the limitation must be to the heirs in fee or in tail, as a *nomen collectivum* for the whole line of inheritable blood. When the ancestor annexes words of explanation to "heirs" or "heirs of the body," as "to heirs now living," etc., using the term as a mere *descriptio personarum*, or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given, and they will be assumed to take as purchasers. *McCann v. McCann*, 197 Pa. 452, 80 Am. St. Rep. 846, 47 Atl. 743.

The single inquiry in all cases is this: Did the party using the words have in his contemplation and purpose, and therefore indicate by the words used, all those indefinite successions proceeding from the body of the first taker, whensoever existing, to whom the terms apply, "the whole line of inheritable succession," to "all the issue of every generation to come?" Or did he thereby only designate a particular individual or class of individuals, as, for example, all in a certain degree of relationship to the first taker, or all in existence at a particular period? *Markley v. Singletary*, 11 Rich. Eq. 393.

The words of limitation must include the whole line of heirs. If, then, it can be shown by the context that the words "issue" or "heirs of the body" cannot mean the whole line of heirs, and must mean something else and something definite, the rule

So, the rule does not apply to a limitation after a life estate to the life tenant's next or nearest male heirs, since, as before stated, to bring a devise within the rule the limitation in remainder must be to the heirs in fee or in tail as a *nomen collectivum*, for the whole line of inheritable blood. When the testator annexes words of explanation to "heirs or heirs of the body," as, "to heirs now living," using the term as a mere *descriptio personarum*, or for the specific designation of individuals, a new inheritance is thereby grafted upon the heirs to whom the estate is given.⁶

f. Necessity as to use of word "heirs."

In the statement of the rule in the argument in Shelley's Case the words of limitation used are "heirs" or "heirs of the body." To bring the rule into operation, however, it is not necessary always to use such words. Equivalent expressions will do. When the statement is made that the word "heirs" must be used, what is meant is that the word "heirs" or equivalent words are necessary.⁷

Other expressions deemed equal in effect with the words "heirs of the body," such

does not apply at all. *Re Keane* [1903] Ir. Ch. 215.

In all cases where the limitation is of an estate of freehold to a man, and afterwards to the heirs of his body, whether general or special, so as to give it to the heirs as a denomination or class, the heirs shall be in by purchase, and not by descent. *Jones v. Morgan*, 1 Bro. Ch. 206. Lord Thurlow said that, by all the cases where an estate is so given that after the limitation to the first taker it is to go to every person who can claim as heir to the first taker, the word "heirs" must be a word of limitation.

Where a limitation was in trust after a life estate, for the use of such persons as would be entitled to the same by the laws of the commonwealth of Pennsylvania, if the life tenant had survived her mother and husband, if any she might have, and had died intestate, seised and possessed of the premises, and in respect to such estate and estates as such person or persons would in such case be entitled to by the laws aforesaid, it was held that the rule in Shelley's Case did not apply, since the limitation was to some only of those who would take under the intestate law, the mother and husband having been expressly excluded. It was also held to be immaterial that the husband and mother were both dead. *Kuntzleman's Estate*, 136 Pa. 142, 20 Am. St. Rep. 909, 20 Atl. 645.

Where the grant is to a woman and the heirs of her body begotten by her present husband, it was held that the rule in Shelley's Case did not apply, since the rule is applicable only to cases where there is a grant of a particular estate to the grantee with remainder over to a class of persons designated. *Pierson v. Lane*, 60 Iowa, 60, 14 N. W. 90.

⁶*Jones v. Jones*, 201 Pa. 548, 51 Atl. 362. See *infra*, XIV.

Where, after the devise of a life estate, the property was devised in fee simple to the persons who would have inherited the same from the life tenant, had he owned the same in fee simple at the time of his death, and it was specified that the provisions of the will should vest in the life tenant only a life estate, it was held that the rule in Shelley's Case did not apply, the words used in making disposition of the remainder being words of purchase, *de-29 L.L.A. (N.S.)*

scriptive of the persons to whom the fee was devised. *Earnhart v. Earnhart*, 127 Ind. 397, 22 Am. St. Rep. 652, 26 N. E. 895.

Mr. Fearn, in his essay on Contingent Remainders and Executory Devises, declares that if a case falls within either of the two following propositions, it is within the rule in Shelley's Case; but if within neither proposition, it is not: First, "That the person to claim the inheritance after the ancestor is to claim as heir, etc., that is, *eo nomine* and under that description, whoever such person may be." Second, "That the effect of the limitation is not confined to the person so first claiming or his representatives as such of any description, but directed equally through all other persons successively answering the same relative description of heirship, general or special, to the ancestor referred to, and entitling them *eo nomine* or in that character only." The first of the propositions excludes from the rule all those cases, among others, "wherein, on account of words subjoined, the persons to take cannot take as heirs or by virtue of that description, by reason of the distributive direction amongst several not constituting an heir, or as tenants in common, or in some other mode irreconcilable with the course of a descent." Vol. 1, p. 197. The latter of the propositions excludes, among others, those cases wherein "the words of limitation superadded to the word 'heirs,' etc., denote a different species of heirs from that described by the first words, as in the case put by Anderson, in Shelley's Case." *Tucker v. Adams*, 14 Ga. 548.

⁷The word "heirs" is essential to justify the application of the rule, just as it was at common law to create an estate in fee simple. *Brown v. Brown*, 125 Iowa, 215, 67 L.R.A. 629, 101 N. W. 81.

The word "heirs" is essential to justify the application of the rule in Shelley's Case. *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97.

The word "heirs" implies legitimacy and a capability of taking by inheritance. Hence the rule does not apply unless the word "heirs" is used in the instrument. *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72.

In *Van Grutten v. Foxwell*, 77 L. T. N. S. 170, Lord Macnaghten says that any expression which imports the whole succession of inheritable blood has the same ef-

as "issue of the body," and "men children of the body," have also been construed to enlarge the estate for life into an estate tail.⁸ Any form of words sufficient to show that the remainder is to go to those whom the law points out as the general or lineal heirs of the first taker will enlarge the estate for the life of the first taker to an estate in fee, by implication.⁹

When an ancestor, however, uses other words than "heirs" or "issue," or uses those words in connection with others in such manner as to show that he meant that the remainder should vest by way of purchase, and not by descent, then the rule does not apply, and the first taker has only an estate for life; as, for instance, if he couples the word "heirs" or "issue" with children

feet in bringing the rule into operation as the word "heirs," though, perhaps, it was not so always.

But ultimate limitation in a deed after a life estate, to such person or persons as would be entitled to take an estate in fee by descent from the line of the grantee, was held not such a one as will, by force of the rule in Shelley's Case, unite with the previous life estate limited to the life of the grantee, and thus vest in her a fee-simple estate, since, in order to invest a party with a fee-simple estate by deed, it is necessary that the word "heirs" should be employed in the limitation. *Handy v. McKim*, 64 Md. 560, 4 Atl. 125.

⁸ *Smith v. Chapman*, 1 Hen. & M. 240.

By an easy transition, this rule was made in England to cover another class of cases, as where the devise was to A for his life and after his death to his issue, and then over. This was adjudged to be a descendible estate, and, by the rule in Shelley's Case, the whole estate was in the first taker for life, and then in his heirs as tenants in tail, with remainder over. *Buist v. Dawes*, 4 Rich. Eq. 423.

A devise to a son and daughter without any words of inheritance would, of course, not be within the rule in Shelley's Case. *Bowlin v. White*, 244 Ill. 623, 91 N. E. 658.

⁹ *Yarnall's Appeal*, 70 Pa. 335. The court said that if the body of persons described constituted in fact the heirs of the life tenant, and represented only a line of descent, and not specially designated persons, the devisee for life became the stock or source of the descent, and by analogy to the rule in Shelley's Case, or perhaps it were better to say, from necessity, he took the inheritance. The remainder having been limited to his heirs, he necessarily became the *stirps* or root of a line of unknown persons, not individuated by the will, yet dependent on him as their source. They sprang into recognition only at his death, for *nemo est hæres viventis*. In other words, they come at the bidding of the law, and not of the testator, who merely adopted them as the law turned them up in the furrow of descent.

In *Zane v. Weintz*, 65 N. J. Eq. 214, 55 Atl. 641, it is said that, where an estate is devised to a woman for life, and in the same instrument there is a gift over after her death "to such person or persons as would by law inherit the same if she had an estate therein in fee simple," if the testatrix intended the remaindermen to take as descendants from the life tenant, then the rule in Shelley's Case at common

law would apply, and the devise would be held to vest a fee-simple estate in the life tenant. If, in defining the qualifications of the remaindermen, the testatrix intended to describe and point out persons who were to take by direct gift from herself, then the rule would not apply, and the life tenant would be held to take only a life estate.

A devise to testator's cousin in trust for the sole and separate use of the cousin, the property not to be liable in any manner for the debts, or subject to the control, of the devisee's husband, with a power of appointment to the devisee, and, for want of such appointment, to such person or persons as would be entitled thereto in case the devisee had died seised and possessed of the same in her own right absolutely, was held to pass the fee. *Norris v. Rawle*, 16 W. N. C. 240.

In *Re Willis*, 25 R. I. 332, 55 Atl. 889, it was held that, in the absence of statute, a limitation after a life estate to the next of kin of the life tenant was equivalent to a limitation to the heirs. The court said that it is well settled that no particular terms are necessary to pass a fee in cases of this sort, but that any words which are of similar import to "heirs and assigns" may have this effect.

In *Re Buckton* [1907] 2 Ch. 406, where property was devised to trustees for the use of testator's eldest son, A, to permit him during his life to occupy the property or receive the rents arising therefrom, and after his death to permit B, the eldest son of A, to occupy or receive the rents of the same during his life, "and then to his sons and their sons in succession," and in default thereof to the second son of A and his sons in succession, it was held that B, the eldest son of A was entitled to an estate in tail male in possession of the property, it being considered that the testator had imported the whole succession of inheritable blood in the male line by the phrase, "his son and their sons in succession."

When a testator uses words intended to designate an entire line of descent, either lineal, or lineal and collateral, as an ultimate limitation of a trust, the *periphrasis* will be considered as equivalent to the words "heirs of the body" or "heirs," as the case may be, and will afford a ground for the coalescing of the life estate and the remainder, if of the same quality, thus creating a fee tail or a fee in analogy to the rule in Shelley's Case. *Williams's Appeal*, 83 Pa. 377.

But in *Loving v. Hunter*, 8 Yerg. 4, as the rule was said to be purely technical, by which a particular meaning is affixed to certain words, in so much as to control the

in such manner as to indicate that the remaindermen shall take as children, and not as heirs or issue.¹⁰

It has been said that a condition sometimes prescribed to avoid the operation of the rule is "that the grantor or donor shall abstain from the use of the word 'heirs,' and adopt some, in most cases, practically equivalent expressions, such as 'issue,' or 'children,' or 'descendants,' or 'next of kin,' supplemented with more or less circumlocutory phraseology."¹¹ But it is not true that, to avoid the rule, "equivalent expressions" must be used; on the contrary words must be employed which clearly show that the heirs of the life tenant are not intended to

take in the quality of heirs. That is all. No circumlocutory phraseology is necessary.

g. Necessity as to conveyance of inheritance to heirs.

The rule does not apply when no estate of inheritance is given to the heirs.¹²

h. Necessity that remainder be given to heirs of person taking particular estate.

It is requisite, of course, in order that the life estate may be enlarged to a fee, that the limitation of the remainder be to the heirs of the life tenant.¹³ If a man by his will gives an estate to the devisee for life with a remainder over to his own heirs,

intention, it will be left, in its application, to the particular case; and where other words are used, the intention should prevail.

¹⁰ *Peirce v. Hubbard*, 10 Pa. Co. Ct. 63, affirmed in 162 Pa. 18, 25 Atl. 231. See *infra*, XIV.

¹¹ *Albin v. Parmele*, 70 Neb. 740, 98 N. W. 29, 99 N. W. 646.

¹² *Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

"Common sense will here tell us," says Sir William Blackstone, "that when no estate of inheritance is devised to the heir male of the body, he cannot take by descent as heir." *Perrin v. Blake*, *Hargrave's Law Tracts*, 505.

¹³ The rule in *Shelley's Case* applies only to a limitation of a remainder to the heirs or heirs of the body of the first taker. *Cushney v. Henry*, 4 Paige, 345; *Hennessey v. Patterson*, 85 N. Y. 91.

To bring a case within the rule, the limitation must be to the heirs or heirs of the body of the person taking the freehold. *Nelson v. Davis*, 35 Ind. 474.

A limitation over after the life estate must be to the heirs or issue of the life tenant. Where the limitation over is to the life tenant himself in fee simple in the event of his having issue, the rule does not apply. *Clagett v. Worthington*, 3 Gill, 83.

The rule in *Shelley's Case* does not prevail where the precedent estate was not given to the ancestor, but to someone else. In such cases the fee vests in the heir, as it would have done in all cases in devises for life and then over to heirs, but for the intervention of that rule. *Campbell v. Rawdon*, 18 N. Y. 412.

To create an estate tail under the rule in *Shelley's Case*, it is essential that the limitation to the heirs of the body should be to the heirs of the body of the ancestor who takes the particular estate, and to the heirs of the body of that ancestor alone.

It is not enough that the limitation should be to the heirs of the person having the particular estate, and of another who might have common heirs of their bodies. Hence, where the estate is limited to the wife for life, remainder to the heirs of the bodies of husband and wife, the freehold 29 L.R.A. (N.S.)

being in the wife alone, the limitation over is held to be a remainder, and the heirs take as purchasers *per formam doni*, and not by descent. *Mudge v. Hammill*, 21 R. L. 283, 79 Am. St. Rep. 802, 43 Atl. 544.

In *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013, a grant in trust for the benefit of a woman for life, at her death to vest in the children born of her body, and to them and their heirs forever, but providing, in the event of her death without any children so born, or if her child or children should all die intestate without issue after her death, that the said property be sold, etc., the limitation "to them and their heirs forever," was held not to create an estate tail in the life tenant, since it is an indispensable part of the rule in *Shelley's Case* that the heirs designated to take the inheritance shall be the heirs general or special of the same person to whom the freehold estate is conveyed.

Where the limitation, after a life estate to the wife, was to the heirs of the wife's body to be by the husband begotten, it was held that these terms did not designate the common heirs of their two bodies, but the heirs of the wife's body alone, and that therefore the heirs in whose favor the ultimate estate was limited were those of the same person to whom the preceding estate for life was limited, and to none others, the conveyance being as exactly within the rule in *Shelley's Case* as it was possible for any conveyance to be. *Wayne v. Lawrence*, 58 Ga. 15.

The rule does not apply to a grant of an estate to a woman and her children for life, with remainder to her heirs, since the remainder is not to the heirs of the same persons to whom the life estate is given, but only to the heirs of the woman. *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161.

Where a deed conferred upon the husband all the rights and profits in the property of his wife during their lives, and upon their deaths the property was conveyed to the heirs of the body of the wife then living, it was held that the rule in *Shelley's Case* had no application by way of enlarging the first estate, since that rule applies only to enlarge the estate of

they do not take as remaindermen by the will, but by descent, as reversioners and heirs; that being regarded as the better title.¹⁴ But the doctrine that, to bring a case within the rule, the limitation over must be to the heirs of the first taker, does not mean that where there are two life estates, the limitation must be to the heirs of the first life tenant.¹⁵ So the rule applies to a devise to a son for life after the death of the testator's wife, with remainder to the heirs of the son.

1. Effect of limitation to heirs of life tenant and heirs of others.

The operation of the rule may be defeated by a limitation to the heirs of the life tenant and to other heirs.¹⁶

the ancestor whose heirs generally or the heirs of whose body are the subjects of the limitation, and who can take by descent from him, and do not therefore take as purchasers under the fee. *Williamson v. Mason*, 23 Ala. 488.

As to the rule that the remainder must be to heirs of the person taking particular estate, see also *BAILS v. DAVIS*.

¹⁴ *Robinson v. Blankenship*, 116 Tenn. 394, 92 S. W. 854.

A devise of certain lands to a testator's sons for life, and on their death to his daughters for life, and then to the testator's heirs forever, was held not within the rule in *Shelley's Case*, since the limitation, to be within the rule, must be to the heirs of the person taking the particular estate only, and not to the heirs of any other person, the testator by this devise not giving the lands at the death of the daughters to their heirs, or to the heirs of his sons, to whom the preceding life estates were devised, but giving them to his own heirs in fee simple. *Doe ex dem. Wright v. Gooden*, 6 Ioust. (Del.) 397.

A devise to daughters of the testator, heir heirs and assigns, providing that, if he daughters should die leaving no surviving issue, the property was to be divided among the heirs of the testator according to the statutes of descent, etc., was held not within the rule, for one reason, because the limitation over was not to the heirs of the daughters, but to the heirs of the testator. *Wolf v. Middleton*, 18 R. I. 810, 31 R.A. 146, 26 Atl. 44, 31 Atl. 271.

¹⁵ *Chippis v. Hall*, 23 W. Va. 504.

¹⁶ In *Allgood v. Withers*, cited in 2 Burr. 107, one I. A. by deed conveyed his freehold land to trustees and their heirs, and his leaseholds to trustees and their executors, upon trust that they should apply the rents and the benefits of redemption to W. for life, and after her death to the heirs of the body of the said H. W. and of I. A., and of H. G. and M. A., their heirs, executors, and assigns, during the continuance of the estate in the premises. The question was whether H. W. took for life or in tail, L.R.A. (N.S.)

1. Effect of limitation to heirs or issue in the singular number.

The rule in *Shelley's Case* applies in terms where the word used is "heirs" in the plural.¹⁷ But the rule also applies where the word "heir" is used, if there are no superadded words of limitation. This seems to be the distinction between the cases in which the rule is applied and in which it is not; where words of limitation are in the singular, the superadded words of limitation are generally held to take the grant or devise out of the operation of the rule,¹⁸ because they indicate that a particular heir is meant, from whom a new inheritance is to spring; where there are no superadded words, the rule applies.

In *Archer's Case*, the leading one on this

and Lord Talbot held that she took an estate for life and that the heirs took as purchasers. Mr. Fearne, on *Contingent Remainders*, p. 120, says that we may observe in this case that the limitation to the heirs of the body of H. W. was blended with that to the heirs of the body of several others, who could take not otherwise than by purchase, and that there were words of limitation, not only to the heirs, but to the assigns of all the said heirs of the body alike.

The rule does not apply to a devise of lands to testator's wife for life, and after her death to his sister, her or her heirs to share and share equally with the heirs of the wife. *Mills v. Thorne*, 95 N. C. 362.

But on the question whether the estate to the heirs and the estate to the ancestor must be of the same quantity, see *WARD v. TODD*.

¹⁷ *Evans v. Evans* [1892] 2 Ch. 173.

¹⁸ In *Clerk v. Day*, Cro. Eliz. pt. 1, p. 313, there was a devise to a daughter for life, the will providing that, "if she marry after my death and have heir of her body, then I will that the heir, after my daughter's death, shall have the land, and to the heirs of their body begotten; and if my daughter die without issue of her body begotten," over. The question was whether this was an estate for life or an estate tail in the daughter. Two of the judges held that the daughter had but an estate for life, on the ground that such an estate was limited to her by express words; but the chief justice was of the opinion that the estate was limited to the ancestor and afterwards limited to the heir, and should execute in the ancestor, especially, the words being if she had any heir and it being therefore intended that any heir should have it. Mr. Fearne, on *Contingent Remainders*, 150, says: "Now here we observe the limitation was to the heir (lawfully begotten) in the singular number, and words of limitation were grafted thereon, and, indeed, according to the above state of the case, which is that delivered by Fitzgibbon, as taken from the roll, the

question, the devise was to Robert Archer, the father, for his life, and afterwards to the next heir male of Robert, and to the heirs male of the body of such next heir

male, and it was held that the ancestor took only an estate for life.¹⁹

It seems to be well settled that the word "heir" is within the rule, there being no su-

limitation grafted on the word 'heir' was in fee, which carries the case still further from the point; for the limitation, being to the heir lawfully begotten, could not give the fee simple to the ancestor, an estate tail in the ancestor could not have answered the superadded words of limitation in fee to the heir. This use of the word 'heir,' etc., in the singular number, with words of inheritance in fee grafted thereon, reduced the import of the word 'heir' to a designation of such issue of the daughter as should be her heir, and made the person answering that description the root of a new inheritance, the stock of a new descent."

In *Burnet and Coby*, 1 *Barnard*, K. B. 367, the question was what estate the following words in a will conveyed: "I devise my lands to A for life, and after his death the remainder to the heirs male of the body of A, and to the heirs male of such issue male." The chief justice was of the opinion that they conveyed an estate tail to A, and said that the settled distinction was, where the word "heir" is in the singular number and a limitation made to the issue of such heir, the word "heir" is considered as a word of purchase and a *descriptio personæ*; but wherever the word heirs is in the plural number and a limitation made to the issue of such heirs, the word "heirs" is considered a word of descent, and not of purchase.

In *Lilly v. Taylor*, *Owen*, 148, M., seised of certain land, devised it to R. L. for life, and if she should marry, and after her death if she should have any heir of her body lawfully begotten, the land was devised to that heir and the heirs of the body of such heir, and in default of such issue, it was provided that the land should revert to the devisor, etc., and the question was whether the husband of R. L. should be tenant by the curtesy or not, that is, whether R. L. took an estate tail or for life only; and the majority of the judges agreed that it was an estate for life.

In *Willis v. Hiscox*, 4 *Myl. & C.* 197, there was a devise to trustees in fee, upon trust, after certain purposes which failed, to pay the rents of certain property to testator's daughter A. during her life, and after her death upon trust for the heir male of the body of the said daughter, and the heirs, executors, and administrators of such heir male. This was held to give A. a life estate only, the devise to A. being expressly for life, and after her death to the heir male of the body, in the singular number, with words of limitation to the heirs general of such heir.

The rule does not apply to a devise to a daughter for her sole use for life, and after her death to her male heir named, if living at her death, to him and his heirs forever, otherwise to her next male heir, to

him and his heirs and assigns forever. *Dunwoodie v. Reed*, 3 *Serg. & R.* 435.

¹⁹ 1 *Coke*, 66b.

In *Greaves v. Simpson*, 10 *Jur. N. S.* 609, it was said that in *Archer's Case* there is a discrepancy between the pleadings and the argument, the words in the former being "the next heir," whereas the judges all refer to the words as "next heir male;" and it may be that either in copying or printing the word "male" had dropped out, and not only so, but in the leading text-books the case is cited and commented on as a gift to the tenant for life, the words ingrafted importing precisely the same estate.

In a dissenting opinion in *Legate v. Sewell*, 1 *P. Wms.* 87, it was said that the reason of *Archer's Case* was not that the devise was to the heir male of the tenant for life, in the singular number (for, if it had gone no farther, it would have been an estate tail executed, the word "heir" being *nomen collectivum*, and the same with the word "heirs"), but the reason why the heir male there took by purchase was because the estate was limited over to the heirs male of the body of such heir male.

In *Doe ex dem. Brown v. Holme*, 2 *W. Bl.* 777, under a devise to testator's son, with impeachment of waste, for the term of his natural life, and after his death to the heirs male or female lawfully to be begotten of the body of the said son forever, in default thereof to the testator's daughter and her heirs, to raise a certain sum, and then to return to the heir male or female of the son and to his or her heirs forever, the son suffered a common recovery, and the court decided that it was good whether this was an estate tail in him or an estate for life. In a note to this case it is said that the first part of the devise to a son for life, and after his death to the heirs male or female of the body forever, if it had stood alone and the devise had ended there, would have given the son an estate tail, as falling directly within the rule in *Shelley's Case*; but the devise in the principal case went on to charge the heirs of the son with the payment of a sum of money, and, in default, the premises were to go over for a time, and then to return to the heir male or female of the son and to his and her heirs forever. Here there was the word "heir" in the singular number, with words of limitation superadded, so that the heir would take a fee by purchase, the word "heir" being used as *designatio personæ*. the head or stock of the new descent, according to *Archer's Case*.

Where property was conveyed by the grantor to the use of himself for life, remainder to the use of his first son and of the heirs male of his body, with similar limitations to his second, third, fourth, fifth, and sixth sons, remainder to the right

peradded words to indicate that it is not used in the sense of heirs.²⁰ Even the superadded word "forever" has been held not to affect the operation of the rule.²¹ And

the fact that the limitation is to the "next heir has been deemed not sufficient to make the word "heir" a word of purchase.²² So,

heir of the grantor to be begotten after the sixth son, and to his heirs male, the remainder was held to be contingent, because first limited distinctly to particular sons, the remainder expressly excluding the first six sons, therefore being essentially different from a limitation to the heirs of the body, which would have descended to the eldest son first. Commenting on this case, Mr. Fearne, p. 151, says that it is further observable that the limitation was not to the heirs in the plural, but to the right heir in the singular number, with words of limitation superadded as in Archer's Case. Waker and Snowe, Palmer, Rep. 359.

²⁰ If the word "heir" in the singular be used in a devise, as "to A for life, with remainder to his heir," the rule still applies. However, where "heir" in the singular is used, the case is more easily taken out of the rule. The addition of words of limitation, as "and the heir or heirs of the body of that heir," are held then to be sufficient to show that the heir is *persona designata*. Evans v. Evans [1892] 2 Ch. 173.

In Richards v. Bergavenny, 2 Vern. 324, in holding that where a house and furniture were given to a woman and such heir of her body as should be living at her death, and, in default of such, remainder over, the woman had an estate tail in the house and an absolute property in the furniture, the court said that a devise to a man for life, remainder to the heir of his body, though in the singular number, or to the issue of his body, is an estate tail; but if the limitation is, as in Archer's Case, to one for life, remainder to the heir of his body, in the singular number, and to the heirs of the body of such heir, then the first taker is but a tenant for life.

In Warrick v. Warrick, 3 Atk. 291, Lord Hardwicke thought a limitation in a settlement to a man for life and to the use of the heir male of his body, in the singular number, would create an estate tail in him.

A grant to a trustee to make title to a certain person for life, and in case he has issue, to make title to his heir, will not vest the fee in the first taker, since the word "heir" is not intended to denote the whole line of succession, but is the description of an individual who shall be a point from which the estate shall start. Smith v. Proctor, 139 N. C. 314, 2 L.R.A. (N.S.) 172, 51 S. E. 889.

A gift of land to testator's son for life, and after his death to his heir at law, creates, by the operation of the rule in Shelley's Case, a fee simple or tail, as the word "heir" is a *nomen collectivum*, and carries the fee. Grant v. Squire, 2 Ont. L. Rep. 131.

But in Garriepie v. Oliver, 8 B. C. 89, it was held that in a devise to testator's son for the term of his natural life, and at

his death to his heir, the testator might have used the term "heir" in a restricted sense, so as to make the rule in Shelley's Case inapplicable.

²¹ In Pawsy v. Lowdall, Style, 249, a man seised of copyhold lands in fee, devisable by custom, devised them to his son Richardson, during his life, and afterwards to the heir of his body forever. It was urged that the question turned upon the use of the word "heir" in the singular and the word "forever." It was held that the son took the fee.

Where the devise was to testator's younger son in *perpetuum*, and after his decease the remainder to his heir male in *perpetuum*, with divers like remainders in the same manner limited *proximo filio seniori heredi masculino in perpetuum*, it was held that the first taker took an estate tail. Whiting v. Wilkins, 1 Bulstr. 219.

But where property was devised to a wife for life, and it was provided that if she should have an heir before her death, the property should descend to her said heir forever, it was held that the word "heir" was used in the sense of "child" or "children" of the wife. Ramsay v. Joyce, McMull. Eq. 236, 37 Am. Dec. 550.

For effect of limitations to heir in the singular, see also Shelley's Case, supra, II.

²² In O'Keefe v. Jones, 13 Ves. Jr. 413, there was a devise in trust for the payment of debts and legacies, after which it was provided that the premises should be delivered to the testator's son J. for life only in no wise to be subject to his debts, engagements, or encumbrances, the premises after his death to go to the first and other sons of the said son J., severally and respectively, in tail male, with remainder to the use of the testator's eldest son, W., for life, with remainder to his first and other sons, severally and respectively, in tail male, with remainder to the use of the testator's son N. for life, with remainder to the use of the first and other sons of his said son N., severally and successively, in tail male, and, in default of such issue, then to the deviser's next heir at law. The question was whether the limitation to the next heir at law was a limitation of the reversion the same in effect as a limitation to his "heirs," or a description of the particular person as purchaser. It was held to be a limitation of the reversion, it being held to be only the common limitation to the testator's own right heirs.

In Burley's Case, 43 Eliz., cited in 1 Vent. 230, where there was a devise to A for life, remainder to the next heir male, and for default of such heir male, then to remain, it was held to be an estate tail.

A devise to testator's sister and his three nephews and two nieces in equal shares during their lives, and after their death the

such words as "oldest,"²³ "first,"²⁴ or "lawful" have been considered of no material effect on the limitation.²⁵ But the word

"issue" in its natural and ordinary signification, no doubt, means "all."²⁶ It may be so

freehold estate to the next lawful heir of one of the nephews named forever, was held to convey to the latter a fee simple, under the rule in Shelley's Case. The court said that it was not an estate intended to be executed in the heir as a *persona designata* so as to convert him into a purchaser, and subject to the inconvenience of its being a contingent remainder, but that it was simply an estate which was to go to the next heir male in a clear succession. Fuller v. Chamier, 12 Jur. N. S. 642.

Where there was a devise to M. and his wife for their lives, remainder to the next heir male of their two bodies, it was held to be a devise in tail, since a devise to the heir male is a devise in tail, unless there are words of limitation superadded so as to bring it within the reason of Archer's Case, and that the words "first," "next," or "eldest" make no difference. Miller v. Seagrave, Fearnie, Contingent Remainders, 179.

But where the devise was to N. for and during the term of his natural life, and after death of the "heirs males" of the body of the said N. lawfully to be begotten, and his heirs forever, but in case the said N. should die without such heir male, "then I give and bequeath the said premises to my kinsman E.," it was contended, among other things, that the words, "in case the said N. should die without such heir male," were in the singular number, and relative to and qualified the foregoing words "heirs males of his body," by pointing out and describing the very person that was to inherit, so as to make him a mere purchaser under the rule in Archer's Case; but the court held this to be an estate tail, saying that the words "heir" and "heir male" were *nomina collectiva*, and included all the heirs of the devisee; that in Archer's Case it was the word "next" which confined it to one particular person, for without that word it would have been a limitation, and not a purchase. Goodright ex dem. Lisle v. Pullin, 2 Strange, 731.

²³ Under a devise to a daughter for life, and at her death to her oldest male heir, but in case there should be no male heir, over, it was held that an estate tail in the first taker was created. Brownell v. Brownell, 10 R. I. 509. The court said that the limitation here was to the oldest heir male, and that it was not necessary to call in aid cases which hold that "heir" might be construed as heirs in the plural, for heir in the singular might be more appropriate to express the intention of the testator, viz., that the estate should pass by inheritance from the daughter, not to all her heirs nor to all her male heirs, but to one only of the male heirs, and that the oldest; and that the estate should go from oldest son to oldest son in succession as it would go to all the male heirs in succession, where the word "heirs" in the plural used.

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²⁴ A devise to testator's son for life, and afterwards "to the first heir male of his body lawfully begotten," creates an estate tail in the first taker, and the fact that the devise is to the first male heir is immaterial. Dubber ex dem. Trollope v. Trollope, Amb. 453.

²⁵ In Reutter v. McCall, 192 Pa. 77, 43 Atl. 398, the devise was, "I give and bequeath to my beloved wife . . . all my estate, personal, real, and mixed, of whatsoever kind, to have and to hold during her natural life, or so long as she remains my widow, and after her death or marriage, to my legal heir during his natural life, and after his death to his heirs and assigns forever." The testator having left one child, a son, it was held that this was an ordinary incident of the direct application of the rule, and that the son therefore took the fee.

In White v. Collins, 1 Comyns, Rep. 289, a testator gave a farm to his son F., to enjoy the rents and profits thereof during the term of his natural life, with power to make a jointure of all or part if he should marry, and after his death and jointure, if any were made, to the heir male of his body lawfully begotten during the term of his natural life, and for want of such heir male, over. It was held that F. took only an estate for life, since the limitation to the heir male showed that the testator intended that such heir male should have it for life only, and that the devise over for want of such heir male did not import that the ulterior devisee should not have it until F. died without heir male generally, but for want of such heir male, who was to have it for life.

²⁶ In Roe ex dem. Dodson v. Grew, Wilmot's Notes, 272, there was a devise to testator's nephew G., to hold unto him, the said G., for and during the term of his natural life, and after his death to the use of the issue male of his body lawfully to be begotten, and the heirs male of the body of such issue male, and for want of such issue male, over. It was objected that the word "issue" was only descriptive of an individual, and that the words "of the body of such issue male" were in the singular number. The court said that "issue" in its natural, ordinary signification means all; that it may be restrained. If "first," "next," or any other similar words, had been used, he might have confined its general meaning, but as it stood in the will it comprehended "all." The word "body" in the singular number was not meant to point out one individual, viz., the first issue, and to exclude all the rest; but to limit the operation of the devise to one at a time in a course of succession, and to exclude the issue from taking altogether, which might have been more doubtful if the word had been in the plural number, "bodies;" but without ex-

qualified, however, as to show that it was used in the singular number.²⁷

k. Possibility of issue extinct.

In a case in which there was a devise to testator's wife for life, and after her death to the heirs of her body by the testator lawfully begotten or to be begotten, and for want of such issue, over, it was urged that, as the possibility of her having issue that might inherit was at an end at the instant when the remainder first vested in her, she took only an estate for life; that the will spoke only so as to vest the estate at the death of the testator; and that with his death, there never having been any issue of the marriage, the limitation to the heirs of her body by the testator begotten became an impossible limitation, and therefore never took effect; that it was true that one state of facts might be imagined which would have given the wife an estate tail, namely, if the testator had died leaving her *en ventre*, and a child had been afterward born; but if that had been the case, it should have been shown, for, although during the lives of the husband and wife, be they never so old, the law would presume the possibility of issue, yet after the death of either of them, no such presumption could be made. But Lord Ellenborough, Ch. J., said there had been no case decided dependent on the event of issue being born, whether the party should take an estate tail. If the words of the will were sufficient to constitute the party tenant in tail, and she might by possibility be such, they were not to be disappointed in their operation by that fact; if the party might by possibility have had issue, they would inherit; that would be sufficient. And Bayley, Judge, said that there might have been issue *en ventre sa mere* at the time of

the testator's death, and until that was ascertained, how could it be pronounced that she was not tenant in tail? The possibility therefore existed at the time, and that was the thing to look to, and not the event; and Dampier, J., gave a similar opinion.²⁸

X. Estates to which rule applies.

a. Rule as to legal and equitable estates.

All the conditions heretofore noticed necessary to make a case for the operation of the rule being present, another one is indispensable, and that is that the estate for life and the estate in remainder must be of the same quality; that is, both legal or both equitable. An equitable estate for life, and a legal estate in remainder to the heirs of the life tenant, preserve their identity; they cannot coalesce. The only question which has given the courts any trouble about the application of this principle turns on the operation of the statutes of uses, in executing trusts. Where trust estates are involved, the question is whether they are to be considered as executed under the statutes of uses. It is said that if both estates are equitable, the rule will apply, but it must not be forgotten that there is an exception in favor of executory trusts. See *infra*, XVIII. If, therefore, the freehold estate and the estate in remainder were both executory trusts, it would seem that, although of the same quality, the rule would not apply.

If the freehold estate were an executory trust, and the remainder a legal estate; or, if the freehold were a legal estate, and the remainder an executory trust,—the rule could not be applied for two reasons: First, because the estates are not of the same quality, that is, both legal or both equitable, and second, because there would be an executory trust. Some of the apparent confusion in the cases on this point seems to be due to the fact that trust estates are not distinguished from other forms of equitable estates. Hence, in some of the cases, where it has been determined that the estate in freehold and remainder are of the same quality, that is, both equitable, and the rule has been applied, the fact that estates were executory trusts appears to have been overlooked.

Where both the freehold estate and the estate in remainder are trusts estates, if the statute does not execute both trusts, the rule in Shelley's Case cannot be applied. Where trust estates are involved, and the language of the instrument is such that, if the estates were legal, the rule in Shelley's Case would apply, the first question the courts

press words the court would not make an exposition productive of such absurd consequences. If only one son, it must be the first; the existence of a son for a moment would determine the limitation; and if ten more sons had been born after, they could not take; but the remainder limited "over" would fall into possession in direct opposition to the will, which says it shall take place for want of such issue male comprising and embracing every branch arising from him; not one, but all the male line derived from him.

²⁷ Under a devise to testator's wife of all certain property for life and "to her issue by me begotten, his or her heirs and assigns forever, but if no heir by him should live" to a certain age, then over, it was held that the word "issue" was used in the singular number, and was therefore a word of purchase. *Wells v. Ritter*, 3 Whart. 217.

²⁸ *Platt v. Powles*, 2 Maule & S. 65.

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determine is whether the trust or trusts are active or passive, executed or unexecuted. After the statute of uses, if applicable, has done its work, if the resulting estates are of the same quality, the rule applies, otherwise not.

It may be said in general that the rule applies alike to equitable and to legal estates.²⁹ In order that the two estates attempted to be created shall coalesce, they must be of the same quality, that is, both

must be legal or both equitable. If the one be equitable and the other legal, the rule will not apply.³⁰

b. Estates of same quality in general.

If the estate for life and the estate in remainder are both equitable, they are, of course, capable of coalescing, so as to enlarge the estate for life to a fee.³¹ The life estate and the remainder uniting, the

²⁹ Croxall v. Shererd, 5 Wall. 268, 18 L. ed. 572; Cannon v. Barry, 59 Miss. 289; Cushing v. Blake, 30 N. J. Eq. 689; Brown v. Wadsworth, 32 App. Div. 423, 53 N. Y. Supp. 215; Austin v. Payne, 8 Rich. Eq. 9; Heather v. Winder, 5 L. J. Ch. N. S. 41.

A limitation which in legal estates, would create a fee under the rule in Shelley's Case, will have a like effect with respect to an equitable estate. Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203.

³⁰ Vogt v. Vogt, 26 App. D. C. 46. To the same effect; Croxall v. Shererd, supra; Sims v. Georgetown College, 1 App. D. C. 72; Edmondson v. Dyson, 2 Ga. 307; Lord v. Comstock, 240 Ill. 492, 88 N. E. 1012; Smith v. Scholtz, 68 N. Y. 41; Little v. Wilcox, 119 Pa. 439, 13 Atl. 468; Shatlers v. Ladd, 141 Pa. 349, 21 Atl. 596; Xander v. Easton Trust Co. 217 Pa. 485, 66 Atl. 759; Austin v. Payne, supra; Settle v. Settle, 10 Humph. 474; Van Grutten v. Foxwell, 77 L. T. N. S. 170.

It is clear that the rule in Shelley's Case cannot operate where the estate limited to the ancestor, and the estate limited to the heirs of his body, are of different natures, so that they cannot unite. Payne v. Sale, 22 N. C. (2 Dev. & B. Eq.) 455.

And so it is if A make a feeoffment in fee to the use of B for life, and after to the use of C for life or in tail, and after to the use of the right heirs of B, B hath the fee simple in him as well when it is by way of limitation of use as when it is by act executed. Co. Litt. 319b.

The rule in Shelley's Case is applicable to trust estates where both the life estate and the remainder are of the same character, but not where the life estate is of an equitable character and the remainder is a legal estate or vice versa. Green v. Green, 23 Wall. 486, 23 L. ed. 75.

The rule in Shelley's Case applies to equitable as well as legal estates, but requires that both estates,—the prior estate limited to the ancestor, and the subsequent estate limited to the heirs,—shall be of the same quality, that is, both legal or both equitable, because, if the prior estate is an equitable or trust estate, and the subsequent estate is a legal one, the two do not unite as an estate of inheritance in the ancestor. Glover v. Condell, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173. To the same effect, Romanes v. Smith, 8 Ont. Pr. Rep. 323.

³¹ A devise to a daughter for life, remainder over, etc., "to hold as her separate es-

tate, free from the control of her husband." the devise both for life and in remainder being of the same equitable estate, does not interfere with the application of the rule in Shelley's Case. Sims v. Georgetown College, 1 App. D. C. 72.

A deed of trust for the use of a man for life, then to such persons as he should appoint by will, and in default of such appointment then to the use of his right heirs, was held to vest an equitable fee simple in him, the estate limited to him for life and that to his heirs being both equitable. Brown v. Renshaw, 57 Md. 67. The court says that it is well settled that the mere power of appointment is wholly ineffective until the power is executed, and that in case of a limitation to one for life with power of appointment, and, in default of appointment, to his right heirs, the remainder limited to the right heirs will become an executed fee in the taker for life under the rule in Shelley's Case, subject to be divested by the exercise of the power.

Where by a deed of settlement in anticipation of marriage the property of the wife was conveyed to a trustee in trust for her use until marriage, and after the marriage for her separate use notwithstanding such coverture, and after her death for the use of such person or persons as she should by will, and notwithstanding such coverture, appoint, and in default of such appointment to the use of her heirs and to the exclusion of the intended husband, either as tenant by the curtesy or otherwise, so that the wife should not at any time thereafter, either by herself or in conjunction with others, have the power of exonerating, releasing, or discharging the property from the operation of her settlement, or of receiving any portion thereof except the annual income.—it was held that, by the operation of the rule in Shelley's Case, the husband having died before the wife, the limitation of the equitable estate to the wife for life, with an unlimited power of appointing the inheritance by will, united itself with the equitable estate in remainder to her heirs generally, so as to create an equitable estate in fee in the whole property in the event that had happened. McWhorter v. Agnew, 6 Paige, 111.

A deed of trust for the benefit of a woman for life, and, after her death, the rents, issues, and profits of the property in trust to and for the sole use and behoof of her right heirs, to them, their heirs, and assigns for-

life tenant takes an equitable fee simple or fee tail.²²

So, where there was a gift of real and personal property in trust for testator's daughter for life, and after her death to her heirs, executors, administrators, and

assigns, the will providing that if she should marry and have no children, the property should go over, it was held that the daughter took an estate tail for life and an equitable remainder which coalesced.²³ And under a devise of certain

ever, was held within the rule in Shelley's Case, since the several interests limited therein were equitable interests of the same nature. *Brown v. Wadsworth*, 32 App. Div. 423, 53 N. Y. Supp. 215.

Where a will devised real and personal property in trust to pay certain legacies, and to hold the residue to pay from time to time all or such parts of the income as the trustee might think proper to the testator's son, and upon his death to convey the property as the son should by his will direct, or, in default thereof, to his heirs, it was held that the devise was within the rule in Shelley's Case and carried an equitable fee in the estate held by the trustee. *Cowing v. Dodge*, 19 R. I. 605, 35 Atl. 309.

A devise to a person of an estate in fee to hold in trust for the separate use of his daughter during life, and after her death to the use of her heirs at law, with power of appointment, separate from any incapacity from coverture, vests in her a fee simple in equity under the rule in Shelley's Case, the limitation of the estate to one and the remainder being both of the same nature. *Armstrong v. Zane*, 12 Ohio, 299.

²² By a deed in consideration of marriage, property was conveyed to trustees for the use of M., without impeachment of waste, or the term of his natural life, and after his death to the use of E., his wife, for life, if she remained unmarried, the deed, after making a certain provision in case the wife married, providing that after the death of M. and E., but after a certain term of years, the property was to be held to the use of the heirs of the body of E. by the said M. lawfully begotten or to be begotten, and, for the want of such issue, to the right heirs of M. forever. It was held that the wife took an estate tail, the estate to her and the remainder limited to the heirs of her body failing. *Curtis v. Price*, 12 Ves. Jr. 89.

Where trustees were given title to property in trust to receive the rents and profits and pay them to a married woman for her separate use, and after the determination of that estate to stand seised of the land to such uses and upon such trusts as she should appoint, and in default of appointment to the use of her heirs and assigns, it was held that, both estates being equitable, they coalesced under the rule in Shelley's Case. *Cooper v. Kynock*, L. R. 7 Ch. 8.

A deed in trust to permit the grantor's son for his sole use to receive and collect the rents, issues, and profits arising therefrom for life, and for no other purpose whatever, and for such other uses and purposes after his death as he by deed or last will should direct forever, and in default thereof for the use and benefit of his heirs

at law and their heirs forever, was held to create an equitable freehold estate for life with remainder to the heirs, and therefore an equitable fee subject to the power of appointment which was practically merged in the power of alienation. *Bates v. Winifrede Coal Co.* 4 Ohio N. P. N. S. 265.

Under a deed of trust conveying real property to one in trust to pay the debts of the grantor out of the income and profits, if sufficient, and, if not, from the principal, and to pay the income and profits as they might accrue to the grantor or his order for the benefit of his family, and if necessary to pay the grantor such portions of the principal as the trustee might think proper not to exceed one half, and in case of the death of the grantor the trust to terminate and the property in the hands of the trustee to be conveyed as the grantor should by will direct, and in default thereof to go to his heirs at law, it was held that the grantor took an equitable fee simple in the property. *Taylor v. Lindsay*, 14 R. I. 518.

Where there was a devise to trustees to stand seised of property for the life of A, and until the testator's debts and certain legacies were paid, and then to apply the rents and profits to A and his assigns during his life, and after his death to the payment of certain legacies, etc., the will providing that the estate should then go to the heirs of the body of A, and for default of such issue to his own right heirs, it was held that A took an equitable estate tail which could be barred by recovery. *Collier v. Walters*, L. R. 17 Eq. 252.

Where real estate was given to trustees upon trust for testator's grandson for life, the will providing that the trustees should receive the rents until the grandson should attain the age of twenty-five, and after certain deductions should pay them in their discretion to the separate use of the testator's daughter and her children, and upon his grandson's attaining twenty-five should put him in possession of the property and any surplus rents, the will providing that immediately after his death the same property should go to the heirs of the body of the grandson lawfully issuing, and for default of such issue, over, it was held that the grandson took an equitable estate tail. *Denman v. Jones*, 16 L. T. N. S. 787.

²³ *Jackson v. Noble*, 2 Jur. 251.

Likewise in *Reynell v. Reynell*, 10 Beav. 21, where the testator left property in trust for his wife to receive the rents for life, and after her death in trust to pay and divide the rents among his children as they should attain twenty-one, and after their deaths to pay the principal of their respective shares to their legal representatives, their executors, administrators, and

property in trust to permit the daughter of the testatrix to receive the rents and interests for life for her separate use, the will providing that after her death the rents and interests should go to the heirs of the body of the daughter lawfully begotten, but that in case the daughter

should happen to die without leaving any lawful issue living at her death, then over, it was held that there was a trust estate for the heirs of the daughter as well as for her life, so that the two estates could coalesce.³⁴

And where a woman conveyed property

assigns, it was held that the trustees took a legal estate, and that the estates of the children and the estates in remainder were equitable and coalesced.

By a devise of lands to trustees in trust for testator's son for life and after his death to hold to trustees to preserve contingent remainders, etc., in trust for the heirs male of the body of the said son lawfully issuing, and the heirs and assigns of such male issue forever, and in default of such male issue lawfully issuing, in trust for another son, the devisee was held to take an estate tail, the two estates being of the same quality. *Nash v. Coates*, 3 Barn. & Ad. 839.

In *Richardson v. Harrison*, L. R. 16 Q. B. Div. 85, a devise of property to trustees, their heirs, and assigns upon trust to pay testator's daughter and her assigns during her life, and after her death upon such trusts for the lawful child or children of the said daughter as she should appoint, and, in default of such appointment, in trust for her right heirs forever, was held to convey an equitable life estate to the daughter, and an equitable estate to the right heirs of the daughter in remainder, so that the two would coalesce, and the rule in *Shelley's Case* apply.

Where the grant was of an estate in trust for the use of the grantor for life, and then in trust for the grantor's daughter and the heirs of her body, it was held that there was no such distinction between the quality of the estate given to the daughter and that to her children as to prevent the operation of the rule in *Shelley's Case*. *Seaman v. Harvey*, 16 Hun, 71. But as to whether this was a case for the application of the rule in *Shelley's Case* in any event, see IX. d, 1.

In *Sherwin v. Kenny*, 16 Ir. Ch. Rep. 138, the testator devised property to trustees in trust to apply the rents, profits, etc., to and amongst his three daughters, C. E., and M., during their respective lives, in equal shares, for their sole use, the will providing that in case either of his daughters should happen to die leaving lawful issue then in trust as to the share of the daughter so dying to the use of such issue, in such shares or proportions as she should appoint, and, in default of appointment, then to the use of such issue equally, share and share alike, and in case any of the daughters should die without issue, that her share be paid to the survivors or survivor, and in case of the death of all of the daughters without leaving lawful issue, then in trust to pay the rents, profits, etc., to a specified person for life, with ultimate remainder to the testator's right heirs. It was held that the estates of the daughters and the estates in re-
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remainder would coalesce, the legal estate and the entire interest of the testator vesting in the trustees. The daughters were held to take an estate in quasi tail.

A devise in trust to pay the rents and proceeds of the property to testator's son for life, and from and after his death in trust for his right heirs forever, was held to give the son an equitable estate in fee under the rule in *Shelley's Case*, since the estate for life and the remainder were both equitable and could therefore unite. *Spence v. Spence*, 12 C. B. N. S. 199.

³⁴ *Verulam v. Bathurst*, 13 Sim. 374.

So, where the devise was to trustees for the use of A for life, to and for her sole and separate use and independent of any husband she might marry, with remainder to the use of the heirs male of the body of A lawfully to be begotten who should live to the age of twenty-one years, and to his heirs and assigns forever, but in default of such heirs male, or, there being such, he or they should die before he or either of them should attain the age of twenty-one years without lawful issue, then to the use of B, etc., it was contended that the devise to A for life was of an equitable estate only, that the trustees must take the legal estate in order to protect her interests from the control of any husband she might marry, but that the devise after her death gave the legal estate, and therefore that the two could not coalesce under the rule in *Shelley's Case*; but the court was of the opinion that if the trustees took the legal estate at all they must take it throughout so far as to protect the devisee from the control of her husband, and that the estates were of the same quality, both legal or both equitable, so that the rule applied. *Toller v. Attwood*, 20 L. J. Q. B. N. S. 40.

In *Re White*, L. R. 7 Ch. Div. 201, property was devised to the use of trustees, their executors, and administrators during the life of E. A. upon trust for E. A. for her separate use, and after her death in case W. W. should survive her, to the use of W. W. for life, and after the death of E. A. and W. W. to the use of R. E., if she should be living at the death of her mother, and to her heirs and assigns forever: in case R. E. should die in the lifetime of her mother, to the use of such persons as E. A. should by will appoint, and in default of appointment to the use of the heirs of E. A. forever. It was contended that E. A. took an estate in fee under the above limitations, subject to intermediate estates. It was held that the rule in *Shelley's Case* applied for the reason that all of the limitations were equitable.

Where freehold estates were conveyed to

to trustees to manage and hold for her sole use, and to pay in their discretion such proportion of the income to her as they thought proper during her life on her sole receipt, and after her death to convey all the trust estate to her heirs at law, it was held that the rule applied, there being nothing to show any intention to take the case out of its operation, both estates being of the same nature, that is, equitable.³⁵

trustees to pay the rents and profits to A for life, and, after his death, upon trust to convey the property, together with any accumulation of rents in the hands of the trustees, to the right heirs of A, it was held that the rule in Shelley's Case applied, the limitations being all equitable. Re Youman [1901] 1 Ch. 720.

Where on the death of a *cestui que trust* it was provided by a deed that the trust should cease and the premises should belong in fee simple absolute to her appointee, or in default of appointment "to her heirs and assigns, and to her and their issue forever," it was held that the limitation to the heirs was of the same quality as that of the life estate, both being equitable, the rule in Shelley's Case giving the *cestui que trust* an equitable fee. McFall v. Kirkpatrick, 236 Ill. 281, 86 N. E. 139.

³⁵ Angell's Petition, 13 R. I. 630.

In Webb v. Shaftesbury, 3 Myl. & K. 599, the devise was of lands to be purchased with the proceeds of certain estates to the use of trustees, etc., upon trust to pay rents and profits to his daughter, whether married or unmarried, for her sole and separate use and benefit, not subject to the control, debts, etc., of any husband she might thereafter marry, and, after the death of the daughter, upon the further trust to convey and assure the property purchased to such person and persons as his daughter should appoint by will, and for want of such, then a trust to convey and assure the freehold and inheritance of the property so purchased to the use of the right heirs of the daughter, and the contention was that two estates would not unite. The court said that if the purchase money had remained invested in land the effect of the limitations in the testator's will is expressly to give it, not to the next of kin, but absolutely to the daughter. That it was reasonable to infer that the testator's intention was the same whether it continued in the shape of money, or was invested in land, and that the limitation to the right heirs of the daughter must therefore be considered not as words of purchase, but as words of limitation.

But where a testator by his will devised a real estate to his eldest son, A, for ninety-nine years if he should so long live, and subject thereto to trustees and their heirs during A's life to support contingent remainders, with remainder to the heirs of the body of A, and for the want of such issue, over, it was held that he did not, by a L.R.A. (N.S.)

c. Equitable life estate; legal remainder.

Where the estate limited to the ancestor is an equitable or trust estate, the two estates, under the rule in Shelley's Case, will not coalesce in the ancestor, and the result would be the same as if the estate for life was a legal estate and that limited to the heirs an equitable estate.³⁶

codicil confirming his will and devising his real estate to trustees upon certain trusts for the payment of debts, and securing a jointure for his wife, make the first taker an equitable tenant for life, with an equitable remainder to the heirs of his body, so as to cause the two estates to coalesce under the rule in Shelley's Case. Coape v. Arnold, 4 De G. M. & G. 574.

³⁶ Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 762.

If the trust is to pay debts, to divide the whole property, real and personal, into shares to pay the income of each share, after deducting the expenses, etc., to a child or grandchild for life and by clear implication to hold to the use of the appointees by will of such child, and in default of any appointment, to the use of the heirs at law, the rule in Shelley's Case will not apply, because the estate limited to the ancestor is an equitable estate and that to the heir a legal estate in fee. Ward v. Amory, 1 Curt. C. C. 419, Fed. Cas. No. 17,146.

Where real estate was conveyed to a trustee for the separate use of testator's wife and his children during her life in absolute right as if she were unmarried, and in trust to convey the premises in such manner and to such purposes as the wife by her will might direct, and in the absence of such direction, to her heirs at law, it was held that an equitable life estate was created in her and that in the absence of appointment the legal estate was executed in her heirs, therefore preventing the rule in Shelley's Case from applying. Green v. Green, 23 Wall. 486, 23 L. ed. 75.

If the first limitation be of a trust estate of freehold, and the subsequent one carries the legal estate, the rule will not apply. Crosby v. Davis, 2 Clark (Pa.) 408; Handy v. McKim, 64 Md. 560, 4 Atl. 125.

Where by deed of marriage settlement property was conveyed to a trustee for the sole and separate use of the wife, and it was therein provided that should she die before her intended husband, leaving no children, the property should vest in and belong to her natural heirs discharged of all trusts, it was held that the rule in Shelley's Case did not apply, because the ancestor's estate was equitable, and that of the heirs legal. Shackelford v. Bullock, 34 Ala. 418.

A devise of land to a trustee for the use of a woman for life, with the direction that in case she should die after attaining the

Unexecuted trust estates in the life tenant and legal remainders will not unite.³⁷

They are not of the same quality.³⁸
So, where property was devised to trus-

age of sixteen leaving lawful issue, to convey said premises by deed to such lawful issue and to his, her, or their heirs or assigns, and that if the devisee should die either before or after attaining the age of sixteen without leaving lawful issue surviving her, then to convey the said premises to the testator's son, his heirs, and assigns, was held not to be within the rule in Shelley's Case, since the devisee had only an equitable estate, while the legal estate in fee simple was given to her issue, and the trust was active. *Slater v. Rudderforth*, 25 App. D. C. 497.

Where the interest of a trust fund was given to a man for his life and then to his wife for life, if she survived him, and then the principal of the fund was given to his heirs, it was held that the rule in Shelley's Case did not apply, because the legal and equitable estates could not coalesce. *Monast v. Letourneau*, 87 Ill. App. 300.

But where money was to be invested in safe stocks, the income to be for the sole use of testator's daughter during her life, and after her death the property was to go to her heirs, it was held that an equitable interest was not created in the devisee for life, so as to take the case out of the rule in Shelley's Case, there being no word about investing in the stock in the name of any trustee, no word about directing that the interest should be paid over to her, but simply that the income should be for her sole use. *Engle v. Mades*, 25 Wash. L. Rep. 229.

And, in *Douglas v. Congreve*, 1 Beav. 59, where the devise was to a woman for life for her independent use and benefit, followed by a direct devise after her death to her husband for his life, with remainder to the use of the heirs of her body in tail, with remainders over, the will containing a declaration that all these limitations were intended to be in strict settlement with remainder to testator's own right heirs forever, it was held that the fact that there was a direction that the devisee should hold the estate for her independent use and benefit did not render the estate of the first taker so far equitable that it could not coalesce with the legal estate in remainder.

³⁷ A deed conveying property in trust for the use of a woman during her natural life, and, upon her death, to inure and vest in her heirs in fee simple forever, said heirs to have and hold the premises under them, and their heirs and assigns, forever, was held not within the rule of Shelley's Case, since if the estate limited to the ancestor is a trust estate and the subsequent limitation to his heirs carries the legal estate, the two will not unite in an estate of inheritance in the ancestor. *Zuver v. Lyons*, 40 Iowa, 510.

Where the devise of money was to testator's daughter to be invested in lands for her, she to have the income of the same 29 L.R.A. (N.S.)

during her life, and "at her death to go to the heirs of her body, and, if none, to be divided equally between the surviving children of her mother," etc., it was held that the rule in Shelley's Case was inapplicable because the testator did not vest the legal estate in the daughter, with a limitation over to the heirs of her body. *Hanna v. Hawes*, 45 Iowa, 437.

The rule in Shelley's Case does not apply to a devise in trust for the use of a married woman for life and after her death to her heirs in fee tail, since the estate of the ancestor is equitable and that of the heirs legal. *Griffith v. Plummer*, 32 Md. 74.

A devise to a trustee for the use of testator's daughter for life, and then to her issue lawfully begotten and their heirs forever, is not within the rule in Shelley's Case, since the use limited to the daughter is equitable and that to the issue is legal. *Shreve v. Shreve*, 43 Md. 382.

Where an estate is limited, either by deed or will, to the sole and separate use of a married woman for life and after her death to the use of her heirs in fee, she takes but an equitable life estate, while her heirs take a legal estate, and this prevents the operation of the rule in Shelley's Case. *Nevin v. Gillespie*, 56 Md. 320.

Where the testator by express language declared that the legal estate should be held by trustees in trust for the life tenant, and from the expiration of the equitable life tenancy in trust for the period of twenty years, when the estate was to vest absolutely in the children or descendants of the life tenant, if any, and, in default of any such issue living at that time, then in the persons who should answer to the description of heirs at law of such life tenant, the rule in Shelley's Case was held not to apply, since this created an equitable life estate followed by a subsequent fee-simple estate. *Mercer v. Hopkins*, 88 Md. 292, 41 Atl. 156.

Under a deed of trust which empowered the trustee to collect and receive the income of the trust estate and pay it over to the life tenant, with remainder to his right heirs, the first taker was held to take an equitable life estate and the heirs a legal estate, making it impossible to apply the rule in Shelley's Case. *Ibid*.

A grantor having given the legal estate in his property to trustees, and created for himself an equitable life estate, and provided that in case of his leaving no children living at the time of his death and leaving a widow surviving him, the widow should have an equitable life estate with remainder to his right heirs, the rule in Shelley's Case was held not applicable, as the preceding life estate in the grantor was an equitable estate and the remainder to the heirs a legal estate. *Mercer v. Safe Deposit & T. Co.* 91 Md. 102, 45 Atl. 865.

³⁸ Where a testator had, before the Revolution, devised lands to trustees dur-

ees in trust to receive the income thereof and pay it over to testator's daughters respectively for the sole and separate use of each daughter during life, and then to her husband in case a husband should survive, and after the death of the daugh-

ters and their husbands said portions to be conveyed to the right heirs of the daughters in fee simple, it was held that the estate of the first taker was equitable and that of the remaindermen legal, so that the two would not coalesce.³⁹

ing the life of his grandson to preserve contingent remainders, but in terms to permit the grandson to receive the rents and profits during his life, and from and after his death devised the same to the first son of the grandson and the heirs male of his body, and in default thereof to his second, third, and every other son successively, and to the heirs male of their bodies respectively, with the further limitations depending upon the failure of male issue of the sons of the grandson; and the grandson, who had no sons at the death of the testator, afterwards had several, the eldest of whom died without issue in the lifetime of the father,—it was held that the grandson was not tenant in tail, but took only an equitable life estate, and that his eldest son became seised, on his birth, of a vested remainder in tail expectant upon the death of his father; since the estates limited in remainder to the sons of the grandson were legal in their nature, while his was but an equity, and such dissimilar estates will not coalesce to enlarge the estate of the ancestor from a life interest to a fee, under the rule in *Shelley's Case*. *Vanderheyden v. Crandall*, 2 Denio, 9.

In *Striker v. Mott*, 28 N. Y. 91, under a devise to grandchildren and their heirs of certain land, the will providing that the property should not at any time be sold or alienated, and that the executors and the survivor of them, etc., should from time to time lease or rent the same, and that the rents, issues, and profits should be annually paid to the testator's said heirs in equal proportions, and in case any of the said heirs or devisees should die without lawful issue his share to inure to the sole use of the grandchildren and the survivor of them, and the heirs of such survivor forever,—it was held that if the remainder to take effect upon the death of a grandchild and the consequent termination of the estate in the executors was considered as limited to the grandchildren's heirs at law by force of this provision of the will, still the rule in *Shelley's Case* would not apply, for the reason that the precedent estate and that in remainder were not of the same quality, the first being equitable and the other legal.

A conveyance to a trustee to receive rents, issues, and profits of the premises, and to pay the same to a specified person for and during the term of her natural life, or to such person as she should from time to time, but not by way of anticipation notwithstanding her coverture, direct and appoint, to be for her sole and separate use, and in no way subject to the control of debts or encumbrances of her husband, and after her death and the death of her hus-

band, to have and hold such premises, rents, issues, and profits thereon in trust to and for the sole use, benefit, and behoof of the right heirs of the *cestui que trust*, to them, their heirs, and assigns forever,—was held not to be within the rule in *Shelley's Case*, on the ground that the first estate was equitable and the remainder legal. One judge dissenting. *Brown v. Wadsworth*, 168 N. Y. 225, 61 N. E. 250.

Where the testator left personal property to trustees for the benefit of his daughter for life, and then to be equally divided amongst the heirs of her body forever, it was held that the daughter's interest was equitable and that of the heir's legal, so that they could not unite. *Payne v. Sayle*, 22 N. C. (2 Dev. & B. Eq.) 455.

³⁹ *Bacon's Appeal*, 57 Pa. 504.

Similarly where a will directed that "each of my said children shall receive the interest only of his or her respective share during his or her natural life, and upon the death of each of my said children then the children of such deceased child shall take absolutely and without restriction in equal shares the share so limited to their parent during his or her natural life," and the testator appointed a trustee for all his children and gave him power to receive and invest, as he might deem most advantageous, the entire fund, with direction to pay the interest of a certain part to each of his children for life, it was held that the rule in *Shelley's Case* was inapplicable for one reason, because the life estate was equitable and the remainder a legal fee simple. *Mannerback's Estate*, 133 Pa. 342, 19 Atl. 552.

In *Harbster's Estate*, 133 Pa. 351, 19 Atl. 558, a testator directed his executors to invest a certain portion of his property in good and reliable securities for the use of his son during his natural life, the principal after his death to go to and be paid to his children, or children's children in proper line of descent. This was held to create an active trust, so as not to entitle the first devisee to the payment of the principal.

Under a bequest of a portion of the testator's estate to be invested by his executors, the proceeds and so much of the principal as should be necessary applied to the maintenance of testator's son during his life, the said son to have no control of it and the property not to be liable for his debts, the will providing that at his death it should go to his heirs, the son does not take the absolute estate. *Dull's Estate*, 137 Pa. 112, 20 Atl. 418.

In *Eshback's Estate*, 197 Pa. 153, 46 Atl. 905, a testator devised a portion of his estate to executors in trust to put the same at interest and pay the interest from time

And a devise of a farm to a trustee in special trust for testator's son, and after him in fee to his heirs, was held to give the son an equitable estate for life only, since the estate of the life tenant and that of the remaindermen were of different qualities.⁴⁰

So, it was held that a grant to a trustee

in trust for the sole and exclusive use of a married woman for life, free from the debts, contracts, or liabilities of her husband, and after her death to her issue to take *per stirpes* their heirs and assigns, to his and their use, benefit, and behoof forever, was not within the rule, for one reason,—because the estate of the an-

tee to time to testator's daughter during her life, the principal after her death to go to her heirs and assigns forever. It was held that the rule did not operate, since the equitable estate for life was followed by a legal estate in remainder.

In a devise of a share of testator's property to his executor to pay the income arising therefrom to testator's son, and upon the latter's death to divide it among the son's children, share and share alike, conceding that the word "children" was used in the sense of heirs of the body, still the rule in Shelley's Case was held not to apply, since the qualities of the estates of the life tenant and the remaindermen were not the same, the trust not being executed in the life tenant. *Xander v. Easton Trust Co.* 217 Pa. 485, 66 Atl. 759.

In *Hemphill's Estate*, 18 Pa. Co. Ct. 527, a will gave to the widow "in trust" all of the estate, "the net income" of which was, with certain exceptions, to belong to her for life. At her death . . . the personal estate was given to the children absolutely, and the real estate to them, naming them, "in trust," the net income of which shall belong to them, share and share alike," and at their death the same was bequeathed to their heirs, administrators, and assigns. It was held that the estate in the children was an equitable estate for life, and that the estate in remainder to their heirs was a legal estate, and that the two estates being of different qualities could not coalesce. The rule in Shelley's Case therefore did not apply.

⁴⁰ *Thurston v. Thurston*, 6 R. I. 206.

Where there was a devise to a trustee of certain property to pay the income thereof to testator's son for life, and at his death to convey the principal "to such issue as he may leave surviving him," and in case the son should die without issue living at the time of his death, over, it was held that even if the word "issue" could be taken in its widest sense as synonymous with the words "heirs of the body," the rule in Shelley's Case would not apply, because the estate to the son, being equitable, would not coalesce with that to the issue, which was legal. *Kern's Estate*, 5 Pa. Dist. R. 204.

Where the devise was as follows: "I give and bequeath to each of my children an equal portion of my estate, that portion that will be for my daughters Emily and Matilda to be invested in safe securities and the interest to be paid to them. Should either of them die without issue, then to be divided with my other heirs,"—the court paid no attention to the final limitation over, on the ground that if a trust for the

separate and sole use of the married daughters existed, their estate was an equitable one, and the rule in Shelley's Case could not apply. *Craige v. Craige*, 9 Phila. 515.

Where the devise was in trust to pay the interest of certain property to testator's daughter for her sole and separate use, free from the control of her husband, for life, and after her death in trust for the use and benefit of such person or persons as would be entitled to the same by the laws of Pennsylvania if the daughter had survived her mother and husband and died intestate, etc., it was contended that the trust was merely a separate use, and that by the death of the mother the parties to it in remainder became the entire body of the heirs of the daughter, and that therefore by the application of the rule in Shelley's Case, she became entitled to the whole estate; but it was held that active duties which were involved in the trust compelled the vesting of the legal estate in the trustees, and that the daughter's interest remaining equitable was prevented from coalescing with the legal estate in remainder. *Kountzleman's Estate*, 21 W. N. C. 467.

In *Boutelle v. City Sav. Bank*, 18 R. I. 177, 26 Atl. 53, a devise was to a trustee to receive the rents and profits of the property, and, after paying therefrom certain charges, annually to pay over the residue to testatrix's daughter during her life for her use and benefit, the will providing that after the death of the daughter the trust estate was to go to the children left by the daughter of her body, or the descendants of such child or children, if she left no child, and that if the heirs of her body should fail before arriving at the age of twenty-one years, then over. It was held that the rule did not apply.

In *Markley v. Singletary*, 11 Rich. Eq. 393, the rule was held not applicable to a grant of a negro girl to grantor's daughter for her use and support for life, and to the daughter's issue at her death, since the first taker's estate was equitable, and that of the remainderman, legal.

In *Holbrook v. Gaillard, Riley*, Eq. 167, it was held that the rule did not apply to a devise of property to executors in trust for the separate use of testatrix's daughters respectively for their lives; and from the death of such of her daughters as might die without issue surviving them, to and for the use of her other children surviving her, and the issue of such as did not survive her, to be divided, etc., and as to such daughters as should leave issue alive at their deaths, in trust and to the uses and purposes which they might declare as to

cestor was equitable, while that of the issue was legal, the trust as to them being executed.⁴¹

And where there was a devise to trustees and their heirs upon trust to pay out of the rents and profits of certain lands certain legacies, devises, and bequests, and then to pay the rest and residue of the rents, profits, etc., to a woman or certain person or persons as she should appoint, for and during the term of her life, the will providing that after her death the trustees should stand seised of the property to the use of the heirs of her body severally and successively as they should happen to be in priority of birth and superiority of age, and to the heirs of their

several respective bodies in tail general, subject to the payment of the legacies, devises, etc., and, in default of such issue, upon the further trust that, from and after the death of the devisee without issue of her body, certain legacies be paid, after which the property was devised to another,—it was held that this was a use executed in the trustees and their heirs during the life of the first devisee, and that she had only an equitable interest in the surplus rents and profits during her life, and that the subsequent limitation to the trustees to the use of the heirs of her body was a use executed in the remaindermen, and that the ancestor having only a trust estate, while the use was executed in the heirs

their respective shares by appointment, and in default thereof, such share to go to the use of the right heirs and distributees of the daughter so dying, free from further trusts, since the gift to the tenant for life was of an equitable estate and that to the heirs a legal estate.

⁴¹ *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64.

Where real property is conveyed to a trustee for the benefit of the grantor's wife for life and then for the heirs of her body, with power to sell and reinvest when deemed best for the interest of the wife and children, the devise is not within the rule, for one reason,—because there is an unexecuted trust in the trustee. *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339.

A devise to each of the testator's daughters, naming them, "for and during the term of her natural life, to and for her sole and separate use, benefit, and behoof, and in no wise to be subject or liable to the debts, contracts, or encumbrances of any husband, and at her death to the issue of her body who may be then living," containing the further provision that "in case either of my daughters shall die without leaving issue of her body living," over, was held not within the rule, because the estate given to the daughter was equitable, and that given to the issue, legal. *Gadsden v. Desportes*, 9 S. C. 131, 17 S. E. 706.

The rule does not apply to a devise in the following language: "I lend unto my son, John, during his natural life or resignation, the balance of my land and appurtenances that is not deeded or willed after the death of my wife in this my will, and at his death or resignation to revert to the lawful gotten heirs of his body;" since the son took only an equitable estate for life in the land, whereas the devise to his heirs gave them the legal title. *Clopton v. Clopton*, *Heisk.* 31.

In *Ward v. Saunders*, 2 Swan, 174, a testator willed property in the hands of his executors for the use and benefit of his daughters named, to remain in the hands of his executors in trust for the daughters during their lives and to the heirs of their bodies forever, and in a codicil provided: L.R.A. (N.S.)

"In pursuance of my last will and testament, it is my desire that my young negroes already devised by will be divided as follows, to wit, to my daughter . . . and the heirs of her body, negro girl Polly," etc. It was held that this passed only a life estate to the daughter.

In *Loving v. Hunter*, 8 Yerg. 4, the testator "lent" a certain portion of his estate to his three daughters for their lives, and then "gave" it to the lawfully begotten heirs of their bodies. The court said that had this been a devise of real estate the word "lend" would have conferred on a daughter only an equitable right to use the estate during her natural life, and that the legal title thereto would have vested in her children by force of the word "gave." The devisee would not therefore have fallen within the rule in *Shelley's Case*, since the estates were not of the same quality.

A devise of freehold and copyhold estates to trustees upon trust, to hold the same upon trust for the life of testator's son, to receive the rents, issues, and profits thereon, and pay the same to the son and his assigns during his life, or otherwise to permit him or them to receive the same, the testator devising the property, after the death of the son, to the sole use and behoof of the heirs of the son's body lawfully begotten, and in case the son should die without leaving any issue of his body lawfully begotten, then over, was held to vest in the trustees a legal estate in both freeholds and copyholds for the son in trust for him, with the legal remainder to the heirs of his body. *Baker v. Parson*, 42 L. J. Ch. N. S. 228.

In *Collier v. M'Bean*, 34 Beav. 426, under a devise of real estate to trustees and their heirs in trust for the life of testator's brother, and, until the payment of testator's debts and legacies, to apply the rents in the payment of such debts and legacies, and then to pay the same to his brother for life, after the latter's death the estate being devised to the heirs of his brother's body, and, in default, to the testator's own right heirs, it was held that the equitable estate in the brother and the legal estate in remainder would not coalesce.

of her body, these interests could not coalesce.⁴²

And a devise to testator's son for the sole use and benefit of testator's daughter and her children, the will providing that should the daughter die without any child

or children, the property should return to testator's children and be equally divided among them, was held not to be within the rule, for one reason,—because the limitation to the children of the daughter was not of the same quality of estate as that

⁴² Say v. Jones, 3 Bro. P. C. C. 113.

In *Crosby v. Davis*, 2 Clark (Pa.) 408, the grantor deeded certain property to a trustee to lease to such persons and at such rents as the trustee might see fit, and to pay the same over to the grantor during the term of his natural life, or so long as the trust should continue, or, in the discretion of the trustee, to permit and suffer the grantor to rent and receive the rents, etc., for his own use, or to permit and suffer the grantor to occupy and enjoy the property, or any part thereof, and to take the issue and profits thereof to his own use and benefit, the deed providing that the trustee, as often as dividends should be declared on certain stock transferred to him, should receive and pay the same to the grantor, and after the decease of the grantor to hold the same in trust for such uses as the grantor by his will might appoint, and in default of appointment then to the issue of the grantor's right heir or heirs, her and their heirs and assigns forever,—if more than one, in equal parts, as tenants in common. It was held that the two estates did not coalesce so as to give the first taker the fee.

In *Hanley v. Pearson*, L. R. 13 Ch. Div. 545, where by a post-nuptial settlement real estate belonging to the wife was conveyed to the husband and his heirs, and to the issue of the husband, his executors, and administrators, during the life of the wife, upon trust to pay the rents and profits to her for her separate use, and, after her death, in case she survive her husband, to the use of the heirs and assigns of the wife forever, but in case of the wife dying before her husband, then to the use of the husband, his heirs, and assigns forever,—the wife surviving the husband, it was admitted that the two estates would not coalesce under the rule in *Shelley's Case*; and it being shown that this was contrary to the intention of the parties, the court ordered a rectification of the deed.

In *Henry v. Purcel*, 2 W. Bl. 1002, it was contended that, under a devise of property to trustees for two hundred years to raise a certain sum for the use of testator's daughter and subject thereto in trust to pay the rents and profits to A, a married woman, for her separate use during her natural life, and after her death to the use and behoof of the heirs of her body lawfully issuing, the elder of such issue and his, her, and their heirs to inherit and take place before the younger of such issue, his, her, and their heirs, with remainder over in default of such issue,—the mother, A, took no legal estate, and that her heirs must therefore take as purchasers. This was not denied, as Mr. Fearne says, and no question was made upon it, but there were other words

that more immediately directed the construction. *Fearne, Contingent Remainders*, 56.

In *Murthwaite v. Jenkinson*, 2 Barn. & C. 359, the testator devised property to trustees, the survivors, etc., in trust to pay several legacies and annuities, and then gave all the rents, issues, dividends, etc., to his three nieces equally to be divided between them, share and share alike for life, and after the death of either of them the testator provided that the lawful issue of them and each of them should have and enjoy his or her mother's share of all the residue of the rents, dividends, etc., for life, in like manner; and that if either of the nieces should happen to die in the lifetime of the others, or other of them, without issue of her body lawfully begotten, the share of the one so dying without issue should go to and be shared and divided equally between the survivors of the nieces for their respective lives, and afterwards to the lawful issue of the survivors in like manner; and that if all the nieces save one should die without issue lawfully begotten, such surviving niece should have and enjoy the whole of the rents, etc., for life, and after her death to the lawful issue of such surviving niece,—if more than one, to have the whole of the rents, etc., equally divided between them share and share alike, and if but one then that such only one should have and enjoy the whole of such part thereof as was personal, to and for his or her own use and benefit; and to hold so much and such part or parts thereof as were freehold, to them and each of them, if more than one, to their heirs, or her heirs and assigns as tenants in common, and not as joint tenants, and if but one, then to such one, his, or her heirs and assigns forever; and if all the nieces should die without issue, then over. It was held that the surviving trustee had a fee simple in the freehold estates and an absolute interest in the leasehold estates, and that the testator's three nieces took no legal estate under the will; and that in case the will had commenced with the words "the rents," etc., and the passage before the words had been omitted, that the three nieces would have taken estates tail in the freehold, and absolute interests in the leasehold.

In *Settle v. Settle*, 10 Humph. 474, there was a devise which read as follows: "I also lend unto my daughter, . . . during her natural life, one negro woman, known by the name of . . . and her increase, and at her death, the said negro and increase to be divided between the heirs of her body." It was held that the word "lend," in defining the first taker's estate, and the words by which the remainder was

to the daughter, the estate to the daughter being equitable, while that to the children was the absolute fee.⁴³

d. Legal life estate; equitable remainder.

If the estate given to a person be a legal estate for life, with a limitation of an equitable estate to his heirs, they will not incorporate into an estate of inheritance in the first taker.⁴⁴

e. Unexecuted freehold estates; executed remainders.

The rule in Shelley's Case does not ap-

ply where the devise is to trustees, to be invested, and the income to be paid to a specific person, the principal to be paid to his heirs after his death, the devise or bequest to the trustees being to them without the addition of the words "their heirs," etc., and their active duty being expressly limited to the life of the devisee.⁴⁵ The remainder being executed, this renders the estate incapable of uniting.⁴⁶

f. Executed freehold estates; legal remainder.

If the freehold estate is executed and the remainder is legal, the estates become

given, created estates of a different nature, and that therefore the rule did not apply, the word "heirs" being declared not to be a word of limitation, but a word of purchase.

⁴³ Turner v. Ivie, 5 Heisk. 222.

In Playford v. Hoare, 3 Younge & J. 175, by a devise to trustees and their heirs for the life of A, to suffer her after she should attain the age of twenty-one to receive the rents, etc., during her life, not subject to the control of any husband, the rents after her death to go to her heirs forever, it was held that the legal estate vested in the trustees during the life of A, and could not unite with the remainder under the rule in Shelley's Case.

In Shapland v. Smith, 1 Bro. Ch. 75, a testator devised certain property to trustees upon trust to pay rents and profits after certain deductions to A and his assigns for life, and after his death to the use of the heirs male of the body of A, and in default of such issue remainder over. It was held that the trustees, being required to pay the taxes and repairs, must have an interest in the premises, and that therefore the legal estate, for the life of A, was in them, and that A had only an equitable estate for life, and that the subsequent estate being executed, the two estates could not unite.

In Silvester ex dem. Law v. Wilson, 2 T. R. 444, it was held that under a devise to trustees to receive the rents and profits of property during the life of A, such rents and profits to be applied for his maintenance for life, was not a use executed in A, so as to unite with a legal limitation to the heirs of his body.

In Stonor v. Curwen, 5 Sim. 264, where the devise of personal property was to trustees to be settled on testator's niece for her separate use for life, and to her issue after death, and failing issue, over, the court said that if there had been a devise to trustees to convey real estate in such words, no possibility whatever could the limitation to the issue have coalesced with the fee interest of the niece, because the property was to be settled on her for her separate use, and therefore she could not have had the legal estate, as it must have been vested in the trustees.

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In Re Wynch, 5 De G. M. & G. 188, where there was a devise of personal property to a married woman for life and the issue of her body lawfully begotten, with a request to certain persons to act as her trustees, so that the annuity might be secured for her sole benefit, it was held by Turner, Lord Justice, that the devise of the life estate was merely equitable, and the devise to the issue legal, so that had it been a devise of real estate the two interests could not have coalesced so as to have given her an estate tail.

⁴⁴ Crosby v. Davis, 2 Clark (Pa.) 408.

In Venables v. Morris, 7 T. R. 342, it was held that ever since the case of Say v. Jones, supra, X. c, it has been considered, and perhaps there was no doubt of it before, that a legal estate in the ancestor and an equitable estate in the issue could not be united so as to increase the estate in the ancestor.

⁴⁵ Vogt v. Vogt, 26 App. D. C. 40. The court said that had there been no conversion of the devised estate into personalty, the vested remainder would be a legal estate, because the use would be executed in the heirs. It might be conceded that the statute of uses in force in Maryland and the District of Columbia did not operate in the case of personal property, but a like result was accomplished by another well-established principle, namely, that a trust estate is not to continue beyond the period required by the purposes of the trust.

⁴⁶ The rule in Shelley's Case was held not applicable to a grant to trustees for an unmarried woman for life, and for her sole and separate use, excluding all right and control of any future husband, or liability for his debts, and in default of child or children, or other descendants, then to the right heirs of the devisee, and their assigns forever, since the ultimate limitation was executed, and would not therefore coalesce with the equitable life estate. Handy v. McKim, 64 Md. 580, 4 Atl. 125.

A deed of trust to a trustee, to pay over the proceeds of the property to the grantor's daughter for life, and on the death of the daughter, bearing child or children, or descendant or descendants of any child or children deceased of the said daughter, not having attained the age of twenty-

capable of coalescing so as to make the rule in Shelley's Case applicable, the troublesome question being to determine whether the particular estate is executed.⁴⁷

one years, to pay over to such child or children, or descendant or descendants of any child or children deceased of said daughter, the profits arising from the property, for their maintenance, etc., was held not to be within the rule, since this created an equitable estate with a legal remainder. *Williams v. Mears*, 2 Disney (Ohio) 604.

In *Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 351, a will devised property to a trustee to let and demise, to recover and receive the rents and pay them over to a certain person, or, at his option, to permit and suffer him to let, demise, occupy, and enjoy, and take the income thereof for life for his separate use, providing that it should not be in the life tenant's power or liable to his debts, control, or engagements, and upon his death the trustee to hold the same for the use of the life tenant's heirs and legal representatives, their heirs and assigns forever. It was held that the trust to the life tenant was active, and that the remainder, when vested, was an executed legal estate, the rule in Shelley's Case therefore not applying.

In *Little v. Wilcox*, 119 Pa. 439, 13 Atl. 468, there was a trust agreement that a homestead should be held in trust for a son during life, and for his heirs after his death, upon complying with certain covenants for his father's maintenance. It was held that the trust as to him was special, not executed or capable of being executed during his lifetime without the consent of his father, while the remainder to his heirs was executed, and therefore in effect, if not in form, a legal estate, and that therefore the two estates could not coalesce so as to constitute an estate tail under the rule in Shelley's Case.

In *Austin v. Payne*, 8 Rich. Eq. 9, where there was a conveyance of real and personal property to a trustee in trust for the sole use of a married woman for life, and after her death to the use of the heirs of her body, it was held that the estate in the heirs became executed upon the death of the life tenant, and being therefore a legal estate, while the estate of the first taker was equitable, the two estates would not coalesce so as to make the rule applicable.

If a trustee holding property for A for life has active duties to perform, but at the death of A the trust for the heirs is merely passive, the statute will execute the use so that the estate of the heirs is a legal one, while the prior estate is equitable. 22 Am. & Eng. Enc. Law, p. 509; *Glover v. Connell*, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173.

In *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762, a grant to a trustee for the use of a married woman for life, and after her death to and for the use and benefit of her legal heirs and representatives, and for no other intent and purpose, was held to create 29 L.R.A. (N.S.)

A gift in trust for the sole and separate use of a married woman, followed immediately by a gift of remainder to her right heirs, their heirs, executors, administrators,

a mere equitable life estate in her, and to execute the legal estate in her heirs, so that the two estates would not coalesce as required to bring the case within the operation of the rule.

⁴⁷ In a note to *Henry v. Purcel*, 2 W. Bl. 1002, it is said that, in a limitation to trustees upon trust, to pay the rents and profits to A, the use is executed in them and they have the legal estate; but if the limitation be in trust to permit A to receive and take the rents and profits, there the use is executed in A, and he has the legal estate. Yet the court will look to the intention of a testator; so in a devise in trust to permit the widow to possess and enjoy certain interest and rents, with a proviso that her receipts, with the approbation of any one of the trustees, should be valid, the use was held not executed in the widow. *Gregory v. Henderson*, 4 Taunt. 772. And in general where something is to be done by the trustees which makes it necessary for them to have the legal estate, such as payment of the rents and profits to another's separate use, or of the debts of the testator, or to pay rents and taxes and keep the premises in repair, or the like, the legal estate is vested in them, and the grantee or devisee has only a trust estate.

A devise will not be taken out of the operation of the rule on the ground that the estate of the first taker is equitable and that of the remaindermen legal, where the only duty remaining to the trustee is to pay the income of the property quarterly to the first taker. Nor will a trust be sustained merely on the ground that it is for the sole use of an unmarried woman, there having been no marriage in immediate contemplation when the will took effect. *Kay v. Scates*, 37 Pa. 31, 78 Am. Dec. 399.

In a devise to trustees for the use of testator's nephew for life, with a power of appointment by will to such child or children, grandchild or grandchildren, as the nephew might direct, with a provision that, in default of appointment, the remainder should be equally divided among the right heirs of the nephew, "to them, their heirs, executors, administrators, and assigns forever," it was held that the estate given to the first taker and that given in remainder were both legal, the law executing the trust. *Physick's Appeal*, 50 Pa. 128.

Where the devise was to trustees for the use of testator's nephew for life, remainder to trustees to preserve contingent remainders, etc., remainder to the heirs male of the nephew, and their heirs, etc., it was said that this was a trust estate, but that in the case of a trust executed, there ought to be no difference of construction in a court of equity from what there is in a court of law upon a legal limitation. *Wright v. Pearson*, 1 Ambl. 358.

and assigns forever, in such portions as they would be entitled to agreeably to the laws of Pennsylvania in case she had died intestate, seised and in possession of the property in her own right, upon the death of the husband, was held to give to the wife an estate in fee simple, the estates of the first taker and the remaindermen being then of the same nature.⁴⁸

The general rule that an equitable estate for life, followed by a legal estate in re-

mainder, does not coalesce so as to vest absolute title in the holder of the equitable life estate, has no application where a deed creates a coverture trust for the protection of the wife, and the husband dies, and the special trust for her sole and separate use thereby terminates, and the legal estate vests in her.⁴⁹

Where the grantor conveys property to his three children named, their heirs and assigns forever, adding that it is never-

⁴⁸ Nice's Appeal, 50 Pa. 143.

A devise to a trustee in trust for the "separate" use of testator's daughter, a married woman, for life, providing that after her death it should go to the heirs of his daughter in fee simple, was held to be within the rule in Shelley's Case, after the death of her husband, since both estates were then legal. Steacy v. Rice, 27 Pa. 75, 67 Am. Dec. 447.

In Davis v. Saunders, 8 Ohio N. P. 161, property was devised to the life tenant for "her separate, sole, and exclusive use and benefit, and to receive the rents and profits of the same for her separate and exclusive use and benefit, independent of her present husband or any future husband, unaffected by any interest or use in him, and not subject to his control, either as to the property or the rents, for and during her natural life, and at her death the title to said property is to vest in fee in her heirs and assigns forever." It was held that the estates being of the same quality, the rule was applicable. The court said that the trust was the merest technical fgment, naked and barren of all power or discretion or room or reason to invoke the interposition of a court of equity. All the power which could be exercised over the property was given to the one who, if it were a trust estate, would be the *cestui que trust*. The trustee would have just as much to do with the estate of her heirs as with the estate of the *cestui que trust*, and no more, which was nothing.

In Dodson v. Ball, 60 Pa. 492, 100 Am. Dec. 586, a grant was to a trustee to permit a woman to occupy, manage, let, and demise, and take and receive the rents, issues, and profits of certain property for her sole and separate use, and for such other use or uses as she might see proper, for the term of her natural life, without any let, hindrance, or molestation of any husband she might have, or of any other person or persons whomsoever, and acquittances or other sufficient discharges to give for the same, notwithstanding her coverture, she paying all taxes on the premises and all necessary and proper repairs thereof, and upon her decease to grant and convey the premises as she should appoint, and on failure of appointment, to grant and convey the premises to such persons as would be entitled to the same had she died intestate, seised of the said premises in fee simple, and in such manner and for such

quantity of estate as such person or persons would in such case be entitled to by law. It was held that after the death of the husband of the life tenant her estate in the trust property was legal.

In Yarnall's Appeal, 70 Pa. 335, where a devise was in trust to pay the interest and income of the property to testatrix's daughters during their natural lives, free from the debts, contracts, and engagements of any husband they might have or take, followed by a power of appointment by will to the daughters, and the will provided that, on failure of appointment, the trustee pay the same to such person or persons as would be entitled to the same in case the daughters had survived their respective husbands, and died intestate, seised thereof in fee, and the trust for coverture had failed, there having been no coverture when the will took effect, and none in contemplation, it was held that legal estates were created in the daughters which enabled these estates to coalesce with the remainders.

⁴⁹ Wilson v. Heilman, 219 Pa. 237, 68 Atl. 675.

In Williams's Appeal, 83 Pa. 377, there was a devise of a portion of testatrix's estate in trust, to pay the income to her sister during her life, not subject to the control or the debts of her husband, with power of appointment by will, and in default of appointment, to such persons to whom, under the intestate laws, the same would go had she died seised in fee, and it was held that the husband of the life tenant having died, and the trust for coverture therefore having fallen, the life tenant had a legal estate, with a remainder to her heirs, and that, by the operation of the rule, the two estates met and constituted a fee in her.

In Carson v. Fuhs, 131 Pa. 256, 18 Atl. 1017, a trust contained in a deed from husband and wife to a trustee was for the use of the wife during her life, and at her death to her heirs in fee, share and share alike, in the meantime to allow and permit her to receive for her own use the rents and issues thereof, subject to the taxes, etc. It was held that this created a passive dry trust, entitling the *cestui que trust* to the reconveyance of the legal title, so that the life estate and remainder coalesced within the rule giving the *cestui que trust* the fee.

A trust for the sole benefit of a married woman will, upon the death of her husband, become executed so as to vest a legal estate

theless understood that the grantor reserves to himself, as natural guardian, the sole and exclusive right and privilege of renting or leasing the premises granted, and of receiving the rents and profits thereof, to be used and applied by him at his discretion for the support and maintenance and education of the children during the life of the grantor, and that the property is not to be subject to the control or disposition of any, or all, or either of the grantees, but is to be held for the sole and exclusive use and benefit of them for their lives, and of the legal heirs of their bodies, and their own proper descendants, forever, the trust will come to an end, at least, after the death of the grantor, so as to permit the rule to apply.⁵⁰

And under a devise of freehold and copy-

in her, capable of coalescing with a legal remainder in fee to her heirs. *Shalters v. Ladd*, 141 Pa. 349, 21 Atl. 596.

So a trust for the benefit of a married woman may be executed after and by virtue of the adoption of a Constitution which affords ample protection to the separate estate of the wife. *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161.

⁵⁰ *Lawrence v. Singleton*, 3 Shannon, Cas. 169.

In *Adams v. Adams*, 6 Q. B. 860, the testator devised lands to trustees in trust to permit his son to take the rents, profits, etc., for life, subject to the payment of an annuity to the wife during her life, and certain other privileges in the property, and if the son should die before the wife, to permit her to enjoy the lands for life, the will providing that after the wife's and son's deaths the premises should go to the heirs male of the son, lawfully begotten of his body, and in default of such issue, over. The son survived both testator and the testator's wife. It was held that he could then bar the estate tail and remainders.

⁵¹ *Re Allsop*, 61 L. T. N. S. 213.

In *Broughton v. Langley*, 2 Ld. Raym. 873, 10 Eng. Rul. Cas. 864, there was a devise to trustees to suffer the testator's son to have and receive and take the rents, issues, and profits of certain property for life, and after his death to stand seised thereof to the use of the heirs of the body of the son, lawfully begotten and to be begotten, and in default of such issue, over, with a proviso that the trustees and the son might have the power to make a jointure for the son's wife. The son, after entering into possession, suffered a common recovery. The question was whether the son took an estate for life, or whether the estate remained in the trustee for his life, and he had only a trust, not executed by the statute of uses; for it was admitted that if he took an estate for his life, executed, he would, by virtue of the subsequent clause which limits the use to the heirs of his body, be tenant in tail, executed.

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hold estates to trustees upon trust, during the life of the testator's son, to receive the rents, etc., and to pay the same to the son and his assigns during his life, or otherwise to permit him or them to receive the same, and after the death of the son, to the sole use and behoof of the heirs of the son's body, lawfully begotten, and in case the son should die without leaving any issue of his body, lawfully begotten, then over, it was held that the son took a legal estate tail in the freehold.⁵¹

g. Executed freehold estates; unexecuted remainders.

The rule does not apply to a devise to testator's executors to hold the property in trust for the use and benefit of the testa-

It was held that the use was executed in the son.

And where the devise was of freehold, copyhold, and leasehold estates to trustees and their heirs, upon trust, to permit the testator's son T. to take such rents and profits for and during the term of his life, and after his death the freehold, copyhold, and leasehold estates to go to the heirs of his body, lawfully begotten, their heirs, executors, administrators, and assigns forever, and in case the son should die without issue, then over, it was urged that by the devise to the trustees the son took only an equitable interest, and that the limitation to the heirs of his body being plainly legal, his estate was necessarily confined to an estate for life; but it was held to have been long settled beyond all question that a devise to trustees to permit one to receive the rents of the land is a legal, and not an equitable, estate. And that therefore the words of limitation annexed to the gift to the heirs of the body must be rejected as well with respect to the freehold as to the leasehold estates. *Kinch v. Ward*, 2 Sim. & Stu. 409.

In *Marsh v. Platt*, 221 Pa. 431, 70 Atl. 802, the testator provided that his executors hold certain real estate, and that his son should have the use and income thereof during his life, said land upon his death to descend to and the title thereto to at once vest in his heirs at law. This was held to create a dry trust, so that the rule in *Shelley's Case* was not prevented from operating.

A deed to trustees to hold to the use of testatrix's children named, the property after the death of any of the children to go to the right heirs of such deceased child, was held to create in the children an estate in fee simple, or at least in fee tail, executed by the statute. *Schwem v. Calloway*, 226 Pa. 51, 75 Atl. 22.

Where the will of a testator conferred upon his executors or trustees no power to sell his real estate, no such trust was imposed upon the estate as converted devises

tor's son for life, and after his death in trust for his heirs, issue of his body, until the youngest of said heirs shall become of age, and then to convey it to said heirs, the children of the said son taking equal shares, and the child or children of any deceased child of the said son to take their parent's share in equal proportion, since the estate in the son is executed so that

he has the legal estate for life, while the estate of the heirs is equitable.⁵²

h. Executed trusts in freehold and remainder.

If the trusts in the freehold estate and in the remainder are both executed, the estates become legal, and the way is clear for the operation of the rule.⁵³

to his children into mere equities, but the estate, whatever it was, vested in them as a legal estate. It was held that therefore there was no such difference in the qualities of the estate for life and in remainder as to prevent the operation of the rule. *Little v. Pittsburgh & C. R. Co.* 34 Phila. Leg. Int. 68.

Where a testator directed his executors to invest a sum of money in realty, and hold the same in trust for the benefit of the testator's son during life, and afterwards to the latter's children and to his heirs forever, it was held that the trust so constituted would be passive, and would have been instantaneously executed in the *cestui que trust* by the statute of uses. *Sprague v. Sprague*, 13 R. I. 701.

⁵² *Re Romanes*, 8 Ont. Pr. Rep. 323.

But in *Eaton v. Tillinghast*, 4 R. I. 276, a woman, in contemplation of a second marriage, vested certain property in a trustee for her sole use during the marriage, reserving a power of appointment, and providing among other things, that, in event of surviving her husband, at her death the said trust estate should descend to and be conveyed over by the trustee to her heirs at law, whoever they might be, and terminate the deed. It was held that the fact that the trust in favor of the *cestui que trust* was an executed trust, and that in favor of her heirs at law an executory one, would not prevent the application of the rule when required to carry out the intention of the parties to the instrument, and it was held that the *cestui que trust* was entitled to an equitable estate in fee simple in the trust property, free from all charge and encumbrance in favor of or interest in any of her children, or any other person whatsoever, derived under the marriage settlement.

⁵³ The rule in *Shelley's Case* applies to a grant in trust for the use of the grantor's sister for life, remainder to the use of her husband for life, remainder to the use of the joint heirs of the body of the sister and her husband, by them lawfully begotten, and creates an estate in special tail in the husband. *Davis v. Hayden*, 9 Mass. 514.

Under a deed of gift of slaves to a trustee to manage for the benefit of the grantor's daughter until she should arrive at the age of twenty-one years, or should marry, and then to deliver possession of the slaves to the daughter or her husband, and account for the profits of the same, and also after that event to see that the property and its future increase should not be sold or disposed of, but should be preserved

for the benefit of the heirs of the body of the daughter, and should vest in the heirs of her body upon her death, and then over in case she should die without living heirs of her body, it was held that the estates of the donee and of the remaindermen were not of different qualities, so as to prevent the operation of the rule in *Shelley's Case*. *Carradine v. Carradine*, 33 Miss. 698. The court said that it was true that before the marriage the legal estate was held by the trustee for the daughter, but that after her marriage her right of possession vested by mere operation of the deed, and the legal title in him was held for her use or in trust for her. This use or trust was executed in possession by operation of the statute of uses; and upon delivery of possession the legal estate became vested in her or her husband. The trustee had no further power over the property. He was not required to make any conveyance to her, nor authorized to take any further control of the property. Her title was derived from the deed of gift; and if the subsequent limitations had been valid, upon the determination of her life estate the property would have vested in the parties in remainder, in virtue of the deed, no act on his part being required or authorized; nor was he clothed with any legal power over the property by the expression that he should see that the property should not be sold or disposed of, and that it should be preserved for the benefit of the heirs of the body of the daughter. His power over the slaves was exhausted by the delivery of possession upon her marriage, and nothing further was necessary to vest the rights intended to be conveyed. He had no power to resume possession of the property for any purpose, nor to interfere with the control of it.

So an estate tail was held created by a devise of land to a trustee and his heirs, to the use of his nephews and the survivor for their lives, remainder to the use of the trustee, to preserve contingent remainders, etc., during their lives, and after their deaths in trust for the heirs male of the body and bodies of the nephews, and in default of such issue, then to the use of another in fee. *Doe ex dem. Terry v. Collier*, 11 East, 377.

Where by the terms of a will an estate was devised in trust to put a specified person in possession, and permit him to have, possess, occupy, work, and enjoy the same during his life, and in trust after his death to put his lineal descendants in possession, to the latest posterity, the devisees under

i. Active trusts in freehold and remainder.

It has been held in a few cases that where the trusts are active in respect to both freehold and remainder, the two estates being of the same quality, the rule will operate.⁵⁴ But as to the doctrine that the rule in Shelley's Case will not be applied to executory trusts, see *infra*, XVIII.

j. Freehold in realty; remainder in personality.

In a case in which a testator in his will declared that it was his desire that all the lands belonging to him should belong to his wife, to use in any way she might think proper during her life, and at her death the land should be sold, and one half of the money arising therefrom should go to his lawful heirs, and the other half to be at her disposal, to whom she thought proper of her heirs, it was held that the life tenant, by executing the power conferred on her, could not have invested her heirs with a legal estate in fee simple; that she could not, by any act of hers, have brought the

the common law would have taken an estate tail, which, by the Mississippi statutes, is changed into a fee simple. *Powell v. Brandon*, 24 Miss. 343.

If the legal seisin and possession be transferred to the *cestui que use* by force of a statute, the rule in Shelley's Case becomes operative notwithstanding the conveyance to trustees; and the reason is that the equitable estate for life being thus converted into a legal estate, and the second use being also executed, the first and subsequent limitations partake of the same nature. *Crosby v. Davis*, 2 Clark (Pa.) 408.

⁵⁴ Where a devise of personal property was to the trustees of a fund, to be invested for a person during his life, and to be paid to his heirs at his death, it was held that it could not be said that the prior life estate, and the subsequent estate to go to the devisee's heirs, were not both of the same quality. *Glover v. Condell*, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173. The court said that the trustees were to hold the proceeds of sale during the devisee's life, and to invest the same and pay him the interest during his life, so that the trust was an active one and his estate was equitable. At his death the principal of the share was to be paid to his heirs, and so, for the purpose of turning the share over to the heirs by payment or delivery or assignment of securities, the legal title at his death still remained in the trustees, and until such payment, delivery, or assignment, the estate of the heirs was equitable.

A devise in trust for the testator's daughters during their lives, and, upon the death of either, her share or income to go to her 29 L.R.A. (N.S.)

rule in Shelley's Case into operation so as to enlarge her express life estate into a fee simple, since she could not dispose of the land itself, but of the proceeds, which was personality; and her life estate being in the land itself and the remainder in personality, the two could not unite.⁵⁵

k. Joint freehold; tenancy in common in remainder.

It has also been held that the rule does not apply to a devise to two persons for life without impeachment for waste, and after their death to the use and behoof of their heirs as tenants in common, and not joint tenants, on the ground that an estate for life in jointure cannot sink into a fee of different nature and quality, as a tenancy in common.⁵⁶

l. Copyhold estates.

The fact that the limitation to the heirs, etc., is in the surrender of a copyhold estate, is generally held not to interfere with the operation of the rule.⁵⁷

A surrendered a copyhold estate to the

heirs until one half of the principal of the estate as it should then be should be made over to them,—the trustees taking such time as they should think proper for the best interest of all concerned in making the division of the principal,—and upon the death of the last of the testator's daughters the other half to go to her heirs, was held to convey to the daughters equitable life interests; and it was also held that the interest of the heirs of each of the daughters was equitable in its nature, the rule in Shelley's Case being declared applicable as to the real estate left by the testator. *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012.

Under a will providing that trustees should take possession and management of certain property for the payment of testator's debts and the production of income, and after the payment of expenses, etc., to pay the same in equal shares to testator's daughters named, during their lives, and upon the death of either, her share or income to go to her heirs until one half of the principal of the estate, as it should then be, be made over to them, the trustees taking such time as they should think for the best interest of all concerned in making the division of the property, it was held that the estate in the trustees and the estate in remainder were both equitable, and that the rule in Shelley's Case applied, vesting an equitable fee in the daughters. *Ibid*.

⁵⁵ *Millhollen v. Rice*, 13 W. Va. 510.

⁵⁶ *Rogers v. Downs*, 9 Mod. 292.

⁵⁷ Where A, seised of a copyhold in fee, surrendered to the use of his will, and afterwards devised it to B for life, remainder to the heirs of his body begotten, forever,

use of his will, and then devised it to B for life, and after his death to the heirs of his body. B died after the making of the will; it was held that his heir could take nothing, as it was a devise in tail to B, and the words "his heirs" were words of limitation; and the chief justice said it made no difference that this was a copyhold estate.⁵⁸

it was held that the heirs of B took by descent. *Pawsey v. Lowdall*, 2 Rolle, Abr. 794.

In *Roe ex dem. Aistrop v. Aistrop*, 2 W. Bl. 1228, C. A. being seised in fee of a freehold estate and of copyhold premises of inheritance descendible by the custom of the manor to the youngest son, by lease and release previous to his marriage settled his freehold estate to the use of himself and A, his intended wife, for their lives and the life of the survivor, and after their death to the use of the heirs of the body of C. A. on the body of the said A to be begotten, with remainder to his own right heirs, and he covenanted to surrender his copyhold to the use of himself and his intended wife, and the heirs of their two bodies to be begotten, in like manner and to the same uses as the freehold lands and tenements thereinbefore mentioned were settled and conveyed. The marriage took place, and C. A. surrendered the copyhold premises to the use of himself and A, his wife, for their lives and the life of the survivor, and after their several deaths to the use of the heirs of their two bodies, lawfully begotten, or to be begotten, and for want of such issue to C. A., his heirs and assigns forever. A died in 1757 and C. A. in 1760, leaving issue of the marriage, their eldest son and the youngest son, the latter of whom was lessor of the plaintiff. The question was whether the plaintiff was entitled to recover. DeGrey, Ch. J., said that it was a mighty clear case. There was indeed reason to suppose that the parties might not mean the two estates to go in a different channel. But this was only a supposition, and if certain, still, as this was a legal estate, it was not in the power of the parties to alter the legal course of descent. It was an estate executed, and seemed to be an estate tail in the father and mother. Had it been executory and upon articles, the court might have construed the word "heir" as a word of purchase. Blackstone, Judge, thought the freehold was clearly vested in the father only in special tail, and the copyhold in both father and mother. He conceived there appeared to be no intention in favor of either son exclusively. They were left to the disposition of the law. The heir was intended to succeed, but who that heir should be must be left to the legal course of descent. Mr. Fearne on *Contingent Remainders* says (vol. 1, p. 64): "It is observable that this was the case of an actual legal settlement before marriage in respect to the freehold; and therefore the limitation of those lands was not open to the construction of articles to be carried into strict 29 L.R.A. (N.S.)

"It may be observed," said Mr. Fearne, "that a distinction was taken by Coke between a limitation upon a surrender by a copyholder in fee to his own heirs general, where he takes a preceding estate of freehold himself, and the like limitation where he takes no preceding freehold estate,—a distinction which certainly has no place in respect to freehold lands. . . . And

settlement. And the settlement of the copyhold, though resting in the covenant for surrender, seemed intimately blended with that of the freehold as part of one and the same settlement; besides that, the limitations of the surrender agreed upon were expressly referred to the same manner and uses as the freehold was settled; and therefore could not, consistently with the express terms of such a stipulation, be limited in strict settlement on the issue as purchasers when the settlement of the freehold gave an estate tail to the parent. And there was no other construction by which the descent of the lands to the youngest son could be avoided. This takes it out of the authorities of the cases . . . where marriage articles are carried into execution by way of strict settlement, and accounts for the distinction by the chief justice between this case, as of an estate executed, and one on executory articles."

⁵⁸ *Busby v. Greenslate*, 1 Strange, 445.

Where A surrendered copyhold lands to the use of D and the wife of A for their lives, and afterwards to the use of the heirs of the bodies of A and his wife, it was held that the limitations to the heirs of the body of A and his wife did not vest an estate tail in the wife of A, but that it was a contingent remainder to the heirs of both of their bodies. *Lane v. Pannell*, 1 Rolle, Rep. 238; *Fearne, Contingent Remainders*, 65.

In *Peddler v. Hunt*, 56 L. J. Q. B. N. S. 212, the testator, at the time he made his will and at his death, had four sons, G., T., J., and F. By his will he devised copyhold hereditaments to his son F. during his life, then to J., described as the testator's next youngest son, for his life; and then the testator provided: "After his demise to be enjoyed by the next surviving son of the younger branch for his life, and so on from son to son until it arrives at the oldest son, then the said copyhold estate to be forever enjoyed by the oldest surviving heir of my oldest son then living, for their life or lives forever." The court was of the opinion that the testator's eldest son G. took a life interest, and a life interest only, under the terms of the will; that by the word "then" after the words "oldest son" the testator indicated the devolution after the death of the oldest son; that the words "my oldest surviving son" meant "the last survivor of my sons;" that the words "then living" were referable to the words "surviving heir," and not to the words "surviving son," and that the intention of the testator was, after the gift to his eldest son for life, to create a series of life estates

where a copyholder surrendered his lands to the use of a stranger for life, remainder to the use of the right heirs of the copyholder, who afterwards surrendered his (supposed) reversion to the use of a stranger in fee and died, and the tenant for life died, and the right heir of the copyholder entered,—according to Coke,—nothing remained to the copyholder upon his first surrender; but the fee was reserved to his right heirs; for, said Coke, if he had not made any second surrender, his heirs would be in, not by descent, but by purchase. And he said the common difference was that when the surrender was to the use of himself for life, and afterwards to another in tail, the remainder to the right

heirs of the surrenderor, there the heirs should have it by descent; but otherwise where the surrenderor had not an estate for life or in tail limited to him, for then his heir should enter as a purchaser, as if such use had been limited to the right heirs of a stranger." Mr. Fearn, however, does not agree with Coke on this point.⁵⁹

XI. Application of rule to wills and deeds.

It is commonly thought that wills are less subject to the operation of the rule in Shelley's Case than deeds.⁶⁰ This is not true, as will be shown more fully in the next subdivision of the note. If there is a

forever, each of such estates vesting in the heir for the time being of the last survivor of his sons.

In *Sutton v. Stone*, 2 Atk. 101, a surrender of a copyhold to a husband for life and to his wife for life, remainder to the heirs of the body of the husband and wife, remainder in fee to the survivor, was held to give the wife who survived only an estate tail after possibility of issue extinct. Mr. Fearn points out that the reasons for the opinion in this case are not mentioned, and that it is not stated that it was the resolution of the court, and that it did not appear whether the point entered the question then before the court, and says that it is no easy matter to account for such an opinion.

The rule does not apply to a gift of an estate for life to A, followed by a gift to his heir, where the limitation shows that the testator's intention was that the heir should take for life only. *Peddler v. Hunt*, *supra*.

By a devise of certain copyholds to L., and then at his death to go to the next heir in the name of L., "as long as the world stands; but every heir that is the owner of this property to keep it all in good repair," etc., it was held that the first taker took a fee simple conditional. *Re Catling* [1890] W. N. 75.

⁵⁹ Fearn, *Contingent Remainders*, 66.

In *Allen v. Palmer*, Leon. pt. 1, p. 101, cited in *Roe ex dem. Nightingale v. Quartley*, 1 T. R. 630, where the limitation of a copyhold was to the use of a stranger for life and afterwards to the use of the right heirs of the copyholder, the court said that the difference was where the surrender was to the use of himself for life, afterwards to another in tail, and the remainder to the right heirs of him who surrendered; there his heir should have it by descent. But it was otherwise where the surrenderor had not an estate for life or in tail limited to him, for there his heir should enter as purchaser, as if such use had been limited to the right heirs of a stranger.

Other limitations of copyhold estates will be found in other subdivisions of the note, classified with reference to the questions upon which the decision turned, no point 29 L.R.A. (N.S.)

having been made of the fact that the estate conveyed was a copyhold estate.

⁶⁰ The rule in Shelley's Case applies to wills as well as to deeds. *Brokaw v. Brokaw* (Iowa) 113 N. W. 469.

But in the application of the rule to deeds of conveyance, it has generally been held of more absolute control than when applied to wills. *Norris v. Hensley*, 27 Cal. 449.

Chancellor Kent states that "there is more latitude of construction in the case of wills in furtherance of the testator's intention, and the rule seems to have been considered as of more absolute control in its application to deeds." 4 Kent, Com. 216; *Andrews v. Spurlin*, 35 Ind. 262.

In construing wills, courts have always borne in mind that a testator may not have had the same opportunity of legal advice in drawing his will as he would have had in executing a deed, and the first great maxim of construction, accordingly, is that the intention of the testator must be observed. *Williams*, Real Prop. 5th ed. 212.

There is more latitude of construction allowed in wills in furtherance of the testator's intention than in deeds. *Slemmer v. Crampton*, 50 Iowa, 302.

The rule generally has been allowed to be of more imperative control in the one instrument than in the other. *Brant ex dem. Provost v. Gelston*, 2 Johns. Cas. 384.

In a conveyance made by a deed, the rule was rigidly adhered to, for such instruments were generally made on mature consideration, as well as under the advice of counsel, but it was somewhat relaxed at common law in favor of wills, where the same opportunity did not always exist in the case of testators. *Brockschmidt v. Archer*, 64 Ohio St. 502, 60 N. E. 623.

The relaxation, however, extended only to the use of the word "heirs," for however explicit the purpose of the testator may be shown from the language of the will, to have been, to give only a life estate to the ancestor, if the estate is then limited, mediately or immediately, to the heirs, without anything else in the will to show that he had used the word "heirs" in a limited

limitation to the heirs or heirs of the body of the life tenant, without any words to qualify the word "heirs," or to explain that it was used in any other sense than its technical sense, the rule in Shelley's Case applies, and it is of no importance whether the instrument containing the limitation is a will or a deed. If there are any words used to qualify the word "heirs," or if, instead of the word "heirs," the word "issue" has been used, a preliminary question of construction arises as to the sense in which the words were employed. More indulgence is allowed testators than grantors, of course, as to the use of technical terms in a nontechnical sense, but this has nothing to do with the rule in Shelley's Case, as will be shown.

The question whether in respect to wills the intention of the testator is to control, rather than the rule in Shelley's Case, is discussed at considerable length in *WESTCOTT v. MEEKER*, the court failing to distinguish between the intention as to the quantity of the first taker's estate, and intention as to the use of technical terms. The intention as to the quantity of the first taker's estate, as will be shown, is never controlling, whether the limitation is in a deed or will. It is the intention as to the use of technical terms,—that is, the intention as to the estate given in remainder,—that is controlling. In *WESTCOTT v. MEEKER*, the only question which the court should properly have considered was whether the modifying words, "said heirs to have absolute title unto their respective portions," indicated that the word "heirs" was not used in its technical sense. To

offset this modifying phrase, the effect of the word "descend," in the phrase "descend to their heirs," might have had some weight. Possibly the limitation for life only might have been taken into account on the question whether the word "heirs" was used in its technical sense. But having come to the conclusion that the word "heirs" was used in its technical sense, the rule in Shelley's Case would be bound to operate. Or, if there had been no words modifying or explaining the sense in which the word "heirs" was used,—that is, if the limitation had been simply "to their heirs respectively,"—there would have been no opportunity to have considered any question of intent as to giving the first taker a life estate; and the facts that the first estate was expressly for life, and that the limitation was in a will, would make no difference.

In an English case, *Malins, V. C.*, said he was not aware that there was any difference whatever between the application of the rule in Shelley's Case to a deed and to a will. The accuracy of this statement will appear in the discussion which follows in the next subdivision.⁶¹

XII. Effect of rule on intention.

a. Different intents which courts may have to consider.

The great point always made against the rule in Shelley's Case is that it disregards the intention of the author of the instrument. The conflict between the Shelleyites and Anti-Shelleyites has been chiefly waged

sense, the devisee took an estate in fee simple. *Ibid.*

A devise to a woman for life, and then to the heirs of her body for their own use, was held to create an estate tail, under the rule in Shelley's Case. *Bender v. Fleurie*, 2 Grant, Cas. 345. The court said that the fact that the testator might not have meant to give an estate tail made no difference. "It is true," continued the court, "that wills are construed more liberally than deeds. The intent of the testator, where it is manifest from the whole instrument, will not be defeated for want of technical words, and terms of art are sometimes allowed to have a meaning different from their strict legal sense. But no court in this state or in England has ever treated the phrase 'heirs of her body' as words of purchase, when they are used with reference to the issue of a devisee to whom a life estate is given. They are words of limitation, and as such they create an estate tail in the first taker, which cannot be cut down even by the clearest expressions of a desire that it shall be a life estate only."

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In *Ridgeway v. Lanphear*, 99 Ind. 251, it is said: "Pressed by the evils wrought by the rule, and shocked by the great number of instances in which it operated to utterly overthrow the intention of the testator, these courts, centuries ago, affirmed that there existed an important difference between wills and deeds, and that the rule should not be so strictly enforced in the case of a will as in the case of a deed. It has long stood as the law that there is a material distinction between wills and deeds, and that the rule in Shelley's Case will not be allowed to override the manifest and clearly expressed intention of the testator, but that the intention will always be carried into effect if it can be ascertained. It is true that where the words used are such as bring the case within the rule, it will be given full force and effect, but where the context clearly shows that the testator annexed a different meaning, that meaning will be adopted, and the rule will not be allowed to frustrate his intention."

⁶¹ *Re White*, L. R. 7 Ch. Div. 201.

over this question; but, in spite of the fact that the operation and effect of the rule and its bearing upon the intention of grantors and testators have been elucidated by some of the greatest masters of judicial exposition, there still appears to be much confusion on this subject. Part of this is due to the fact that some courts have either misunderstood the question themselves, or else have been so careless in the use of language as to mislead others. It is impossible, of course, to reconcile all of the de-

cisions on the theory that expressions used in the opinions of the judges were merely inaccurate; but many of them apparently in conflict may be satisfactorily explained in that manner.

It is often said that the rule in Shelley's Case is a rule of property, and not of construction,⁶² meaning that it is a rule which must prevail in spite of any intention to the contrary.⁶³ Indeed, this is one of the well-settled rules in jurisdictions in which the doctrine of Shelley's Case is still in

⁶² The rule is one of property, and not of construction. *McArthur v. Allen*, 3 Ohio L. J. 471, Fed. Cas. No. 8,059; *Hall v. Hankey*, 98 C. C. A. 173, 174 Fed. 139; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. ed. 661; *Goodrich v. Lambert*, 10 Conn. 448; *Vogt v. Vogt*, 26 App. D. C. 46; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325; *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139; *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435; *Burton v. Carnahan*, 38 Ind. App. 612, 78 N. E. 682; *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82; *Cook v. Councilman*, 109 Md. 622, 72 Atl. 404; *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347; *Kepler v. Reeves*, 7 Ohio Dec. Reprint, 34; *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300; *Kiersted v. Smith*, 8 Ohio N. P. 378; *Davis v. Saunders*, 8 Ohio N. P. 161; *Hess v. Hess*, 67 Pa. 119; *Austin v. Payne*, 8 Rich. Eq. 9; *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013; *Lytle v. Beveridge*, 58 N. Y. 592; *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137; *Brooks v. Evetts*, 33 Tex. 732; *King v. Evans*, 24 Can. S. C. 356; *Evans v. Evans* [1892] 2 Ch. 173; *Tunis v. Passmore*, 32 U. C. Q. B. 419; *Garriepie v. Oliver*, 8 B. C. 89.

The rule in Shelley's Case is not a rule of interpretation, but an inflexible rule of property. *Baker v. Scott*, 62 Ill. 86.

The rule is not merely one of construction, but one of imperative obligations. *Hurst v. Wilson*, 89 Tenn. 270, 14 S. W. 778.

The rule is not one of construction, but a law of property not designed to give meaning to words, but to fix the nature and quality of the estate. *King v. Beck*, 15 Ohio, 559.

The rule in Shelley's Case was never a rule of intention, or of construction to reach and carry out the settlor's intention; but is an absolute rule of property, to obviate real difficulties that would arise in relation to tenures, if certain persons to whom the property was limited were allowed to take as purchasers, and not by descent. *Mack v. Champion*, 11 Ohio Dec. Reprint, 327.

The rule in Shelley's Case is not a rule of construction; not a means of ascertaining the intention of the testator. It presupposes the intention to have been ascertained. It is a rule of law which declares inexorably that when the ancestor takes a preceding

freehold by the same instrument, whether deed or will, a remainder shall not be limited to his heirs as purchasers. *Kleppner v. Laverty*, 70 Pa. 70.

If the estates created are such as to bring the rule into operation, the rule will prevail, even against a declared intention to the contrary. *Coape v. Arnold*, 4 De G. M. & G. 574.

⁶³ This is an arbitrary rule of law, unconnected with and independent of the donor's or testator's intention. *Williams v. Foster*, 3 Hill, L. 193.

The rule was frequently applied contrary to the intent of the testator. *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075.

The rule prevails irrespective of, and even contrary to, what would otherwise, as a matter of construction, be deemed to be the intention of the testator. *Macnamara v. Dillon*, Ir. L. R. 11 Eq. 29.

Where the language used in the instrument brings the case within the rule, the fact that it was the intention of the grantor or deviser that the rule should not operate is of no importance. *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

The courts seem to agree in the general statement that it is a rule of law, and not of construction, that is, if the words "heirs" or "heirs of the body" are used with no explanation, with no superadded words which to a certainty show that other persons or individuals are meant than heirs generally of the first taker, the rule must apply inexorably as one of law; and that the intention of the grantor or deviser is not to be considered. *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459.

It is a rule of tenure which is not only independent of, but generally operates to subvert, the intention. *Hughes v. Nicklas*, 70 Md. 484, 14 Am. St. Rep. 377, 17 Atl. 398.

The rule, if operating at all, operates wholly irrespective of the intention of the testator. *Ward v. Amory*, 1 Curt. C. C. 419. Fed. Cas. No. 17,146.

It is a strict rule of law which cannot be prevented by an expression of intention to the contrary. *Britt v. Rowland Lumber Co.* 136 N. C. 171, 48 S. E. 586.

This is an arbitrary rule that never deigns to consider the intention of the grantor. *Crandell v. Barker*, supra.

The rule in Shelley's Case is a technical one, and generally, or at least often, thwarts the grantor's intent, and for this reason is

force; it is therefore very frequently stated that the rule thwarts the plain intention of the writer of the instrument.⁶⁴ On examining the cases, the reader also finds many expressions to the effect that when the intention of the author of the instrument is clearly ascertainable, it will prevail even against the rule in Shelley's Case. It is sometimes declared that in the matter of wills, at least (see *supra*, XI.), effect

will be given to the intention of the testator, which is not to be overridden by any arbitrary or technical rule of law. Again it is said that there is an exception to the rule in the case of executory trusts (see *infra*, XVIII.), that the courts will give effect to the intention of the author of the trust, rather than follow the arbitrary rule in Shelley's Case.

Each of these statements is true in a cer-

almost everywhere strictly construed. *Brown v. Brown*, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81.

The artificial construction adopted by the English judges in Shelley's Case was a clear violation of the intention of the testator. *Demarest v. Den*, 22 N. J. L. 599.

The rule has been held to apply even in cases where it appeared to interfere with the intention of the grantor or deviser. *Seaman v. Harvey*, 16 Hun, 71.

The rule in Shelley's Case was against the manifest intention of the testator. *Taylor v. Gould*, 10 Barb. 388.

As the effect of the rule is to defeat the intention of the grantor, it is to be confined to cases literally within it. *Crosby v. Davis*, 2 Clark (Pa.) 409.

In *Ackerman v. Ackerman*, 34 Pa. Super. Ct. 162, it is said that sometimes a rule of law, like the rule in Shelley's Case, operates to defeat the intention.

The inflexible rule of law in Illinois is that the rule in Shelley's Case must control, even though against the testator's manifest intent. *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012.

Every devise coming within the rule in Shelley's Case is controlled by it, even though the express purpose and intention of the testator is thereby thwarted. *Bonner v. Bonner*, 28 Ind. App. 147, 62 N. E. 497.

⁶⁴In *Sanborn v. Sanborn*, 62 N. H. 631, the court said, in referring to the statutes of New Hampshire repealing the rule in Shelley's Case, that they had removed a technical ground on which the testator's intention was formerly defeated by the word "heirs."

In *Turman v. White*, 14 B. Mon. 560, it is said: "It may be asserted with confidence that no man, not even a scientific conyancer, either in England or America, intending to convey the fee simple to A, would, as a means of effectuating that intention, convey the land to A for life, and then to his heirs. Such language directly negates the intention to convey a fee to A, and never would be adopted for that purpose, less with a view to deceive. . . . To apply such a rule to the acts and transactions of ordinary men might enable the crafty and cunning to make victims of the ignorant and unwary."

In *Richardson v. Wheatland*, 7 Met. 169, the court said that where a testator gives an estate to one for life in express terms, and then devise over to the general heirs or persons of the body, the natural presumption would seem to be that the intent of

the testator was that it should be carried into effect literally, and that the first taker should have a life estate only, without power to alienate and defeat the claims of the heirs, who seemed to be alike the objects of the testator's bounty. The rule in Shelley's Case, therefore, would probably defeat the real intent of the testator.

In *Kirby v. Brownlee*, 13 Ohio C. C. 86, affirmed without opinion in 55 Ohio St. 676, 48 N. E. 1114, it was said that, by the rule in Shelley's Case, the manifest and clearly expressed intention of the testator or grantor was defeated and held for nothing, and that the one who was to take for life only was vested with the fee simple, in order to avoid the uncertainties which might occur as to who should enjoy the fee upon the termination of the life estate.

This is a rule of property founded in principles of feudal policy, absolute and invariable in its application to all cases falling within its terms, not only wholly independent of the intention of the maker of the instrument, but by its very terms in positive contravention of that intention. *Markley v. Singletary*, 11 Rich. Eq. 393.

It is difficult to reconcile the rule in Shelley's Case with the acceptance of the rule sometimes called the cardinal rule for construction and interpretation, that is, that the intention of the testator must be ascertained and carried into effect if possible. *Millett v. Ford*, 109 Ind. 159, 8 N. E. 917.

Although it is a cardinal rule in the construction of wills that the intention of the testator must control, it is also true that when words are used that have a settled legal meaning, the full effect must be given to them. *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435.

The rule in Shelley's Case is one of those artificial rules of construction which give to the terms used an effect different from that suggested by them to anyone not versed in these rules, and therefore was found often to mislead testators, and its application to disappoint their evident intentions, and sometimes to mislead the devisees. *Quick v. Quick*, 21 N. J. Eq. 13.

In *Sheeley v. Neidhammer*, 182 Pa. 163, 37 Atl. 939, in holding that the words "his children or legal heirs" were words of limitation, the court said that it might be probable that this construction defeated the intention of the testator, but that such was the common result of the application of the rule in Shelley's Case.

tain sense, but is also false to a certain extent. The cases collected in this subdivision of the note will make this point clear; but, to understand and reconcile many of them apparently in conflict, it is necessary to keep in mind the fact that when the word "intention" is used in this connection, it may be used in different senses. To illustrate, let it be supposed that A has conveyed lands to B for life, remainder to the heirs of B. Here three distinct intentions may have been, and quite likely were, present in the mind of the grantor. First, an intention that B should have an estate for life, and no longer; second, an intention resulting from the limitation to the heirs, that B should not have the power to defeat the remainder to his heirs; and, third, that the whole line of the heirs of B should take the estate. If, instead of a limitation in the simple language just given, the limitation had been to B for life, remainder to the heirs of B living at his death, a new element of intention, which, for the sake of reference, will be called the fourth intention, is added.

⁶⁵ The only method in which an instrument employing the word "heirs" can be taken not to be within the rule is by showing that the word was not employed in its legal sense. *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013.

Although a cardinal rule in the interpretation of wills is to ascertain and then adopt the intention of the testator, yet if the devise for consideration comes under the operation of Shelley's rule, the words must be taken as they stand in their strict legal signification. *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499.

⁶⁶ In *Jones v. Rees*, 6 Penn. (Del.) 504, 16 L.R.A. (N.S.) 734, 69 Atl. 785, the court says that the rule is an arbitrary one; that it is strictly a rule of law, and not of construction or intention; and that where the language used in the instrument brings the case within the rule, the fact that it was the intention of the grantor or deviser that the rule should not operate is of no importance. This arbitrary feature has induced courts of law and equity to construe the rule most strictly, and when practicable, to take cases out of its operation.

In *Robert v. West*, 15 Ga. 124, it is said that it is obvious that this rule, which is said to be a rule of law, and not of construction, fixed nothing except that the use of certain words in a certain way will be held to indicate an intention to create an estate tail, and of certain others words, an intention to create a fee simple. When the terms used are "heirs of the body" alone, or where they are "heirs" general, the rule easily and plainly performs its office; but difficulty begins when words are employed which are assumed to be only equivalent to these terms, or where such words, or words supposed to be similar in effect to each of

ed. Here, it will be observed, the limitation in remainder is not simply to the heirs of B, but to the heirs of B "living at his death." The first question to be decided in such a case, therefore, would be: Did the grantor use the word "heirs" in its technical sense? that is, did he mean that the whole line of B's heirs were to take, or did he mean that only such heirs as were living at his death should take? This is a preliminary question which must be decided independently of the rule in Shelley's Case, under the ordinary principles of construction. The great object of the preliminary investigation is to find out what the grantor intended by his use of ambiguous words. Only when that has been ascertained, can it be known whether it is a proper case for the application of the rule.⁶⁵

When it is said that the rule in Shelley's Case is a rule of property, and not of construction, that it operates to defeat the manifest intent of the grantor or deviser,⁶⁶ usually what is meant is that it defeats the first and second intention, as

these terms, are used in the same instrument. Then it is that resort must be had to referential construction, and the task of fixing an intention for the testator needs more a rule of construction than of law.

In *Butler v. Huestis*, 68 Ill. 594, 18 Am. Rep. 589, it is said that the rule in Shelley's Case is at most a technical rule of property, and has always, ever since the decision in *Perrin v. Blake*, given way to the clear intention of the donor, when that could be ascertained from the instrument in which the words were used. Otherwise, instead of being a rule by which justice could be administered, it would be a source of incalculable mischief in its practicable application. To the same effect, *Belsay v. Engel*, 107 Ill. 182.

"This rule is said to be a rule of property which overrides even the expressed intention of the testator or grantor, that it shall not operate, or which, rather, raises a conclusive presumption that where a devise or grant is made to a man and his heirs, the testator or grantor intends to use the word 'heirs' as a word of limitation, and not of purchase." *Fowler v. Black*, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596.

The rule in Shelley's Case is not a rule of construction or interpretation, by which the sense of the particular words, and the intention with which they were used, was ascertained or fixed, but a rule of law, declaring the effect of a certain disposition of land, and having no operation in the particular case unless there be such disposition, and no application until it was ascertained, by the aid of other rules and principles, that, according to the intended sense (not the intended operation) of the words used in framing the limitation in question, the conveyance made the particular disposition to

above set forth, but not the third. When it is stated generally that the intention of the testator will prevail even against the rule in Shelley's Case, the intent which has herein been called the fourth intention is usually what is meant, that is, the intent with which certain ambiguous words of limitation were used. When it is said that more leniency is shown in the application of the rule to wills than to deeds, the statement is not accurate. What is generally meant is that, in the preliminary inquiry to ascertain the sense in which certain words of limitation are used,—that is, to ascertain the fourth intention, so called herein,—the courts are more lenient in the case of wills than of deeds. This has nothing to do with the application of the rule in Shelley's Case itself; for if, by the lenient rules of construction which obtain in the case of wills, it is once understood that the word "heirs" is used in its technical sense,—that is, that the whole line of heirs in succession, from generation to generation, is meant,—the rule applies as readily to a will as to a deed. After the preliminary inquiry is at an end, the will and the deed stand on exactly the same footing, so far as the application of the rule is concerned.

When the statement is made that the rule in Shelley's Case is not applicable to executory trusts (see *infra*, XVIII.), but

that in such cases effect will be given to the intention of the author of the trust, what is meant is that effect will be given to the intent herein called the first and second intent, but not to the third intent. Thus understood, statements of law in the propositions following in this subdivision of the note become more reconcilable. These statements are given to show in what broad and confusing terms the effect of the rule is stated by various courts.

It has been said that the rule in Shelley's Case is not a mere rule of construction designed to carry out the intentions of the testator, which will therefore yield to any indication of a contrary intention to be found in the will. It is a rule of law that, where an estate is devised to the heirs or heirs of the body of a person to whom a prior estate of freehold has been given, the heirs take by descent, and not by purchase, and that an estate in fee simple or in fee tail is created in the ancestor; that a testator can no more make such a devise, and direct that it shall not have this operation, than he can in terms create an estate in fee simple or an estate tail, and then direct that these estates shall not have the incidents which the law annexes to them; that, if words be superadded purporting to have that effect, they must be treated as absolutely ineffectual.⁶⁷

which the rule applied, and which it virtually prohibited by giving to it an operation and effect regardless, and most frequently destructive, of the intention with which it was made. *Stephenson v. Agan*, 15 B. Mon. 282.

In *Wool v. Fleetwood*, 136 N. C. 460, 67 R.A. 444, 48 S. E. 785, it is said that this rule is of very ancient origin, and has always been considered as a rule of law or of property, and not merely as a rule of construction adopted for the purpose of ascertaining the actual intention of the testator. When the words employed bring the case within the rule, the intention of the testator is not to be considered, even though he would declare that the ancestor shall have by a life estate. The rule is imperative and must be enforced inflexibly in all cases in which, by the term of the particular instrument, it is applicable. If there is anything in the instrument to indicate clearly an intention not to use the words in their technical sense, but as *descriptio personarum*, as, for instance, that, by the words "heirs of the body," the testator and his children, such an interpretation will be given to his language as will effectuate his intention.

Van Grutten v. Foxwell, 77 L. T. N. S.

The rule must prevail whenever a devise of realty by its terms falls within it, regardless of the otherwise expressed intention. (R.A. (N.S.))

tion of the testator or grantor. *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751.

The rule in Shelley's Case is a rule of law, and not of construction, where the language used in the instrument brings the case within the rule. The fact that it was the intention of the testator or deviser that the rule should not operate is of no importance. 22 Am. & Eng. Enc. Law, p. 495; *Waters v. Lyons*, 141 Ind. 170, 40 N. E. 682.

Where the rule is enforced in all its rigor, it is held to be a rule of property, and not of construction, and a grant or devise to a person named "and his heirs" would be subject to the rule, and no declaration, however unequivocal, that the ancestor should have the estate for life only, or that his heirs should take as purchasers, would be effective. *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18.

The rule in Shelley's Case is not a rule of construction for ascertaining or effectuating the intention of the party in limiting an estate or in creating trusts upon it, but is a positive and rigid rule, the chief operation of which is to defeat the ascertained intention of the grantor. *Berry v. Williamson*, 11 B. Mon. 245.

The rule in Shelley's Case is a rule of positive law, and not of construction. Where, upon the construction of a grant or devise, the rule is found to be applicable, it cannot be controlled by any expression of a contrary intent. In such cases the devolu-

Since it is a rule of property, and not of construction, no declaration, however unequivocal, that the ancestor shall have an estate for life only, or that his estate shall be subject to all the incidents of a life estate, or that the heirs shall take as purchasers, will be operative; the particular intent thus clearly expressed will be compelled to yield to the general intent expressed by the creation of the estate, and the devise will be held accordingly.⁶⁸ For a discussion of this question, see next subdivision.

b. The general and particular intent.

The rule in Shelley's Case is said to give effect to the general intent, and to disre-

tion of the estate is irresistibly fixed. *Martling v. Martling*, 55 N. J. Eq. 771, 39 Atl. 203.

The rule is inflexible when the words are used with nothing to qualify them, but if they are used in connection with explanatory language which shows that they were used not with technical accuracy, but artificially, to denote particular persons, they will be permitted to have effect accordingly, especially in wills. *Burges v. Thompson*, 13 R. I. 712.

Whenever the court comes to the conclusion that the gift over includes the whole line of heirs, general or special, the rule at once applies, and an estate of inheritance is executed in the ancestor or tenant for life, even though the testator has expressly declared that the ancestor shall take for life, and no longer, or has endeavored to graft upon the words of gift to the heirs or heirs of the body, additions, conditions, or limitations which are repugnant to an estate of inheritance, and such as the law cannot give effect to. *Lord Davey in Van Grutten v. Foxwell*, supra.

The rule is one of law, and not merely one of construction for the purpose of ascertaining the intention, and when words of limitation bring the case within the rule, it applies regardless of the intention, or, if expressed differently, the intention is presumed to be in accordance with that which the law implies from the use of words having a fixed definite meaning. *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 55 S. E. 289, 9 A. & E. Ann. Cas. 244.

The rule is universally one of law, and not of construction, and consequently the intention of the testator in its presence is of no account whatever. *Lippincott v. Davis*, 59 N. J. L. 241, 28 Atl. 587.

No matter how evident the intent to create a life estate may be, when the words actually used bring the gift within the rule, the intention must give way, and the fixed rule must be followed. *Hughes v. Nicklas*, 70 Md. 484, 14 Am. St. Rep. 377, 17 Atl. 398.

The rule in Shelley's Case has nothing to 29 L.R.A. (N.S.)

gard the particular intent. As pointed out in the last subdivision, there are four different senses in which the intention of the author of a will or deed may be understood. These intentions naturally fall into two divisions which have been termed the general and particular intent. The general intent is said to be the intent that a grantor or testator has with reference to the course the property shall take after the life tenancy ends. He either intends that it shall go to the whole line of the life tenant's heirs, in succession from generation to generation, in the course marked out by the law of descent, or he intends that it shall go to a portion of those heirs in a course different from that marked out by the law of descent. The former intention

do with the testator's intention. It is a rule of property which overrides the intention. In fact, wherever applicable, it may be said that it disregards the intention altogether; for whilst the intention may confessedly have been to give but a life estate, the rule converts that life estate into a fee, by treating the terms of the gift over to the heirs as a limitation of the estate, and not as words of purchase. *Travers v. Wallace*, 93 Md. 507, 49 Atl. 415.

⁶⁸ 1 Powell, Devises, 435; *Trumbull v. Trumbull*, 149 Mass. 200, 4 L.R.A. 117, 21 N. E. 366.

In applying the rules of construction, it is fully settled that the fact that the estate of the ancestor is expressly for life only, and no longer, or that he shall not sell or dispose of the estate for any longer time than his life, and like expressions applied to the estate of the tenant for life, will not prevent the application of the rule in Shelley's Case. *Martling v. Martling*, supra.

The rule in Shelley's Case is a rule of law which in its application is generally, if not necessarily, contrary to the apparent intention of the author of the estate. It therefore overrules, or is paramount to, such intention. *Taylor v. Cleary*, 29 Gratt. 448.

When the devise is to the heirs generally, the rule applies, and is held conclusively to express the intention of the testator, and will necessarily govern and control in determining the estate devised, notwithstanding the expression of an intention on the part of the testator that the ancestor shall take a less estate than the fee. *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814.

In *Davis v. Sturgeon*, 198 Ill. 520, 64 N. E. 1016, it is said to be well settled that when a conveyance contains language creating a fee under the rule in Shelley's Case, that is, to one and his heirs, or heirs of his body, the word "heirs" is one of limitation, and that no intention of the grantor, however clearly expressed, can change it into a word of purchase. In this case there was no life estate given to the first taker, but the devise was to one and her heirs.

is sometimes called the paramount intention. When an instrument is examined for the purpose of discovering the sense in which certain words of limitation were used, the examination is aimed at the discovery of this general or paramount intent.

The particular intention is considered to be that the first taker shall have an estate for life only; and that he shall not have the power, by alienation or other acts, to defeat the estate of the remaindermen. When it is stated that the rule in Shelley's Case gives effect to the general intention, and sacrifices the particular intention, what is meant is, that it gives effect to the intention to create that kind of an estate which will descend in the line marked out by the laws of descent. Having given effect to this general intention, the particular intention, that the first taker shall have only a life estate, and that he shall not have power to defeat the remainder, must necessarily fail. It is apparent that this must be so, because the general and particular intentions cannot both be carried out unless a new species of estate, unknown to the law, is created.

If, for example, to take a case outside of the scope of the rule in Shelley's Case, A is given a fee simple estate by a limitation to A and his heirs, and the deed contains a clause stating that it is the intention of the grantor that A shall not have the power to dispose of the property during his life, it is evident that two intentions are expressed in the deed: First, the intention that A shall have a fee simple estate; and, second, that he shall not have the power to dispose of it during his life. Now it is impossible to give effect to both of these intentions. One of the chief incidents of a fee simple estate is that it may be alienated. If, therefore, effect is given to the intention that A shall not have power to dispose of the estate granted him, there must be given an estate that is less than a fee simple estate. The moment that the power of alienation is taken away from the estate, the nature of the fee simple is destroyed. And it follows of course that effect is given to the expressed intention to give A a fee simple estate, the intention that he shall not have the power to dispose of it must be disregarded. In construing such a deed to pass a fee simple estate, therefore, it may be said that effect is given to the paramount intention of the grantor, to the sacrifice of the particular intention.

This is exactly what happens in the application of the rule in Shelley's Case, and what is meant by giving effect to the general intention at the expense of the

particular intention. This fact can find no better illustration than in Shelley's Case itself (see *supra*, II.).

It should be remembered that Edward Shelley, the ancestor, was dead when the controversy in that case arose. Therefore there could be no dispute over the particular intent; that is, that Shelley should have the estate for life only, and that he should not have the power to defeat the remainder. He had no opportunity to defeat the remainder, for he died as soon as the recovery passed. Therefore the only question in the case was, How did he intend the remainder should go? This was not only a question as to the paramount intent, but it was the only question for consideration in that case.

Now, if A becomes vested with the title in fee by purchase of a tract of land and dies intestate, and the land descends to B, his heir, and B dies intestate, and the land descends to C, his heir, and then C sells the land to D, a stranger, and D dies intestate, and the land descends to F, his heir, and F sells the land to G, a stranger, and G dies intestate, and the land descends to H, his heir, etc., it is manifest that each time the title to the land changes by purchase a new line of descent begins, a new and different set of heirs become entitled to take from those who would have taken if the land had not been sold to strangers. It makes no difference, of course, whether the land is sold to a stranger of the blood or not, or whether the title is acquired by sale or by gift, so long as the transfer takes the property out of the line of the original descent. A new descent, a new and different line of heirs, must be marked out for the descent every time the title of property passes by purchase. The purchaser becomes the source, the *stirps*, from which the new branch springs.

The great question in Shelley's Case was whether Shelley, the ancestor, intended that he himself should be the source from which the inheritance was to descend, or whether he intended that the heirs male who should be living at his death should constitute a new stock from which the inheritance was to descend. If the first intention was the one entertained, then the property, in the event that happened,—the birth of a grandchild after his death,—would actually have to go to a different individual than it would have gone to if the ancestor entertained the second intention, that is, that a new stock of descent should be created. To give effect to the first intention it was necessary to create an estate in the ancestor capable of descending, or in other words, a fee. The question of intention was therefore the vital question in Shelley's Case,

and the court, instead of disregarding the intention, endeavored to give effect to it, and to decide the case as Shelley himself would have decided it. For no one reading Shelley's Case can doubt that he intended that he himself, rather than his second son, should be the source from which the inheritance was to spring. Having so decided, there was nothing left to do in Shelley's Case but to carry out this intention; but this required the court to hold—as it would require courts to hold even where the rule in Shelley's Case is no longer in force—that the ancestor had the fee; for, as already shown, the moment effect is given to the particular intention that the first taker take only a life estate, that instant the inheritance is destroyed. The two cannot exist together. It is therefore inaccurate to state that the rule in Shelley's Case destroys the intent.

It will be observed that if A grants land to B for life, remainder to the heirs of B, there is very little from which the intent as to the course of descent can be gathered. It might well be argued from the fact that an express estate for life is limited to B, that he therefore intended his heirs to take by purchase, rather than by descent.⁶⁹

The point to be emphasized, however, is that this is still an inquiry after the intention, and that no matter whether the result reached is that the word "heirs" in a limitation to A for life, remainder to his heirs, is deemed to be used as a word of limitation or purchase, the aim is to give effect to the intention of the author of the instrument, as expressed therein.

If A limits an estate to B for life, remainder to his heirs, the heirs, under the

rule in Shelley's Case, would take by descent; under statutes abolishing the rule, they would take by purchase. The property would descend in one course under the rule in Shelley's Case, and in another course under the statutes. One rule is as arbitrary as the other. Both are designed to give effect to what is deemed the paramount intent. In applying the statutory rule, the paramount intent is deemed to be that the first taker shall take a life estate, and that he shall not have it in his power to defeat the remainder. The rule in Shelley's Case is calculated to give effect to the intention as to the course the property shall take after the death of the ancestor. As to which is more likely to carry out the real paramount intent of the author of the instrument, see *supra*, VII.

In *Perrin v. Blake*, Lord Mansfield, in the King's bench division, said he always thought that as the law had allowed a free communication of intention to the testator it would be a strange law to say: "Now you have communicated that intention, so as everybody understands what you mean, yet because you have used a certain expression of art, we will cross your intention, and give your will a different construction; though what you meant to have done is perfectly legal, and the only reason for contravening you is because you have not expressed yourself like a lawyer." He said that his examination of the question had always convinced him that the legal intention, when clearly explained, was to control the legal sense of a term of art, unwarily used by the testator. But Sir William Blackstone, in his famous argument in that case, pointed out that the true

⁶⁹ According to Blackstone's opinion, says Chancellor Kent (4 Commentaries, p. 225): "Two things must appear upon the face of the will: (1) That the testator meant to confine the first taker to an estate for his life; and (2) that he meant to effectuate that intent by some clear and intelligent expression of a design to have the heirs of his son take by purchase, and not by descent. This opinion has been much admired, as containing incontestable evidence of the skill and talents of its great author. But the premises and the conclusion do not appear to be very consistent. The argument admits that the intention of the testator will control the rule; and it would seem then naturally to follow that when the testator explicitly declared that the son was not to have a power to sell and dispose of the estate for a longer time than his life, and to that intent gave him a life estate, with an intervening contingent remainder, and then with remainder to the heirs of his body, that the words 'heirs of the body,' were not intended to operate to the destruction of that intent, so as to give the son a fee with the 29 L.R.A. (N.S.)

power to sell. The presumption that those technical words were intended to be used in a technical sense was certainly rebutted when that technical sense would inevitably destroy the testator's declared intent, and confer upon the son, by the magical operation of attraction and merger, an estate tail, which the testator never intended."

In *Siceloff v. Redman*, 26 Ind. 251, it was said that if it is true that the ancestor was intended to take a life estate, and no more, and if the testator intended that the heirs should take after him, how could it be inferred that he intended that they should take by descent from the ancestor, to whom he had not, at least as he supposed, given an estate that could descend? On the contrary is it not clearly apparent that as he did not intend to devise more than a life estate to the first taker, which would terminate on his death, he must have intended that the heirs will take directly from him as purchasers, or as the root of a new stock, and not by descent from the ancestor.

question of intent should turn not upon the quantity of the estate intended to be given to the first devisee, but upon the nature of the estate intended to be given to the heirs.⁷⁰

The rule in Shelley's Case is not really an exception to the rule that the intention of the testator must guide in interpreting a will, but only sacrifices a particular, to a general, intent.⁷¹

70 6 Greenleaf's Cruise, Real Prop. 386.

"One should have thought," says Mr. Hargrave, "that the friends of the rule would have seen that if the mere intention to prevent a tenant for life from having power over the entail was sufficient to repel the rule, it would scarce be possible to sustain its application in any of the contested cases on the subject; for there is scarce one of them in which a person unblinded by the frequency and mist of disputatious subtlety could fail seeing that it was not the intent to invest the tenant for life with a power to defeat the succession to his heirs. Even the single circumstance of giving an express estate for life leads to a conjecture against such an intent. But where the estate is given by words negating a greater estate; as where a devise is to one for life only, or for life and no longer; or where powers of leasing or jointuring are either given or refused to the tenant for life; or where he is restrained from committing waste; surely it is more than conjecture, that the testator or donor did not mean to have the remainder to the heirs of the body of the tenant for life so construed as to enable his selling or giving away the inheritance itself; it is surely most strong and persuasive evidence. How much less then can it be convincingly argued that a tenant for life was intended to have such a power to disappoint his children and posterity of the entailed property; when the author of the entail, in order to prevent such effect and consequence, interposes between the estate of the tenant for life and the remainder to the heirs of his body, an estate to trustees to preserve contingent remainders of which the professed and only object is to guard the succession against all acts destructive of it by the tenant for life? To insist that even in such a case there is not sufficient evidence of an intention to deny to the tenant for life the power of breaking the entail and stripping his issue of the estate seems to be such an extreme as can only originate from the supposition of decisive judicial precedents the ponderous weight of which, from their number and respectability, becomes absolutely irresistible without breach of the reverence justly due to the strong current of past decisions. If also the rule really is under the control of intention, how can it be reasonably urged that it ought not to prevail in cases in which the intention is confessedly disappointed by applying the rule?" Hargrave's Law Tracts, 557.

Again, he says: "In the cases in which the question arises whether the rule shall govern or not, it almost ever occurs that the author of the entail doth not mean that the tenant for life, to the heirs of whose body the remainder is limited, should have

power to defeat the succession to them by an alienation to their prejudice. Anxiously and formally to aim at creating a strict entail, and at the same time to intend that the first taker of the estate shall be competent to destroy it at his pleasure, is an inconsistency too improbable to be justly imputed. But hence a sort of opposition necessarily arises between the rule in Shelley's Case and the intention of the party entailing; for if the rule is applied, it immediately gives to the tenant for life the opportunity of disappointing the succession established in favor of his heirs; whereas if the rule is not applied, the succession is invulnerable by him. The rule and the intention then drawing in these opposite directions, it naturally caused a temptation to avoid the form in such cases to the utmost, for the sake of accomplishing the latter as far as our policy against the perpetuity of entails will allow. The explanation, it is apprehended, exhibits the true source and spring of the controversy in question, the real origin of all the numerous contentions about the force of the rule. If the rule and the intention accorded, there would be no room for hesitation about applying the rule. It is therefore from their clashing only, that the contest could arise." Id. 556.

71 Huber's Appeal, 80 Pa. 348.

In *Fuller v. Chamier*, 12 Jur. N. S. 642, Sir W. P. Wood, V. C., said: "The difficulties that arose when Shelley's Case had to be determined were two in number. The one was that on a limitation of an estate for life to the ancestor, with remainder to his heirs, without adding any words of limitation, if the heir was treated as purchaser, there would be a question whether he would take more than a life interest, as there were no words added conferring the fee upon him. Besides, there was this difficulty, that the remainder to the heir would be a contingent remainder; and the state of law as it then existed appeared to the judges who decided that case, to require that the interest created by any instrument should be a vested interest at as early a period as possible, because the contingent remainder would be liable to be destroyed and the intention of the testator to be defeated in a variety of ways. The intention of the testator was supposed to be an intention to convey an absolute interest to the person who was the object of his bounty and to the heir who came after him; and although it was plain and manifest that the first taker was intended only to take for life, the particular gift was extended in order that the property might pass fully and absolutely to the family of the person who was to take only for life, but to whose heirs the inheritance could not pass unless the will was con-

It is only the apparent exception to the rule that the intention of the testator shall control.⁷²

In its principle, declared one court, it is very like the rule of the statute of uses and of our equity, that disregards the mere

strued as vesting the whole interest in the first taker."

In *Knight v. Ellis*, 2 Bro. Ch. 570, Lord Camden said: "Now what do the cases come to? A man by his will devises to A for life, there being plainly an interest only for life given; if that were all, the disposition would end there as to A, and any other gift would be effectual after his death. The testator then gives the same fund over to B, after failure of issue of A. What is the court to do? It is clear that a life interest only is given to A. It is clear that no benefit is given to B while there is any issue of A. The consequence is that as no interest springs to B, and no express estate is given after the death of A, the intermediate interest would be undisposed of, unless A were considered as taking for the benefit of his issue as well as of himself; and as the words in this case are capable of such amplification, the court naturally implies an intention in the testator that A should so take that the property might be transmissible from him to his issue, and he was therefore considered as taking an estate tail which would descend on his issue."

The common-law rule that the general intention of the testator is to be effectuated, though at the sacrifice of his particular intention, is in truth nothing more than an enlargement of the rule in *Shelley's Case*. In most of the cases in which that rule is applied the particular intent is perfectly clear, that the party shall take for life, and for life only. But that particular intention will be overruled if there appear another and a paramount intention, that the land shall not go over, except on failure of issue of the first taker; and the will contains in terms no such gift to the issue as will carry it to them absolutely. In such a state of things in order that the land may not go over, except on an indefinite failure of issue, the court is obliged to imply an estate tail in the original taker. *Kavanagh v. Moreland*, 18 Jur. 185.

But Lord Macnaghten, in *Van Grutten v. Foxwell*, 77 L. T. N. S. 170, said that some have attributed the subtlety of the distinctness in the decisions to that most unsatisfactory doctrine of "particular intent" and "general intent," which practically destroyed both by rejecting the one and placing the other at the mercy of the first taker,—a great favorite with Wilmot, Ch. J., and with Lord Kenyon, but a doctrine that in my opinion, if I may be permitted to say so, has all the merits and some of the dangers of those nostrums which are advertised as universal remedies.

⁷² *Yarnall's Appeal*, 70 Pa. 335.

In *Doe ex dem. Gallini v. Gallini*, 5 Barn. & Ad. 621, it was said: "The doctrine that the general intent must overrule the particular intent has been much, and we conceive justly, objected to of late, as being as 29 L.R.A. (N.S.)

a general proposition incorrect and vague, and likely to lead in its application to erroneous results. In its origin it was merely descriptive of the operation of the rule in *Shelley's Case*; and it has since been laid down in others where technical words of limitation have been used, and other words showing the intention of the testator that the objects of his bounty should take in a different way from that which the law allows have been rejected; but in the latter cases the more correct mode of stating the rule of construction is that technical words, or words of known legal import, must have their legal effect, even though the testator use inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical words in their proper sense; and so it is said by Lord Redesdale in *Jesson v. Wright*, 2 Bligh 57, 10 Eng. Rul. Cas. 714. This doctrine of general and particular intent ought to be carried no further than this; and thus explained it should be applied to this and all other wills."

In *Daniel v. Whartenby*, 17 Wall. 639, 21 L. ed. 661, it is held that in construing wills, where the question of its application arises, the intention of the testator must be fully carried out so far as it can be done consistently with the rules of law, but no further. The meaning of this is that, if the testator has used technical language which brings the case within the rule, a declaration, however positive, that the rule shall not apply, or that the estate of the ancestor shall not continue beyond the primary express limitation, or that his heirs shall take by purchase and not by descent, will be unavailing to exclude the rule, and cannot affect the result. But if there are explanatory and qualifying expressions from which it appears that the import of the technical language is contrary to the clear and plain intent of the testator, the former must yield and the latter will prevail.

In *McGraw v. Davenport*, 6 Port. (Ala.) 319, it is said that the rule in *Shelley's Case* only sacrificed the particular to the general intent of the testator.

The frequent frustration of a partial design is one of the acknowledged consequences of the rule. *George v. Morgan*, 16 Pa. 95.

The rule subverts a particular intention in perhaps every instance of its operation, but it is an intention which the law cannot indulge, being an intention to create an inalienable estate tail in the first donee. *Carroll v. Burns*, 108 Pa. 386.

In *Rowen v. Lewis*, L. R. 9 App. Cas. 890, Earl Cairns said that the foundation of the rule in *Shelley's Case* was this: "You have an indication of a general intention, which you gather from the whole of the will, that the estate shall travel through the issue gen-

form of a title to land, and even some of its minor incidents, and treats it as being his to whom it substantially belongs, though the form and intention be otherwise.⁷³

If it appears upon the face of a will that the limitation over after the life es-

tate is to the heirs of the life tenant, and that they take as his heirs, and not as purchasers, then the rule applies as a matter of law. In such a case the particular intent, that the first taker shall possess only a life estate, yields to the general intent, that his heirs shall inherit from him.⁷⁴

erally of a certain person. You have that accompanied, no doubt, with a particular intention that the first taker shall take an estate for life; but in order to give effect not to a technical construction, which would limit the first taker to a life estate, but to give effect to the general intention of the testator, and to make the estate travel through the issue generally, as the testator intended it to do, you apply the rule in Shelley's Case. Otherwise, if you do not do that, the consequence is that the only other resource which you have is to give to the first taker in the series of issue an estate by purchase, in which case it will not go through the issue generally, but only through the descendants of that particular head of the issue."

⁷³ Price v. Taylor, 28 Pa. 102, 70 Am. Dec. 105.

In *Chippa v. Hall*, 23 W. Va. 504, it is said that "the person making by deed or will such a limitation as comes within the rule in Shelley's Case had in his mind two purposes which were legally in conflict. One was to give to the ancestor only a life estate, and the other was to limit the land to his heirs as such collectively and in indefinite succession. It was held that these two interests could not stand together without producing much public mischief. Now when these two intents appeared in a deed or will, under the rule in Shelley's Case, the second intent, to limit the land to the heirs in indefinite succession, was preferred, and the first intent to give the ancestor a life estate only, no matter how clearly it was expressed, was set aside. And as the only means of effecting this second intent, the rule in Shelley's Case was adopted; and the ancestor was declared to have a fee simple estate, or an estate tail. There was generally no difficulty in ascertaining the first intent of the grantor or testator. It was almost always clearly expressed, and in all the cases nearly it was entirely clear, that the ancestor was intended to have a life estate only; and it was often, when the rule in Shelley's Case was applied, expressly declared that the ancestor should have no more than a life estate. But under the operation of this rule this estate, though it was expressly declared that it should not exceed a life estate, was declared by the courts to be a fee simple, because it appeared by the deed or will that the grantor or testator intended that the estate, on his death, was to go to his heirs collectively and in indefinite succession. But this second intent very often did not appear so clearly as this first intent; and whether the grantor or testator did intend that, after the death of the life tenant, the land should go to his

heirs collectively and in indefinite succession as such, or whether he intended it to go to his heir apparent or to his children, or to some other particular individuals in the eye of the grantor or testator when he made the deed or will, was very often the subject of bitter controversy."

In *Den ex dem. Pinkerton v. Laqueur*, 4 N. J. L. 301, Kirkpatrick, Ch. J., said: "Nor do I well see how it has come to pass that lawyers have so much puzzled themselves about the reason of this rule. Both parts of such a devise cannot take effect upon a literal construction. If the first devisee take an estate for life only, his heir, as such, can take nothing, because he had no heritable estate. It became necessary, therefore, so to construe such devise, as that both parts of it should stand. Either the devise for life must be taken in the popular and common acceptance of such terms, and must be intended to mean that the devisee should have power over the estate during his life only, and not the power of selling and disposing of it in fee; or the term "heirs" must be taken in a sense different from its appropriate meaning and limited signification in the law. And, as the great interest in such devises is the inheritance, and not the estate of the immediate devisee, it is easy to see which of these rules of construction would be most likely, on a general scale, to carry into effect the intention of the testator. We have no necessity, therefore, to go back to feudal times, and to trace the chivalrous notions of our ancestors, buried in the ruins of a thousand years, as has been said, to find at least one sufficient reason for this rule; a reason, too, which ought to operate equally at all times, and with us as powerfully as it did with them."

⁷⁴ *Cook v. Councilman*, 109 Md. 622, 72 Atl. 404.

The rule in Shelley's Case operated to defeat the particular intention by force of a general rule of construction. If the testator had declared that his children should have life estates, and no more, such language would not have prevented the application of the rule in question, and, notwithstanding this declaration, they would have taken fees. *Warner v. Sprigg*, 62 Md. 14.

In every case where the testator creates an estate tail by words of this description, unless he is perfectly cognizant of the technical rule of law, he does not intend to enlarge the life estate of the first taker to an estate tail, but the rule of law, notwithstanding, attaches and gives the first taker an estate tail. *Doe ex dem. Terry v. Collier*, 11 East, 377.

The rule in Shelley's Case was adopted as a rule of interpretation to give effect to the

In determining whether the rule is applicable, the test is how the donees in remainder are to take. If, as purchasers under the donor, then the particular estate is limited by the literal words of the deed, and the rule in Shelley's Case has no application. But if the remaindermen are to take as heirs to the donee of the particular

estate, then what has been called the superior intent, as declared in Shelley's Case, operates, and the first donee takes a fee, whatever words may be used in describing the estate given to him.⁷⁵

When it is said that the rule is a rule of property, overriding the particular intention, it is not meant that the testator's

paramount intent of the testator. The words "heirs of the body" or "heirs" will yield to a particular intent, that the estate shall be only for life, and that may be from the effect of the superadded words, or any expression showing the particular intent of the testator, but that must be clearly intelligible and unequivocal. *Kennedy v. Kennedy*, 29 N. J. L. 185.

In *Hileman v. Bouslaugh*, 13 Pa. 351, 53 Am. Dec. 474, it is said that it is admitted that the rule subverts a particular intention in perhaps every instance, but that it is an intention which the law cannot indulge consistently with the testator's general plan, and which is necessarily subordinate to it. It is an intention to create an inalienable estate tail in the first donee, and to invert the rule of interpretation, by making the general intention subservient to the particular one. A donor is no more competent to make tenancy for life a source of inheritable succession, than he is competent to create a perpetuity or a new canon of descent.

A particular intent must yield to a general intent, when necessary to preserve the compatibility of the estates created, and, says the court in *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537, where the general intention is that the first devisee shall be the root of a new succession, and that those in remainder shall take as his heirs, either general or lineal, they take by descent from him; consequently the estate given to him must be a fee, since nothing but an inheritable estate can be taken by descent. A life estate in the first taker who is to become the root of a new succession is incompatible with the transmission of an estate of inheritance to his heirs. His estate, therefore, though from a particular intent limited in terms to his life, is, by the creation of law, enlarged to an estate of inheritance, in order that effect may be given to the general intent. No expression of intention, however explicit and absolute, can hold his interest down to a life estate when the further intention appears that those in remainder shall take as his heirs.

Where there is a particular and a general intent, the particular is to be sacrificed to the general intent. *Jesson v. Wright*, 2 Bligh, 1, 10 Eng. Rul. Cas. 714. In this case it is said there is, indeed, no reason why judges should have been anxious to set up a general intent to cut down the particular, when the end of such decision is to give power to the person having the first estate according to the general and paramount intent to destroy the interest both under the general and particular intent. It 29 L.R.A. (N.S.)

is also said that it is not a most accurate expression of the principle of decision "that the general intent should overrule the particular." That the rule is that technical words shall have their legal effect, unless from subsequent inconsistent words it is very clear that the testator meant otherwise.

⁷⁵ *Shapley v. Diehl*, 203 Pa. 566, 53 Atl. 374.

"The rule is not a means to discover the intention of the grantor or testator, but supposing the intention ascertained, the rule controls it, giving effect to the general and legal, rather than to the more particular and prescribed intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate; the other, to limit the land to his heirs collectively and in indefinite succession. These two intents cannot stand together, without more or less of general mischief to the public welfare; and the rule prevails, simply to subordinate the particular and apparently less important design of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose of transmitting the inheritance in the manner indicated. If this double intent appears, the rule must prevail; but if it can be plainly collected from the will, that the testator used the word 'heirs,' as a *descriptio personarum*, then the rule in Shelley's Case is not applicable. The word 'heirs,' or 'heirs of the body,' must be used in its technical sense, as importing a class of persons to take indefinitely in succession. Hence, if it appears that the words were not employed in this sense, but inaccurately, as designating particular individuals only, the rule in Shelley's Case would not be applicable; but the persons who, at the time of the limitation, were the ancestor's heirs apparent or presumptive, would take a vested remainder." *Minor*, Inst. 395; *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455.

But on a rehearing in *Leathers v. Gray*, 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657, the court said that although the intention of the testator may have been such as the court declared it to be, he had failed to express his purpose consistently with a settled rule of law which it was the court's duty to uphold and enforce. "When a testator employs words and phrases to express his intention in the disposition of his property by will that have a well-known legal or technical meaning," continued the court, "he must be deemed to have used them in such sense in defining and limiting the estate disposed of, unless he shall in some ap-

real intention as to the disposition of his property will be disregarded if he makes that intention plain.⁷⁶

But when the intention has been ascertained, it has been said that the rule controls the intention so far as it is repugnant to public policy.⁷⁷

But by public policy is meant that what we understand to be a fee cannot be created without giving him in whom it vests the power to alienate it. It is better for the community that a testator's real intention should be occasionally defeated, than that there should be increased uncertainty in the construction of instruments.⁷⁸ This is equally true in respect to the rule applied in *Shelley's Case*, or the rule substituted for it by modern statutes.

2. Quantity of estate given first taker.

1. In general.

Since effect cannot be given to both the

appropriate way, to some extent to be seen in the will, have qualified or used them in a different sense. And so, also, if the use of aid words bring his intention so expressed within a settled rule of law, the latter must prevail, although the effect may be to disappoint the real intention of the testator. Otherwise, technical words would have no certain meaning or effect, and the rule of law would be subverted in order to fluctuate the real intention of the testator unexpressed, or imperfectly expressed. It is said, however, that the real intention of the testator must have effect; and so it must; but the real intention recognized and enforced by the law is that expressed in the will, and this is to be ascertained by a legal interpretation of the language employed to express it."

In *Smith v. Collins*, 80 Ga. 411, 17 S. E. 613, the court says: "The rule does, however, defeat incidentally the intention of limiting the first freehold estate to the life of the freeholder, for that intention is inconsistent with the transmission of the estate to his heirs as such. Both intentions, the first that the freeholder shall have an estate not of inheritance, and the second that his heirs shall succeed to it as heirs, cannot be executed. The law as embodied in the rule we are discussing determines that the latter intention shall be preferred; from whence it results that the former must be sacrificed."

⁷⁶ In *Settle v. Settle*, 10 Humph. 474, the court said: "It is also said in some of the cases that it is a rule of property, and not of intention, and that it will take effect in case, proper for its application, against the apparent intention of the deed or will. This apparent intention is not to be taken as aid of the rule when it would not otherwise apply. But when it is said to be a rule of property, and not of intention, we do not

general and particular intentions, and the rule in *Shelley's Case* is supposed to give effect to the paramount intention, that the estate shall descend to the whole line of the life tenant's heirs in succession from generation to generation, it follows that, no matter how strongly a grantor or deviser may have indicated his particular intention, that the estate shall go to the first taker for life only, it can have no effect upon the operation of the rule; for to give effect to this intention would be to destroy the paramount intention, and to give the remainder to a new stock, from which the estate would thenceforth descend. Directions that the first taker shall have power of jointuring, that the ancestor shall have the power to sell the property, and other expressions and provisions indicating that it was the grantor's or deviser's intent that the first taker have only a life estate, manifestly, then, cannot hinder the operation of the rule.⁷⁹ The inference of intention, from the fact that estates for life only are given

understand that the intention is to be wholly disregarded. If an estate be granted to A for life, remainder to his heirs, the rule applies, and, giving the legal effect and meaning to the terms employed, the rule is consistent with the intention, and carries it into full effect. The use of the legal and appropriate terms of limitation necessarily implies that it was intended that they have their legal technical effect. It may be called the legal constructive intention. For instance, the word 'heirs' implies that it was the intention that those in remainder shall take as heirs at the death of the tenant for life, and, if so, they must take by inheritance. It is true that the intention which the law infers from the use of its proper terms of limitations is often, in cases under this rule, in opposition to the apparent intention of the deed or will. And in such case the question is whether the technical or legal intention inferred from the use of technical terms, or the apparent intention, shall prevail. The rule is properly applicable to real estate, because the words of limitation to which it applies relate to the realty, and not to the personality. And yet by analogy where the words of limitation used would raise an estate tail in real estate, they will give the absolute property in personal estate."

⁷⁷ *Chipps v. Hall*, 23 W. Va. 504.

⁷⁸ *Re Keane* [1903] Ir. Ch. 215.

⁷⁹ In commenting on *Perrin v. Blake*, 6 Greenleaf's Cruise, Real Prop. 392, the author says: "It is observable that in the several cases in which the question has arisen whether the rule in *Shelley's Case* should be applied to the construction of a will, the objection to its application has always been founded on the obvious intention of the testator, to give the first devisee no more than an estate for life, without considering that in all those cases the

to the first takers, amounts to nothing.⁸⁰ | Where the word "heirs" is used in its tech-

testator devises the remainder expectant on the determination of the first estate, to the heirs general or special, or to the issue of the first devisee; and that it is as necessary to ascertain his intention in the second, as in the first, devise. There can be no doubt but that, where a common person devises his estate to A for life, with a remainder to his heirs general or special or issue, he does not mean to give A any greater estate than for his life; and as to the addition of negative words, or a devise to trustees to preserve contingent remainders, they can add nothing to the clearness of the first words. The whole difficulty therefore lies in ascertaining the intention of the testator in the second devise."

The rule is hardly ever applied without defeating the testator's intention. The testator may say that the first taker is to take for life. He might add the words "and no longer." He might say that his heirs are to take, but the rule, which is not a rule of construction merely, but a rule of law, will not permit the heirs to take by purchase, and will hold the first taker tenant in tail. *Re Keane*, supra.

It matters not how distinctly, in point of intention, it may appear that the grantor meant that the first taker should have a life estate only; if it further appear that by the use of the terms "heirs of the body, issue, sons, children," etc., he meant the descendants of the first taker should take, in their character of heirs, a descendible estate of inheritance, exhausting the lineal stock of the first taker, such purpose, by operation of the rule, vests the first taker with the inheritance. *Polk v. Faris*, 9 Yerg. 209, 30 Am. Dec. 400.

Another rule in the construction of wills is that neither an intent manifested by the testator to give only an estate for life, nor the interposition of trustees to preserve contingent remainders, nor mere words of condition describing the order of succession in which the devises are to take place, nor the introduction of powers of jointuring or of liberty to commit waste, are of themselves sufficient to vary the technical sense of the words used. *Poole v. Poole*, 2 Boa. & P. 620.

No words, however positive, negating the continuance of the ancestor's estate beyond the period of its primary express limitation, will exclude the rule, and in like manner a declaration that the heirs shall take as purchasers is equally inoperative. *Re Romanes*, 8 Ont. Pr. Rep. 323.

In determining whether the rule applies to a given case, its application does not turn upon the quantity of the estate intended to be given to the ancestor, but upon the nature of the estate intended to be given to the heirs. *Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. 28; *Miller v. Mowers*, 227 Ill. 392, 81 N. E. 420.

The rule must control even though against testator's manifest intention. *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012. 29 L.R.A. (N.S.)

That the intention was to create an estate for life in the first taker will not prevent him from taking an estate tail. *Goodright ex dem. Lisle v. Pullin*, 2 Strange, 731.

⁸⁰ *O'Keefe v. Jones*, 13 Ves. Jr. 413; *Hinson v. Pickett*, 1 Hill, Eq. 35.

A grant is not taken out of the operation of the rule, because of the intention of the grantor that the first taker shall have only a life estate. *Auman v. Auman*, 21 Pa. 343.

In construing a devise which assumes to give a life estate to the ancestor and the remainder in fee to the heirs at law of such ancestor, the language of the will in giving the life estate, and other parts of the will showing, in connection with that language, that the intention was only to give a life estate, does not control. *Carpenter v. Van Olinder*, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868.

No principle of law is better established than that which provides that, although the testator did intend the first taker to have but a life estate, yet if the technical words are used, that intention, be it ever so clearly expressed, will be defeated and the first devisee allowed to take the whole estate. *Silva v. Hopkinson*, 153 Ill. 386, 41 N. E. 1013.

No presumed intention arising from the circumstance of the estate being limited in the first instance for life will be permitted to control the operation of the words "heirs or heirs of the body" as words of limitation. *Horne v. Lyeth*, 4 Harr. & J. 431.

The principle seems to be clearly settled that although a testator may evidently have intended to give only a life estate to his first devisee, yet if it also clearly appears that he intended a remainder, either in fee or in tail, should at all events go to the heirs, sons, or children of the tenant for life, his particular intention will give way to that which is more general, and the estate under the devise shall be held accordingly. *Bowers v. Porter*, 4 Pick. 198.

In *Crockett v. Robinson*, 46 N. H. 454, it is said that in determining whether the rule in Shelley's Case shall apply, it is not material to inquire what the intention of the testator was as to the quantity of estate that should vest in the first taker. If the limitation were to A for life, remainder to his heirs in fee simple, without other qualifying words, the actual intention would undoubtedly be that A should take an estate for life only, and have no power to dispose of the remainder in fee, and negative words that A should take for life only would add nothing to the clearness of the first words. The material inquiry is, What is taken under the second devise? If those should take under the second devise the estate that they would take as heirs or heirs of his body, the rule applies. However clear the intention may be to create an estate in A for life, remainder to his heirs,

nical sense in connection with remainder, the rule is bound to apply.⁸¹

Although the testator may have intended to give to the first taker only a life estate, the law will not treat that as an estate for life which is essentially an estate of inheritance, nor permit anyone to take

in the character of heir, unless he takes also in the quality of heir. It does not stand in the interest of the state that land so devised shall be tied up from alienation during the life of the first taker and the minority of his heirs.⁸²

so that the estate shall go to those persons who are the heirs of A, and descend to his heritable blood in line of descent, the policy of the law which established the rule in Shelley's Case did not allow such a limitation. By that rule no person was permitted to raise in another an estate of inheritance, and at the same time make the heirs of that person purchasers.

That the apparent intention of a testator was to give the first taker but a life estate does not matter. The answer to this has always been that the intention was contrary to law, and was governed by the rule; and that when the testator devises the legal estate he takes upon himself to order the limitation, and the rules of law will control him. *Haverstick v. Duffenburgh*, 2 Edm. Sel. Cas. 463.

So imperative are its requirements when it is applicable, that it will control the operation of the grant and vest the whole estate in the ancestor, though the instrument declares he shall have only a life estate. *Thomas v. Higgins*, 47 Md. 439. To the same effect *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

⁸¹*Jones v. Bower*, 20 Pa. Co. Ct. 95.

The intention of a grantor to vest a life estate in the first taker, remainder in fee to his children, may go for naught if the deed brings the devise within the rule in Shelley's Case. *Griswold v. Hicks*, 132 Ill. 494, 22 Am. St. Rep. 549, 24 N. E. 63.

As the rule applied expressly to the case of a gift to the first donee, being a freehold, that is, an estate for life, the intention that he shall have but an estate for life, very strongly expressed, has not been deemed sufficient in itself to repel the application of the rule, if the gift in remainder be to his heirs, general or special, without further qualification. *Stephenson v. Hagan*, 15 B. Mon. 282.

That the property is given to the first taker, "to be used by him while he lives," will not prevent the application of the rule. *King v. Beck*, 12 Ohio, 390.

In *Lytle v. Beveridge*, 58 N. Y. 592, the court said: "By the rule an estate for life is raised by implication to an estate of inheritance, and either an estate tail or in fee simple, depending upon the words of succession used in the deed or will, is made to vest in the first taker. It was not at first supposed that an express estate for life could be thus enlarged, on the ground that implication could only be admitted in the absence of, but not in contradiction to, an express limitation; but it was soon held otherwise, and an estate tail raised in the first taker by implication, upon a devise expressly for life."⁸³ L.R.A. (N.S.)

But this was in cases where the intention of the testator was manifest that the estate should not go over until the whole line of his issue was extinct, thus basing the rule upon the supposed intent of the testator. . . . So far as the rule confers upon the tenant for life or first taker the power to disappoint the successor, either by alienating the fee or barring the entail, it necessarily, in a great majority of cases, defeats the intention of the testator. In the cases in which the question has arisen, the testator has not intended that the tenant for life, to whose heirs or the heirs of whose body the remainder is limited, should have power to defeat the succession to them by an alienation to their prejudice."

In *James's Claim*, 1 Dall. 47, 1 L. ed. 31, in holding that where a devise was to one "during the time of his natural life, and if he leaves lawful issue then to such issue, but in case of his dying without issue, or they dying under twenty-one years," over, the first devisee took an estate tail, the court said that probably no more than estate for life was intended, but that the law supervened that intention. There was a second intention manifest in the will which was to be carried into execution; that was, that the issue should take in succession, which they could not do without a previous estate of inheritance in the father.

The fact that a testator gave only a life estate to the first taker will not affect the operation of the rule. The court says that the rule is an absolute and peremptory obligation, and enlarges the life estate, notwithstanding the intention, into an estate of inheritance, and clothes the tenant for life with the power of defeating the right of those to whom the estate is limited by fine and recovery or by feoffment. *Buist v. Dawes*, 4 Strobb. Eq. 37.

The fact that the limitation to the first takers is "during their natural lives, and no longer," does not prevent the rule from operating. The court said that this was no more than to show that the testator meant to confer an estate for life, and that it was to this class of cases that the rule in Shelley's Case applied. *Moore v. Brooks*, 12 Gratt. 135.

⁸²*Steady v. Rice*, 27 Pa. 75, 67 Am. Dec. 447.

In *Jones v. Morgan*, 1 Bro. Ch. 206, Lord Thurlow said that he thought the argument immaterial that the testator meant the first estate to be an estate for life, but took it that in all cases the testator did mean so, but rested his judgment upon what the testator meant afterwards. If the testator meant that every other person

The words "without impeachment of waste" make no difference.⁸³

In a number of cases, some of which are to be found in other subdivisions of this note, an attempt was evidently made by the author of the instrument to avoid the rule by the use of the word "lend" in conveying the estate to the first taker. This, of course, would not be of any help in escaping the operation of the rule.⁸⁴ Nor

will the interposition of trustees to support contingent remainders stand in the way of applying the rule,⁸⁵ since such directions merely indicate an intention that the first taker have a life estate.

A few cases seem to hold that the intention, meaning the particular intention, that the first taker shall take a life estate only, shall control.⁸⁶ But this is an evident con-

who should be heir should take, the law would not suffer him to give, or the heir to take, as purchaser.

⁸³ *Tunis v. Passmore*, 32 U. C. Q. B. 419.

⁸⁴ The fact that a testator makes use of the word "lend" instead of "gift" in a bequest to the life tenant does not show that no gift was intended. *Pournell v. Harris*, 29 Ga. 736.

Where the devise was as follows: "I lend to my daughter Sarah during her natural life, and at her decease to be equally divided between the heirs of her body, the following land," it was held that the fact that the testator used the word "lend" in creating the first estate did not prevent the application of the rule in *Shelley's Case*. *Holt v. Pickett*, 111 Ala. 362, 20 So. 432.

In a bequest of personal property, "I lend to my daughter," etc., during her life, and then to the heirs of her body, the word "lend" was held to have been used as synonymous with give. *Hinson v. Pickett*, 1 Hill, Eq. 35.

That the word "lend" is used in the devise of an estate to the first taker will not take the case out of the operation of the rule. *Ibid*. The court said that the term "lend" when used in a bequest is generally equivalent to "give;" in some special cases it had its appropriate meaning; that in such cases there was something which showed that the testator did not intend the legal estate to pass to the legatee.

Other cases will be found under other subdivisions of the note in which the word "lend" was used in conveying the estate to the first taker, but no point is made of that fact in the decisions.

⁸⁵ Where the devise was to a grandson for life, remainder to A and B, and their heirs, to support contingent remainders during the life of the grandson, remainder to the heirs of the body of the grandson lawfully begotten, it was held that the testator's intent to give an estate for life to the grandson by placing trustees to take advantage of the forfeitures which could only be in case he was tenant for life would not prevent the operation of the rule. *Colson v. Colson*, 2 Atk. 247.

In *Papillon v. Voice*, 2 P. Wms. 471, a devise of lands to B for life, remainder to the heirs of his body, though the life estate was expressed to be without waste, and there was a remainder to trustees to support contingent remainders, was held 29 L.R.A. (N.S.)

to create a vested estate tail in B. The court said that the breaking into the rule would occasion the utmost uncertainty.

In *Welply v. Raycroft*, 15 Week. Rep. 213, the testator devised his estate to trustees upon trust to preserve contingent remainders therein limited, and then to the issue of A for life, and the heirs of his body lawfully begotten, remainders over. It was held that in spite of the provision to preserve contingent remainders, the remainder immediately executed in the ancestor.

Many other cases will be found under other subdivisions of the note, in which it is assumed that the fact that trustees are interposed to preserve contingent remainders will not affect the operation of the rule.

⁸⁶ In *Frank v. Frank*, 1 Monaghan (Pa.) 347, 17 Atl. 11, it was said that the rule does not operate where the manifest intention of the testator was to give the first taker only an estate for life.

It seems always to have been held in England that where the language of the instrument manifests a clear intention to have the estate pass to the heirs, and to have the ancestor take only a life estate, it should be allowed to have that operation, certainly where this is unquestionably so expressed. *Smith v. Hastings*, 29 Vt. 240.

The rule in *Shelley's Case* is not an inflexible rule of law, no matter what the intention of the testator may have been, at least in testamentary cases. *Chelton v. Henderson*, 9 Gill, 432. The court said that it was established in England as a convenient and necessary rule of construction by which the intention was to be effectuated, not defeated. It was not there an imperious rule of law which must control the operation of the will, no matter how clearly a contrary intention might be expressed upon its face; but it was a rule of construction, which must prevail, except in cases where a contrary intention satisfactorily appears by the will itself.

In *Tongue v. Nutwell*, 13 Md. 415, in commenting on the last-mentioned case it is said: "Nor do we understand the decision in *Chelton v. Henderson*, supra, as designed to exclude the operation of that rule in the interpretation of a will, to any greater extent than to hold that where the intention of the testator to create no larger estate in the first devise than for life is clearly expressed by the will, such intention must prevail."

As to the point discussed under this subdivision, see also *WARD v. TODD* and *BAILS v. DAVIS*.

fusion of the rule that the intention as to the sense in which certain words of limitation have been used must control. See *infra*, XII d. As the authorities amply show the "intention" to use technical words in their technical sense having been determined, the rule will operate, no matter how clearly the intention that the first taker have only an estate for life be expressed.

2. Illustrative cases.

Where a testator devised property to the heirs males of the testator's brother N.'s sons, and to any of their heirs males, during their lives, of which none of them were tenants any longer, and providing that it should not be in their power to sell, dispose, or make away with any part of it, and in case they all died without issue, then to the testator's next of kin, and a schedule annexed to the will and made a part of it expressly gave an estate to the sons of the testator's brother N., it was held

that this was an estate for life by implication in a son of N., which united with the estate expressly given to his heirs males, making an estate in tail male. It was said by Mr. Fearne in his work on *Remainders*, p. 174, that it was to be observed that the testator's express restriction of the power of alienation, even aided by the words of limitation superadded to "heirs males" of his brother's sons, etc., was not allowed to repel the operation of the rule.⁸⁷

And where the devise was to one for life, and after his death to the "heirs males" of his body lawfully to be begotten, and "his" heirs forever, the will providing that if the devisee should happen to die without such "heir male," the property should go over, the fact that the testator intended the devisee to take only an estate for life was held not to be sufficient to take the case out of the operation of the rule, so as to give the first taker only a life estate.⁸⁸

That the testator in a devise to his son

⁸⁷ *Hayes ex dem. Foorde v. Foorde*, 2 W. Bl. 698.

In *Douglas v. Congreve*, 1 Beav. 59, where the devise was to a woman for life, for her independent use and benefit, followed by a direct devise after her death to her husband or his life, with remainder to the use of the heirs of her body in tail, with remainders over, the will containing a declaration that all these limitations were intended to be in strict settlement, with remainder to testator's own right heirs forever, it was held that the fact that the gift was expressly for life, and the fact that the limitation to the heirs of her body was "in tail," did not prevent the rule in *Shelley's Case* from applying; and it was declared that the devise was entitled to an estate tail.

In *Poole v. Poole*, 2 Bos. & P. 620, there was a devise to testator's first son by his wife begotten or to be begotten, for life, remainder to trustees to preserve contingent remainders, remainder to the several heirs male of such first son lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger and the heirs male of his body; remainder to the testator's second, third, fourth, and all of every other son and sons, for their several and respective lives, remainder to trustees to preserve contingent remainders, etc., remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the elder of such sons and the heirs male of his body should always be preferred and take before the younger of the same sons and the heirs male of his and his body and bodies; remainder to the testator's first and other daughters for their lives, remainder to trustees to preserve contingent remainders, etc., remainder to the several heirs male of their several and respective bodies lawfully issuing, so as the

elder of such daughters and the heirs male of her body should always be preferred and take before the younger of the same daughters and the heirs male of their body and bodies, it was held that the first son of the testator took an estate tail.

In *Shaw v. Way*, 8 Mod. 253, there was a devise in trust for the testator's two sisters, equally between them, during their lives, without committing any waste, the will providing that if they should happen to die leaving issue or issues of their bodies, the property be held in trust, that the mother's share should be for such issue or issues, or else in trust for the survivor or survivors of them and their respective issue or issues; and that if the sisters should die without issue, or, having issue, such issue should die without issue, the trustees should stand and be intrusted for A and the heirs male of his body, etc. The chief question in the case was whether the sisters took an estate for life or an estate tail. In the King's bench one of the judges held the devise to create an estate for life, and two were of the opinion that it was an estate tail, and the chief justice doubted. Afterwards the court was of the opinion that the estate was only for life, the reasons given being that there was an express estate for life and a provision against the commission of waste, together with other provisions indicating an intention to give only a life estate, and also a limitation over to the issue of the issue. But this decision was reversed by the House of Lords.

⁸⁸ *Goodright v. Pullyn*, 2 Ld. Raym. 1437.

In *Britton v. Twining*, 3 Meriv. 176, a testator directed certain personal property to be "firmly fixed" on a certain person, "to be so secured that he may only receive the interest during his life, and after his decease to the heir male of his body, and so on in succession to the heir at law, male or

for life, and to his legal heirs if he had any at his death, intended to give the first devisee only a life estate, will not take the

devise out of the rule, since this would give effect to the particular rather than to the general intent.⁸⁹ The fact that the estates

female." This was held to give him an absolute interest, in spite of the intention to give the devisee only a life estate. The court said that there was nothing to qualify the words "heir male," or to show that they were not used in their strict technical sense. On the contrary, it was evident that the testator conceived that he could make a perpetual entail of the property so as to make it pass from heir to heir in succession, with a condition, however, which he also conceived he could impose on the power of disposition. The heir male was to take in the first instance in the same manner as the heir male or female was afterwards to take; for he said "to the heir male of his body, and so on in succession to the heir at law, male or female," so that he had inheritance alike in view with regard to them all.

In *Broughton v. Langley*, 2 *Ld. Raym.* 873, 10 *Eng. Rul. Cas.* 864, there was a devise to trustees to suffer the testator's son to have and receive and take the rents, issues, and profits of certain property for life, and after his death to stand seised thereof to the use of the heirs of the body of the son lawfully begotten and to be begotten, and, in default of such issue, over, with a proviso that the trustees and the son might have the power to make a jointure for the son's wife. It was urged that the use was not executed, because the testator intended that this should be only a trust, but it was held that the law supervened the intention, executing the trust, and therefore making the son a tenant in tail. It was also held that the power to make a jointure did not execute the estate tail. In commenting on this case, *Mr. Fearn*, on *Contingent Remainders*, says (vol. 1, p. 159): "Now, though the power of making a jointure be itself not allowed a sufficient ground upon which to deny that construction which gives an estate tail, yet the circumstances attending that power in the above case seem to be very strong against an estate tail; that power being made to depend upon the consent and concurrence of the trustees, and they being required to join in the executing it, and, of course, in the conveyance for that purpose; it seems to have been an evidence of the testator's intention that an estate should remain in them, and consequently that he did not intend A should take any legal estate at all, much less an estate tail. But, however, the strength of the general rule prevailed against these arguments of intention."

In a devise to one for life, the will providing that, if he left lawful issue, then to such issue, but, in case of his being without issue, or they dying under the age of twenty-one years, then over, the word "issue" was held to be a word of limitation, and the first taker to get an estate tail. *James's Claim*, 1 *Dall.* 47, 1 *L. ed.* 31. The court said that probably no more than an estate for life was in 29 *L.R.A.* (N.S.)

tended to have been given him, but that the law supervened that intention. There was a second intention manifest in the will, which was to be carried into execution, and that was that the issue should take in succession, which they could not do without a previous estate of inheritance in the father.

The operation of the rule in *Shelley's Case* was not prevented where there is a devise of land to the testator's daughter during her natural life, and after her death "to descend and vest in her legal heirs," because of the fact that it defeats the intention of the testator. *Vangieson v. Henderson*, 150 *Ill.* 119, 36 *N. E.* 974. The court says that the word "heirs," being used in the generally accepted legal sense, is, under the rule, one of limitation, and that no intention of the testator, however clearly expressed, can change it into a word of purchase.

⁸⁹ *Bassett v. Hawk*, 118 *Pa.* 94, 11 *Atl.* 802.

In *Lee v. Lee* (*Ind. App.*) 91 *N. E.* 507, a devise by which real property was to vest in testator's son for life, and after his death remainder to vest in fee simple in his heirs, was held to be within the rule, and the fact that the testator intended the first taker to have only an estate for life did not matter.

In *Crockett v. Robinson*, 46 *N. H.* 454, the devise was to the testator's two sons, Joshua and Chase, to be equally divided between them and their heirs, if they had any lawful heirs at the time of their decease, and, if none, the property was to be equally divided between the children of a daughter had by a specified person, and the court held that the actual intention of the testator was to give an estate in an undivided half of the land to Joshua for life, remainder to the heirs of his body, and that, by the well-established interpretation of the rule in *Shelley's Case*, an estate of inheritance contrary to the intention of the testator vested in Joshua.

Although a devise is to persons during their natural lives, and the will provides that neither of them can in their lifetime dispose of the property for any longer period than during their respective lives, and declares that each of them is given only a life estate in the land so devised, after their deaths the property to go to their respective heirs at law in fee simple, the rule in *Shelley's Case* applies, since there is no devise over in case the life tenants should die without heirs, and there is nothing in the will to show that the testator used the word "heirs" in any other than its usual sense in law, except that he gave a life estate to his son, which in no way affects the application of the rule. *Brockschmidt v. Archer*, 64 *Ohio St.* 502, 60 *N. E.* 623.

That the construction of the meaning of the word "children" in a limitation after a

given to the first takers were to be used and enjoyed by them in particular modes marked out, and that the "interest" of each of them was to vest at the death of each of them in his or her heirs, was held

not to take the devise out of the rule, since, if they could not hold consistently with the gift, they must give way in order that the general intent might prevail.⁹⁰

In a case in which the bequest was "I

life estate to the children or heirs of the life tenant, as a word of limitation, might defeat the plainly expressed intention that the first grantee should take only a life estate, will not prevent the operation of the rule, since the rule in Shelley's Case is a rule of law, and not of construction, and where a case falls within it, it applies inexorably without reference to intent. *Shapley v. Diehl*, 203 Pa. 566, 53 Atl. 374.

A devise of certain real estate to a son for life, "and after his death to his heirs forever," carries the fee, under the rule in Shelley's Case. *Bullock v. Waterman Street Baptist Soc.* 5 R. I. 273. The court said that the particular intention to create an estate for life must yield to the more general intent and policy.

A devise to a testator's grandson of certain property, "to have and to hold the use and improvement of the aforesaid bequeathed premises, with the privileges and appurtenances thereunto belonging, to him, during his natural life, and at his death, to descend to the eldest male heir of his body, and on failure thereof, to his heirs general," was held to convey a fee to the grandson, who left no "eldest male heir of his body." *Goodrich v. Lambert*, 10 Conn. 448. The court said that the inquiry as to what estate the testator intended the grandson to take was not the only question involved in the case. What estate did he intend the heirs of the grandson should take? and of what nature? Did he intend that they should take as descendants or as purchasers? Or had he no intention on the subject? If he intended that they should take as heirs, his intention to give a mere life estate to the ancestor was inconsistent with the general intent, and the rule applied. That where the testator shows a particular, and also a general, intent, which are inconsistent with each other, the general intent will be established, and the particular one disregarded.

⁹⁰ *Pierce v. Pierce*, 14 R. I. 514.

The language in a devise of a life estate to the testator's sons, that they "shall neither of them sell or mortgage any of the lots," but that "the same shall go to their heirs after them," does not take it out of the rule in Shelley's Case, since there is nothing to designate any particular person or class of persons as remaindermen. *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814.

Where the grant was to a person for life, and upon his death to his heirs and their assigns forever, the fact that the deed contained a declaration that it was the true intent and meaning of the instrument that the grantee should have and hold only during his natural life, and that upon his death the property should be held in fee simple by his heirs, was held wholly ineffectual to

make the word "heirs" a word of purchase, so as to take the devise out of the rule in Shelley's Case. *Fowler v. Black*, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596.

The rule in Shelley's Case applies to a conveyance to one for life, and then to the heirs of his body and their assigns in fee simple forever, in spite of a provision that the wife of the life tenant shall have merely the privilege of living on the premises during his life, and that neither the life tenant nor his wife shall have any power to convey or place encumbrances on the property. *Kepler v. Larson*, 131 Iowa, 438, 7 L.R.A. (N.S.) 1109, 108 N. W. 1033.

A devise to one during his natural life, and afterwards "to descend unencumbered to his lawful heirs," was held to create a fee in the first devisee, and it was declared to be immaterial that the testator by the words, "descend unencumbered to his lawful heirs," did not mean that the first taker should have anything more than a life estate. *Lippincott v. Davis*, 59 N. J. L. 241, 28 Atl. 587.

In *Doe ex dem. Ross v. Toms*, 15 N. C. (4 Dev. L.) 376, where there was a devise to a woman for life, the will providing that after her death the property was to be equally divided among the male or female heirs lawfully begotten of her body, it was said that two intents were manifest; one, that the life tenant should only have an estate for life, and the other that the remainder over should not take effect so long as any of her issue remained; that the latter must be presumed to be the main intent and paramount purpose of the testator, his object being to provide for the family of the life tenant. This main intent could not be effected by giving the first taker a life estate and making her children take by purchase.

Where a negro woman was devised to testator's daughter for life, then to her heirs, and afterwards a plantation was also devised without limitation, the fact that this might show that the testator did not intend to give the negress absolutely to his daughter was held not to take the devise out of the operation of the rule. *Kiser v. Kiser*, 55 N. C. (2 Jones, Eq.) 28. The court said that if a gift is made so as to pass the estate to the same persons as it would pass to by descent, the rule applies, and they are held to take by descent, notwithstanding an express intention that they should take as purchasers.

Where the testator first devised property to his nephew absolutely, and then by codicil gave it to trustees for the use of the nephew for life, with power of appointment by will to such child or children, grandchild or grandchildren, as the nephew might direct, and, in default of appointment, ordered the remainder to be equally divided among the right heirs of the nephew, etc., the fact that

lend to my daughter," etc., during her natural life, and then to the heirs of her body, the court said that it had struggled to give effect to the clear intention of the testator that the first taker should take an estate for life, but that the technical rule was too strong and too well settled that the words "heirs of the body" must be considered words of limitation, and not of purchase, and that consequently the estate vested in the first taker.⁹¹

Where the devise was of a life estate to

the testator's son, with remainder limited to his heirs, evidence to show the condition, character, and habits of the son, with a view of raising an inference that his father did not intend to intrust him with the fee simple, and the declarations of the father that he intended to give the son only a life estate, are immaterial, since under the rule in Shelley's Case the fee passes in opposition to the apparent intention of the testator.⁹²

But where the granting clause of a deed

this indicated an intention to give the nephew an estate for life was held not to prevent the operation of the rule. *Physick's Appeal*, 50 Pa. 128.

Although a will provided that the devisee should in no wise sell or alienate any of the property devised, as it was intended that he should have a life interest only in the same, with remainder over to his heirs in fee, it was held in *Doebler's Appeal*, 64 Pa. 9, that the rule in Shelley's Case applied, and that the devisee therefore took a fee.

⁹¹ *Hinson v. Pickett*, 1 Hill, Eq. 35.

In *Re Casner*, 6 Ont. Rep. 282, a testator devised property to his son A. C., "to have and to hold unto the said A. C., his heirs and assigns, to and for his and their sole and only use forever," and then provided that it was to be understood that the property devised was to be held during the life of the son, and then to become the property of his heirs, and that the son should have no power to convey or dispose of the land in any manner whatever. It was contended, on the one hand, that the rule in Shelley's Case applied to the last paragraph of the will; and, on the other, that it did not, and the clear intention to be gathered from the whole will would take the case out of the operation of the rule. The court held that the first taker took a fee simple, notwithstanding the last paragraph, and that the condition against alienation was void.

An estate tail is given to the first taker by a devise to him to hold as tenant for life, with remainder to his heirs, notwithstanding the express declaration of the testator that he was to be considered a strict tenant for life. *Macnamara v. Dillon*, Ir. L. R. 11 Eq. 29.

A devise of negroes to a testator's daughter "during her natural life, and the heirs of her body forever," was held to convey to her the absolute estate. *Choice v. Marshall*, 1 Ga. 97. The court said that, although an estate by devise was for life only, or for life, and not otherwise, or with any other restrictive expression, yet if there were afterwards added proper words to create an estate of inheritance in the heirs of the body, the latter language would overbalance the former, and make the first legatee tenant in fee.

Where there is a devise to A for life, and at his death to his issue, the limitation to the issue serves only to enlarge the estate of A to a fee conditional, and does not create 29 L.R.A. (N.S.)

a remainder to the issue as purchasers, notwithstanding the manifest intent to the contrary. *McIntyre v. McIntyre*, 16 S. C. 290.

Where a grantor lent a certain tract of land to a specified person during his natural life, and at his death granted the same to his lawful heirs and their heirs, executors, administrators, and assigns, it was held that the grant, under the rule in Shelley's Case, passed a fee to the first grantee, without regard to the intent of the grantor. *Edgerton v. Aycock*, 123 N. C. 134, 31 S. E. 382.

Where the grantees were to have and hold the property to their use during the term of their natural lives, and it was then to go to their heirs forever, it was held that, although the grantor intended to give the life tenants an estate for life, and no more, nevertheless, as the word "heirs" stood unattended with superadded words going to change or qualify its ordinary legal meaning, the rule in Shelley's Case applied. *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459.

A deed conveying to a man during his natural life, and to his heirs forever, certain real estate, to have and to hold during his natural life, and then to his heirs forever, and providing that the life tenant was not to have the privilege of selling or renting his interest in the property during his natural life, was held to convey a fee to the first taker, under the rule in Shelley's Case, although it was the intention of the grantor to convey only a life estate to the immediate grantee. *Jenkins v. Artz*, 6 Ohio S. & C. P. Dec. 439.

⁹² *McCray v. Lipp*, 35 Ind. 116.

So, testimony of one who drafted a will devising property to the testator's wife and children for their natural lives, and after their death in fee simple to their heirs, that the testator's purpose was to put the property out of the reach of the devisees' creditors, and that it was his intention to give the devisees only a life estate, was held immaterial, since the rule in Shelley's Case is one of law, and not of construction or intention. *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399.

And where the devise was to testator's son after the death of testator's wife, with remainder to the heirs of the son, it was held that depositions taken to show that the son was dissipated, and that the testator had given him but a life estate because he did not want what he gave drunk up, was held irrelevant and inadmissible. *Chippes v. Hall*, 23 W. Va. 504.

expressly limited the estate to the natural life of the grantee, and the habendum was to her during her natural life and to her heirs forever, and there was an express condition in the deed that the erections on the premises should be kept in repair, taxes paid, no waste committed, and that the grantor should have the privilege of cutting timber at all times and to any extent, and that, upon failure of any such conditions, the deed should be void, the heirs were held to take as purchasers.⁹³

d. Intention as to use of technical terms.

1. Discussion of principle involved.

Language is often found in the cases to the effect that it is settled law that the rule in Shelley's Case will not be allowed to defeat the plain intention of a grantor or testator. Much is often made of the fact that the instrument under consideration is a will. It is said that the cardinal rule in the construction of wills is that the intention must control, any arbitrary rule of law to the contrary. These statements, as before pointed out, are exceedingly misleading. They are accurate only when referring to the intention with which certain words, such as "heirs," "heirs of the body," and "issue," were used, and only when what is meant is that the rule does not prevent anyone from using technical language in a nontechnical sense.

⁹³ Smith v. Hastings, 29 Vt. 240.

Likewise, in Striker v. Mott, 28 N. Y. 91, a devise to grandchildren and their heirs of certain land, the will providing that the property should not at any time be sold or rented, and that the executors and the survivor of them, etc., should from time to time lease or rent the same, and that the rents, issues, and profits should be annually paid to the testator's said heirs in equal proportions, and in case any of the said heirs or devisees should die without lawful issue, his share to inure to the sole use of the grandchildren and the survivor of them, and the heirs of such survivor forever, it was held that it would be hostile to the plain intention of the testator that the several grandchildren should take estates in fee, since he had expressly provided that the property should not be sold or alienated. For this reason the rule in Shelley's Case did not apply. The court said: "The cases in England generally admit that a clear intention on the part of the testator that the immediate devisee should take only a life estate would preserve the remainder, and prevent the vesting of the fee in the first devise, though difficulties have arisen in deducing such an intention from particular language; but where the devise of the pri-

If A grants land to B for life, remainder to the heirs of B, and it is plain from other explanatory words that he used the word "heirs" in the sense of children, then his intention that the remainder shall go to B's children will control, and will be given effect just as readily where the limitation is in a deed as where it is in a will. If it is evident from the language of the instrument that the word "heirs" was used in its technical sense, the rule will operate, and it makes not the slightest difference whether the instrument is a deed or a will.

It is well enough to say in such cases that the grantor's or testator's intention will control; but it is inaccurate to state that it will control in spite of the rule in Shelley's Case, for the rule has nothing whatever to do with this inquiry. The question as to the sense in which the word "heirs" is used in a deed or will is an ordinary question of construction, depending upon rules of construction applicable generally to deeds and wills. The rule in Shelley's Case cannot aid in solving this question, which is a preliminary one, and which arises as frequently in jurisdictions in which the rule in Shelley's Case has been abolished as in jurisdictions in which it is in force.

Most of the difficulty that has been attributed to the application of the rule in Shelley's Case is not chargeable to that rule at all, but arises out of the attempt to construe instruments expressed in ambiguous language, for the purpose of ascertaining

mary estate is in trust, and the remainders are legal estates, and there is besides an explicit prohibition of the right to sell, no doubt as to the intention can be entertained."

And in Miller v. Lynn, 7 Pa. 443, a devise to a son for life, and after his death to his children lawfully begotten, share and share alike, was held not within the rule, but the decision was not put on the ground that the word "children" was a word of purchase, but on the ground that the manifest intention of the testator was to convey a life estate to the first taker. The court said that in Pennsylvania the manifest intention of the testator has always been a rule of construction, and that where the intent was plain, if that intent was not against the policy of the law, it overbore and overcame technical words and technical rules.

In Tendick v. Evetts, 38 Tex. 275, the word "heirs" in a devise of certain property to testator's sister and her heirs during her natural life was considered as a word of purchase, the court saying that any presumption in support of the rule in Shelley's Case was overborne by the manifest intention of the testatrix.

whether certain words were used in a technical sense. This is a difficulty which does not pass away with the abolition of the rule in Shelley's Case.

When there is a limitation to the life tenant's heirs, and there are no qualifying words, the rule in Shelley's Case at once operates. There is no chance for a preliminary inquiry as to the sense in which the word "heirs" was used. It is deemed a word of limitation, where unexplained. When, however, to this limitation qualifying words are added, it is evident that the word "heirs" may have been used in a different sense. What then did the author of the instrument mean? When this intent is ascertained, it will, of course, control, but that does not mean that it overrides the rule in Shelley's Case; for, the moment when, by giving effect to the intention of the author of the instrument, it is ascertained that he meant to use the word "heirs" in its technical sense, that is, that he meant the whole line of heirs in succession from generation to generation, the rule in Shelley's Case at once steps

in, and operates to give the first taker the fee; and nothing can stop it, unless the estate limited happens to be an executory trust. When it is ascertained that, in using the word "heirs," the author of the instrument did not mean heirs, there is no occasion for the application of the rule, any more than there would have been if A had granted land to B for life, remainder to C. The broad statements made in some of the cases grouped under this heading must be understood to mean nothing more than that the rule in Shelley's Case will not prevent anyone from using technical words in any sense he pleases, provided his intention to do so is plain. If they mean that the intent that the first taker is to have only a life estate is to control, they are contrary to the overwhelming weight of authority.⁹⁴

It never has been decided that words in the will might not be explained by the testator himself.⁹⁵

But all authorities agree that the rule has no place in the interpretation of a will, and takes effect only when the interpreta-

⁹⁴ In *Perrin v. Blake*, 6 Greenleaf's Cruise, Real Prop. 389, Sir William Blackstone, in his opinion in the exchequer chamber, said: "The rule in Shelley's Case is not to be reckoned among the great fundamental principles of juridical policy, which cannot be exceeded or transgressed by any intention of the testator, but is of a more flexible nature, and admits of many exceptions; for, if the intention of the testator be clearly and manifestly contrary to the legal import of the words which he has thus hastily and unadvisedly made use of, the technical rule of law shall give way to this plain intention of the testator."

It is settled law that the rule in Shelley's Case will not be allowed to defeat the plain intention of the testator. *McMahan v. Newcomer*, 82 Ind. 565.

There is no doubt that the intention of the testator, when ascertained, must control. *Perkins v. McConnell*, 136 Ind. 384, 36 N. E. 120.

The rule will not apply if it will defeat the testator's intention as deduced from the whole will. *Hall v. Gradwohl* (Md.) 77 Atl. 480.

The intention of the testator as shown by the will, construed according to established rules, must control. *Kiene v. Gmehle*, 85 Iowa, 312, 52 N. W. 232.

And in *Hambel v. Hambel* (Iowa) 75 N. W. 673, it was held that the rule in Shelley's Case, if in force in Iowa, would not be permitted to defeat the intention of the testator as expressed by the language of the will.

In *Benton v. Patterson*, 8 Ga. 146, it is said that the rule in Shelley's Case was made to effectuate the intention of testators, not to disappoint them.
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The intention in the will will control the application of the rule, and the first taker will take for life only. *Smith's Estate*, 1 C. P. Rep. 181, cited in 4 *Brightly's Dig.* (Pa.) p. 5016.

When applied to wills, the rule is not allowed to override the manifest and clearly expressed intention of the testator, but the intention will always be carried into effect if it can be ascertained. *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97; *Lacy v. Floyd* (Tex. Civ. App.) 84 S. W. 857.

In *Shriver v. Lynn*, 2 How. 55, 11 L. ed. 177, it was said that there is a rule of construction applicable to all instruments and especially to wills, that is, the intention of the parties, which should control any contrary rule, however ancient may be its origin.

In *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167, it is said that there is no reason why the clearly expressed intention of the parties to the deed in that case should not prevail, for neither the rule in Shelley's Case nor any other rule of law opposed the way of the court to a natural and reasonable construction of the deed.

The application of the rule in Shelley's Case may certainly be avoided by the donor of the estate if he chooses to do so, and expresses his intention to that effect in plain and unmistakable language in the deed by which the estate is conveyed. *Taylor v. Cleary*, 29 Gratt. 448.

⁹⁵ *Goodtitle ex dem. Sweet v. Herring*, 1 East, 264.

Whenever it can be fairly inferred from explanatory and qualifying expressions in a will that the import of the technical terms employed is contrary to the real intention of the testator, the latter must prevail. *Mc*

tion has been first ascertained.⁹⁶ Before applying the rule, it is requisite to ascer-

tain by the application of settled rules of construction what the testator's meaning

Arthur v. Allen, 3 Ohio L. J. 471, Fed. Cas. No. 8,059.

In Wescott v. Binford, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18, the court said: "It is well known that wills are frequently drawn hurriedly by persons not skilled in the use of technical terms, and words are often used in them in a sense not technically accurate. That is true of the word 'heirs.' . . . To hold that when used it must be given a technical effect, that it must be taken as a word of limitation, and not of purchase, notwithstanding the fact that the context shows clearly that it was not used in a technical sense, does not seem to us to be in harmony with the best rules of interpretation nor with the weight of authority, nor to be founded in reason, nor to be demanded by anything in the letter or spirit of the laws of this state or the condition and policy of its people and their institutions."

The rule was not designed to defeat the intention of the grantor or testator, but gave to certain words, as "heirs," such force and effect that when used they were conclusively presumed to show an intent to vest the remainder in the ancestor in fee. Theoretically, the rule was not applied to ascertain the intent of the grantor or testator, but to declare its effect when ascertained. Ibid.

In Tendick v. Evetts, 38 Tex. 275, the court said: "We believe with Redfield in his Treatise on the Law of Wills, vol. 2, pp. 66, 68, that the American courts have never followed in strictness the English courts in their apparent partiality to the rule making the heir take by descent, rather than by purchase; and the popular doctrine in this country as to the rule in Shelley's Case is that, when it is used to define the character of the estate which it is intended to vest in the first taker, then the word 'heirs' shall be construed as a word of limitation, but when it is used to designate certain persons who are to become the beneficiaries of the deed or will, such persons take as purchasers; and so strong has been the popular antipathy to this rule that where the courts have carried it beyond the boundary thus laid down, the legislatures have repealed it."

If the grantee clearly evinces an intention to create a life estate in the first taker, with remainder to the children of the grantee, the grantor's declared intention will control, notwithstanding the use of words which, if unrestricted, invoke the operation of the rule in Shelley's Case. Pearce v. Carrington (Tex. Civ. App.) 124 S. W. 469.

While it is true that courts will respect and enforce the technical meaning of the word "heirs" or the words "heirs of the body," so as to make them strict words of limitation, after a life estate to the ancestor, where there is nothing to show that they are not used in a different sense, still 29 L.R.A. (N.S.)

there is a disposition, especially since the abolition of estates tail, to seize upon the slightest circumstances to make them words of purchase. Findley v. Hill, 133 Ala. 229, 32 So. 497.

Sir William Blackstone, in the course of his argument in Perrin v. Blake, supra, said: "This rule, when applied to devises, may give way to the plain and manifest intent of the devisor, provided that intent be consistent with the great and immediate principles of legal policy, and provided it be so fully expressed in the testator's will, or else may be collected from thence by such cogent and demonstrative arguments, as leave no doubt in any reasonable mind whether it was his intent or no." The position taken by the learned author of the Commentaries in this case was therefore, in substance, that, while the intent to use technical words in a nontechnical sense would be given effect, that intention must be very clearly expressed, to overcome the presumption that they were used in the technical sense.

⁹⁶ Yarnall's Appeal, 70 Pa. 335.

"The rule supposes the intention already discovered, and to be that the gift or conveyance in question has first given to some person an estate of freehold, and then superadded a succession to the heirs general or special of that same person, by making him or her the ancestor, terminus, or *stirps*, by reference to which the whole generation and posterity of heirs is to be accounted. Whether the conveyance has or has not so constituted an estate of freehold with a succession ingrafted upon it is a previous question, which ought to be adjusted before the rule is thought of. To resolve that point is not the office of the rule in Shelley's Case; nor from its nature can it contribute any assistance whatever. Therefore, the ordinary rules for interpreting the language of wills and other conveyances should be resorted to; and then being appealed to, it will appear that there is no more of objection to a reasonably liberal allowance for imperfect, inaccurate, and inartificial language in the case of a gift or devise to one for life, with remainder to heirs of the body or heirs, than there is in other cases where the sense of technical phraseology is to be determined upon. . . . What the donor or testator means by heirs or heirs male of the body or issue should be first adjusted without the least reference to or thought of the rule. Till that meaning shall be settled, it is uncertain whether the rule in Shelley's Case may not be quite a foreign consideration." Hargrave's Law Tracts, 574.

The rule cannot be applied to discover the intention. Xander v. Easton Trust Co. 217 Pa. 485, 66 Atl. 759; Chipps v. Hall, 23 W. Va. 504.

The rule is not one of construction; not a means of ascertaining the intention of the testator. It presupposes that intention

was, by the language in which he expressed himself.⁹⁷

The law first ascertains, as a matter of mere interpretation, that persons in a certain line or lines of descent from one person are to be preferred to all persons that are collateral to those lines, and then, in order to effectuate this intent, it starts

the title with and the descent from him, if he had such connection with the estate as to enable this to be done. This may very often defeat the specific form in which a devise is worded, but it meets and answers its paramount intent, in its definition of the objects of the testator's bounty, though it at the same time allows those to whom

to have been already ascertained. *Frank v. Frank*, 1 Monaghan (Pa.) 347, 17 Atl. 11; *Kepler v. Reeves*, 7 Ohio Dec. Reprint, 34.

The rule is not one of construction, but of law, and operates only after the intention of the testator has been ascertained from the language of the will. *Hastings v. Engle*, 217 Pa. 419, 66 Atl. 761. To the same effect, *Dobler's Appeal*, 64 Pa. 9; *Moyer's Estate*, 12 Pa. Co. Ct. 137.

The rule in Shelley's Case is not regarded as a device to determine the testator's intention, but is applied only after his intention has been found out, when by its own inexorable force it unites in the ancestor an estate which his heirs are to take as such after a precedent estate to him, no matter what the purpose of the testator may have been. *Conger v. Lowe*, 124 Ind. 368, 9 L.R.A. 165, 24 N. E. 889.

The rule operates only on the intention when it has been ascertained, not on the meaning of the words used to express it. The ascertainment is left to the ordinary rules of construction peculiar to wills, but when the intention, thus ascertained, is found to be within the rule, there is but one way; it admits of no exceptions. *Hileman v. Bouslaugh*, 13 Pa. 351, 53 Am. Dec. 474.

The rule is not a technicality, but is founded in the nature of things and the very purpose of the testator. It is not used to determine the meaning of a will, but its operation when the meaning has been ascertained by the ordinary rules of interpretation. *Williams's Appeal*, 83 Pa. 377.

⁹⁷*King v. Evans*, 24 Can. S. C. 356.

In *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300, it is said: "The rule is not a mean to discover the intention of the grantor or testator, but, supposing the intention ascertained, the rule controls it so far as it is repugnant to the policy of the law, giving effect to the general and legal, rather than to the more particular and proscribed intent. The party making such a limitation has in his mind two purposes, which are legally in conflict. One is to give the ancestor only a life estate, the other to limit the land to his heirs collectively, and in indefinite succession. These two intents cannot stand together, without more or less of general mischief to the public welfare; and the rule prevails simply to subordinate the particular, and apparently less important, design of limiting the ancestor's interest to a life estate, to the more comprehensive, and probably the preferred, purpose of transmitting the inheritance in the manner indicated." 29 L.R.A. (N.S.)

In *Doe ex dem. Patterson v. Jackman*, 5 Ind. 283, it is said that "the rule is not designed to give meaning to words, but to fix the nature and quantity of an estate. Whenever, then, the matter becomes certain that the term 'heirs' is used with an intent that they should take as purchasers, the instrument should be so construed. Indeed, there is no rule that can guide us safely through the numerous cases and apparent conflict of authorities on this subject, save that which looks to the intent of the testator."

The rule in Shelley's Case is not to be used for the purpose of finding out the intention of a testator. The sense in which the testator uses the words "heirs of the body" must first be found out, and when that is done, the question can arise whether the rule in Shelley's Case applies. *Grimson v. Downing*, 4 Drew. 125.

In every case a preliminary question must be settled, and that is, whether or not the terms of the gift or conveyance bring the estate within the operation of the rule. *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347. To the same effect, *Jones v. Bower*, 20 Pa. Co. Ct. 95.

The true issue is whether the party establishing means to build up a succession of heirs on the estate of the tenant for life, and so to establish those premises on which only the rule proceeds. If such be the intent, then the rule should be applied, even though the party should express in his will that the rule should not be applied, and that the remainder to the heirs of the tenant for life should operate by purchase, which strong sort of a case has not yet occurred in a court of justice, though it certainly has been the subject of private consultation. In exploring whether the premises on which the rule proceeds are existing or not, Mr. Hargrave would be studious to find out and to indulge the intention, but the moment the intention to establish those premises was discovered, he would disregard every other intention, and obdurately apply the rule, though ever so strongly solicited to the contrary. *Hargrave's Law Tracts*, 551.

In *Guthrie's Appeal*, 37 Pa. 2, it is said that it is always a precedent question in any case to which it is supposed the rule is applicable, whether the limitation of the remainder is made to the heirs in fee or in tail as such, and in solving this question the rule itself renders no assistance. It is silent until the intention of the grantor or deviser is ascertained; but if that intention is found to be that the remaindermen are to take as heirs of the grantee or devisee of the particular freehold, instead of be-

the title passes to defeat his ulterior purposes, by selling the property.⁹⁸ The question is, What is the great object of the deviser? The ascertainment of this is subject to the ordinary rules of construction,

but where well-considered and unimpeached adjudications have assigned to certain forms of disposition a determinate result, we are bound by it as an ascertained law of construction.⁹⁹ The question in every

coming themselves the root of a new succession, the rule is applied, although it may defeat a manifest intention that the first taker should have but an estate for life.

⁹⁸ *Price v. Taylor*, 28 Pa. 102, 70 Am. Dec. 103.

In *Shalter v. Ladd*, 8 Pa. Co. Ct. 528, in referring to the doctrine that the particular intent expressed in a will is to be sacrificed to the general and paramount intention, the court said that, stripped of all its mystery, it seemed to mean simply that an intent to give the first taker a life estate only is to be sacrificed when it is apparent that his issue is to take after him by limitation. In other words, it is merely descriptive of the rule in *Shelley's Case*, which, conversely, is said to sacrifice a particular intent, to give effect to the main intent, of the testator. But it is said that all authorities agree that this rule has no application in the interpretation of a will, and takes effect only when the interpretation has been first ascertained. It is manifest that, in order to sacrifice the particular to the general intent, the latter must be first found to exist, that is, the intention that the issue shall take by limitation must be first ascertained. If it is not, neither the rule as to the particular and general intent, nor the rule in *Shelley's Case*, with which it seems to be interchangeable, can apply, and in solving this question the rule itself renders no assistance.

In *Allen v. Pass*, 20 N. C. 207 (4 Dev. & B. L. 77), it is said that "before the application of the rule in *Shelley's Case*, it is always proper first to ascertain whether, on the true interpretation of the words of the gift, there is a limitation of the inheritance in remainder to the heirs or to the heirs of the body of one to whom a precedent freehold is given. Such a limitation does exist when the gift is to them in the quality of heirs,—embracing the same number and succession of objects, and conferring the same extent of interest, as would be embraced and conferred where the inheritance has been limited to the ancestor.

On the other hand, as the law will not entrap men by words incautiously used, in the limitation of a remainder by any instrument of conveyance, the phrase 'heirs' or 'heirs of the body' be expressed, but it is unequivocally seen that the limitation is not made to them in that character, but simply as a number or class of individuals has attempted to be described, then the whole force of the phrase is restricted to its designation or description; it shall have the same operation as the words would have of which it is the representative: there is not in fact a limitation to 'heirs' and, of course, there is no room for the application of the rule."

In *Kingsland v. Rapelye*, 3 Edw. Ch. 1, L.R.A. (N.S.)

the court said that whenever the words "heirs of the body" or "heirs" are used, there is no question of construction arising from any supposed intention of the party to use them in any other sense than what the law has affixed to them; nor is a different meaning to be sought for. The law at once interposes, and gives to the words a precise meaning; and upon this basis a rule has been established which for ages has been the rule of property wherever the common law is suffered to prevail, and no instance can be adduced of a deviation from it. If, however, instead of employing the precise words in a limitation upon which the rule in *Shelley's Case* was founded, other words of similar import are introduced which may admit of the same and likewise of a different application, as for example "issue," "children," "sons" instead of "heirs" or "heirs of the body;" or if there be superadded words of limitation to those just mentioned, or of modification, or expressions tending to create an estate tail by implication merely,—in all these cases it then becomes a question of construction upon the context of the instrument, and the intention is to be ascertained and followed as the governing principle. This intention has sometimes been called the law of the instrument; sometimes the polestar; but, in taking it for a guide, courts submit to be bound by precedents and authorities in point, and endeavor to follow it upon judicial grounds, and not by mere arbitrary conjecture.

⁹⁹ *George v. Morgan*, 16 Pa. 95.

Whenever the word "heirs" is used in a conveyance or devise, and the rule in *Shelley's Case* is invoked, a preliminary question arises whether the word "heirs" has been used in such a sense as will make the rule in *Shelley's Case* applicable. *Martling v. Martling*, 55 N. J. Eq. 771, 39 Atl. 203.

The solution of the problem is determined by a construction of the terms of the grant or devise, to ascertain whether the word "heirs" is used in the one sense or the other,—in its technical sense or as a mode of indicating persons. *Ibid*.

It is equally well settled that the construction to determine the meaning of the testator or donor in using the word "heirs" shall be from the entire language of the instrument. *Ibid*.

The proper method of applying the rule in *Shelley's Case* is this: interpret the deed or will by the ordinary rules of construction, precisely as if this rule had no existence. Then, having ascertained the testator's intention, look at this rule, and see whether such intention conflicts with it; if it does, the rule must be applied, for it is absolute and has no exceptions. *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

case must be whether the expression requiring exposition, be it "heirs" or "heirs of the body," or any other expression which may have the like meaning, is used as a

designation of a particular individual or a particular class of objects, or whether, on the other hand, it includes the whole line of succession capable of inheriting.¹⁰⁰

The rule is not properly a matter to be considered until the meaning of the instrument has been ascertained under the rules of construction. When the intention of the grantor or deviser has been ascertained under the ordinary rules of construction, then the question properly arises, Does that intention violate the rule in Shelley's Case? *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137.

The underlying question in all controversies when it is contended that the rule in Shelley's Case applies is whether the words "heirs," "heirs of the body," or "issue" are to be construed as words of limitation or words of purchase,—if the former, the rule applies, denying any estate to the issue or heirs of the body, but enlarging the estate of the life tenant to a fee simple or fee conditional, as the case may be. *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339.

In *Colclough v. Colclough*, Ir. Rep. 4 Eq. 263, it was said: "Can anybody doubt that when an express estate for life is given to the first taker, with a subsequent devise to his heirs or the heirs of his body or his issue, the testator intended that the first taker should have an estate for life, and nothing more? But once it is ascertained that the words 'heirs' or 'heirs of the body' or 'issue' are used in the technical sense, then it is settled that his intention cannot be effected according to his wish, by reason of the intervention of a rule of law. The office of a court of construction is to determine in the ordinary way and by the ordinary tests the meaning of the words which have been employed by the testator, and when that has been accomplished, the rest is matter of positive arbitrary law."

Where a life interest is given to the ancestor, with a devise over either to his heirs general or the heirs of his body, there the two estates coalesce, unless there is a plain indication that the words "heirs of the body" or "heirs," as the case may be, are used in a sense different from their ordinary signification. The question which has constantly been raised is this: What is to be considered sufficient evidence of the words having been used in such special sense? Upon this there exists a multitude of decisions on which many titles depend; and the court is not at liberty to depart from any rules which have been laid down to determine what does and what does not afford sufficient evidence to give a special sense to the words "heirs of the body." *Mills v. Seward*, 1 Johns. & H. 733.

The question is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used words synonymous with "heirs of the body." The rule, perhaps, in every instance, subverts the intent. *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499, 29 L.R.A. (N.S.)

100 *Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

If the words which are added, or, indeed, any provision to be found in other parts of the will, show that the expression "heirs" or "heirs of the body" was not intended to be used in the ordinary legal sense, but was intended to designate some individual person or particular class of persons, effect may be given to the intention of the testator thus expressed. *Ibid*.

The question in case of a will is not whether the testator intended that the rule should not operate, for that is not subject to his power, but whether he used the words "heirs of the body" as synonymous with the word "children" or its proper equivalent. By not adverting to this, the rule has sometimes been thought to be a flexible, instead of an unbending, one. *Hilman v. Bouslaugh*, 13 Pa. 351, 53 Am. Dec. 474.

The question to be determined is whether the testator meant by the word "heirs" an unbroken line of descendants or a class, as children. *Moyer's Estate*, 12 Pa. Co. Ct. 137.

If the intention is ascertained that the heirs are to take *qua* heirs, they must take by descent, and the inheritance vest in the ancestor. *Doebler's Appeal*, 64 Pa. 9.

Where the ancestor takes a preceding freehold, by the same instrument a remainder shall not be limited to the heirs *qua* heirs to take as purchasers. If given as an immediate remainder after the freehold, it shall vest as an executed estate of inheritance in the ancestor; if mediately after some other interposed estate, then it shall vest in him as a remainder. *Ibid*.

This rule was so stubborn that, where the grant of the remainder was to the "heirs" or "heirs of the body" of the life tenant, it was conclusively inferred that the intent and purpose of the grant was to create an estate of inheritance which would descend to those nominated by the general description of "heirs," notwithstanding the grantor should declare his intention to be otherwise. *Duffy v. Jarvis*, 84 Fed. 731.

In cases where the words "heirs" or "heirs of the body" are used, they will be construed to limit or define the estate intended to be conveyed, and will not be treated as words of purchase, and no supposed intention on the part of the testator or grantor, arising from the estate being conveyed in the first instance for life, will be permitted to control their operation as words of limitation. *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

When it is apparent that the words "heirs" or "heirs of the body" are used as descriptive of individuals, and not of the general line of heirs, they are considered words of purchase, that is, they indicate the object and limit the scope of the gift, and, although those to whom the gift is

2. Illustrative cases.

Where a testatrix, by the first item of her will, devised to her son an undivided one half in fee simple of certain land, and by the second item granted to her daughter the remainder of the undivided half of said property "during her natural life, and after her decease . . . to her lawful heirs," and after that in a subsequent clause of the will she directed that certain household effects "be equally divided between my said two heirs," it was held not to show that, in using the term "lawful heirs" in conveying the estate to her daughter, she thereby meant her daughter's children, so as to take the devise out of the rule in Shelley's Case. The court said that before it could conclude that the testatrix employed it in a sense different from that assigned to

it by the law, there must be something in the context manifesting a clear intention to employ the word as one of purchase, and not of limitation.¹

But where the remainder was to "the heirs of the body and the bodies of such child or children," followed by the words, "to be equally divided between them," it was held that these latter words did not, even when taken in conjunction with a subsequent direction to trustees to convey to "such heirs" in fee, show that the testator could not have used the words "heirs of the body and bodies of such child or children" in their legal sense, or intended thereby to designate the whole stock of inheritable descendants of his child or children in due course of succession, and they would not therefore take the devise out of the rule in Shelley's Case.² So an estate tail

thus secured may be heirs, of the first taker, they do not take as heirs, but directly from the donor, and thereby take by purchase. *Price v. Price*, 5 Ala. 578.

Upon the point discussed under this heading, see also *PEER v. HENNION*.

¹ *Perkins v. McConnell*, 136 Ind. 384, 30 N. E. 120.

In *Belcher's Estate*, 211 Pa. 615, 61 Atl. 252, a testator bequeathed his whole estate to his executors in trust, to pay the income to testator's parents, brothers, and sisters in equal portions, and to the issue of any brothers and sisters in case of their death, for and during the term of their natural lives and the life of the survivor of them, and provided that after the death of the testator's father, mother, or any of the brothers or sisters without issue, the portions of the income of the estate so paid to them during their life should go to the survivor or survivors during the remainder of their natural lives, and after the death of the father, mother, brothers, and sisters, that the estate should descend to the issue of such brothers and sisters who might then be living, share and share alike, in fee. It was held that the remaindermen took, not as heirs of anyone's ancestor, but directly, as donees and purchasers under the will, and that therefore the rule in Shelley's Case did not apply. The court said that, in determining whether the rule was applicable, the test was how the donees in remainder were to take.

In *Zavitz v. Preston*, 96 Iowa, 52, 64 N. W. 668, the court said whether the rule in Shelley's Case was in force in Iowa need not be determined; that it certainly could not be invoked to defeat the intention of the testator; that when that was ascertained according to established rules, it would prevail if not in violation of law. In this case the devise was to one during his natural life, the property at his death to be equally divided between his lawful heirs and next of kin; and the court declared that it was clear that the testator

intended that the devisee should have a life estate only.

Where the devise was to the testator's son for life, and no longer, and after his death to his heirs, lawfully begotten, forever, to be equally divided between them, but it was provided that should the son desire to sell the property, he could do so, and convey the land in fee to the purchaser, it was held that the negative or restrictive words used in connection with the devise of the estate for life, and the subsequent words of division used in connection with the devise to the heirs, followed by the power of sale to the first devisee, sufficiently indicated a plain and unequivocal intention of the testator to use the words "heirs lawfully begotten" in the sense of children rather than in their strict technical sense, so as to take the devise out of the rule in Shelley's Case. *Clarke v. Smith*, 49 Md. 106.

In *List v. Rodney*, 83 Pa. 483, a will provided that a devise to a daughter and to her children was intended, and that by the devise certain real estate should be given to her children living at her death, and to the lawful issue of any of them if dead, in the right of such one deceased, and to their heirs forever, share and share alike; and for want of such issue living, then the real estate so devised was to vest in her husband during the devisee's natural life, for his own use and benefit, subject to certain trusts; and it was held to be a clear intention of the testator not to give during the life of his daughter any vested estate to her children in being at the date of the will, nor to her subsequently born children. The court also held that the intention being thus made clear, the rule in Shelley's Case could not be invoked to prevent that intention from being affective.

² *Van Grutten v. Foxwell*, 77 L. T. N. S. 170.

So, a devise to A for life, and after his death to his issue, as tenants in common, the will providing that in case A should die without leaving issue, the property should

was held to be given to the first taker under a devise to one for life without impeachment of waste, with a power of jointuring, remainder to the issue of his body and their

heirs, and in default of such issue, over, this ruling giving effect to the general intention.²

The intention not to use technical words

go to B in fee, was held to give A an estate tail in order to effectuate the general intent. Doe ex dem. Cock v. Cooper, 1 East, 229.

A devise of real estate to A for life, and after his death to the male issue of the body of A, in equal shares and proportions, gives him an estate tail. Jackson v. Calvert, 1 Johns. & H. 235. The court said that when real estate was given to issue without words of limitation added thereto, in order to preserve what was supposed to be the general intent, the court, finding that the issue could not take the intended benefit for want of words of limitation super-added to the gift to them, gave effect to the devise by vesting an estate tail in the person named as tenant for life, because by so doing the issue would have a chance, though rather a precarious one, of succeeding to the estate.

In Roe ex dem. Dodson v. Grew, 2 Wils. 322, it was held that a devise to A for life, and after his death to the heirs of his body and the heirs of the body of such issue, created an estate tail in A. Bathurst, J., said that it is a rule that where an ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation; where there appears a particular intent and a general intent, the general must take precedence.

Under a devise to a man for life without impeachment of waste, and after his death to the issue male of his body, and to the heirs and assigns of such issue male forever, and for default of such issue, over, it was held that the first devisee took an estate tail in order to give effect to the general intention of the testator. Denn ex dem. Webb v. Puckey, 5 T. R. 299.

And in order to give effect to the general intention of a deviser, the first taker was held to take an estate tail under a devise of property to testator's nephew, to hold to him during his natural life, and after his death "to and amongst his issue, and in default of issue," over. Doe ex dem. Blandford v. Applin, 4 T. R. 82.

A devise to children and for and during their natural lives, with remainder over in case of their dying without issue, prevents them from taking estates for life, as the testator intended, since the rule in Shelley's Case applies. Doe ex dem. Gallini v. Gallini, 5 Barn. & Ad. 621.

Where there was a devise to A for life, remainder to his children and their heirs as tenants in common, and by a codicil, after purchased estates were devised to A for life, remainder to the heirs of his body, lawfully begotten, forever, equally, share and share alike, sons and daughters, but if A should die without heirs or heir, then over, it was held that A took an estate tail in the property devised by the codicil. Grimsoa v. Downing, 4 Drew. 125. 29 L.R.A. (N.S.)

In Doe ex dem. Cole v. Goldsmith, 7 Taunt. 209, testator devised certain property to A and his assigns for life, and after his death to the heirs of his body, lawfully to be begotten, in such parts and shares as A should appoint, and in default of such heirs of his body immediately after his decease, over, it was held that A took an estate tail by implication. The court said that it is an established rule that where a general intent appears, any particular intent which appears, however clearly expressed, shall never take effect where it is inconsistent with the general intent.

² Frank v. Stovin, 3 East, 548.

So, where there was a devise to testator's nephew G., to hold unto him, the said G., for and during the term of his natural life, and after his death to the use of the issue male of his body, lawfully to be begotten, and the heirs male of the body of such issue male, and for want of such issue male, over, it was held that the general intention must control so as to create an estate tail in G. Roe ex dem. Dodson v. Grew. Wilmot's Notes, 272. The court said that though the testator certainly intended in the first instance to give G. only an estate for life, yet, if he certainly intended that all his sons should take in succession, one after another, and they could not take in that manner but by lodging the estate tail in G., then it came to this: "Here are two things intended: one, an estate for life to G. Grew, another an estate in succession to all his sons in tail male *ad finitum*; can they both take place? If they can, they ought; if they cannot, then balance the intentions against one another, and see which is the weightiest and most comprehensive, and give that an effect. Courts substitute themselves in place of a testator, and suppose the question to have been asked him, 'You have willed two things which cannot both be obeyed exactly according to your will, and therefore one must yield to the other.' What must have been the answer? 'I wish to be obeyed in the principal, capital, and most material destination I have made, and to reject the secondary and subordinate one.'"

In Blackwell v. Hale, 1 Ir. C. L. Rep. 612, testator devised certain lands to trustees, etc., upon trust, to permit testator's brother and son during their lives to take and receive the rents, etc., of the premises, to their own sole and separate use, share and share alike, and after the death of either of them to permit the survivor to receive the rents, etc., during his life, and then to trustees, to preserve contingent remainders, etc., then to permit the lawful issue male of the said brother and son, or the lawful issue male of one of them, in case the other should have no issue at the time of his death, to take and receive the rents, etc., share and share alike, during their respec-

in a technical sense must be clearly indicated; but when such intention is plain, effect will be given to it.⁴ What the actual

intent was, when expressed in ambiguous terms, is a question upon which minds may easily differ.⁵ If by the use of the word

tive lives, and in case of no issue male of either of them living at the death of the survivor of them, then to permit the issue female of them and each of them during their natural lives to receive the rents, etc., share and share alike. It was held that the word "issue" meant "heirs of the body," and that the survivor took an estate tail in order to effectuate the general intention of the testator.

Where an estate is given to a woman for life, and the remainder is expressly limited to the heirs of her body, lawfully begotten, an estate tail is created in her. *Philadelphia Trust, S. D. & Ins. Co's Appeal*, 93 Pa. 209.

In *Colclough v. Colclough*, Ir. Rep. 4 Eq. 263, it was therein determined that a devise of lands to a man and his assigns "for and during the term of his natural life, without impeachment of waste," the will declaring that after his death the property should "go to and be equally divided among his issue, male and female, share and share alike, as tenants in common, and not as joint tenants, and if he should die leaving issue only one child, then to such only child, but if he should happen to die without leaving any issue," then over, would not be affected by a proviso that the property should not vest in such issue, or any of them, so as to cause any title to descend from them by inheritance or special occupancy until such issue should attain the age of twenty-one years, it being the true intent and meaning of the will that the intention and meaning therein expressed should not be defeated by any operation of law in regard to said issue.

⁴In *Perrin v. Blake*, 6 Greenleaf's Cruise, Real Prop. 380, where the devise was as follows: "It is my intent and meaning that none of my children should sell and dispose of my estate for longer time than his life; and to that intent I give, devise, and bequeath all the rest and residue of my estate to my son John Williams and the said infant, for and during the term of their natural lives, the remainder to my brother-in-law Isaac Gale and his heirs, for and during the natural lives of my said sons John Williams and the said infant; the remainder to the heirs of the bodies of my said sons John Williams and the said infant, lawfully begotten, or to be begotten;" and also provided for remainder over, it was held in the exchequer chamber that John Williams took an estate tail, on the ground that the intention was not clearly otherwise.

Where there was a devise to testator's brothers and sisters who should be living at the time of the death of the testator's wife, "and to their issue, male and female, after the respective deceases of said brothers and sisters, forever, to be equally divided between and among them," the words "issue, male and female," were held to be 29 L.R.A.(N.S.)

words of limitation. It was urged that the devise was expressed in a mode quite inconsistent with the notion that the children were to take by inheritance through their parents; that the devise to the issue was a different sentence from that to their parents; that it was to take effect "after" the respective deceases of the brothers and sisters; that it was given "forever" or in "fee," and that it was to be "divided equally between and amongst them, without preference." In other words, the issue, male and female, were to take equally and together, and that this intention could not be effected by giving an estate tail to the ancestor, in which case the estate would not be divided, but the eldest male would take the whole. The males and their issue would take in priority exclusively of the females, and there was no gift over in default of issue; but the court nevertheless applied the rule, *Lord Langdale*, the Master of the Rolls, saying that he could not help thinking that the operation of the will was not in accordance with the testator's intention, but being unable to find such clear indications of intention that the technical words which were employed should not have their ordinary effect, he was unable to give effect to his intention. *Tate v. Clarke*, 1 Beav. 100.

A life estate in the first taker was held not enlarged by a devise to one for life and afterwards to his eldest son, or any other son after him, for life, and then to as many of his descendants issue male as should be heirs of his or their bodies, down to the tenth generation, during their natural lives. *Lord Ellenborough*, Ch. J., said that in this case the deviser had not used general terms from whence an intent to give a descendible estate to the issue of the first devisee might be collected; but had in express terms narrowed the estates which the issue were to take to estates for life; and this, properly speaking, was not a case of a particular and a general intent, both of which could not be effectuated, and where the one must give way to the other; but a case of single intent to create a succession of estates for life, not warranted by law. *Seaward v. Willock*, 5 East, 198.

⁵In *Wright v. Pearson*, 1 Ambl. 358, where a devise was in trust for the use of testator's nephew for life, with remainder to trustees, to preserve contingent remainders, with remainder to the use of the heirs male of the nephew begotten, and their heirs, the will providing that in case the nephew should die without leaving any issue male of his body living at his death, the premises be subjected to the payment of a certain sum to two nieces mentioned, under certain conditions, with benefit of survivorship, the testator empowering his trustees after the death of the nephew to raise and pay the same, the will then providing that, in default of such issue male of the nephew, all

"heirs," the whole line of the life tenant's heirs is not meant, the fee will not vest in the first taker, although from the language sometimes used by the courts, it might be

the premises be subject to the payment of a certain sum for the use of five grandchildren, or such of them as should be living at the time of failure of issue male of the nephew, to take as tenants in common,—it was contended that the testator intended that the nephew should take only an estate for life, with remainder to his issue male, in fee, in case he should have any at his death; that the limitation was expressly for life, and that the limitation to preserve contingent remainders indicated that the nephew took a forfeitable estate, and that the words "at the time of failure of issue male" did not mean failure of issue male generally, but failure of issue male at his death; but the court held that the nephew took an estate tail by the intention; that the testator did not intend to give the heirs male of the nephew the fee; that the subsequent limitation over depended upon the words "failure of issue male" generally; that the proviso was collateral, and that if placed upon the limitation, the whole would be consistent. It would then stand thus: in default of issue male of the nephew, to his grandchildren, with a proviso that if the nephew should die without issue male living at his death, to raise the specified sum for the portion of his nieces. This opinion is said in *Ambler* to have been very dissatisfactory to the bar in general. Mr. Fearne, in his work on *Contingent Remainders*, vol. 1, p. 131, says: To remove the fair implication on the words of the proviso, it was found requisite to new model the context of the will by transplanting the clause which afforded it, to a different place from that which the testator had given it; and by its removal opening a reference of the words "in default of such issue," etc., which seemed excluded by that clause as it stood in the will. And to avoid the effect of the words "and their heirs," superadded to the words "heirs male," he expunged them entirely. "These constructive modifications were not of the gentlest touch; and whilst the one passes over in silence the auxiliary implication from the ultimate limitation over to the grandchildren living at the failure of the issue male, spoken of in the preceding limitations, the other was not perfectly reconcilable with the stress before laid in the same argument on the words 'their heirs,' against the construction of the heirs male, etc., taking by purchase. The words 'their heirs,' the lord keeper said, would not permit him to construe the words 'heirs male,' etc., words of purchase without giving them the fee, which would have been inconsistent with the subsequent words, 'and in default of such issue male.' But could he give the words 'heirs male,' etc., the effect of words of limitation in consistence with the same words, 'and their heirs?' He thought not, and discarded those words by expressly treating them as words of surplusage. The 29 L.R.A. (N.S.)

thought that the important inquiry was what the intention as to the estate to be taken by the first taker was.⁶ It does not follow, however, from the fact that the

same stroke equally removed the supposed obstacle to the other construction."

⁶ In a devise of land to a testator's son for life, provided he will live on and occupy the same, and at his death, or on his refusal to live on or occupy the same, to his lawful heirs, the word "heirs" was held to mean children, and that therefore the first devisee took only a defeasible life estate, the court saying that when it becomes manifest that the word is used as a synonym for children, or in some modified sense, the rule in *Shelley's Case* will not be applied to overturn the testator's intention. *Conger v. Lowe*, 124 Ind. 368, 9 L.R.A. 165, 24 N. E. 889.

Under a devise to a son for life, and at his death to his widow during widowhood, and no longer, and at her decease to go to the son's heirs, to be divided among them as the law directs in case of dying intestate, the words "as the law directs" give an estate at the death of the life tenant to persons who may not then be his heirs at law, and therefore prevent the operation of the rule in *Shelley's Case*. *Quick v. Quick*, 21 N. J. Eq. 13.

Where an estate is expressly limited to a devisee for life, and her enjoyment limited to the rents, issues, profits, and income during life, and it is also provided that if the devisee shall die after entering upon the enjoyment of the estate for life, without leaving any heirs of her body begotten, as aforesaid, the estate shall go to the heirs of the testator, it was held to be the plain intention of the testator to devise a life estate, and that the rule in *Shelley's Case* did not apply. *Kiene v. Gmehle*, 85 Iowa, 312, 52 N. W. 232.

Where there was a devise of a farm to testator's son and to his heirs, with similar devises to other children, the will providing that none of the children should sell their land or encumber it, but that the land should remain free for their children or heirs, testator's children to have the issue, income, and profits during their lifetime, with power of appointment, it was held that the son took a life estate, the intention of the testator being not to grant a larger estate. *Urich v. Merkel*, 81 Pa. 332.

In *Backhouse v. Wells*, 10 Mod. 181, the devise was of lands to a man for his natural life only, without impeachment of waste, then to the issue male of his body, lawfully to be begotten, remainder to the heirs male of the body of that issue. It was held that this created an estate for life only in the first taker. The court said that the words of the will were so express to this purpose that neither any words that could have been used, nor any arguments, could make it plainer. This was both the obvious and legal import of these words, and what they would have imported in a conveyance.

A testator devised certain property to a

author of the instrument used certain words in one sense in one clause, that he employed them in the same sense in another clause.⁷

Where there was a bequest to the testator's daughter "in trust for her sole use and benefit, and of her children and their children thereafter," but in event that the daughter should die leaving no children as heirs, there was a limitation over, it was held that the word "children," where it was first used in the devise, did not mean "heirs," so as to bring the devise within the rule in Shelley's Case, and the fact that in the last sentence children were referred to as "heirs" was held not to show an intention to limit the remainder to the heirs, and not to the children of the daughter.⁸

And where, after a devise of a life estate to one person, there was a devise to A for life, and afterwards to the heirs of his body, and afterwards to the other sons of the first devisee successively in tail, then to the

daughters in tail, and for want of such issue, to B in fee, it was held that the intention being doubtful, A, by legal operation of the words of limitation used, took an estate tail in the real property and an absolute interest in the personal property.⁹

XIII. Unqualified Limitations.

a. Limitations to heirs.

1. Effect in general.

It is, of course, well settled that where the limitation in remainder is to the heirs of the life tenant in its simplest form, that is, with no additional words to qualify its meaning or to explain the sense in which the author of the instrument used it, the word is to be understood as having been used as a word of limitation,¹⁰ and this, by the operation of the rule in Shel-

grandchild for life, and in another clause of the will provided that should his grandchildren die without issue of their body the property should be equally divided among all the testator's grandchildren and their legal representatives, and the title thereto thereafterward so vest forever, and that no title in fee to any of the property should vest in any of the grandchildren, the testator declaring that they should have only a life estate therein, and that the fee simple should vest in their legal heirs. It was held that the plain intention of the testator to create a life estate only in the grandchildren would not be defeated by giving the words "legal heirs" a technical meaning, wholly inconsistent with the context, and that the language of the devise was not within the meaning of the rule in Shelley's Case. *Belslay v. Engel*, 107 Ill. 192.

But in *Carpenter v. Van Olinder*, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868, the opinion in the last-mentioned case was disapproved and overruled in so far as the latter case places the decision upon the intention of the testator to vest a fee in the legal representatives or legal heirs of the ancestor, and not upon the intention of the testator to use the words "legal representatives" or "legal heirs" as synonymous with "children," and therefore as words of purchase, and not of limitation.

⁷ Although the testator used the words "lawful heirs" in one part of the will as synonymous with "children," it does not follow that he used the words "heirs of the body" in another part of the will in that sense. *Wilkerson v. Clark*, 80 Ga. 367, 12 Am. St. Rep. 258, 7 S. E. 319.

Where the devise was to the testator's daughter, for her benefit during her life, the husband to have no control over the property, which was to "remain the property of the heirs of her body after her death," the fact that the testator did not provide for keeping in the blood the shares
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of other daughters was held not to indicate that he had no such design respecting the share of this one. *Ibid*.

⁸ *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136.

⁹ *Garth v. Baldwin*, 2 Ves. Sr. 646.

¹⁰ It is well settled that the words "heirs" or "heirs of his body" are to be construed as words of limitation, and not of purchase. *Connecticut Mut. L. Ins. Co. v. Skinner*, 2 Ohio C. D. 688.

Where a deed or will uses the word "heirs," and uses it in its ordinary legal signification, a fee is vested in the first taker, under the rule in Shelley's Case. *Shimer v. Mann*, 99 Ind. 190, 50 Am. Rep. 82.

It appears to be settled that the words "heirs" or "heirs of the body," when used alone and without explanation, are always considered as words of limitation, and not words of purchase,—that if it appear that by the term "heirs" the donor meant the general line of descent from the ancestor, the rule will prevail, no matter how strong the intention may be to make them take as purchasers. *Price v. Price*, 5 Ala. 578. To the same effect, *Ewing v. Standefer*, 18 Ala. 400.

The term "heirs" is one of limitation. It has a fixed and legal meaning, and a mere presumed intention will not control its signification. It cannot be held a word of purchase, unless the testator's intent so to use it appears manifest. *Doe ex dem. Patterson v. Jackman*, 5 Ind. 283.

When the word "heirs" is taken as a word of limitation, it is collective, and signifies all descendants in all generations; but when it is taken as a word of purchase, it may denote particular persons answering the description at a particular time and in a special sense, according to the circumstances. *Fulton v. Harman*, 44 Md. 251.

If the word "heirs" or other like word is not used in a large sense and to include succession, but is used in a restricted sense,

ley's Case, vests the fee in the first taker. Even where there are qualifying words, they must clearly indicate that the word "heirs" was not intended to be used in its technical sense, before the instrument will be taken out of the operation of the rule. So that the cases in effect come to this:

First, where the word "heirs" is used, without qualification or explanation, in the limitation of the remainder after the life estate, as where the limitation is to A for life, remainder to his heirs, the word is always a word of limitation; and

Second, where the word "heirs" is accompanied by qualifying words, or words of explanation, as where the limitation is to A for life, remainder to his heirs "and their heirs," or to his heirs "in fee," or to his heirs "living at his death," etc., there is a presumption that the word "heirs" was used in its technical sense;¹¹ that is, as a word of limitation. This may be said to be a conclusive presumption only where the word "heirs" is used with no additional quali-

and merely to describe persons who will answer the description at a future time, as at the death of the tenant for life, the rule has no application, and the remainder is contingent until the death of the tenant for life, upon which event the persons designated as heirs or otherwise in succession take, not by inheritance from the first taker, but as purchaser. Therefore what the grantor or testator means by heirs, or other like phrases, must first be adjusted without reference to the rule. *Lytle v. Beveridge*, 58 N. Y. 592.

When the testator devises the remainder on failure to appoint, to the heirs of the life tenant, or by words which mean the same thing, the inheritance will pass to the life tenant. *Yarnall's Appeal*, 70 Pa. 335.

11 The presumption is that the testator used the word "heirs" in its ordinary legal sense; that is, as a word of limitation. *Criswell's Appeal*, 41 Pa. 288; *Nice's Appeal*, 50 Pa. 143.

The strong presumption arising from the use of technical words of limitation is of an intention that the remaindermen shall take by descent,—a presumption not easily overcome. It may be rebutted, but it can be by nothing short of affirmative evidence of a contrary intent, so clear as to leave no reasonable doubt. *Physick's Appeal*, 50 Pa. 128; *Serfass v. Serfass*, 190 Pa. 484, 42 Atl. 888.

The words "heirs" or "heirs of the body," when used by a testator, are presumed to have been used in their legal sense; that the testator intended to designate, not individuals, but quantity of estate and descent. Whenever they are employed, therefore, the burden is thrown upon him who contends that they are words of purchase, to rebut this presumption, and to show that they were used in the particular grant or devise to designate persons. *Guthrie's Appeal*, 37 20 L.R.A. (N.S.)

fying or explanatory words. It is a rebuttable presumption where such additional explanatory words are used, but the evidence of intention furnished by the explanatory words must be clear and strong before the presumption that the word "heirs" was used as a word of limitation will be overcome.

For the discussion of the effect of certain explanatory words and phrases following the words "heirs," "heirs of the body," or "issue," see *infra*, XIV.

2. Illustrative cases.

It will be found that in some of those cases qualifying words appeared, but no notice of them was taken, so that the question of what effect they may have had on the sense in which the word "heirs" was used was not involved. A grant to one for life, and then to his heirs, vests the fee, under the rule in *Shelley's Case*.¹² So a devise to testator's son for life, the property at

Pa. 9. To the same effect, *Seybert v. Hibernia*, 5 Pa. Super. Ct. 537.

The intent not to use the words "heirs" or "heirs of the body" in their legal sense must be unequivocal. *Guthrie's Appeal*, *supra*.

Whenever the terms of a limitation can be fairly and justly interpreted to mean heirs or heirs of the body, an estate of inheritance will be presumed to have been intended by the testator. *Dodson v. Ball*, 60 Pa. 492, 100 Am. Dec. 586.

If the remainder is to persons standing in the relation of general or special heirs of the tenant for life, the law presumes that they are to take as heirs, unless it unequivocally appears that individuals other than persons who are to take simply as heirs are intended. *Price v. Taylor*, 28 Pa. 102, 70 Am. Dec. 105; *McKee v. McKinley*, 33 Pa. 92.

The word "heirs" is a technical word, and is always construed to be a word of limitation, and not of purchase, unless there be some controlling words clearly showing that a contrary meaning was intended by its use. *Kay v. Connor*, 8 Humph. 624, 49 Am. Dec. 690.

¹² *Doyle v. Andis*, 127 Iowa, 36, 69 L.R.A. 593, 102 N. W. 177, 4 A. & E. Ann. Cas. 18.

To the same effect, *Daniels v. Dingman*, 140 Iowa, 386, 118 N. W. 373; *Muldrow v. White*, 67 Mo. 470; *Riggin v. Love*, 72 Ill. 553.

By the common law, as declared in *Shelley's Case*, a grant to one "for and during his natural life, and after his death to his heirs and their assigns forever," would have conveyed to him a fee. *Moore v. Little*, 41 N. Y. 66.

A grant to trustees to the use of the husband and wife during the term of their natural lives and the natural life of the sur-

his death to go to his heirs, and devises of a similar nature, would plainly be within the rule.¹² In such cases there is nothing to overcome the presumption that technical

vivor of them, and then to the use of another for life, and then to the use of the heirs of the wife forever, was held to convey a fee to the surviving wife, under the rule in Shelley's Case. *Bullard v. Goffe*, 20 Pick. 252.

A declaration of trust for the benefit of a man for life, and then for the benefit of his heirs, is within the rule in Shelley's Case, there being nothing in the language of the instrument itself from which it can be inferred that the grantor intended to describe particular individuals. *Mack v. Champion*, 11 Ohio Dec. Reprint, 327.

A limitation over after the life tenant's estate "to her heirs at law forever" was held to indicate an indefinite succession of interest, so as to make the rule applicable. *Kennedy v. Colclough*, 67 S. C. 118, 45 S. E. 139.

The conveyance of land to children for their lifetime, with remainder to their heirs, would, under the operation of the rule in Shelley's Case, vest a fee in the children. *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484.

Where there was a title bond to convey land to a woman for life, and after her death to "her heirs forever," and, after the death of the grantor, a deed was obtained by chancery proceedings to which the heirs of the grantee were not parties, it was held that the grantee took the fee. The contention of the grantee's heirs was that the word "heirs" in the title bond was used in the sense of "children," and that the rule in Shelley's Case did not apply. *Small v. Howland*, 14 Ind. 592.

In a grant to a man and his wife for life, and on their death to their heirs, it was held that the word "heirs" did not mean the joint heirs of the husband and wife,—in other words, their children,—so as to take the grant out of the rule in Shelley's Case. *Connecticut Mut. L. Ins. Co. v. Skinner*, 2 Ohio C. D. 688.

A devise of property to trustees, to hold or the use and benefit of a person for life, and at the latter's death for the like use and benefit of his heirs at law, is within the rule in Shelley's Case, and vests the estate absolutely in the first taker. *Williams v. Williams*, 11 Lea, 652.

In one clause of a will, the testator bequeathed certain property to a son's bodily heirs M. and A., and in another it was provided that said M. and A. should not sell the property, and that at their death it should revert to their heirs. The court said that he devisees M. and A. were given a legal rehold estate by the first paragraph, and by the second there was a limitation to their heirs upon their death, and that the case therefore fell strictly within the rule. *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160, allowed in (Tex. Civ. App.) 116 S. W. 52.

Where a testator gave a house and lot to be held by his daughter, who should receive

all rents, etc., during her life, and at her death all rents should be invested for the benefit of her heirs on coming of age, it was held that rents were equivalent to the use of an estate in the corpus; and as the benefit was given in the same rents, both to the mother and her heirs, that exhausted the whole property as designated by rents, and that the whole series of heirs took in due course of succession, so that the rule in Shelley's Case plainly applied to give the fee simple to the mother. *Re Thomas*, 2 Ont. L. Rep. 660.

¹³ *Hurst v. Wilson*, 89 Tenn. 270, 14 S. W. 778.

Where the devise was to an executor and trustee for the use of testatrix's daughter for life, and after her death to the use of her heirs forever, it was held that, under the rule in Shelley's Case, the word "heirs" would vest the estate in the ancestor, but that a later devise, "and in case of her death to her children," was merely substitutionary in case the daughter died in the lifetime of the testatrix, in which case the property would be vested in her children, if she had any. *Nealis v. Jack*, N. B. Eq. Cas. 426.

Where a father gives a life estate to his son, and limits the remainder to his heirs in the same conveyance, the son takes the fee. *McCray v. Lipp*, 35 Ind. 116.

Where the devise to the life tenants after their deaths is to go to their several heirs at law, the devise is within the rule in Shelley's Case. *Warner v. Sprigg*, 62 Md. 14.

A provision in a will that "after my real and personal estate shall be so respectively divided, it shall be held by my aforesaid children during his, her, or their natural lives, respectively; and upon his, her, or their several decease, shall go to his, her, or their heirs, forever," is within the rule in Shelley's Case. *Post v. Post*, 47 Barb. 72.

Where the words of a will are, "After the decease of my wife, all the overplus of my real estate, of what kind soever, I devise unto my three children," naming them, and another person, "to be divided," etc., "and after their decease to go unto their legal heirs," etc., the devise is clearly within the rule in Shelley's Case. *Ibid*.

By a devise to testator's daughter for life, and after her death to her heirs forever, the daughter, under the rule in Shelley's Case, would take the fee. *Spader v. Powers*, 56 Hun, 163, 9 N. Y. Supp. 39.

A devise of a legal estate to a man for life, and after his death to his heirs and assigns forever, brings the devise at once within the rule in Shelley's Case, and gives him an estate in fee, because he takes an estate of freehold legally under the will, and in the same instrument there is a limitation by way of a remainder of an interest of the same legal quality to his heirs, as a class of persons to take in succession. *Haverstick v. Duffenburgh*, 2 Edm. Sel. Cas. 463.

A loan to a daughter of a tract of land

words are to be taken in their technical sense.¹⁴

for her natural life, and, after her death, a gift of the same to her heirs forever, is within the rule in Shelley's Case, and vests a fee in the daughter. *King v. Utley*, 85 N. C. 59.

The rule applies to a devise of real estate to one for life, and to his heirs in fee simple forever, after his death. *Morrisett v. Stevens*, 136 N. C. 160, 48 S. E. 661.

A devise to a man for life, and after his death to his heirs (lawful) forever, is within the rule. *Pitchford v. Limer*, 139 N. C. 13, 51 S. E. 789.

A devise of land to two persons during their respective lives, at their deaths to descend to their heirs, was held to vest a fee in the life tenants, under the rule in Shelley's Case. *McFeely v. Moore*, 5 Ohio, 464, 24 Am. Dec. 314.

A devise to children for their natural lives, and then to their heirs, was held to convey to them a fee. *Carter v. Reddish*, 32 Ohio St. 1.

In *Henderson v. Walthour*, 2 Monaghan (Pa.) 224, 15 Atl. 893, there was a devise to testator's son and to his heirs during his natural life, and to him and his heirs forever after his death. It was held that the word "heirs" was not used in the sense of "children," so as to take the devise out of the operation of the rule.

A devise of rents and profits of land to testator's wife during her life, and at her death to her heirs, conveys the fee to the wife, under the rule in Shelley's Case. *Vowinkel v. Patterson*, 114 Pa. 21, 6 Atl. 470.

¹⁴ A devise to testator's son, to his use as long as he should live, and to his legal heirs, if he had any, at his death, and if he had not, then over, was held within the rule. *Bassett v. Hawk*, 118 Pa. 94, 11 Atl. 802.

The first taker gets a fee tail converted into a fee simple by statute under a devise of land to him for life, and after his death to his heirs and legal representatives in fee simple. *Shoup v. DeLong*, 190 Pa. 331, 42 Atl. 480.

A devise of land to one for life, after his death to descend to his heirs, vests in him the fee, under the rule in Shelley's Case. *Brokaw v. Brokaw* (Iowa) 113 N. W. 469.

In *Brown v. Lawrence*, 3 Cush. 390, it was said that under a devise to testator's son of the rents or improvement of certain real estate during his natural life, the premises to descend to his heirs, the son would have taken the fee, under the rule in Shelley's Case. In this case there was a codicil, however, which revoked the devise.

A devise to a son for life, the property to descend to his heirs at law, vests the fee in him. *Quillman v. Custer*, 57 Pa. 125.

A limitation after a life estate to a woman, to descend to her heirs upon her death, was held to vest the fee in her, those words not being within the provision of 29 L.R.A. (N.S.)

§ 10, art. 1, p. 63, of the General Statutes, in effect abolishing the rule in Shelley's Case. *Wedekind v. Hallenberg*, 88 Ky. 114, 10 S. W. 368.

A devise of a third of a testatrix's property to each of three persons for life, and then to their heirs and assigns, "but never to sell it," was held to create a fee in the devisees. *Norris v. Hensley*, 27 Cal. 449.

In *Carpenter v. Van Olinder*, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868, where the devise was to certain persons, the testator stating that it was his will that none of the property, except a specified portion, be sold, but that it be kept sacred for their heirs, it was held that the life tenant would take an estate in fee, since the word "heirs," as used, clearly meant all who were to take generally, without exception, as a class of inheritable persons, and as the successive heirs, and not a part,—as individuals selected out of the class of heirs,—therefore bringing the devise within the rule in Shelley's Case.

Where, after a devise of one moiety of the testator's property to his son, and of the other moiety, after the death of his wife, to his son and daughter, the testator provided that none of the property should be sold, but that it should all pass to the heirs of his children, it was held that the clause was to be read as if the testator had devised the one moiety to his son for life and then to his heirs, and the other moiety on the death of the widow to his daughter and son as tenants in common for life, and then to their heirs, and that the word "heirs" so used was a word of limitation, and not of purchase. *Bond v. McNiff*, 6 Jones & S. 83, affirmed in 9 Jones & S. 543.

"A devise to a son, he not to have the privilege to sell, and at his death to his heirs and assigns forever, vests a fee in the son." *Stout's Estate*, 1 Wilcox, 9, cited in 3 Brightly's Dig. (Pa.) 3471.

Where the devise was to a man in trust for the use of his heirs at law, to have and to hold the same during his natural life, and to receive the rents, issues, and profits so long as he might live, followed by a prohibition against alienation during life, the next succeeding clause in the will manifesting a clear intention that he should have possession of the property, and provide for the support of his mother upon it, the fee was held to vest in the first taker. The court said that the gift was of an estate for life, with remainder in fee to the heirs at law of the devisee for life; both estates united and made a fee in the first taker. *Kepple's Appeal*, 53 Pa. 211.

A devise of lands to a person for life and to his heirs, with the power of a life tenant to sell the same with the consent of specified persons, would, it was said, under the rule in Shelley's Case, have given the first taker a fee. *Barber v. Cary*, 11 N. Y. 397.

b. Limitations to heirs of body.**1. Effect in general.**

In all cases in which the limitation of remainder is to the heirs of the body of the life tenant, without qualification or explanation, these words, unless otherwise provided by statute, are deemed to be words of limitation,¹⁵ and at common law, where the limitation was in its simplest form, as to A for life, remainder to the heirs of his body, the rule in Shelley's Case would always operate to give A a fee tail. In jurisdictions where the rule is still in force, but in which estates tail are abolished, and converted into estates in fee simple, A would be held to take a fee simple, first by the rule in Shelley's Case, which would convert his life estate into a fee tail, and then by the operation of the statute, which would convert the fee tail into a fee simple.

The presumption that the words "heirs of the body" are used in their technical sense is the same as the presumption that the word "heirs," when used, is used in its technical sense; and this presumption can

be overcome only by qualifying or explanatory words or phrases clearly indicating that the author of the instrument did not intend to use them as words of limitation. Certain qualifying words, however, may have a stronger tendency to overcome the presumption where the limitation is to the heirs of the body, than they would if the limitation were simply to the heirs: as, for example, where the limitation is to A for life, remainder to his heirs "in fee simple," and where the limitation is to A for life, remainder to the heirs of his body "in fee simple;" since in the latter case the superadded words of limitation "in fee" would change the course of descent, while in the former case they would not. For a discussion of the effect of explanatory words and phrases, as applied to limitations to the heirs of the body, see *infra*, XIV.

2. Illustrative cases.

A grant to one for life, and to the heirs of her body after her death, conveys the fee to the grantee, under the rule in Shelley's Case.¹⁶ So, a devise of land to one for life,

¹⁵ It is too well settled to be controverted that the words "heirs of their body" must be held to be words of limitation, and not of purchase, and that even though the estates of the first takers are at first declared to be for life, and words of limitation are superadded to the words "heirs of their bodies," the rule in Shelley's Case must nevertheless be inflexibly applied as a rule of law, and the life estates expressly given must be enlarged thereby to estates tail. *Manchester v. Durfee*, 5 R. I. 549.

In *Sayer v. Masterman*, 1 Ambl. 344, Wilmet, Lord Commissioner, said that he could not find any case where the words "heirs of the body" in the plural number, with no words superadded, had been considered as words of purchase.

But, of course, if it appears from the instrument that the words "heirs of his body" are used to designate the children of the grantee or devisee, effect will be given to that intention, and the estate conveyed or bequeathed will be limited to the life of such grantee or devisee, with remainder in fee to the children thus designated; if, however, it does not so appear, the law gives to such language the effect of conferring upon the named grantee or devisee an absolute estate. *Scott v. Brin*, 48 Tex. Civ. App. 500, 107 S. W. 565.

¹⁶ *Wilson v. Rusk* (Iowa) 103 N. W. 204.

In *Wilson v. Alston*, 122 Ala. 630, 25 So. 225, it was held that a statute abolishing the rule in Shelley's Case was applicable to a grant to a woman and to the heirs of her body after her death.

Where the granting words of a deed are to a man and his wife during their natural lives, and at their death to the heirs of their body, the rule in Shelley's Case must apply. 29 L.R.A. (N.S.)

particularly when no other words in the deed modify the meaning of the words so used. *Waters v. Lyon*, 141 Ind. 170, 40 N. E. 662.

A grant to a woman for life, and then unto the heirs of her body, under the rule in Shelley's Case gives her an estate tail. The court said that the words "heirs of her body" are *nomina collectivi*, and include all her heirs descending from her, and *ex vi termini* take in the whole generation. *Den ex dem. McGinnis v. McPeake*, 2 N. J. L. 291.

A grant to a husband and wife "to hold to them during their lives and in the life of the survivor," and to the heirs of their bodies, and if they should die without heirs of their bodies, the premises to revert to the grantor and his heirs and assigns forever, conveys an estate tail to the first takers, under the rule in Shelley's Case. *Steel v. Cook*, 1 Met. 281.

Where the limitation in a deed after the life estate was "at her death to the heirs of her body," it was held that these words were words of limitation, and not of purchase, there being no explanatory words added. *Dott v. Cunningham*, 1 Bay, 453, 1 Am. Dec. 624.

A deed by which the grantor conveys property to the grantee for life, and after his death to the heirs of his body, lawfully begotten, habendum, to have and to hold for the term of his natural life, and after his death to the heirs of his body, lawfully begotten, etc., was held to be within the rule, the words "heirs of his body," without qualification, being words of limitation. *Scott v. Brin*, 48 Tex. Civ. App. 500, 107 S. W. 565.

Where there was a devise to the testator's

the property at the devisee's death to go to the devisee's heirs or heirs of the body, or similar limitations, will convey the absolute interest. 17

c. Limitations to issue.

The word "issue" is not mentioned in the rule in Shelley's Case. The words of limitation upon which the rule operates are "heirs" and "heirs of the body." Having found that the rule applies to a limitation to A for life, remainder to his heirs, or to a limitation to A for life, remainder to the heirs of his body, the next question is, Does it apply to a limitation to A for life,

remainder to his issue, or the issue of his body? This is merely a question of interpretation directed to the discovery of the intention of the author of the instrument in the use of this ambiguous word. Did he use it in the sense of "heirs of the body?" Did he use it in the sense of "children?" This is a preliminary inquiry upon which the rule in Shelley's Case can have no sort of influence. Having first determined the sense in which the word is used, the court is in a position to apply or reject the rule. If the word "issue" is used in the technical sense of "heirs" or "heirs of the body," the rule, of course, applies; if it is used in the sense of "children," it does not. See *infra*.

daughter for her benefit during her life, the husband to have no control over the property, which was to "remain the property of the heirs of her body after her death," the words "heirs of her body" were held to be words of limitation, and not words of purchase, the property being given to them as heirs, and not as children. *Wilkerson v. Clark*, 80 Ga. 367, 12 Am. St. Rep. 258, 7 S. E. 319.

A devise to a person during his natural life, and at his death to his bodily heirs, conveys a fee simple to the first taker, under the rule in Shelley's Case and the laws of North Carolina. *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111.

Where a bequest was to a woman, the property after her death being given to her lawful heirs of her body, it was held that the rule in Shelley's Case applied, there being nothing so qualifying the words "lawful heirs of her body" as to make them words of purchase. *Lloyd v. Rambo*, 35 Ala. 709.

A devise of property to a testator's sister for life, and at her death to the testator's brothers, and after their deaths to their bodily heirs, was held to vest a fee in the brothers. *Carnes v. Baker*, 100 Ga. 779, 28 S. E. 496.

A devise to a woman for life, and then to the heirs of her body, vests the fee in her, under the rule in Shelley's Case. *Harris v. McCann*, 75 Miss. 805, 23 So. 631.

The rule applies to a bequest of the use, benefit, and profit of the estate to a woman for life, and to the lawful heirs of her body after her death, the words "heirs of her body" being words of limitation. *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 55 S. E. 289, 9 A. & E. Ann. Cas. 244.

¹⁷ *Cooper v. Coursey*, 2 Coldw. 416.

In *Woodrum v. Kirkpatrick*, 2 Swan, 218, the testator provided that the property assigned to two of his daughters named should be held by them for the benefit of the heirs of their bodies, not subject to be sold, bartered, or traded by their husbands. This was held to vest the fee in the daughters.

A gift to one for life, and then to the heirs of his body, was held to create an estate tail, the words "heirs of the body" being, in their natural and ordinary signification,

words of limitation, and not of purchase. *May v. Ritchie*, 65 Ala. 602.

An appointment to sons for their lives, and at their deaths to the heirs of their bodies, would, under the rule in Shelley's Case, vest in them a fee tail, converted by the Virginia statute into an estate in fee simple. *Hood v. Haden*, 82 Va. 588.

By a devise to a daughter for life, then to the heirs of her body, and so to her and her heirs forever, it was held that she took an estate in tail general. *Den ex dem. Pinkerton v. Laquear*, 4 N. J. L. 301.

Under a devise of land to testator's daughter for life, the property at her death to go to the heirs of her body, it was held that the daughter took an absolute entail in the lands devised, and having died leaving issue of the marriage, her husband was entitled to a life estate in the land as tenant by the curtesy. *Cooper v. Coursey*, *supra*.

In *Ambrose v. Hodgson*, 3 Bro. P. C. 416, there was a devise to testator's sister for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of the body of the sister, remainder to a second sister for life, remainder to trustees, etc., to preserve contingent remainders, etc., remainder to the heirs of the body of the second sister, remainder over. The first sister died in the lifetime of the testatrix, leaving a daughter. The second sister, after the death of the testatrix, entered upon the property and suffered a recovery, and contracted to sell the property, the purchaser refusing to complete his purchase, on the ground that the sister had only a life estate. The court was of the opinion that if the first sister had survived the testatrix, she would have taken an estate for life in the premises devised to her, not merged in the devise to the heirs of her body; but that by that devise an estate tail in remainder would have vested in her, and that consequently her daughter took no estate under the will of the testatrix, but that the second sister took an estate for life in all the devised premises not merged by the devise to the heirs of her body; but by that devise an estate tail in remainder vested in her. The court decreed that the purchaser should pay the purchase price.

XIV. Being a more ambiguous word than "heirs," the presumption as to its meaning is much weaker, and more easily overcome.¹⁸

When an estate is given to one and his issue, or to one for life and after his death to his issue, the donor either means the issue in indefinite succession, or he means the issue that may be in *esse* at a particular

period. To give the latter meaning to the word there must be an explanatory or restrictive context, for the natural import of the word is the enlarged sense. He who assumes that it is used in the limited sense must show the qualification, and wherein such qualification exists.¹⁹

The word "issue" is no doubt well settled

¹⁸ For the effect of modifying or explanatory words as applied to this term, see *infra*, XIV. a, 4; b, 4; c, 4; d, 4; XV. c, 3; XIX. c.

The word "issue" is one of doubtful import. Its legal sense is one of very general signification, and includes all persons having a common ancestry. Its true interpretation must be found from the connection in which it is used,—*noscitur a sociis*. It may be used in the sense of heirs, and if, from its connection and association with words of reference, it is plain that it is used in that sense, it must be so taken. Thomas v. Higgins, 47 Md. 439.

The word "issue" must *prima facie* be taken to be used in its ordinary sense, embracing all future descendants, and be construed as a word of limitation of the inheritance, equivalent to the technical expression "heirs of the body." Bradley v. Cartwright, 36 L. J. C. P. N. S. 218, 25 Eng. Rul. Cas. 661.

The word "issue" in a deed is *designatio personarum*, always a word of purchase. Markley v. Singletary, 11 Rich. Eq. 393. To the same effect, Martling v. Martling, 55 N. J. Eq. 771, 39 Atl. 203.

Issue is primarily a word of limitation; and while the context may show that it is used as a word of purchase, it will not be so construed unless other language of the will requires it, to carry out the manifest intention of the testator. Arnold v. Muhlenberg College, 227 Pa. 321, 76 Atl. 30.

In *Doe ex dem. Cooper v. Collis*, 4 T. R. 294, Lord Kenyon, Ch. J., said that the proposition to be collected from the cases is that in a will the word "issue" is either a word of purchase or of limitation, as will best answer the intention of the deviser, though in the case of a deed it is universally taken as a word of purchase.

Where lands are to be settled to one for life, and to the heirs of his body, it was said in *Meure v. Meure*, 2 Atk. 265, that there is no case where such a limitation has not been held to be an estate tail, and that, on the other hand, there is no case where it is to be settled to one for life, and after his death to the issue of his body, that such a limitation has not been construed an estate tail.

In *Haddelsey v. Adams*, 22 Beav. 266, it was conceded that if estates were limited simply to granddaughters for life as tenants in common, with remainder to the issue male of the granddaughters successively, lawfully to be begotten, and in default of such issue, remainder to the right heirs of the testator, that such estates would coalesce, so as to give an estate tail to the 29 L.R.A. (N.S.)

granddaughters. The court said that there can be no question that the word "issue" is not so strong a word as "heirs," but that the general meaning of the word "issue" is that it is a *nomen collectivum*, and includes all, that is, the whole class of descendants; that it may undoubtedly be cut down if the testator in his will shows a plain intention that he intended it to be cut down; but that, in the absence of any such plain intention, the general effect must be given to it, and it must be held to be a word of limitation.

¹⁹ Moore v. Paul, 7 Rich. Eq. 362.

Courts have applied the rule more liberally where the devise is to the heirs or heirs of the body, than where it is to the issue of the first taker. The latter is regarded as a term of equivocal import, being either a word of limitation or of purchase, meaning heirs of the body, or children, according to the intention of the testator, deduced from the expressions contained in his will. *Shreve v. Shreve*, 43 Md. 382.

There is less reluctance to narrow the *prima facie* meaning of the word "issue" than of the words "heirs of the body," because these latter words are proper technical words of limitation, while issue is not when used in a deed; and accordingly in a will it is to be construed as a word of purchase or of limitation, as will best effectuate the intention of the testator, gathered from the entire instrument. *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565.

A statement in *Kavanagh v. Morland, Kay*, 16, that "the word 'issue' is a word which *prima facie* would be taken as equivalent to 'heirs of the body,' but, in construing the word 'issue' by other expressions in the will, the courts have, in applying the rule in Shelley's Case to these limitations, considered that word more flexible than 'heirs of the body,'" was approved in *Whitelaw v. Whitelaw*, Ir. L. R. 5 Eq. 120.

While the rule is held to apply as well to wills as to deeds, the words "issue of his body" are more flexible than the words "heirs of his body," and the courts more readily interpret the former as the synonym of children, and a mere *descriptio personarum*, than the latter. The word "issue" is not *ex vi termini* within the rule in Shelley's Case. It depends upon the context whether it will give an estate tail to the ancestor. *Daniel v. Whartenby*, 17 Wall. 639, 21 L. ed. 661.

The word "issue" may mean lineal descendants of a person, or it may mean his children, or it may mean some particular defined class of lineal descendants, to be ascertained by reference to a time or event. In wills the first is the *prima facie* meaning,

to be *prima facie* a word, not of purchase, but of limitation, equivalent to "heirs of the body."²⁰ It has been said that "the word 'issue' is well adapted for a word of limitation, having much more aptitude for such an use than it has to designate the objects of a gift. In signification it very nearly resembles the technical phrase 'heirs of the body,' and indeed the two were used as synonyms in the statute *de donis*. Hence it has long been settled that when real estate is devised by one or more limitations in the same will to a person and his issue, the word 'issue' will be construed as a word

of limitation, so as to give the ancestor an estate tail, unless there are expressions in the will unequivocally indicative of a contrary intention. It may be that less is required to overcome the primary meaning of the word 'issue' when used in a will than would be necessary to destroy the force of the technical words 'heirs of the body,' but it cannot be regarded as a word of purchase, unless the context clearly shows that the testator intended to use it in the abnormal and restricted sense of 'children,' 'sons,' 'daughters,' etc." ²¹

and justly so; for if a testator meant to say children, or sons, or daughters, it is easy to do so; and his using the word "issue" implies that he confined his meaning to that class of issue unless the contrary be clearly shown. In devises of real estate, therefore, to a man and his issue, without more, since a man cannot take concurrently with his issue, in this sense, as a class, "issue" has always been held *ex necessitate* to be equivalent to "heirs of the body," and treated as a word of inheritance, not of purchase, thus letting in the rule in Shelley's Case with all its consequences whenever it would apply if the more technical words "heirs of the body" had been used instead. *Sandes v. Cooke*, Ir. L. R. 21 Eq. 445.

²⁰ It will, however, be interpreted as meaning children when that interpretation is required, either by the context, or from superadded limitations. The same may indeed be said of the more technical expression "heirs of the body," which may be read as "children" if the testator has sufficiently expressed his intention that that shall be done. The word "issue" is, however, said to be a more flexible expression than "heirs of the body," and will more readily be diverted by force of the context or superadded limitations from its *prima facie* meaning than the term "heirs of the body." *King v. Evans*, 24 Can. S. C. 356.

The word "issue" in a will *prima facie* means "heirs of the body." *Peirce v. Hubbard*, 152 Pa. 18, 25 Atl. 231.

The word "issue" used in a will means *prima facie* the same thing as "heirs of the body," and in general is construed as a word of limitation; but this construction will give way if there be on the face of the instrument sufficient to show that the word was intended to have a less extended meaning, and to be applied only to children, or to the descendants of a particular class, or at a particular time. *Kleppner v. Laverty*, 70 Pa. 70; *Robins v. Quinliven*, 79 Pa. 333; *Parkhurst v. Harrower*, 142 Pa. 432, 24 Am. St. Rep. 507, 21 Atl. 826; *McCann v. McCann*, 197 Pa. 452, 80 Am. St. Rep. 846, 47 Atl. 743; *Hill v. Giles*, 201 Pa. 215, 50 Atl. 758.

The word "issue" standing alone in a will, that is, without some unequivocal contrary intent apparent, is to be taken as a word of 29 L.R.A. (N.S.)

limitation, similar in import with "heirs of the body;" and if an estate be limited to a man and his issue, he will take an estate tail which, under the statute abolishing such estates, was turned into a fee simple. *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

The word "issue" in a will *prima facie* means the same thing as "heirs of the body," and is to be construed as a word of limitation; but this *prima facie* construction will give way if there be on the face of the will sufficient to show that the word was intended to have a less extended meaning and to be applied only to children, or to the descendants of a particular class, or at a particular time. Though, however, the rule thus stated is perfectly simple, yet its application is often very difficult. The real question in each particular case is, what are the circumstances which are to be considered sufficient to indicate that the word has been used in a restricted sense. Indeed, the rule itself is not more applicable to the word "issue" than it is to the words "heirs of the body," or indeed to any other words which can be suggested. In all cases the *prima facie* import of words used by a testator is liable to be controlled or modified by the context. *Slater v. Dangerfield*, 15 Mees. & W. 263.

The word "issue" is a word which *prima facie* may be taken to be equivalent to a limitation to the heirs of the body, but, in controlling the word "issue" by other parts of the will, the courts have leaned more to the controlling and cutting down effect of this word "issue" than of the words "heirs of the body." *Kavanagh v. Morland*, 18 Jur. 185.

The word "issue" in wills may be taken either as a word of purchase or limitation, as will best answer and promote the intention of the testator. *Paxson v. Leferts*, 3 Rawle, 59.

²¹ *Angle v. Brosius*, 43 Pa. 189.

In Maryland, even before the act of 1862, chap. 161, the rigidity with which the rule was applied elsewhere seems to have been somewhat relaxed, and it was held that the word "issue," used in a will, is sometimes a word of limitation and sometimes of purchase, according to the context of the devise and the apparent intention of the testator. There can be no doubt that where the testator manifested an intention to give

XIV. Qualified limitations.**a. Effect of words of distribution.****1. In general.**

Upon passing to the consideration of the effect of qualifying or explanatory words upon limitations to the heirs, heirs of the body, or issue of the life tenant, it must be remembered that this question has, strictly speaking, nothing to do with the rule in Shelley's Case. Whenever there are modifying words the question is: In what sense was the word "heirs" or "issue" used? Did the author of the instrument mean the whole line of the life tenant's heirs, or not? Did he mean a limited portion of the heirs? Did he mean children? Such questions may arise even in jurisdictions where the rule in Shelley's Case is not in force. No attempt has been made therefore to collect all of the cases dealing with the qualifying effect of these modifying words, as this would take the inquiry into a field far beyond the legitimate scope of this note. When it is said that modifying words will

or will not affect the operation of the rule in Shelley's Case, all that is meant is that the modifying words do or do not show that technical words were used in their technical sense. The complications and conflicts which arise on this point should not be charged to the rule in Shelley's Case.

If the limitation to the heirs, heirs of the body, or issue, etc., is accompanied by words of distributive modification, such as "share and share alike," "tenants in common," etc., the question arises whether the author of the instrument intended that the property be divided at once at his death, or desired that it go to the remaindermen in indefinite succession. It has generally been held that when such words of distribution alone are added to the limitation to the remaindermen, this modification will not have the effect of changing words that are ordinarily words of limitation to words of purchase; that is, they are held not to indicate that the grantor or testator intended to use them as words of purchase. For example, under a limitation to A for life, remainder to his heirs, the word "heirs" is to be taken as a word of limitation under the rule in Shel-

to the first taker only an estate for life, and uses the words "issue," "son's children," or "descendants," the case will be withdrawn from the operation of the rule. *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72.

The term "issue" may be employed either as a word of purchase or of limitation, as will best effectuate the testator's intention; and it is much more flexible than the words "heirs of the body." Courts more readily interpret the word "issue" as the synonym of "children," and as a mere description of the person or persons to take, than they do the words "heirs of the body." *Timanus v. Dugan*, 46 Md. 418. To the same effect, *Parkhurst v. Harrower*, 142 Pa. 432, 24 Am. St. Rep. 507, 21 Atl. 826.

The word "issue" in a devise will not necessarily bring the case within the rule in Shelley's Case, since it is sometimes a word of limitation and sometimes of purchase in a will, according to the context. *Lyles v. Digges*, 6 Harr. & J. 364, 14 Am. Dec. 281.

Notwithstanding there may have been some diversity of opinion among judges whether the word "issue" has any precise technical meaning affixed to it or not, and if it has, whether it be that of a word of limitation or of purchase, they all seem to agree that in a will it should be taken to signify the one or the other, as will best comport with the intention of the testator. *Wells v. Ritter*, 3 Whart. 217.

The word "issue" in a will is either a word of purchase or of limitation, as will best effectuate the intention of the testator. It is sometimes singular and sometimes plural, sometimes a word of limitation, sometimes of purchase, but must always be 29 L.R.A. (N.S.)

construed according to the intention of the will or deed wherein it is used; and it is said to be a rule that when the ancestor takes an estate of freehold, if the word "issue" in a will comes after, it is a word of limitation. *Smith v. Chapman*, 1 Hen. & M. 240.

The word "issue" in a will is to be construed either as a word of limitation or of purchase, as will best effectuate the intention of the testator, gathered from the entire instrument. *Prima facie*, however, the word means "heirs of the body," and is to be construed as a word of limitation, and not of purchase, unless there be something on the face of the will showing that it was intended to have a less extended meaning, and to be applied to children only, or to a particular class, or at a particular time. *Shalters v. Ladd*, 141 Pa. 349, 21 Atl. 596. To the same effect, *Peirce v. Hubbard*, 152 Pa. 18, 25 Atl. 231.

If it appears either by expression or by clear implication that by the word "issue" the testator meant children or issue living at a particular period, as at the death of the first taker, and not the whole line of succession, which would be included under the term "heirs of the body," it must necessarily be construed as a word of purchase. *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565.

In *Potts's Appeal*, 30 Pa. 169, where a limitation in a will after the life estate was to the issue, the life tenant was held to take an estate tail in real property.

And in *Rancel v. Creswell*, 30 Pa. 158, a limitation in a will to the issue of testator's son at the latter's death was held to give the son an estate tail.

ley's Case, that is, it is deemed to have been used in its technical sense. But the mere fact that to such a limitation are added the words "share and share alike"—as where the limitation is to A for life, remainder to his heirs share and share alike—does not overcome the presumption that the word "heirs" was used in its technical sense. It would seem that there is much more reason why it should do so, under the laws of descent in England, where the male blood in order of birth is preferred, than under the laws of descent in this country, where such preference is not made.²²

2. As qualifying the word "heirs."

The added words "share and share alike" referring to the word "heirs" in a limitation in a deed after a life estate will not be sufficient to take a conveyance out of the rule.²³ And although the word "remaining" may have been used in the sense of surviving heirs in a deed to a woman for life, "then to be distributed equally between her remaining heirs," it does not so limit the word "heirs" as to take the grant out of the operation of the rule.²⁴

There is a conflict as to the effect of words

²² Words of distribution, such as "tenants in common," or "equally to be divided," or "in case of one child, that child to take," without superadded words of inheritance, do not prevent the general rule from taking effect. *Baron Watson in Roddy v. Fitzgerald*, L. R. 6 H. L. Cas. 823.

Where the gift to the issue is accompanied with words of distributive modification, while this is a strong indication of an intent to give an estate to the issue by purchase, it is not sufficiently strong to overcome the prima facie meaning of the rule, and this is true where the gift to the issue is a fee or in tail. *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

One of the settled rules is that the fact of the gift in remainder being to the heirs of the body as tenants in common is not such a circumstance as will alter the construction. *Mills v. Seward*, 1 Johns. & H. 733.

While words of distribution coupled with words of superadded limitation may show that the word "heirs" is used as a word of purchase, words of distribution by themselves, or words of superadded limitation by themselves, will not. *Keys's Estate*, 4 Pa. Dist. R. 134.

In *Blackwell v. Hale*, 1 Ir. C. L. Rep. 612, it was held that a provision that the issue should take as tenants in common would not prevent the word "issue" from being construed as a word of limitation.

Estates tail are not embraced in the Pennsylvania intestate law of 1883, so as to bring a limitation in remainder to the children of the testator's daughter, and the children of her deceased children to take as tenants in common, within the rule, on the theory that what would have been the share of the deceased parent is in accordance with the statutory rules of lineal descent. The direction that they should take distributively, therefore, is not equivalent to a direction that they should take as heirs. *Guthrie's Appeal*, 37 Pa. 9.

²³ *Carson v. Fuhs*, 131 Pa. 256, 18 Atl. 1017.

In a grant of land to a woman for life, to descend to her heirs in equal portions, it was held that the words subsequent to the grant of the life estate were at most sufficient only to raise a doubt as to the meaning of the granting words of the deed, and 29 L.R.A. (N.S.)

that this was not sufficient to take the grant out of the rule in *Shelley's Case*. *Taney v. Fahndley*, 126 Ind. 88, 25 N. E. 882.

But in *Hadlock v. Gray*, 104 Ind. 596, 4 N. E. 167, the devise was to a husband and wife for life, and, after the death of both, to be equally divided between their heirs. The court said that when the word "heirs" is used as it was in this instance, it does not designate those who shall take in indefinite succession, but designates persons who shall take the remainder as soon as the life estate ends, the word meaning heirs apparent, and not heirs.

It will be observed, however, that in the last-mentioned case the limitation is to the heirs of a husband and wife, which might more readily be taken to mean children, than similar words in a limitation to an individual.

In *Tucker v. Adams*, 14 Ga. 548, a conveyance of property to a woman and her husband "for and during their existence in this world," and, after their deaths, to be equally divided among and between the lawful heirs of the body of the wife, etc., was held not to be within the rule in *Shelley's Case*, because the deed contained a direction to distribute among several not constituting the heirs; that by the law of England there could generally be but one heir at a time, so that the "several" persons meant by the plural word "heirs" could not "constitute an heir."

²⁴ *Davenport v. Eskew*, 69 S. C. 292, 104 Am. St. Rep. 798, 48 S. E. 223. The court said that "when a grant or devise is to surviving children or surviving issue, as distinguished from children or issue generally, it is manifest that the intention is to take a particular class from a general class,—to include those children or issue who survive, and exclude those who do not. The word 'surviving' in such case has a qualifying effect. . . . But there can be no heirs except surviving or remaining heirs, and hence these words have no effect when used, as in this case, in connection with the general term 'heirs.'"

In a deed of land to a woman for life, "then to be distributed equally between her remaining heirs," it was held that the words "to be distributed equally" did not prevent the operation of the rule. *Ibid*.

of distributive modification following the word "heirs" in a will.²⁵ In all cases of this character, however, it is well to observe closely whether there is not other language in the will which helps the court to reach its conclusion; for of course the object of

the court always is to determine the intention of the testator from the whole language of the will. By the weight of authority words of distributive modification do not affect the operation of the rule.²⁶ The cases collected under this subdivision

²⁵ A devise to the use of testator's son for life and to his heirs to the third generation, the property then to be sold and divided equally among the son's heirs, was held to pass a fee to the son. *Stigers v. Dinamore*, 193 Pa. 482, 74 Am. St. Rep. 702, 44 Atl. 550.

Where the remainder was to the heirs and the life tenant, and, by a subsequent clause, the testator provided that it was his will that if any of the heirs should die leaving no lawful issue, their share or shares should be divided equally among the surviving heirs of the testator, it was held that such words of distribution did not signify that the testator meant to use the word "heirs" as synonymous with children, so as to take the devise out of the rule in *Shelley's Case*. *Kennedy v. Kennedy*, 29 N. J. L. 185.

And in *Cockin's Appeal*, 111 Pa. 26, 2 Atl. 363, it was held that a devise of real property to the testator's three nieces, share and share alike, during their lives, and at their deaths to go to their heirs in equal amounts, to all heirs living at the time of their deaths, was not taken out of the rule in *Shelley's Case* by the words "to go to their heirs in equal amounts, to all heirs living at the time of their death," the court on appeal saying that it was clear that the doctrine of survivorship as incident to joint tenancy could have no application in the case.

A devise of real estate to testator's daughter, to be held and controlled by her during her life, and after her death to be divided in a legal manner among her heirs, was held to give the devisee an estate in fee simple under the rule in *Shelley's Case*. *Hall v. Trull*, 21 Canadian Law Times, 665.

But under a devise to two sons during the full term of their natural lives, the will providing that if either of the sons should die not leaving heirs, the issue of his own body, his surviving brother should inherit his share of the lands for the time being, and after the death of both of the sons that the land should be sold and the proceeds of each share be equally divided among and given unto their respective lawful heirs then surviving them, share and share alike, it was held that the sons took joint estates for life, with remainder in fee to the persons answering the description of heirs of each son at the death of the survivor, the rule in *Shelley's Case* not being applicable, since by the will the point of time for the distribution is fixed. *Haight v. Dangerfield*, 5 Ont. L. Rep. 274.

And in *Bull v. Comberbach*, 25 Beav. 540, in a devise of freeholds to several persons equally for life, the will providing that after the death of the survivor the property be sold and the money equally divided among

their several heirs, the word "heirs" was held to have been used in the sense of children.

²⁶ In *Moore v. Brooks*, 12 Gratt. 135, a testator provided that the shares of his estate given to his two daughters be held by them for life, and no longer, and that the property then be equally divided between their heirs lawfully begotten. It was held that the words "equally divided between their heirs" did not convert the word "heirs" into a word of purchase. The court said that in England these words "were entitled to more consideration as indicating an intent that the estate should not pass according to the law of descents. With us, where estates tail are converted into estates in fee simple, and the doctrine of primogeniture is abolished and the general sentiment is in favor of an equal division amongst those standing in the same relation, the inference would be that the testator by the use of these words intended that they should take as heirs, rather than in any other character."

The words "share and share alike," in a devise to one for life and then to his heirs forever, do not take it out of the rule. *Bullock v. Waterman Street Baptist Soc.* 5 R. I. 273.

Under a devise to a trustee for a woman during life, and at her death to descend and be equally divided among her heirs, she takes the fee by the rule in *Shelley's Case*. *McQueen v. Logan*, 80 Ala. 304.

Where a devise is to a daughter for life and after her death to her heirs, the additional words "share and share alike" do not have the effect of converting the devise into one for life to the daughter, with remainder to the heirs as purchasers. *Sims v. Georgetown College*, 1 App. D. C. 72.

A devise to a trustee for the benefit of testator's daughters during their lives, with the fee simple to the heirs of said daughters, to be divided equally, was held to convey to them a fee simple absolute. *Kiersted v. Smith*, 8 Ohio N. P. 378.

A devise to a daughter for life, providing that immediately after her death the property should be and belong to all her legal heirs, share and share alike, was held to vest a fee in the daughter. *Steiner v. Kolb*, 57 Pa. 123.

A devise to a person for life, and to his heirs after his death, to be divided among them according to law, and if any of the heirs of the testator die leaving no lawful issue, then their share or shares to be divided equally among the surviving heirs of the testator, is within the rule in *Shelley's Case*. *Kennedy v. Kennedy*, 29 N. J. L. 185.

A devise to one for life, remainder to his surviving sisters, and in case none of his

of the note are brought together, however, for the purpose of showing what position the courts take where there are words of distributive modification added to the words of limitation in remainder, and nothing else from which the intention can be discovered.

3. As qualifying the words "heirs of the body."

Where the limitation in a deed is to the heirs of the body, the cases seem to hold that the addition of words of distribution converts the words "heirs of the body" into words of purchase.²⁷ Here, again, however, the whole instrument must be carefully examined, to determine whether some other word or words may not have some weight in determining the intention of the grantor.

The cases are not in harmony on the question of the effect of words of distribu-

tive modification following limitations to the heirs of the body in wills. Here, also, the search for the testator's intention must include an examination of the whole will, but it would seem to be the better opinion that words of distributive modification alone do not affect the operation of the rule in Shelley's Case. In the leading case of *Jesson v. Wright*, a devise to the testator's sister's son for life, and after his death to the heirs of his body in such shares and proportions as he, by deed or other writing, should direct, and for want of such direction then to the heirs of the body of the said son issuing, share and share alike, as tenants in common, and if but one child, the whole to such child, and for want of such child, then to the testator's right heirs forever, was held to create an estate tail in the first devisee.²⁸

But by the words "heirs of the body"

sisters survive him, then to his legal heirs, in equal proportions, was held, after the death of his sisters, to vest the fee in him under the rule in Shelley's Case. *McNeal v. Sherwood*, 24 R. I. 314, 53 Atl. 43.

In a devise to a woman for life, and after her death equally to be divided among the male or female heirs lawfully begotten of her body, and for want of such heirs, over, it was held that the words "equally to be divided," did not keep the daughter's interest down to an estate for life. *Doe ex dem. Ross v. Toms*, 15 N. C. (4 Dev. L.) 376.

A devise to testator's grandson for life, and after his death to his lawful heirs, to be equally divided, was held not taken out of the operation of the rule by the words "to be equally divided." *Williams v. Foster*, 3 Hill, L. 193.

²⁷ In *Tucker v. Adams*, 14 Ga. 548, the court, after reviewing the English cases, said that they showed that a gift to A for life, with remainder to the heirs of his body, to be equally divided among them, and without a limitation over on a failure of heirs, did not make an estate tail in A, and that it was not within the rule in Shelley's Case.

A grant of land to a woman for life, and after her death "to be equally divided between the lawful heirs of her body," is not within the rule, the words "to be equally divided" indicating that the words "heirs of the body" were used as words of purchase. *Fields v. Watson*, 23 S. C. 42.

In a grant of property providing that it was not to be traded or sold, but that the produce of the same was to go to the support of a woman and her family during her natural life, and at her death to be equally and impartially divided between her bodily heirs, the consideration for which was expressed to be the affection of the grantor for the devisee and her four children, naming them, and the duty which he owed to them, it was held that the words "bodily heirs" were used in the sense of children, and that therefore the rule in Shelley's Case could not apply. *Simonton v. White*, 93 Tex. 50, 77 29 L.R.A. (N.S.)

Am. St. Rep. 824, 53 S. W. 339, reversing on another point 49 S. W. 269.

In the last-mentioned case, however, the word "bodily" seems to have had more influence on the decisions, than the words of distributive modification.

²⁸ 2 Bligh, 1, 10 Eng. Rul. Cas. 714.

The words "share and share alike" following the devise to J. & E. for their lives and that of the survivor, and then to the heirs of the body of E. by J., were held not to show that the parents were to take for life only and the children as purchasers. And the fact that there was not a subsequent limitation "for want of such issue," as in the last-mentioned case, was held to make no difference. *Doe ex dem. Atkinson v. Featherstone*, 1 Barn. & Ad. 944.

But in *Tucker v. Adams*, supra, the court was of the opinion that the last-mentioned case was not good authority, declaring that in its whole length it was not supported by a single case, while it was opposed by a long line of cases.

Where the devise was to a woman for life, and after her death to the heirs of her body, to take the freehold and inheritance as tenants in common, and in default of such heirs of the body, to the testatrix's own right heirs, the court said that if this were not held to be an estate tail in the devisee, it would amount to overruling *Jesson v. Wright*, supra. *Anderson v. Anderson*, 30 Beav. 209.

In *Doe ex dem. Bosnall v. Harvey*, 4 Barn. & C. 610, under a devise of one seized in fee of lands in gavelkind of all his real estate to his nephew A for life, then to trustees to preserve contingent remainders, etc., and after the death of A to and amongst all and every the heirs of the body of A, as well female as male, such heirs, as well female as male, to take as tenants in common, and not as joint tenants, and in default of such issue, over,—it was held that A took an estate tail in the premises; and the fact that the testator directed that females should take as well as males, and that they

the testator was held to have meant "children," in a devise of a portion of his estate to trustees to pay over to his daughter for her sole and separate use during her natural life the income thereof, and at her decease the principal to be given equally to and among all the heirs of her body if she should have any; the children or descendants of any one of her children who may be dead to take collectively what their parent or ancestor would have been entitled to if living, and if any die before their mother, without issue, the share or shares of such to go to the survivor or survivors, or their issue, in the same manner, and in default of such heirs equally to her brothers and sisters and their heirs.²⁹

4. As qualifying the word "issue."

Where after a limitation in a deed, following a life estate, to the lawful issue of the life tenant, it was declared that the issue of the life tenant should take distributively as tenants in common, it was

should all take as tenants in common, and that the females could not take gavelkind lands at all by descent, and that the heirs of the body could take only as coparceners, and not as tenants in common, was held not to affect the operation of the general rule that where, in a deed or will, there is a limitation of an estate of freehold to a man, and afterwards to the heirs of his body, so as to give it to the heirs as a denomination or class including the whole line of heirs, the words "heirs of the body" are to be construed as words of limitation, and the heirs then take by descent.

Where the devise was as follows: "I lend to my daughter Sarah during her natural life, and at her decease to be equally divided between the heirs of her body, the following land," it was held that the words "equally divided" did not prevent the application of the rule in Shelley's Case. *Holt v. Pickett*, 111 Ala. 362, 20 So. 432.

A devise to testator's daughter for life, at her death to be equally divided among the heirs of her body, is within the rule. *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522.

²⁹ *Clemens v. Heckscher*, 185 Pa. 476, 40 Atl. 80.

And a limitation over, after a life estate to testator's widow, being in these words, "at her decease what remains to be sold and equally divided among the lawful heirs of her body," it was held that the words "heirs of her body," as thus used, were words of purchase, and not of limitation according to the rule in Shelley's Case, because by reason of the direction "what remains to be sold and equally divided" the persons indicated to take as heirs of her body did not take the same estate in like manner as they would have taken had the

held that this language did not describe particular persons as individuals to take in their own right, and not under tenancy in tail, since there might be a tenancy in common in tail.³⁰

Words of distributive modification added to limitations in wills to the issue of the life tenant have been held to show that the testator intended to use the word "issue" as a word of purchase; and it has been so held where, in addition to the words of distributive modification, there was a limitation over to another upon failure of issue of the life tenant.³¹

b. Effect of superadded words of limitation.

1. In general.

By weight of authority, limitations superadded to words of limitation do not show that the original words of limitation were not used in their technical sense. For example, the rule in Shelley's Case applies, of

life tenant taken the absolute estate. *Thompson v. Mitchell*, 57 N. C. (4 Jones, Eq.) 441.

³⁰ *Kingsland v. Rapelye*, 3 Edw. Ch. 1.

³¹ In *O'Rourke v. Sherwin*, 156 Pa. 285, 27 Atl. 43, the word "issue" was held used in the sense of children, in a devise to a daughter and sons as tenants in common for their natural lives and the life of the survivor of them, with remainder in fee to their issue, said issue to take *per stirpes* and not *per capita*, so that in case of the death of either of the said three leaving issue, the said issue would take what their parent would have been entitled to, subject to the life estate of the survivor or survivors of the original devisees.

A devise of land to a woman for life without power of sale, and in case she should die leaving issue of her body surviving, her property to go to such issue, share and share alike, was held to create a life estate in the first taker, the words "issue of her body" clearly indicating that those who came from her body and who should be living at her death, and those only, were to take, and that if she were to die without issue, her heirs were not intended to have the estate, but that the estate would revert to the heirs of the testator. *McDonnell's Estate*, Myrrick Prob. Ct. Rep. (Cal.) 94.

Under an act (1874, chap. 204, § 12) providing that a devise of land shall be held to be a devise in fee simple unless such devise shall in plain and express words show that the testator intended to convey an estate of less dignity, the words "to be equally divided" in a devise of property to a man for life, and should he leave lawful issue, then to be equally divided between his lawful issue, were held to have the effect of preventing the first taker from having the

course, to a limitation to A for life, remainder to his heirs or to the heirs of his body; it is also held to apply where the limitation is to A for life, remainder to his heirs or the heirs of his body, "and their heirs," etc., since these superadded words of limitation are not deemed to show that a new course of descent is to begin with the heirs of the life tenant; in other words they do not overcome the presumption that the whole line of A's heirs was meant, or, in short, they do not overcome the presumption that the word "heirs" was used in its technical sense. In one case the limitation in remainder is to A's heirs; in the other case, it is to A's heirs "and their heirs." The question is whether the author of the instrument, by adding the limitation "and their heirs," etc., to the limitation to A's heirs, intends the descent to begin at the heirs of A living at his death, instead of at A, as it would if no qualifying words were used. If the limitation had been to A for life, remainder to B and C and their heirs, unquestionably B and C would take as purchasers, because the inheritance would begin at B

and C. If, then, instead of a limitation to A for life, remainder to B and C and their heirs, the limitation is to A for life, remainder to the heirs of A and their heirs, does the grantor mean the descent to begin at the heirs of A living at his death, as it would begin at B and C in the other case, or, in the language of the cases, are the heirs of A living at his death intended to be the original stock, the *stirpes* from which the inheritance springs? The mere addition to the limitation to A's heirs, of the words "and their heirs," called in the cases, superadded words of limitation, would seem to furnish very slight evidence to overcome the presumption that the word "heirs" in the original limitation to the heirs of A was used in its technical sense. They would appear to furnish a weaker indication of the intention, than words of distributive modification, such as share and share alike, tenants in common, etc. And the better opinion is that words of limitation superadded to words of limitation do not of themselves indicate that the original words of limitation were not used in their technical sense,²²

absolute estate, and to give him an estate for life, and then to the issue distributively as tenants in common by purchase, in the same way that these words do in a bequest of chattels. *Ward v. Jones*, 40 N. C. (5 Ired. Eq.) 400.

In a bequest of chattels the words "to be equally divided between the issue" make an exception to the general rule, and prevent the vesting of an absolute estate in the first taker, it being inferred from these words that the testator could not intend that the issue should take as issue, but that they should take distributively as purchasers, so as to give the first taker an estate for life and then to the issue as tenants in common; and it would seem to follow as a corollary that like words of distribution used in a devise of land would have the effect of creating a tenancy in common or a distribution *per capita* among the heirs, heirs of the body, or issue, of a life tenant. *Mills v. Thorne*, 95 N. C. 362.

In *Hill v. Giles*, 201 Pa. 215, 50 Atl. 758, there was a devise to testator's niece for life, the will providing that at her death the property should be inherited by her surviving issue, share and share alike, and directing that at the death of the niece, failing issue, the property should go to children of testator's brother. It was said that the word "issue" in the will meant the descendants of the niece at a particular time, that is, at the time of her death, and that this, together with the direction of the distribution in equal shares among such descendants, would seem to be sufficient to indicate that the word "issue" in the last paragraph was not a word of limitation, but a word of purchase.

In *Corbett v. Laurens*, 5 Rich. Eq. 301, lands were devised in trust for the use of

a woman for life, and at her death in trust for the use of her lawful issue, to be equally divided among them, share and share alike, and in default of issue then alive, over. It was held that she took an estate for life with contingent remainder to her surviving issue.

It will be observed that in the two last-mentioned cases, in addition to words of distribution, there was a limitation over on failure of issue. For the effect of such limitations, see *infra*, XV.

²² Superadded words of limitation have never of themselves been held sufficient to convert the words of limitation to which they are added into words of purchase. The most that can be said of them is that they are superfluous. They are not inconsistent. *Nice's Appeal*, 50 Pa. 143.

The addition of the words of inheritance, "their heirs and assigns," to the limitation to the heirs of the body of the life tenant, and the further words, "in fee simple," do not alter the legal significance of the limitation. *Re Brand*, 4 Ont. Week. Rep. 473, opinion adhered to on further argument in 5 Ont. Week. Rep. 297.

The addition of the ordinary words of inheritance, "and their heirs," makes no difference even though appended to the words "heirs of the body." *Evans v. Evans* [1892] 2 Ch. 173.

Words of limitation added to the first words of limitation to the heirs or heirs of the body of the first taker are sometimes held not to prevent the application of the rule in *Shelley's Case*, where the superadded words are similar to the first words, and may be understood as being used in the same sense. *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486.

When to the word "heirs" are superadded

unless the superadded words are such as to change the course of descent.³³

2. As qualifying the word "heirs."

If a man be enfeoffed to the use of himself for life, the remainder to another for

life, the remainder *ad usum hæredum vel hæredum* of his body, and *usum hæredis talis hæredis vel hæredum*, and if dying without issue of his body, the remainder over, etc., in that case the heir takes by descent.³⁴ But where lands were limited by deed to the use of a man and his assigns

the words of limitation, "for them and their heirs," the limitation will still be construed within the rule in Shelley's Case. *Ham v. Ham*, 21 N. C. (1 Dev. & B. Eq.) 598.

When the gift to the heirs of the body is followed by the superadded words of limitation, "and to their heirs and assigns," this has no effect in displacing the operation of the general rule. *Mills v. Seward*, 1 Johns. & H. 733.

But in North Carolina the superaddition of like words to the limitation to the heirs or heirs of the body or issue prevents the application of the rule. *Mills v. Thorne*, 95 N. C. 362.

And in *Kavanagh v. Morland*, 18 Jur. 185, it was held that if there be a limitation to A for life, and then a gift to his issue, with words of limitation superadded, as, to his issue and their heirs, and the like, the current of authority has been to treat the issue as purchasers, and to give them the whole estate under the words of limitation.

And in *Brown v. Brown*, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81, it was held that the rule does not apply when the limitation is to the heirs or issue of the first taker and to their heirs, for in such cases there is evinced a purpose to create in the heirs of the first taker an estate in fee simple.

³³ Any superadded word that would change the course of indefinite succession implied by the word "heirs" in its technical sense takes the case out of the operation of the rule, as, for instance, in England when the gift is for life, remainder to the heirs female, for that is a change of the course of descent. *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455.

Mr. Jarman in his treatise on Wills, 6th ed. vol. 2, p. 1208, says: "If the superadded words of limitation operate to change the course of descent they will convert the words on which they are ingrafted into words of purchase, as in the case of a devise to a man for life, remainder to his heirs and the heirs female of their bodies; and the same principle, of course, would apply where a limitation to the heirs male of the body is annexed to a limitation to the heirs female, and *vice versa*; but the books contain no such case, and the doctrine rests entirely upon the position *arguendo* of Anderson in Shelley's Case, which, however, has been since much cited and recognized."

For case put by Anderson, see Shelley's Case, *supra*, II.

If, where the word "heir" is used, and 29 L.R.A. (N.S.),

there be superadded words of limitation establishing a new succession, the first donee or devisee will take but a life estate. *King v. Beck*, 15 Ohio, 559; *Kiersted v. Smith*, 8 Ohio N. P. 378.

In *Tucker v. Adams*, 14 Ga. 548, the court in referring to the case put by Anderson, as above, said that Shelley's Case established the proposition that if the word "heirs" has grafted upon it other words which will be made void if the word "heirs" he held to be a word of limitation, that word cannot be held to be a word of limitation.

Superadded words of limitation ingrafted on words of procreation will not operate to turn these words into words of purchase, unless the superadded words denote a different species of heirs from that described by the first words, thus showing an intent to break the ordinary line of descent from the first taker. *McCann v. McCann*, 197 Pa. 452, 80 Am. St. Rep. 846, 47 Atl. 743.

³⁴ *Bony v. Taylor*, 2 Rolle, Abr. 253, pl. 3.

A deed defining the estate of a grantee as "a freehold and good possession during his natural life, and his heirs and their assigns," the operative words in the habendum clause being "to him during the term of his natural life and his heirs forever," brings the grant within the rule. *Tucker v. Williams*, 117 N. C. 119, 23 S. E. 90.

In *Johnson v. Morton*, 28 Tex. Civ. App. 296, 67 S. W. 790, a deed to two grantees "during their natural lives, and after their deaths to their heirs and assigns," habendum, to them for life, and after their deaths to their heirs and assigns forever, was held to be within the rule, the court saying that the word "assigns" evidenced the intention on the part of the grantors to give the grantees power to sell and dispose of the property.

A conveyance to a trustee and his heirs to the use of himself and his heirs, in trust for the use of a woman for life, and after her death in trust for her right heirs, their heirs and assigns forever, was held to vest the fee in her. The contention in this case was that the words "right heirs" in the deed should have been taken as words of purchase, from the concurrence of the provisions for an express life estate to the woman, the contingent remainder to her right heirs, and the addition of words showing an intention to make the right heirs a new stock of inheritance or purchasers. *Danner v. Trescot*, 5 Rich. Eq. 356.

The habendum clause of a deed being "to her, the party of the second part, her heirs and assigns, during her natural life, and at her death then to belong to her bodily heirs,

for life, without impeachment of waste, with an ultimate limitation to the use of such person or persons as at his death should be heir or heirs at law, and to the heirs and assigns of such person or persons, it was held that the rule did not apply.³⁵

The words "their heirs and assigns forever" added to the limitation to the heirs of the life tenant in a will do not take the

devise out of the operation of the rule.³⁶ And a devise of property to the testator's wife and children during their natural lives, to be used and controlled by them free from all rents, and after their death to be the property "in fee simple" of their heirs, was held within the rule, so as to pass an absolute fee to the widow and children.³⁷

to have and to hold in free simple forever," the grant is within the rule. *Marsh v. Griffin*, 136 N. C. 333, 48 S. E. 735.

For discussion of effect of superadded words of limitation, see also *Shelley's Case*, *supra*, 11.

³⁵ *Evans v. Evans* [1892] 2 Ch. 173, Kay, L. J., in summing up the several indications that the words pointed to a particular person to be ascertained at the death of the first devisee, gave the following reasons to show that the words were not used as words of limitation: (1) The relief from impeachment of waste, which is usually attached to a life estate; (2) the use of the words "such person or persons;" (3) the use of the very significant expression, as, at the death of the devisee, should be "his heir or heirs at law," which he considered to point to some individual or individuals to be then ascertained, and not to the whole line of heirs *in finitum*; and added to these indications, (4) the last words, "and of the heirs and assigns of such person or persons."

Where the limitation was to the heirs of the life tenant, it was held that the additional words "by her present husband," naming him, to them and the heirs of the said life tenant and husband, their heirs and assigns forever, furnished the necessary qualification and explanation to the other preceding words to take the case out of the rule. *Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483.

³⁶ *Andrews v. Lowthrop*, 17 R. I. 60, 20 Atl. 97.

In *Myers v. Hamilton Provident & Loan Co.* 19 Ont. Rep. 358, where the devise was to testator's son for life, and after his death to his heirs and their assigns forever, it was held that the fact that there were children of the son living at the date of the devise, and that the words "their assigns" followed the word "heirs," did not make the latter word a word of purchase, and prevent the operation of the rule.

A will giving the use of certain land to the testator's daughter for life, remainder to her heirs and their assigns forever, was held to create a fee in the devisee. *Bishop v. Selleck*, 1 Day, 299.

Under the rule in *Shelley's Case*, where the devise is to the testator's son during life, and after his death to his heirs and their heirs and assigns forever, the word "heirs" is a word of limitation, and the first taker takes the fee. *Schoonmaker v. Sheely*, 3 Hill, 165, affirmed in 3 Denio, 485.

A devise of a portion of testator's estate to testator's son for life, and after his death

to his heirs and their assigns forever, vests the fee in the son, under the rule. *Manchester's Petition*, 22 R. I. 636, 49 Atl. 36. A testator by will, which took effect prior to the enactment of the Revised Statutes abolishing the rule in *Shelley's Case*, having devised lands to his son during his natural life, and after his death to his heirs and their assigns forever, it was held that the son, by the force of the rule in *Shelley's Case*, took an estate in fee in the premises, the superadded words of limitation, "and to their heirs," after the first limitation to the heirs of the testator's son, not taking the case out of the operation of the rule. *Schoonmaker v. Sheely*, 3 Denio, 485.

After a life estate, the testator gave land to the heirs of the life tenant lawfully begotten, to them and their heirs forever, and then over in case of his dying without lawful issue of his body. It was held that the superadded words of limitation, "and their heirs," did not change the course of descent into another line or channel; that they did not operate so as to convert the first words of limitation into words of purchase. *Den ex dem. Folk v. Whitley*, 30 N. C. (8 Ired. L.) 133.

Where the devise was to a nephew for life, remainder to trustees, etc., to preserve contingent remainders, remainder to the heirs male of the nephew and their heirs, the will providing that if the nephew should die without issue male living at his death, the property should go over, it was held that superadded words "and their heirs" did not make the words "heirs male" words of purchase. The court said that it was true that there were many cases where superaddition words had made the first words of limitation to be words of purchase, but all those cases were founded on *Archer's Case*, and the first limitation had been to the heir in the singular number, or the word "each" or "every" had been used, so as to be descriptive of one individual person who was to take. Mr. Ambler in his report said that this opinion was very dissatisfactory to the bar in general, and the opinion is also severely criticized by Mr. Fearn in his work on *Contingent Remainders*, p. 13. *Wright v. Pearson*, 1 Amb. 358.

³⁷ *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399.

In *Root's Estate*, 2 W. N. C. 156, real estate had been conveyed by a decedent in his lifetime to a trustee in trust to permit a person to use and occupy the same, and to receive the rents thereof during his life, the

3. As qualifying the words "*heirs of the body*."

A grant to a woman for life, with remainder to the heirs of her body, habendum, to have and to hold the premises during her life, and then to the heirs of her body and assigns forever, would at common law, under the rule in Shelley's Case, have created an estate tail in her.³⁸ And a conveyance

to a woman for life, and then to the heirs of her body in fee simple, and if at her death there are no heirs of her body, then to be divided and distributed according to the laws of descent and distribution, was held to be within rule in Shelley's Case, the first devisee taking the fee.³⁹

By a devise to a daughter for life, the property then to descend to the heirs of her body, and to their heirs and assigns for-

grantor reserving to himself a power of appointment by will, but, in default of the exercise thereof, upon the further trust to convey the premises to the heirs of the *cestui que trust* in fee simple. It was held that the heirs at law of the decedent took by descent, and not by purchase.

The rule in Shelley's Case does not apply to a devise by which a testator loans to his son his entire interest in a tract of land for life, to be his during his natural life, and in which, at the son's death, the testator gives the land to his heirs, if any, to be theirs in fee simple forever, and in which he provides that if the devisee should die without heirs, the property is to revert back to his next of kin, since the limitation is not to the same person who would take in the same manner and quality as heirs, the rule in Shelley's Case applying only when the same persons take the same estate, whether they take by descent or purchase. May v. Lewis, 132 N. C. 115, 43 S. E. 550. The court said that any words added to the limitation, which carry the estate to any other person in any other manner, or in any other quality than the canons of descent provide, will take the case out of the operation of the rule, and limit the interest of the first taker to an estate for life.

³⁸ *Emmerson v. Hughes*, 110 Mo. 627, 19 S. W. 979; *Godman v. Simmons*, 113 Mo. 122, 20 S. W. 972.

By a grant to the grantor's son and wife, and to their heirs and assigns, in trust for the use of the son and wife during their lives and the longest liver of them, and after their deaths for the use of the heirs of the body of the son lawfully begotten, their heirs and assigns forever, and, in default of such issue, to the use of the right heirs of the son, their heirs and assigns forever, it was held that the son took an estate tail. *Baughman v. Baughman*, 2 Yeates, 410.

The rule in Shelley's Case applies to a grant of real estate to a married woman during her natural life, and after her death to the heirs of her body, and to them and their heirs and assigns forever, and vests an estate tail in her. *Hileman v. Bouslaugh*, 13 Pa. 351, 53 Am. Dec. 474.

A grant to one to have and to hold to him, his executors, and administrators, for and during the time of his natural life, and at his death to go to the heirs of his body, to them, their heirs and assigns forever, vests in the life tenant an estate tail. *Ex parte McBee*, 63 N. C. 332.

³⁹ *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. 490.

In a grant to one for life and to the heirs

of his body begotten on his wife named, in fee simple and forever, to have and to hold to him and his wife during their joint and several lives, and in fee simple to the heirs of their bodies lawfully begotten and their assigns forever, the words "in fee simple and forever" do not have the effect of making the preceding words "heirs of his body begotten," etc., words of purchase, instead of limitation, by making the heirs of the body of the first taker a new root of inheritance in fee simple, since they were not apt words for the creation of an estate in fee simple. *Chamberlain v. Runkle*, 28 Ind. App. 599, 63 N. E. 486.

But a conveyance of property to a woman and her husband "for and during their existence in this world," and after their deaths to be equally divided between the lawful heirs of the body of the wife, "as their own right and property, and for their own proper use and benefit forever, in fee simple," was held not to be within the rule in Shelley's Case, the words of limitation superadded to the word "heirs," etc., denoting a different species of heirs from that described by the first words. The species of heirs described by the first words was "lawful heirs of the body." The species denoted by the superadded words was heirs general. The property was to be divided among the lawful heirs of the body, "as their own right and property, and for their own proper use and benefit forever, in fee simple." *Tucker v. Adams*, 14 Ga. 548. The court said: "Now, if the persons intended to take were intended to take in fee simple, they could not have been intended to take in fee tail,—to take as 'heirs of the body.' Therefore, the words 'heirs of the body' were not intended to have their ordinary legal import. What other import can they have? They cannot have the import of the words 'heirs general,' so as to make the deed the same as it would be were the words, to the son-in-law and daughter for life, remainder to her heirs, instead of to the heirs of her body. If they cannot have the ordinary legal import of words 'heirs of the body,' nor the import of the words 'heirs general,' it follows that they cannot have any import which implies persons who are to take by descent; but must have an import which implies persons who are to take by purchase."

The words, "so vest in such heirs in fee simple," following a limitation to a husband and wife for life, the deed providing that, at their death or the death of the survivor, the land should "ensue and descend to

ever, it was held that she would, under the rule in Shelley's Case, take a fee-tail estate.⁴⁰ And where the devise was to one for life, and after his death to the "heirs males" of his body lawfully to be begotten, and "his" heirs forever, the will providing

that if the devisee should happen to die without such heir male, the property should go over, the superadded words "to his heirs forever" were held not to make the words "heirs males" words of purchase.⁴¹ And it was conceded that the rule in

the heirs of the man of the body of his present wife begotten," were held to take the grant out of the rule in Shelley's Case, since the deed limited an estate to the heirs, which they could not take from the tenant in tail. *Stephenson v. Hagan*, 15 B. Mon. 282.

⁴⁰ *Brown v. Lyon*, 6 N. Y. 419.

Where the limitation after the life estate was to the heirs male of the life tenant's body, lawfully to be begotten, and the heirs and assigns of such heirs or heir male forever, and for want of such heirs male, over, it was held that this created an estate tail male in the first taker. *Carter v. M'Michael*, 10 Serg. & R. 429.

Where the will devised certain property to the testator's five daughters for life, and to the heirs of their bodies forever, and to the heirs and assigns of such heirs forever, and provided that, if any of the daughters should die without issue, her share pass to the surviving children, and then to them and their heirs and assigns forever, the testator stating it was his intent to give an estate in fee to such daughters as should die leaving issue, and an estate for life only to such of them as should die without leaving issue, it was held that each of the daughters took an estate tail in their respective shares, with cross remainders to the survivors upon the death of any of them without issue. *Manchester v. Durfee*, 5 R. I. 549.

The rule in Shelley's Case applies to a devise to a woman and her husband during their lifetime, and no longer, if dying without any lawful heirs begotten of their bodies, and if any lawful heirs, to them and their heirs forever, otherwise to return to the grantor's heirs at law and his heirs forever. *Williams v. Lane*, 4 N. C. (2 Car. Law Repos. 266), 6 Am. Dec. 561.

Where the limitation after the estate of the life tenants was to the "legal heirs of their bodies," it was held that the additional words, "and their own proper descendants forever," would not take the grant out of the operation of the rule, these words having no other effect than to indicate the line of descent in which the property was to go, that is, to the descendants as heirs. *Lawrence v. Singleton*, 3 Shannon, Cas. 169.

In *George v. Morgan*, 16 Pa. 95, a devise of certain land to testator's son, "to hold to him for and during his natural life, and after his decease to the heirs of his body lawfully begotten, and to their heirs forever, and, in default of such issue, then to the heirs of my son Samuel and their heirs forever," the superadded words of limitation were held not to limit a fee in the issue of the first taker, and not to show that the testator intended to constitute them the stock of a new descent as purchasers. The 29 L.R.A. (N.S.)

court said: "It has long been settled that superadded words of limitation ingrafted on words of procreation will not operate to turn these into words of purchase, unless the superadded word denote a different species of heirs from that described by the first words, thus showing an intent to break the ordinary line of descent from the first taker." In this devise the superadded words, "and to their heirs forever," were held not to show an intention to change the line of descent.

Where there was a devise to a woman for life, and then unto the heirs of her body, it was held that subsequent words, "and to their heirs and assigns forever," were either merged in the preceding words limiting the estate to the heirs of her body, or were too uncertain to control them. The court said there were cases of devises where the testator had superadded fresh limitations, and grafted other words of inheritance upon the heir to whom he gave the estate, whereby it evidently appeared that these heirs were meant by the testator to be the root of a new inheritance, and not considered as branches derived from their own ancestor, but the present case did not come within any of them. *Den ex dem. M'Ginnis v. M'Peake*, 2 N. J. L. 291.

⁴¹ *Goodright v. Pullyn*, 2 Ld. Raym. 1437.

In *Legate v. Sewell*, 1 P. Wms. 87, the testator, in default of issue of his own body, devised lands to his nephew for life, and after the latter's death to the heirs male of his nephew's body lawfully to be begotten, and the heirs male of the body of every such heir male, severally and successively, as they should be in priority of birth, etc., and for want of such issue, over. This was held to be an estate tail in the first taker, by three judges against one. In the dissenting opinion, however, it was said that the limitation over to the heirs male of the body of every such heir male, severally and successively, must be wholly rejected as idle and void, if the limitation to the heirs male of the body of the nephew were to be taken as words of limitation.

In *Naah v. Coates*, 5 Barn. & Ad. 839, in a devise of lands to trustees in trust for testator's son for life, and after his death to hold to trustees to preserve contingent remainders, etc., in trust for the heirs male of the body of the said son lawfully issuing, and the heirs and assigns of such male issue forever, and, in default of such male issue lawfully issuing, in trust for another son, the superadded words of limitation were called to the attention of the court, which, nevertheless, held that the first taker took an estate tail.

In *Zabriakie v. Wood*, 23 N. J. Eq. 541, it was held that a devise to a son for life, and to such lawful issue of his body as he

Shelley's Case applied to a devise to testator's daughter for life, and no longer, at her death to vest in her bodily heirs forever, and in fee simple, and that therefore the devisee took the fee.⁴²

4. As qualifying the word "issue."

A deed conveying and warranting real estate to a woman "during her life, in remainder to the issue of her body, their heirs and assigns forever," has been held within the rule in Shelley's Case.⁴³ But

may have by any after marriage, together with subsequent words limiting forever the estate to the heirs and assigns of the issue of the body, under the 11th section of the act of 1820, which provides that, when a conveyance or devise vests an estate which, under the statute of Edward the First, would have been held an estate in fee tail, the grantee or devisee shall have an estate for life only, has the same effect as if the rule in Shelley's Case had been abolished as to this class of estates. It will be observed that it is the statute, not the super-added words of limitation, which in this case gives the life estate.

But in *DeVaughn v. DeVaughn*, 3 App. D. C. 50, where the devise was to a woman for life, remainder to her three daughters during their natural lives, and after their deaths to their heirs begotten of their bodies, and to their heirs and assigns forever, it was held that the words "heirs of their bodies begotten," read in the light of the whole context of the devise, and with the superadded words of limitation, were to be taken as equivalent to "children."

Where there was a devise of lands to trustees upon trust to allow testator's child to have the profits for her sole use and benefit for life, and after her death to the use of the heirs of her body, "such freehold lands . . . and premises to be legally conveyed and assured unto such heirs of my child or children in equal shares as they shall severally and respectively attain the age of twenty-one years, or be married, and to their several and respective heirs and assigns forever," it was held that the rule in Shelley's Case would not operate to vest the reversion in the daughter for one reason, because the beneficiaries under the devise were not heirs of the body at large, but designated individuals of that class. *Foxwell v. Van Grutten*, 78 L. T. N. S. 231.

⁴² *Burton v. Carnahan*, 38 Ind. App. 612, 78 N. E. 682.

A devise of property to one for life, with power to sell and convey the same in fee simple in case of necessity, remainder after her death to the heir or heirs of her body in fee simple, was held to be within the rule in Shelley's Case, there being nothing in the will which clearly and unequivocally showed that the word "heirs" was not used in its strict legal sense. *Teal v. Richardson*, 160 Ind. 119, 66 N. E. 435.

⁴³ *King v. Rea*, 56 Ind. 1. The court said that "a will can be made, altered by codicil, 29 L.R.A. (N.S.)

in a will where the limitation was in effect to each of the testator's children for life, remainder to the issue of the child lawfully begotten, and to their heirs forever, it was held that the superadded words "their heirs forever" indicated that the word "issue" was used as a word of purchase.⁴⁴

Where, however, the limitation was to the legal issue or the heirs of the life tenant, the added words "or heirs" were held not to weaken the force of the words "legal issue," and not to show that the testatrix intended

or revoked, at the pleasure of the devisor. Not so with a deed of conveyance. To it there must be two parties, each having a right in settling its terms, and in its construction the intention of both parties must be considered. It cannot be altered or abrogated by either party, but only by the act of both. This difference between the rules of construction which govern these two classes of instruments is plainly founded in reason and justice. And in the construction of deeds of trust, the express trusts will always govern the words in the habendum. Not so in a deed of conveyance merely between the vendor and vendee. In such cases the distinction between words of limitations and words of purchase must be preserved, and the rights of the parties maintained accordingly."

But in *McIlhinny v. McIlhinny*, 137 Ind. 411, 24 L.R.A. 489, 45 Am. St. Rep. 186, 37 N. E. 147, the court says that it has long been established law that when used in a will the word "issue" may be a word of purchase, or it may be a word of limitation, depending on the testator's intention as expressed in the context. But when used in a deed, it is always a word of purchase.

The word "issue" in a deed of gift to one for life, and at his death to his lawful issue forever, is held to be used as a word of purchase, the word "forever" relating to the property given, and not to the persons taking. *Hancock v. Butler*, 21 Tex. 804.

⁴⁴ *Shreve v. Shreve*, 43 Md. 382. The court said that where an estate is devised to a person for life, with remainder to his issue, with words of limitation superadded, the word "issue" will in that case be construed as a word of purchase.

So, it was held that, under a devise to a man for life, without impeachment of waste, and in case he have issue male, then to such issue as he might have, and his heirs forever, and if he should die without issue, over, the first taker took an estate for life only, there being superadded words of limitation grafted on the word "issue male." *Loddington v. Kime*, 1 Salk. 224.

And the word "issue" was held to be used as a word of purchase in a devise of property to A during his life only, upon certain conditions, and after the determination of that estate to the said A's lawful issue male, and the lawful issue male of such heirs, the eldest of such sons of the said A. to be always preferred before the youngest, according to their seniority of age and

by them, not limitations, but personal description.⁴⁵ Where the limitation to the

issue is in fee or forever, it is held that the word "issue" must have been used as a

priority of birth, and for want of such lawful issue male of the said A, over, *Mandeville v. Lackey*, 3 Ridgw. P. C. 352.

Where by a will a testator devised his real estate to his son during his life, and after his death to his issue by him lawfully begotten of his body, their heirs and assigns forever, and in case his son should die without lawful issue, then over, it was held that the words, "issue of his body by him lawfully begotten," were used in the sense of children, and that the rule did not therefore apply. *Daniel v. Whartenby*, 17 Wall. 639, 21 L. ed. 661.

An express devise to one for life, "and then after her decease to her lawful issue, provided she hath issue who are or shall live to be twenty-one years old or to have lawful issue, to hold to them, their heirs and assigns forever," passes only a life estate to the first taker. *Way v. Gest*, 14 Serg. & R. 40. The court said that in the first place the word "issue," even without superadded words of limitation, is often a word of purchase, where the word "heirs" or even the word "heir," in the singular number, is not. But when there was ingrafted on the limitation to the issue words of limitation to them in fee on their living to the age of twenty-one years or having issue, it was undisputable that the devise to the first taker was for life only.

In *McIntyre v. McIntyre*, 16 S. C. 290, where the devise was to children for life, and at their death "to the issue of them and their heirs forever," it was held that the words "their heirs forever" so qualified the word "issue" as to indicate that it was not to be taken as descriptive of an indefinite line of descent, but was used to indicate a new stock of inheritance.

In *Re Voegtly*, 29 Pittsb. L. J. N. S. 30, a devise was to a woman for life, the property upon her death to go to her surviving issue and their heirs, and upon failure of issue, then over. It was held that the limitation to the heirs of the surviving issue showed that it was the intention that her surviving issue should take as purchasers, not as her heirs, and that they should become the root of a new succession; that the word "issue" was not to be construed as synonymous with heirs of the body, and that therefore the rule in *Shelley's Case* did not apply.

⁴⁵ *Angle v. Brosius*, 43 Pa. 189.

In *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387, there was a devise to testator's daughter and her husband during their joint lives, and to the survivor of them during the life of such survivor, the will providing that if the daughter should die leaving issue at her death, the property after the termination of the life estates should go to such issue, to his, her, and their heirs forever. The husband having died, it was held that an estate tail was vested in the daughter, which by the Virginia statute was converted into a fee simple.

And where a devise gives an estate to a

person for life and to the issue of his body, the addition of a limitation to the heirs general forever of such issue was held not to prevent the words "issue of the body" from operating according to their technical effect to give an estate tail. *Zabriskie v. Wood*, 23 N. J. Eq. 541.

In *Paxson v. Leferts*, 3 Rawle, 59, it was held that the first taker takes an estate tail under a devise to testator's son for life, the will providing that, if he shall leave lawful issue, then to them, their heirs or assigns forever, but for want of such lawful issue, then to return to another son, etc., the words of inheritance ingrafted on the limitation to the issue not taking it out of the rule in *Shelley's Case*.

And in *Hall v. Smith*, 25 Gratt. 70, it was held that, in a devise in which the testator lent certain property to his daughter during her life, and after her death gave the same to the lawful issue of her body, to them and their heirs and assigns forever, the superadded words, "to them and their heirs and assigns forever," did not take the gift out of the rule in *Shelley's Case*.

In *King v. Burchell*, 1 Ambl. 379, 10 Eng. Rul. Cas. 782, a testator devised certain property to his wife, remainder to his cousin J. H. for life, and from and immediately after the determination of that estate, to the issue male of the body of J. H., and to their heirs, and, for want of such issue, to his cousin W. K., his heirs and assigns forever, with a proviso that the property limited to J. H., etc., was on special consideration that if J. H. or his issue or any of them should alienate, mortgage, encumber, or commit any act or deed to alter, change, charge, or defeat the bequests, he should pay or cause to be paid a certain sum which was to be a charge upon the premises, to such person or persons and his or their heirs who could, should, or ought to take next by virtue or means of any of the bequests or limitations. It was urged that the superaddition of words after the words of limitation indicated that the testator meant that in case J. H. had issue male, they should take the fee; that where there are words superadded to words of limitation, whether the words of limitation be in the singular or plural number, the first taker is only tenant for life. On the other hand, it was contended that the intention was plain, as the testator had restrained the issue of J. H., as well as J. H. himself, from alienating, which would be absurd if he had intended to give them the fee. It was held that J. H. took an estate tail, and that the proviso was repugnant to the estate. *Mr. Fearne*, 1 *Fearne, Contingent Remainders*, 164, says of this case: "This, we may observe, was a pretty strong case; the limitation being not to heirs male, but issue male, with words of limitation in fee superadded, aided by the connection in the proviso of the devise of the estate in question with that of the other estate which had been limited to

word of purchase.⁴⁶ It will be noticed that in several cases there was also a limitation over on failure of issue, and yet in spite of that fact the word "issue" was not construed as a word of limitation.⁴⁷

c. Effect of words of distribution and superadded words of limitation.

1. In general.

Having considered what effect words of distributive modification alone, and superadded words of limitation alone, have on the meaning of the words "heirs," "heirs of

the issue male, his or their heirs, share and share alike. But the extent of the proviso to the issue was very strong against their taking in fee. And should it be urged that the implication from that circumstance might possibly have been satisfied by an estate tail male in the issue male as purchasers, instead of an estate in fee, the answer is that would have been either rejecting the words 'their heirs' or reducing them by a constructive qualification into heirs male; which would at once have removed the only objection afforded by the circumstances of the case against the ancestor's taking an estate tail, and have left no argument for the issue male taking by purchase at all; instead, as in *Wright v. Pearson*, of throwing the case open to those other arguments in favor of the heirs, etc., taking by purchase, which had prevailed in *Bagshaw v. Spencer*."

⁴⁶ In *Myers v. Anderson*, 1 Strobb. Eq. 344, 47 Am. Dec. 537, a testator provided that slaves should, at the death of his son, be divided between his two daughters during their lives, and, after their deaths, provided that they should be the absolute property of the issue of their bodies forever. It was held that the daughters took only a life estate.

The rule does not apply to a devise to a son for life, and from and after his death to his lawful issue absolutely and in fee simple, the limitation to the issue being as purchasers. *Boykin v. Ancrum*, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305.

Where the devise over to the lawful issue of the devisees of the life estate is expressly of a fee simple, the word "issue" is not a word of limitation. *Craig v. Warner*, 5 Mackey, 460, 60 Am. Rep. 381. The court said that at common law the estate tail in the ancestor must descend as such to the issue, and that therefore an express devise to the latter of a fee simple amounted to an explanation which was conclusive that the deviser had not used the word "issue" in that sense which would make it a term of limitation to the ancestor, whereby the issue would inherit a smaller estate than the one which he had given them. Since the word "issue" was of variable meaning, and that meaning which the testator chose was to be accepted, an express devise of a fee simple forbade the adoption of a meaning

the body," etc., the next step is to inquire what effect words of distributive modification and superadded words of limitation together have on the meaning of the words "heirs," "heirs of the body," etc.

If, in a limitation to A for life, remainder to his heirs, "to be divided among them share and share alike," the words "to be divided," etc., do not show that the word "heirs" was not used in its technical sense, and if, in a limitation to A for life, remainder to his heirs "and their heirs," etc., the words "and their heirs," etc., are not sufficient to show that the word "heirs" was not used in its technical sense, will it make

which would give the issue an estate with which the actual devise to them was inconsistent.

Under a devise to a woman for life, and if she leave lawful issue to the said issue in fee, it was held that the superadded words "in fee" prevented the operation of the rule in *Shelley's Case*, so that she took a life estate, the word "issue" not being used as synonymous with "heirs of the body." *Timanus v. Dugan*, 46 Md. 418.

In *King v. Evans*, 24 Can. S. C. 356, a devise to testator's son for life, and after his death to his lawful issue, to hold in fee simple, was held to vest but a life estate in the first taker, with remainder to his children in fee.

⁴⁷ In *Tongue v. Nutwell*, 13 Md. 415, a devise was in trust for the sole and separate use of the testator's daughter during the life of her husband, and it was provided, among other things, that in case the daughter should die without leaving issue, the property should go to the testator's son, and that in case the daughter should survive her husband, the trust should cease, and the legal estate in the said property should vest in the daughter for life, in respect to the real estate, and absolutely in respect to the personal property, and after her death, in case she should leave issue, that the issue should have a legal estate in fee in the said real property, and that, on failure of such issue, the property should go to the testator's son and his heirs. The court held that it was the clear intention of the testator to give the property to his daughter for life only, and then to her issue, if she should leave any, the word "issue" being here considered as a word of purchase, and not of limitation.

By a devise to testator's son of certain property for life, in such manner that he should not dispose of the same in his lifetime, and that the property should not be liable for his debts, the will providing that after his death it was to go to such person or persons as he by his last will should direct, and in event of his dying intestate leaving issue surviving, then to his issue in fee, but in event of his dying intestate leaving no issue, then over, it was held that the son took a life estate only. *Nes v. Ramsay*, 155 Pa. 628, 26 Atl. 770.

any difference if both classes of these modifying words appear in the same instrument? that is, if the limitation is to A for life, remainder to his heirs, their heirs, etc., to be divided among them share and share alike, will the words "their heirs," etc., plus the words "to be divided," etc., be sufficient to show that the word "heirs" was not used in its technical sense? To put it in another way, do these words show that the heirs of A living at his death are the stock from which the author of the instrument intended the inheritance to spring? If they show this, then the word "heirs" must be held to have been used as a word of purchase. The great question is, Did the author of the instrument intend that the property should descend to A's heirs, or did he intend it should descend to the heirs of A's children or other heirs living at A's death? The presumption flowing from the use of the word "heirs" in the limitation to A's heirs is that he intended the property to descend to A's heirs, rather than to the heirs of A's children or other heirs. Does the use of the additional words of distribution, together with the superadded words of limitation, show a different intention, and indicate it with sufficient certainty to overcome this presumption, and render the word "heirs" a word of purchase? In short, do such added words indicate that the word "heirs" was used in the sense of children or heirs living at the death of the grantor or testator?

There is a conflict in the cases on this

question, the courts seeming to be less inclined to modify the technical meaning of the limitations where the word "heirs" is used than they do when the limitation is to the heirs of the body or to the issue of a life tenant, and more inclined to consider such words so modified as words of purchase in wills than in deeds. This, of course, applies to cases in which there are no other words to modify the meaning of the technical words "heirs," "heirs of the body," or "issue." If there should be anything else to show that they were not used in their technical sense, that is, that they were used as words of purchase, there is no more reason for holding the rule in Shelley's Case applicable in the case of a deed than in the case of a will. Once let the instrument show what the intention was in respect to the use of the words "heirs," "issue," etc., and the intention will control, whether the instrument is a deed or a will. See *supra*, XI. and XII.

Where words of distribution, together with words which would carry an estate in fee, are attached to a gift to the issue, it is generally held that the ancestor, in spite of that fact, takes an estate for life only; and the result is the same whether the fee is given by the usual technical words or by implication.⁴³

2. As qualifying the word "heirs."

As has been stated, the cases, however, are not in harmony. A gift of land to a

In *Re Hamilton*, 18 Ont. Rep. 195, the court expressed the opinion that by a devise of land to testator's daughter for life, and after her death to her lawful issue, to hold in fee simple, "but in default of such issue her surviving" then over, the daughter would take only a life estate, for the reason that the word "issue" must be construed as meaning "children."

In a devise to testator's son for life, and if he should have issue born of his body lawfully begotten, then to such issue after his death in fee tail, and then over in case the son should die without issue, the word "issue" was held not to be a word of limitation, and the rule in Shelley's Case not to apply. *Chelton v. Henderson*, 9 Gill, 432.

In *Faison v. Odom*, 144 N. C. 107, 58 S. E. 793, the word "issue" in a devise to a trustee for the use and benefit of testator's son for life, and after his death to his issue forever, "and in case of his death without leaving issue, I give, devise, and bequeath the lands devised in trust to him, unto his surviving brothers and their heirs, and in case of their death before him and leaving children, to such issue and their heirs," was held to have been used as a correlative term for children, the word not being sufficient 29 L.R.A. (N.S.)

to indicate a purpose to create an estate of inheritance in the life tenant.

⁴³ *Bradley v. Cartwright*, 36 L. J. C. P. N. S. 218, 25 Eng. Rul. Cas. 661.

So, whether the fee be given by the technical word "heirs" or by the word "estate" occurring in the description of the subject of the gift, and whether the gift to the issue be direct or by implication from the power of appointment to them, and whether there is a gift over on the general failure of issue of the ancestor or not, the rule will operate. *Rotheram v. Rotheram*. Ir. L. R. 13 Eq. 429.

Under a will giving an estate for life to one on his attaining the age of twenty-one, and then limiting the lands to his issue in such shares and proportions as he should appoint, and, in default of appointment, to all his issue, male or female, living at his death, share and share alike, and, if but one child living, then the whole of the lands to go to such only child, male or female, his and her heirs and assigns, and in case the first devisee should die without living issue male or female, then over in fee, it was held that the first taker took only an estate for life. *Ibid*.

Words of distributive modification may be inconsistent with a gift to heirs as chil-

woman to have and to hold for life, and then to go to her heirs equally alike, and their heirs and assigns forever, and similar conveyances, have been held to be within the rule.⁴⁹

But where a testator devised a tract of land to a son and to the wife of such son, habendum, unto them and the survivor of them for life, and afterwards devised the same premises from and immediately after the death of the son and wife, to their heirs male, habendum, unto such heirs male, and to their heirs and assigns forever, share and share alike, it was held that the rule in Shelley's Case did not apply, since the testator had provided that the heirs male should take as tenants in common, and had in the most formal manner given to them an estate in fee,—all of which was wholly inconsistent and irreconcilable with the idea of a tenancy in tail.⁵⁰

3. *As qualifying the words "heirs of the body."*

The fact that the additional words subse-

quent to the limitation, "heirs of the body of the life tenant," viz., "and to his, her, or their heirs and assigns forever, equally to be divided between them," are sufficient in a deed, as well as in a will, to create a tenancy in common, was held not necessarily to take a devise out of the rule in Shelley's Case. It was urged that as the law stood at the time of the execution of the deed, the heirs of the body of the life tenant could not take as tenants in common, unless those words were considered as meaning "children," and that those children should take as purchasers, and that this must accordingly be the intent of the deed, and also that these children should transmit an estate in fee to their descendants. Kent, J., said that the employment of these words by the grantor was by no means certain evidence of his intent to control the legal operation of the preceding words, and prevent the inheritable blood of the life tenant from taking in the character of heirs; the words of limitation superadded were not descriptive of a different species of heirs from the first words, so as to break in upon and divert the line of

children, and hence it has sometimes been held that a gift to heirs of the body, or even heirs, in England, where the oldest son takes in exclusion of his brothers and sisters, if followed by added words of limitation and by words of distributive modification, may amount to no more than a gift to children. Together, they overcome the presumption that technical terms are used in a technical sense; alone, neither of them is sufficient. Nice's Appeal, 50 Pa. 143.

⁴⁹ Brown v. O'Dwyer, 35 U. C. Q. B. 354. In Den ex dem. Hopper v. Demarest, 21 N. J. L. 525, it was said that by a devise to a daughter for life, the will providing that after her death the property should be equally divided among her heirs, "and as unto them, their heirs and assigns forever," the daughter at the common law could have taken a fee simple.

In a devise in trust for the sole and separate use of a married woman, followed immediately by gift of the remainder to her right heirs, their heirs, executors, administrators, and assigns forever, in such portions as they would be entitled to agreeably to the laws of Pennsylvania in case she had died intestate, seised and possessed of the property in her own right, it was held that the words of distributive modification were not inconsistent with the presumed intent of the testatrix that the remaindermen should take as right heirs. The court said that they would be in England, and that they would be in Pennsylvania in a case where the remainder was limited to the heirs of the body, for in such cases distribution by descent was impossible. But in Pennsylvania, a gift to heirs general in fee contemplated descent according to the intestate laws. Hence a direction that it should so descend was in perfect harmony 9 L.R.A. (N.S.)

with the technical meaning of the words of the gift, and consequently was no reason for presuming that the donor employed the technical language in any other than its ordinary and legitimate sense. Nice's Appeal, 50 Pa. 143.

In Physick's Appeal, 50 Pa. 128, there was a gift to trustees for the use of testator's nephew for life, with a power of appointment by will to such child or children, grandchild or grandchildren, as the nephew might direct, and, in default of appointment, it was provided that the remainder should be equally divided among the right heirs of the nephew, "to them, their heirs, executors, administrators, and assigns forever." It was held that the strong presumption arising from the use of the technical words of limitation was not overcome by the words of descriptive modification, with the words of limitation added, that is, the direction of an equal division among them, their heirs, executors, administrators, and assigns forever. The court said that after all it was a question of intention. How did the donor or testator intend the remaindermen to take? If as heirs, in Pennsylvania they take distributively, and therefore a direction that the remainder shall be divided among the right heirs is not repugnant to an intent that they shall take by descent. There was in this will nothing to show that the testator did not use the words of limitation, "right heirs," in their proper sense, except the superadded words of limitation, and these alone had always been held insufficient.

⁵⁰ Tanner v. Livingston, 12 Wend. 83.

And a devise to testator's son for life, and after his death, if he should die leaving lawful issue, to his heirs as tenants in common, and their respective heirs and as-

descent from the ancestor. It was rather an attempt to describe a different qualification to the heirs in their character as heirs than what the law had prescribed. All efforts of the grantor to change their qualifications, while he admitted their character by saying that they shall take by purchase or as tenants in common, were fruitless.⁵¹

A bequest, however, to testator's wife for life, and after her death to the heirs of her body, to hold to the said heirs, share and share alike, and to their heirs or assigns forever, but over if she should die without issue, was held to create an estate for life only, in the first taker.⁵²

But under a devise to a man and his assigns for life, and after his death to the heirs of his body, his, her, and their heirs and assigns forever, as tenants in common if more than one, and not as joint tenants, and, in case he should die without leaving such heirs of his body him surviving, then over, the word "issue" was held not to have been used in the sense of children, so as to take the devise out of the operation of the rule in Shelley's Case.⁵³

signs forever, but in case he should die without leaving issue, then over, was held to vest a life estate only in the first taker, the word "heirs" having been used as a word of purchase. *Findlay v. Riddle*, 3 Binn. 139, 5 Am. Dec. 355.

In this case it should be noticed that there was a limitation over on failure of issue which would tend to enlarge the life estate. See *infra*, XV.

⁵¹ *Brant ex dem. Provoost v. Gelston*, 2 Johns. Cas. 384.

⁵² *Lillibridge v. Ross*, 31 Ga. 730.

So, the rule in Shelley's Case was held not to apply to a devise to testator's son for life, "and after his death to the heirs of his body, to be equally divided between them, to them and their heirs forever." *Moore v. Parker*, 34 N. C. (12 Ired. L.) 123.

In *Right v. Creber*, 5 Barn. & C. 866, the testator devised land to trustees in trust to permit his daughter to receive the rents for her own use for life, the property after her death to go to the heirs of her body, share and share alike, their heirs and assigns forever, and it was held that the words "heirs of the body" here meant "children."

Where the will devised real estate to a woman for life, providing that after her death the property be equally divided among the heirs of her body begotten, share and share alike, to their heirs and assigns forever, it was held that the limitation to her heirs begotten of her body, and to "their" heirs and assigns,—a restricted class of heirs,—showed that it was the intention of the testator that the first taker's children should become the root of a new succession, and take as purchasers, and not as heirs. *DeVaughn v. Hutchinson*, 165 U. S. 566, 41 L. ed. 827, 17 Sup. Ct. Rep. 461. 29 L.R.A. (N.S.)

4. As qualifying the word "issue."

A grant to a trustee in trust for the sole and exclusive use of a married woman for life, free from the debts, contracts, or liabilities of husband, and after her death to her issue to take *per stirpes*, their heirs and assigns, to his and their use, benefit, and behoof forever, was held not within the rule, for one reason, because by the words, "and after her death to her issue to take *per stirpes*, their heirs and assigns," the issue were made the root of a new inheritance.⁵⁴

And where the superadded words of limitation and of distributive modification were both annexed to a devise to the issue, they were held sufficient to show that the intent of the testator was that the issue should not take through the ancestor, but that a new line of descent should commence with them, and that they should take as purchasers in fee or in tail.⁵⁵

Likewise where the testatrix by the terms of a will lent to her granddaughter a negro girl and her increase during the devisee's

The rule in Shelley's Case does not apply to a limitation after a life estate, providing that all property should go to the heirs of the body lawfully begotten, to be equally divided among them, and their heirs forever, since, where the heirs are thus made ancestors, it is evident that the term "heirs of the body" is simply descriptive of the persons intended to take, and imports sons and daughters of the tenant for life as shall also be heirs of his body. *Jarvis v. Wyatt*, 11 N. C. (4 Hawks) 227.

⁵³ *Mills v. Howard*, 7 Jur. N. S. 654.

⁵⁴ *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64.

⁵⁵ *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

In *Greenwood v. Rothwell*, 6 Beav. 492 a devise to one for life and after his death to the issue of his body, share and share alike, as tenants in common, and the heirs of such issue, was held to create an estate for life in the first taker, there being words of distributive modification and the superadded words of limitation "the heirs of such issue."

By a devise of property to testator's grandson to hold the same unto the use of the grandson for life, the property after his death being given "unto and to the use of all and every the lawful issue of my said grandson . . . their heirs and assigns forever equally as tenants in common. And not as joint tenants, and as he, she, or they shall attain his, her, or their age of twenty-one years," it was held that the grandson took only an estate for life. *Slater v. Dargersfield*, 15 Mees. & W. 263.

The word "issue" was construed as a word of purchase in a devise of real and personal estate to trustees upon trusts after certain prior limitations, after testatrix's children

life, and at her death to the lawful issue of her body that might then be living, share and share alike, their heirs and assigns forever, remainder over, it was held that the perfectly obvious intention here was that the issue of the body were to take as purchasers, and not as heirs of the first taker.⁵⁶ But in a case in which there was a devise

to one for life, with the reversion or remainder to her lawful issue, to have and to hold the same in common to them, their heirs, and assigns forever, it was held that the words "in common" were not such superadded words of limitation, or distributive modification, as would make the words "lawful issue" words of purchase.⁵⁷

should attain the age of twenty-one years, to stand seised and possessed of and interested in the said trust property to and for the use of all her children, share and share alike, for the term of their natural lives respectively, and, after the death of any of the children attaining such age, then upon trust as to the share of the child so dying in the said trust property to stand seised thereof and interested therein to and for the use and benefit of the issue of such child in equal shares and proportions, and their respective heirs, executors, administrators, and assigns, but if there should be but one such child of the testatrix who should attain the age of twenty-one years, then upon trust as to the whole of the said trust property, to and for the use of such only child for the term of his or her life, and after his or her death in trust for and to the use of the issue of such child and their respective heirs, executors, administrators, and assigns respectively as tenants in common. *Bannister v. Lang*, 17 L. T. N. S. 137.

An express estate for life is not enlarged to an inheritance by a devise to testator's son for life, the will providing that after his death the property should be equally divided amongst all his lawful issue or their legal representatives, share and share alike, and to their heirs and assigns. *Abbott v. Jenkins*, 10 Serg. & R. 296.

In *Walker v. Milligan*, 45 Pa. 178, the first taker was held to have been given only a life estate where the devise of a remainder was to his lawful issue, child or children, then living, or to the lawful issue of such child or children as may at the first taker's decease be then dead, share and share alike. The court said that the language was descriptive of persons, rather than of the character in which the remaindermen were to take; that the testatrix defined what she meant by the unequivocal term "lawful issue," by using as synonymous with it the words "child" or "children." By pointing to those who might be living at the decease of the first taker, and by directing distribution, she had manifested an intent to use the word "issue" as meaning "child" or "children," rather than to use the latter words as words of limitation.

In a devise to one for life and after his death to his lawful issue,—if one, to him or her, his or her heirs and assigns forever, but if more than one, to be equally divided amongst them, their heirs and assigns forever, remainder over if the life tenant die without lawful issue,—it was held that there were two directions in the gift of the remainder, each of which indicated, and 29 L.R.A. (N.S.)

which combined were decisive, that the word "issue" was used by the testator as a word of purchase, meaning children, sons and daughters, or descendants, living at the death of the devisee for life. They were, first, that if more than one, the property should be equally divided between them, or, if one, then to that one; and, second, the added words of limitation in fee simple to the gift to the issue. *Powell v. Domestic Missions*, 49 Pa. 46.

⁵⁶ *Woodley v. Findlay*, 9 Ala. 716.

In *Robins v. Quinliven*, 79 Pa. 333, it was held that the first taker took only a life estate, under a devise to a woman for life, free from the control of her present or any future husband, and after her death to her issue and their heirs forever, in the proportions to which they would be entitled under the intestate laws of Pennsylvania respectively, since the limitation to the heirs general of the issue, with the superadded words of distributive modification, clearly showed that by issue the testator meant children, and intended that they should take the remainder as purchasers, and not as heirs by descent.

Under the statute of wills a devise to a grandson for life and then to his lawful issue, "to be and remain to such issue, in equal portions, and to their heirs and assigns forever," and in case he should die leaving no issue, then over, could not create an estate tail in the first taker. *Williams v. Angell*, 7 R. I. 145.

Where the devise was to one for life, with reversion or remainder to her lawful issue, to have and to hold the same in common to them, their heirs, and assigns forever, it was held that by the words "lawful issue" the testator meant the lineal descendants of the devisee, and not of the collateral heirs. *Grimes v. Shirk*, 169 Pa. 74, 32 Atl. 113.

⁵⁷ *Grimes v. Shirk*, supra.

Where the devise after the life estate was to the lawful issue of the life tenant, his, her, and their heirs, executors, administrators, and assigns forever, equally to be divided among them, share and share alike, the superadded words "his, her, or their heirs, equally to be divided among them, share and share alike," were held not to require that the words "lawful issue" be considered as words of purchase, the word "heirs" in the superadded clause of limitation, being of similar import, could not have the effect of changing former words, and diverting their meaning from the object of an estate tail. *Kingsland v. Rape-lye*, 3 Edw. Ch. 1.

And where the devise was to the use of

d. Effect of other modifying or explanatory words or phrases.

1. In general; relation to rule in Shelley's Case.

It would serve no useful purpose to make a further analysis of the varying classes of words or phrases found in deeds and wills, tending to modify or explain the words "heirs," "heirs of the body," or "issue." A more elaborate analysis might, indeed, tend to confuse the subject. After all, most instruments of this kind are to a large extent individualistic, and a ruling on the effect of certain words in one might be of but little assistance in determining the effect of the same words appearing in another. The eternal question is: In what sense did the author of the instrument use the words "heirs," "heirs of the body," or "issue?" Is there anything in the deed or will which will help the court to find out what was meant by the use of such words? The effect of certain modifying words and phrases—words of distribution, superadded words of limitation, and limitations over—has been discussed. There are many other forms of expression that may be used, especially by persons not learned in the law, which tend to show that a grantor or deviser has or has not used technical words in their technical sense; such as, for example, a devise to A, the property at his death to "descend" to the heirs of A; or a gift to B, remainder to the heirs of B "living at his death;" or a grant to C, remainder to his "legal heirs," his "legitimate heirs," or his "nearest heirs;" and such modifying words, and many others, may be used in combination with words of distribution, superadded words of limitation, or modifying words in limitations over, all of which simply indicate that the whole instrument must be examined to discover the intention; and that a decision on one case can only be a guide in a very general way as to what the ruling should be in another. As has already been pointed out, if there is any conflict of opinion in this matter of interpretation; if there is any confusion in the cases,—it is not due to any difficulty with respect to the rule in Shelley's Case, but results from the effort of the courts to discover the inten-

tion of the author of the instrument, who has expressed himself in ambiguous language. It must not be forgotten that the court is not here dealing with the rule in Shelley's Case or any real exception to the rule; it is simply considering a preliminary question of interpretation, a question which might have to be decided in a jurisdiction in which the rule in Shelley's Case has been abolished. See *HAMILTON v. SIDWELL*.

The cases under this subdivision have been arranged so as to lead the reader to the modifying word or phrase which seemed most to influence the court in reaching its decision; but in many cases the particular expression cannot be pointed out with certainty. A careful examination of the authorities leads to the conclusion that too much reliance must not be placed on single modifying words or phrases, but resort must be had to the language of the entire instrument, a caution which of course applies to the interpretation of any other writing. Where there are any superadded words in the deed or devise,—words of explanation which plainly show that the grantor or deviser did not mean to use the term "heirs" in a technical sense, but merely as a description of persons to whom he intends the estate shall go after the death of the first taker,—the court will effectuate such intention and restrain the grant or devise to an estate for life.⁵⁸

2. As qualifying the word "heirs."

(a) Deeds.

Where real and personal property were granted in trust for the use of the testator's infant son for life, and for the use and benefit of his heirs at the time of his death, and their heirs and assigns forever, but in case he should leave no heir or heirs living at the time of his death, the property was to go to the heirs at law of another son, it was held that the word "heirs" used in the first limitation was employed in the sense of children, and vested the life estate in the first taker.⁵⁹

Under a deed to one for life, and then to his heirs, etc., it was held that the word "then" indicated that the word "heirs" was used in a restricted sense.⁶⁰

all of testator's children as tenants in common during their respective lives, and afterwards to their issue as tenants in common, it was held that the children took an estate tail as tenants in common, and the children of the testator's children did not take any estate under the will. *Harrison v. Harrison*, 7 Mann. & G. 938.

⁵⁸ *Tallman v. Wood*, 26 Wend. 9.
29 L.R.A. (N.S.)

⁵⁹ *Findley v. Hill*, 133 Ala. 229, 32 So. 497.

⁶⁰ *Turman v. White*, 14 B. Mon. 560. The court said that as this would make the limitation consistent with the rule, and give effect to the whole instrument according to the evident intention of the grantor, that interpretation of the word would be adopted, if necessary for this purpose, and espe-

Where the estate was to "descend to" the heirs at law of a life tenant, "whoever they may be," it was held that the words "heirs at law" were clearly used as words of limitation to designate a class of persons to take in succession, upon whom, by the terms of the deed, the equitable estate was to descend from the settlor, and to whom, as entitled by such descent, the trustee was to convey over the legal estate, and thus terminate the trust. This was made

still more clear by the words "whoever they may be" immediately following and explaining the meaning of the words "heirs at law."⁶¹

But, as before stated, the whole instrument must be carefully examined to discover the intention, and the effect of no single word or phrase may be relied on with certainty to take a case out of the operation of the rule.⁶² Such qualifying words as "next of kin" ⁶³

cially as it was evident that the writer of the deed was not skilled in legal phraseology.

But in a conveyance to a trustee for the benefit of a woman for life, then to and for the use and benefit of her legal heirs, it was held that there were no apt words to indicate that the heirs were to be the termini from which the succession was to commence, so as to take the grant out of the rule in Shelley's Case. *Ware v. Richardson*, 3 Md. 505, 56 Am. Dec. 762.

⁶¹ *Eaton v. Tillinghast*, 4 R. I. 276.

⁶² A deed conveying real estate to a woman for life on condition that she shall not sell the property during the life of the grantor without his consent, and providing, upon the death of the life tenant, for reversion to the grantor, and in the event of his prior death that the property go to his lawful heirs, was held not to convey to a child in being when the deed was executed a vested interest as a purchaser in the property conveyed, the court stating that the deed, if taken as a whole, or if its provisions were considered separately, did not indicate in the slightest degree that the words "lawful heirs" were not used in their legal and technical sense as words of limitation and inheritance. *Due v. Woodward*, 151 Ala. 136, 44 So. 44.

Under a deed to a trustee in trust for a woman for life, the property at her death to belong "of right in fee simple to the lineal heirs" of the life tenant forever, it was held that the limitation to the "lineal heirs" was not so qualified by the super-added words "in fee simple forever" as not to denote an indefinite line of descent. The estate of the first taker was therefore a conditional fee. *Clark v. Neves*, 76 S. C. 484, 12 L.R.A. (N.S.) 298, 57 S. E. 614.

Under a deed to a husband and wife for their joint lives and the life of the survivor of them, and to their joint heirs free, clear, and discharged of all encumbrances whatsoever, the word "joint" before the word "heirs" was held not to be a word of explanation, indicating that the grantor meant to use the word "heirs" in a qualified sense as a mere *descriptio personarum*. *Waller v. Pollitt*, 104 Md. 172, 64 Atl. 1040.

But in a deed to a woman for life, it was provided that the property should then descend to her heirs, the children of her husband, after her death, with habendum to have and to hold unto them and their heirs forever. It was held that the words "the children" of the said husband, follow-

ing immediately after the word "heirs," were evidently intended as a more particular description of the persons who were to take upon her death, and that therefore "heirs" would be construed as a word of purchase, and not of limitation. *Hodges v. Fleetwood*, 102 N. C. 122, 9 S. E. 640.

And in a deed to a woman for life, and at her death to "such heir or heirs as she hereafter may have," it was held that the words "hereafter may have" showed that the words "heir or heirs" were used in the sense of children, and that therefore the rule did not apply. *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137.

A grant to one for life, and after his death to such person or persons as should at that time answer the description of heir, or heirs at law, of the devisee, the deed providing that such person or persons should take the property under that description as purchasers under and by virtue of the deed, and not by inheritance as heirs of the devisee,—was held to convey an estate to the heirs as purchasers. *Taylor v. Cleary*, 29 Gratt. 448.

In *Griswold v. Hicks*, 132 Ill. 494, 22 Am. St. Rep. 549, 24 N. E. 63, a conveyance to certain persons, their heirs, and assigns contained this provision, "meaning and intending by this conveyance to convey to my said children the use and control of said real estate during their natural lives, and at their death to go to their children, should they die without issue to their legal representatives, to have and to hold the same . . . to the only proper use, benefit, and behoof of . . . their heirs and assigns forever,"—it was held that the word "heirs" was not used in its legal sense, but rather as meaning children.

⁶³ A conveyance in trust for a married woman to have the rents, issues, and profits during her natural life, the trustees to sell and convey in fee simple the whole or any part thereof, lease, rent, or mortgage same as the *cestui que trust* should by writing direct, and, in case of a sale and conveyance, to invest the net proceeds, and pay the *cestui que trust* the interest thereon, or to invest the proceeds in the purchase of other real estate according to the trust, and upon the death of the *cestui que trust* to convey the property to such person as the *cestui que trust*, by any writing in the nature of a last will, should appoint and direct, and in default of such appointment, to her heirs at law or next of kin as may be,—was held to vest in her a life estate

or "children," however, may have an important bearing on the question.⁶⁴

(b) *Wills.*

By a limitation to the begotten heirs or heiresses of the body of the life tenant, it was held that the testate meant children, the rule in Shelley's Case not applying.⁶⁵ But the court afterwards reversed itself on this point, saying that the words "or heiresses" could not have any qualifying effect. In their direct connection the next preceding word "heirs" implied and embraced heiresses, and all they meant or could mean in their connection,—they were mere expletives, and served no useful purpose. The phrase, "her heirs or heiresses," meant no more than that the testator devised the land to his daughter and the heirs of her body, male and female. The course of descent was not changed in any degree from what it would have been if the word "heiresses" had not appeared, nor did that word suggest or imply children of the testator any more than the word "heirs."⁶⁶

only, the persons who were to take in succession as heirs at law to be ascertained at the time of the death of the *cestui que trust*, and that therefore those words were not words of limitation within the rule in Shelley's Case, but a *designatio personarum*. *Martling v. Martling*, 55 N. J. Eq. 771, 39 Atl. 203.

⁶⁴ Where the limitation after the life estate is "to their heirs after them forever" followed by the qualification, if the life tenant leaves any children, otherwise over, this was held to show that the grantor really meant children by the use of the word "heirs." *Criswell v. Grumbling*, 107 Pa. 408.

It does not follow, however, because the grantor uses the word "children" in one clause of a deed disposing of a tract of land, that he uses the word "heirs" in the same sense in another clause in which he disposes of other property as follows: "I give to him for life, with remainder to his heirs after his death." *Kay v. Connor*, 8 Humph. 624, 49 Am. Dec. 690. The court said that it would be as fair to argue that, by the use of the word "heirs" of the second clause, he meant heirs when he used the word "children" in the first. But the legal inference to be drawn from the use of these different words in the two clauses of the deed was that the donor knew their legal meaning and used them accordingly, for why should he vary them?

Where, by articles of agreement in contemplation of marriage, it was stated that the object of the contract was to secure the property of the woman to the use of her and her heirs, but it was provided that in case there should be issue of the marriage the property and every part thereof should

In a devise to one for life, then to his heirs, providing that in case any of the "above-mentioned heirs shall bring an account against the estate for labor or services, his share of the estate shall become forfeited and be distributed among the testator's remaining children," the word "heirs" was held to have been used in the sense of children.⁶⁷

Where the words of limitation were to the heirs and assigns of A, as if she had continued sole and unmarried, it was held that these words would, if she should marry a second time, prevent her own son, if she married a second time and had one, from succeeding, and that this would make the rule in Shelley's Case inapplicable for want of proper words of limitation.⁶⁸

The fact that a will may have been drawn by a person unskilled in legal terminology is a fact to be considered in finding out the testator's intention.⁶⁹

The question to be determined is whether the presumption that technical terms have been used in a technical sense is overcome by the qualifying words in the will.⁷⁰

descend to such child or children, share and share alike, according to the law of the state of Tennessee, it was held that the words "heirs" and "issue" were used in the sense of children, and were therefore words of purchase. *Aydlett v. Swope* (Tenn.) 17 S. W. 209.

As to the effect of the word "surviving" as a qualification of the meaning of the word "heirs," see *PRICE v. GRIFFIN*.

⁶⁵ *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455.

⁶⁶ 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657.

⁶⁷ *Bunnell v. Evans*, 26 Ohio St. 409.

⁶⁸ *Brookman v. Smith*, L. R. 6 Exch. 291, affirmed in L. R. 7 Exch. 271.

⁶⁹ In *Campbell v. Noble*, 110 Ala. 382, 19 So. 28, although a devise to the life tenant, named Elizabeth, was followed by the words, "if the said Elizabeth die and leave no heir or heirs of her body, my will is that all of the property she may acquire by the will shall be equally divided between all my children living, and such of my grandchildren whose parents may have died; and if she should die and leave an heir or heirs, I give to them forever," it was held, taking the whole will into consideration, and the fact that it was drawn by a person unskilled in the use of legal terms, that the terms were used in the sense of "children," and that therefore the rule in Shelley's Case did not apply.

⁷⁰ Where the devise was of the rents and profits of certain land to testator's wife for life and at her death to her heirs, it was held that the fact that the devisees might sell the land and use the proceeds in case of destruction of the buildings was not enough to show the testator's intent to

In an Indiana case it was held that a devise to one for life, and to her heirs in fee after her death, was squarely within the rule in Shelley's Case, so that the devisee took a fee simple. In this case the will also contained the following provision, providing that should the devisee die leaving no children alive, the land should be sold and the proceeds divided equally among the testator's remaining children, but this provision was not discussed. The court evidently did not deem the intention of the testator ma-

terial; for it was declared that every devise coming within the rule in Shelley's Case is controlled by it, even though the express purpose and intention of the testator is thereby thwarted.⁷¹ But it would seem that this was a proper case for a consideration of the question as to the intent with which the testator used the technical word "heirs." As heretofore emphasized, the rule in Shelley's Case does not preclude an inquiry as to such intention. Whether the testator used the words "nearest heirs"⁷² or "next

give the mere life estate to the wife, in the absence of such destruction. *Vowinckel v. Patterson*, 114 Pa. 21, 6 Atl. 470.

In *Elliott v. Pearsoil*, 8 Watts & S. 38, it was held that an estate tail is created by a devise of land to be enjoyed by the devisee during life, and at his death to be enjoyed by his heirs, and so on in tail forever.

The words "as he may by will direct" following the limitation to the heirs of the husband under a marriage agreement were held not to affect the operation of the rule. *Ferris v. Ferris*, 9 Ont. Rep. 324.

In *Morris v. Ward*, cited in *Alpass v. Watkins*, 8 T. R. 518, "Thomas Wardell, seised in fee, had issue, a daughter named Lucretia; and by his will . . . devised thus: I give and bequeath to my daughter Lucretia, wife of G. Andrews, all my plantation, together with the negroes, etc., charged, etc., during the natural life of my said daughter. Item. I bequeath to the heirs of the body of my said daughter Lucretia begotten or to be begotten, and to his or her heirs forever, after my said daughter's decease, all my before-named plantation, etc.: but for want of such heirs of the body of my said daughter I also give and bequeath the aforesaid premises after the decease of my said daughter to my next heirs and their heirs forever." The argument of counsel was that "it is a general rule of law that when an estate is limited to one for life, a limitation afterwards to the heirs of the body of the same person creates an estate tail; and though this be in the case of a will, there is no reason to depart from that rule; for if Lucretia were construed to have an estate for life only, then the remainder 'to the heirs of her body' would be words of purchase; and then though she had had several sons, yet the eldest son only would have been heir; and the younger sons would never have taken under that limitation, though it was clearly the testator's intention that all her sons should take, by his using the word 'heirs' in the plural number; and the subsequent clause, 'for want of such heirs of the body of my said daughter, to my own next heirs and their heirs forever,' was a further explanation of his meaning, that his daughter should take an estate tail with a remainder to his own right heirs. . . . This was heard before the privy council 29 L.R.A. (N.S.)

18th March, 1730, where it was ruled that 'Lucretia took an estate tail.'

In *Brooks v. Evetts*, 33 Tex. 732, where the devise was to a woman and her heirs during her natural life, the court said that it was the intention of the testatrix to give the devisee an estate for life in the property devised, with a vested remainder to the latter's heirs, and that the heirs of the life tenant took as purchasers.

A devise to a daughter for life and to her heirs forever, or whosoever she may please to will the property devised to at her death, under a will executed and probated before 38 O. L. 126, § 5968, of the Ohio Revised Statutes, was held to create a fee simple in the daughter. *Kimball v. Kimball*, 13 Ohio S. & C. P. Dec. 555.

Where the devise was to the testator's sisters for life, and as they should severally die, to their several heirs, it was held that such words had never been held to make the heirs purchasers. *Sheppard v. Gibbons*, 2 Atk. 444.

⁷¹ *Bonner v. Bonner*, 28 Ind. App. 147, 62 N. E. 497.

⁷² A devise to a person for life, with remainder over "to his nearest heirs," was held not taken out of the rule in Shelley's Case by the use of the word "nearest." *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65. The court said: "The nearest heirs are all those persons upon whom the law would cast the inheritance in the first instance upon the death of the ancestor intestate, and there can be no other heirs. Those who are heirs are therefore necessarily nearest heirs, and conversely, nearest heirs can be no other than heirs generally, and must include all those who stand in the same relation to the ancestor in respect of the right of inheritance."

And the superadded words, "or next of kin, in the same manner as though she had been seised thereof in her lifetime in fee simple and unmarried, and had died intestate," in a devise to one for life, the property at her death to pass and descend to her heirs, were held not to show an intention that the first devisee take only a life estate. *Serfass v. Serfass*, 190 Pa. 484, 42 Atl. 888.

But a devise to a testator's four sons during their natural lives, and at their deaths to their, or each of their, nearest

of kin," or "legitimate,"⁷³ "legal,"⁷⁴ or "lawful heirs,"⁷⁵ or "begotten" heirs,⁷⁶ or

male heirs, was held to give the first taker a life estate, the word "heirs" not being used in its technical sense, and the rule in Shelley's Case therefore not being applicable. *Jones v. Bower*, 20 Pa. Co. Ct. 95.

⁷³ Where, after a devise to one for life, the will provides that if the life tenant leaves no legitimate heirs, the property is to go to a specified person, it was held that the words "legitimate heirs" had, in the mind of the testator, no other meaning than children born in lawful wedlock or children generally, and did not refer to heirs generally, collateral as well as lineal, or issue in indefinite succession, and that therefore the rule in Shelley's Case did not apply so as to raise an estate tail in the first taker. *Lytle v. Beveridge*, 58 N. Y. 592.

⁷⁴ A bequest to a son of the use of one half of the testator's real estate for life, and at his death to his legal heirs, gives him a fee simple title thereto under the rule in Shelley's Case. *Pease v. Davis*, 225 Ill. 408, 80 N. E. 249.

A devise to the testator's son during his natural life and then to go to his legal heirs, the will containing no added words of limitation, nor any provisions repugnant to the acceptance of the technical word "heirs" in its strict legal sense, was held to give the devisee a fee. *McGregor v. Davidson*, 14 Pa. Super. Ct. 230.

A devise of real and personal property to one for life and after that to his legal heirs, to do with it as they see proper, is clearly within the rule. *Garver v. Clouser*, 218 Pa. 611, 67 Atl. 909.

In *King v. Beck*, 15 Ohio, 559, it was held that the words "legal heir or heirs" were used in the sense of children, in a devise to testator's brother to be used by him while he lives, and at his death, if he should be possessed of any legal heir or heirs born in lawful wedlock, the property should go to them, and that if the testator should die without lawful heirs, and his brother should die without heirs born lawfully, that the property was to go to children of the testator's two sisters.

Where by the terms of a will an estate for life is devised to a son, with remainder to his legal heirs, this will vest an estate in fee in him under the rule in Shelley's Case. *Swann v. Poag*, 4 S. C. 18.

The use of the words "legal heir or heirs" in a devise over after a life estate does not take it out of the operation of the rule. *King v. Beck*, 12 Ohio, 390.

⁷⁵ In *Wool v. Fleetwood*, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785, it was held that the rule applies to a devise to the children of the testator during their natural lives, and at their death to vest in their lawful heirs, the word "lawful" being not sufficient *per se* to show an intention not to use the word "heirs" in its ordinary legal sense as a word of inheritance or limitation.

Where a will provided that a devise of land to the testator's son should be for 29 L.R.A. (N.S.)

life only, and that at his death it should go to his lawful heirs, it was held that he took the fee according to the rule in Shelley's Case. *Hicks v. Deemer*, 87 Ill. App. 384, reversed on another point in 187 Ill. 164, 58 N. E. 252.

A devise of land to testator's daughter and heirs, the will providing that the property was lent to the daughter, and was not to be subject to any debts she or her husband might contract, "but to be bona fide property of her lawful heirs," if construed to be a devise over after a life estate, would be within the rule. *Britt v. Rowland Lumber Co.* 136 N. C. 171, 48 S. E. 586.

The rule applies so as to vest a fee in the first taker under a devise of the testatrix to her son in the following words: "The two houses situated on Fourteenth street is a lifetime lease; it cannot be taken from you, nor you cannot spend it; but it is held to insure you something to live on during your lifetime, and at your decease if you have lawful heirs, then all will fall to them, but if not, then my present residence to be sold, the money to be distributed as follows," etc. *McCann v. Barclay*, 204 Pa. 214, 53 Atl. 767.

Where by a devise a son is given the use, benefit, and control of the property during his lifetime, and at his death the fee is given to his lawful heirs, it was held that the first taker had the fee; and the fact that the scrivener who prepared the will, as well as the testator, was unfamiliar with the use and meaning of technical language, and that the son had an illegitimate child which the testator sought to exclude from taking under the will, by the use of the term "lawful heirs," and that the testator executed the same with a view to cut down a devise formerly given to the son, from a fee to a life estate, was held to make no difference. *Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. 28. The court said that the testator having used language the legal effect of which was to vest in the son a fee, that the intention thus expressed must control in giving a construction to the will, regardless of whatever unexpressed intention might have existed in the mind of the testator.

But in *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684, there was a devise to testator's grandson for life, and "if it shall so happen that he have any lawful heirs I give it to them, or any of them that he may think proper." It was held that the testator used the words "lawful heirs" in the sense of heirs of the body, and that the superadded words, "or any of them he may think proper," took the devise out of the rule in Shelley's Case; since it was in the power of the life tenant, if he had more than one child, to give the land to one of them, and that one would not have taken the same estate which he would have taken if the land had come to him by descent.

⁷⁶ Where the devise was to the testator's wife during her life, and at her death to

"male" heirs,⁷⁷ the question always is whether he meant thereby to take the property out of its ordinary course of descent by designating a particular class to take. If words such as "at his (the life tenant's) death,"⁷⁸ or "then,"⁷⁹ or "then

be divided among the testator's lawfully begotten heirs, for their use, and their lawfully begotten heirs during their natural life, and then to descend to their lawful heirs to be disposed of as they might severally determine, it was held that the words "my lawfully begotten heirs" were here used in the sense of children. *Watson v. Williamson*, 129 Ala. 362, 30 So. 231. The court said that the indiscriminate use of the word "heirs," when it was evident that children were meant, to designate the class of persons who were to take upon a division of the lands after the termination of the life estate of the wife of the testator, evinced that the will was drawn by one not skilled in the drawing of such instruments, unacquainted with their forms and unacquainted with the technical meaning and force of the expressions employed. Where this was the case greater latitude of construction must be indulged, than where the instrument was drawn by a person acquainted with the meaning of technical phrases and words used.

The words "born of his wife," qualifying and explaining the words "his lawful heirs," confine the remainder to the children of his wife, and prevent the operation of the rule, since the superadded words show that the deviser intended to make the words "lawful heirs" a *designatio personarum*, that is, they showed an intention on his part to limit the remainder over to a particular class of heirs. *Thompson v. Crump*, 138 N. C. 32, 107 Am. St. Rep. 514, 50 S. E. 457.

In *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721, the word "heirs" in a devise by which the testator lends property to his son, providing that if he has a lawful heir begotten of his body at his death, "I give to said heir or heirs, and if he dies without an heir as aforesaid," then over, it was held to be quite manifest that the terms "heir," "heirs," and "lawful heir begotten of his body," were employed not to designate the estate, but the persons to take it,—the children of the devisee to whom the immediately preceding life estate was limited,—in other words they were a *designatio personarum*, since the word "lend" was used to indicate the nature and extent of the donation, and when the absolute property was to be parted with it was given to the ultimate donee, and the expression, "if he have a lawful heir begotten of his body at his death," most clearly pointed to personal offspring.

But in a devise by which the testator gave his son the use of certain land during his life, and provided that in case the son should have heirs lawfully begotten he might dispose of the said land "to either or amongst the said heirs as he shall think proper," but in case of dying without heirs, then over, the words "heirs lawfully be-

gotten" were held equivalent to the words "heirs of the body," and as such were held to have been used as words of limitation, the first taker taking an estate tail converted by statute into a fee simple. *Ball v. Payne*, 6 Rand. (Va.) 73. In this case, however, it will be observed that there is a limitation over on "dying without heirs."

⁷⁷ The words "male heirs" in a devise to a grandson for life and after his death to his male heirs, equally between them, and for want of male heirs, then over, are words of limitation, and enlarge the first estate to an estate tail under the rule in *Shelley's Case*. *Cooper v. Cooper*, 6 R. I. 261.

A devise to a testator's son for life and after his death to his male heirs gives the first taker an estate tail under the rule in *Shelley's Case*, which by statute was held to be changed into an allodial estate. *Fraser v. Chene*, 2 Mich. 81.

But in *Conklin v. Conklin*, 3 Sandf. Ch. 64, lands were devised to the testator's nephew for life and at his death to his male heirs which he "now has or may have hereafter," but in case he should die without male heirs then the lands were devised to his female heirs. It was held that the devise to the nephew was clearly for life only, and that the words used in the devise of the remainder were not such as would have created an estate tail within the rule in *Shelley's Case*.

The rule in *Shelley's Case* does not apply to a devise to testator's brother for life and at his death to his eldest male heir, and after his death to the said male heirs and assigns forever, since the words "said male heirs" were intended to designate the eldest male heirs who should take in succession after the death of the first remainderman, these words therefore must be construed as words of limitation of the estate in remainder, and not as enlarging the life estate. *Canedy v. Haskins*, 13 Met. 389, 46 Am. Dec. 739.

⁷⁸ Under a will, the words "lawful heirs" used in the phrase, "to have and to hold during his natural life, and at his death to his lawful heirs," were held to have been used in the sense of children, the rule in *Shelley's Case* not applying. The court said that if the words "lawful heirs" were intended by the testator as words of limitation they were in conflict with the words "at his death." *Lacy v. Floyd* (Tex. Civ. App.) 84 S. W. 857.

In *Foxwell v. Craddock*, 1 Patton & H. (Va.) 250, the testator devised property, at the death of his wife, to his son, to be used by him for his own benefit for life, to be vested in fee simple in his lawful heirs at his death; the will providing that should he die without issue the property was to return to the testator's other children, to be equally divided between them; the will also providing that the right given to his

living" or "surviving," or "now living,"⁸⁰ the question is whether it was intended by these words to limit the distribution to a definite time, rather than permit the property to descend in the regular course from generation to generation.

And the word "descend" may have an im-

portant bearing on the question of intention. Where the limitation after the life estate was that the property "descend" to the life tenant's heirs, this was held to indicate that the word "heirs" was used in its technical sense.⁸¹ But it will not do to rely absolutely on this word as indicating the purpose

son should not be construed so as to vest in him any power to dispose of the property in any way, the testator declaring that it was only loaned to him during his life, and that after his death it should be used in the manner provided for. It was held that the word "heirs," as here used, was a word of purchase, meaning children, and not of limitation.

By a devise in the following words: "I will and bequeath to my son J. S., for the term of his natural life, the farm, etc., but if my son J. S. should leave a lawful heir or heirs, then said lands shall be equally divided among them at the death of their father. But if my son J. S. should die without leaving lawful heirs, then in that case I direct the said lands to be sold and the proceeds divided equally among my remaining children or their heirs,"—it was held that the testator had himself interpreted the first words "lawful heir or heirs" to mean child or children, by declaring that the farm was to be divided among them at the death of their father, and that therefore the rule in Shelley's Case did not apply. *Smith v. Smith*, 8 Ont. Rep. 677.

But in *Pierce v. Pierce*, 14 R. I. 514, the fact that the limitation to the heirs is "at the decease" of the life tenant was held not to show that the word "heirs" was used to designate certain persons answering to the description of heirs, and not as a word of limitation, but as a *nomen collectivum* for the whole line of descent. The court said that undoubtedly "at his or her decease" is not so common an expression as "after his or her decease" in such devises, but the difference is considered too insignificant to break the stubborn strength of the rule.

⁷⁹ The word "then" does not restrict a limitation to a man for life and then to his heirs at law in fee simple, the word indicating only the order in which, not the time at which, the limitations are to take place. *O'Keefe v. Jones*, 13 Ves. Jr. 413.

⁸⁰ In *Criswell's Appeal*, 41 Pa. 288, the devise was in the following words: "I give to my son . . . during his natural life and that of his present wife, all the tract of land whereon he now lives, etc., and it is further my will and desire that after the decease of my said son and his present wife, that the said tract of land descend to their heirs jointly, and their heirs and assigns forever, or to such of them as may be then living." It was held that the testator by the use of the alternative phrase, "or to such of them as may be then living," did not intend to show that he did not mean to use the word "heirs" in its technical sense. The court said: "Let it be admitted 29 L.R.A. (N.S.)

that the words 'then living' are strictly of no legal meaning when applied to heirs, this is no sufficient reason for holding that the testator in the use of technical words of limitation intended to depart from their ordinary legal meaning. . . . If the words are repugnant, why should the word 'heirs' give way, rather than the words 'then living'? In the will of an unlettered man, however, they can hardly be called repugnant. Lawyers may understand that there are no heirs of a living person, or that the phrase 'living heirs' is a superfluous addition to a gift to heirs, but laymen may not."

And in a devise to a nephew for life, followed by a remainder to his then surviving heirs in fee simple, it was held that the words "his then surviving" did not prevent the word "heirs" from falling within the rule. The court says there is no distinction between the expression "his then surviving heirs" and "heirs then living," or "heirs then living at the time of their deaths." In each case the word "heirs" refers to those who, under the intestate laws, would inherit from the first taker *qua* heirs. *Hiester v. Yerger*, 166 Pa. 445, 31 Atl. 122.

In *Green v. Staples*, 5 Madd. Ch. 85, there was a devise of certain property to trustees and their heirs to permit a man to enjoy the same for life, the property to go after his death to his first and other sons and daughters "now living," successively for life as they were in priority of birth, the sons to be preferred in succession to the daughters, and the heirs of the bodies of such sons and daughters respectively issuing, and, in default of such issue, in trust for the testator's right heirs forever. It was held that he took an estate tail, the court saying that the true construction of the will was that the heirs of the body were to succeed to the parent, and that the effect of the limitation was the same as if it had been to the first devisee alone for life and remainder to the heirs of his body.

⁸¹ *Chippis v. Hall*, 23 W. Va. 504. The court said that the language used was so very strong to show that this was his meaning, that it was doubtful whether, if the will has been made after the abolition of the rule in Shelley's Case, testator's son would not still have taken a fee simple. For, though the will did say that this land was given to him during his natural life, yet when the testator added that at his death it should "descend" to his heirs, he had used language utterly inconsistent with the idea that his son should have nothing but a life estate of the land. No matter how ignorant the testator might

of a testator to use the word "heirs" in its technical sense.⁸²

3. As qualifying the words "heirs of the body."

(a) *Deeds.*

Where real property was conveyed to a trustee for the benefit of the grantor's wife for life, and then to the heirs of her body, with power to sell and reinvest when deemed best for the interest of the wife and children, the grant was held not within the rule for one reason, because the word "children" in the power indicates that the words "heirs of the body" were used as words of purchase.⁸³ And a deed to one for life, remainder to the heirs of his body forever, except a certain person named, one of the sons of the first grantee, was held not to convey an estate in fee tail, but only a life estate to the first grantee.⁸⁴ The words "bodily heirs by me," and words of similar import, have been held as synonymous with the word "children."⁸⁵ Under a deed conveying property to a person for her lifetime, and after her death to descend to the heirs of her body, it was held that the grantee would at common law take an es-

tate tail.⁸⁶ But where by a marriage settlement estates were given to the husband and wife for their lives, remainder to the heirs of the body of the husband on the body of the wife, and their heirs, if more children than one, equally to be divided among them as tenants in common, and for default of such issue, to the wife and her heirs, it was held that the words "heirs of the body" were interpreted by the words "and if more children than one," and therefore must be taken to mean children.⁸⁷

Where the grantor conveyed property to his three children named, their heirs and assigns forever, adding that it was nevertheless understood that the grantor reserved to himself, as natural guardian, the sole and exclusive right and privilege of renting or leasing the premises granted, and of receiving the rents and profits thereof, to be used and applied by him at his discretion for the support and maintenance and education of the children during the life of the grantor, and that the property was not to be subject to the control or disposition of anyone, or all, or either of the grantees, but was to be held for the sole and exclusive use and benefit of them for their lives, and of the legal heirs of their bodies, and their own proper descendants forever, the rule in Shelley's

have been, the court could not conceive that he did not know that a life estate could not descend to a man's heirs on his death.

A devise to a testator's son during his natural life, the property at his death to descend to his heirs, is within the rule. *Ibid.*

Where a life estate is devised to a person, "the principal to descend to her heirs," the devise is within the rule in Shelley's Case, since the heirs are named to take as a class or denomination of persons in succession from generation to generation, and by way of remainder, or so that the estate to arise from the limitation to the heirs and the estate of freehold, both owe their effect to the same will, and the several limitations give interests of the same quality, and both of them are legal. *Baker v. Scott*, 62 Ill. 86.

A devise of lands to the testator's daughter "during her natural life, and after her death to descend and vest in her legal heirs," vests a fee in the daughter. *Vangiesou v. Henderson*, 150 Ill. 119, 36 N. E. 974.

Under the rule in Shelley's Case a fee was held to vest in testator's son under a devise in the following words: "I hereby confirm and make over to the use of my son Robert, the land on which he now lives, during his life, and in no case to be taken for debt, and at his decease to descend to his lawful heirs." *Fewell v. Fewell*, 6 Rich. Eq. 138.

⁸² In *Wescott v. Binford*, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18, a devise to one for life, providing that he

should have the use, rents, and profits of it during that time, that he should have no power to convey or dispose of the same for a longer period than during his natural life, and that at his death it should descend to his heirs, was held to show that the testator intended a life estate only, and that this intention would not be overthrown by the application of the rule in Shelley's Case.

⁸³ *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339. The court said that the use of the word "children" in the same clause of the deed where the words "heirs of her body" occur would sufficiently indicate the purpose of the grantor to create a new stock of inheritance.

⁸⁴ *Blake v. Stone*, 27 Vt. 475.

⁸⁵ *Twelves v. Nevill*, 39 Ala. 175.

In *Ault v. Hillyard*, 138 Iowa, 239, 115 N. W. 1030, it was held that the word "heirs" in a limitation after a life estate "to the heirs of her body begotten, in fee simple, to take effect as to said heirs at the death" of the said life tenant, was used in the sense of "children," so that the rule in Shelley's Case did not apply.

⁸⁶ *Andrews v. Spurlin*, 35 Ind. 282.

⁸⁷ *North v. Martin*, 6 Sim. 266. The court said that if those interpretative words had not been used, the husband, notwithstanding the superadded words of limitation, would have taken an estate in tail special. The court did not recollect any case in which the words "heirs of the body" had been held to create an estate tail where those words of interpretation had been used.

Case was held applicable.⁸⁸ And the words, "Which I convey wholly unto her charge and possession by the delivery of the same," instead of explaining or restricting the words "bodily heirs," so as to show that the donor intended that they should take as purchasers, were held to be affirmative of the construction put upon them by the common law.⁸⁹

And a deed conveying property to a person for her lifetime, and after her death "to descend to the heirs of her body," was held not taken out of the rule in Shelley's Case by a subsequent clause providing that the grantee, in consideration of the deed, receipts and forever quitclaims to any further interest in and to the grantor's real

estate, and that a transfer of the property by the grantee shall in no wise be valid, since this prohibitory language applies to that interest in the grantor's estate which the grantee quitclaimed to the grantor.⁹⁰ In the construction of a deed to determine the intention with respect to the use of technical terms, effect must, of course, be given, if possible, to all of its provisions.⁹¹

(b) Wills.

No definite rule can be deduced for determining a testator's intention that will apply to every testament. It will be observed that each case must stand largely on its own facts,⁹² which vary largely in each of the in-

⁸⁸ Lawrence v. Singleton, 3 Shannon, Cas. 169.

⁸⁹ Bradford v. Howell, 42 Ala. 422.

⁹⁰ Andrews v. Spurlin, *supra*.

⁹¹ In Lisle v. Gray, 2 Lev. 223, one seised of certain lands covenanted to stand seised to the use of himself for life, remainder to E., his first son, for life, remainder to the first son of E. in tail male, remainder to the second, third, and fourth sons of E. in tail male, etc., and so to all and every other the heirs male of the body of E. respectively and successively, and to the heirs male of their bodies, according to their seniority of birth, remainder to A. for life, remainder to his first son in tail male, and so to the first, second, third, and fourth sons in tail male, and so to all and every other the heirs male of the body of A. severally and respectively, according to their seniority of birth. The covenantor died. E. suffered a common recovery and died without issue male. The question was whether A. was barred by the recovery. It was urged E. took only an estate for life, because first, by the words "and so to the heirs male of the bodies of those heirs," it appeared that the heirs male were to take by purchase, for otherwise these words, "to the heirs male of their bodies," need not have been added; for if they took by purchase and successively, then had the words the same sense as all and every son and sons; and that the words, "and so to all and every other the heirs males," etc., were words of relation, and signified "so as the heirs male, *scil.*, the sons," translating the word "so" in latin *eodem modo* as the first four sons took, to serve the intent of the parties and to make the conveyance coherent; that a proviso that if E. should die without heirs male of his body, he might charge the estate with portions for his daughters, were needless if E. had an estate tail; and the court so concluded, holding that E. had an estate for life. It is said in this report that upon a writ of error upon the first argument, the court of exchequer chamber inclined to affirm the judgment, but that before it was affirmed or reversed the suit abated.

⁹² The words "heirs of her body" in a 29 L.R.A. (N.S.)

devise of property to testator's daughter for her natural life only, providing that after her death the property should go to the heirs of her body, free and clear of all liens and encumbrances thereon, were held to be words of purchase, the use of the word "only" indicating the intention of the testator to create a new stock of descent at her death. Slemmer v. Crampton, 50 Iowa, 302.

The rule does not apply to a devise of money and real estate to a son, providing that he may invest or use the property as in his discretion he may think best, during his natural life, and that at his death it is to go to the heirs of his body, and be used for their education if necessary, the court saying that the intention of the testator must prevail over technical language when such language is qualified by superadded words. Crawford v. Wearn, 115 N. C. 540. 20 S. E. 724.

In Goodtitle *ex dem.* Sweet v. Herring, 1 East, 264, where there was a devise to A for life without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of A to be begotten, severally, successively, and in remainder, one after another, according to the seniority, etc., the eldest of such sons and the heirs male of his body being always preferred before the younger of such son and sons, and the heirs male of their bodies, and in default of such issue, to the daughter and daughters of the bodies of A, as tenants in common in tail, remainder over, it was held that A took an estate for life only. Lord Kenyon, Ch. J., said the rule in Shelley's Case was established only to the extent in which it was there found; that is, to this effect, that if an estate of freehold be given to a man, and either mediately or immediately, in any part of the same instrument, an estate is limited to the heirs of his body, the latter limitation will unite with the former, and give him an estate tail; but it had never been decided that those words might not be otherwise explained in the will of the testator himself.

By a devise to a man for life, and after his death to the heirs male of his body for

dividual cases,⁵⁵ it being necessary to consider carefully the language of the whole in-

their lives, in succession, according to their respective seniorities, or in such parts and proportions, manner and form, amongst them, as the first taker should appoint, it was held that the words "heirs male of his body" were used in the sense of "sons," and that the first taker therefore took an estate for life only. This opinion was held by two of the judges only, the remaining two being of the opinion that the first taker took an estate tail. The court being evenly divided, the judgment of the lower court in favor of the life estate in the first taker was therefore affirmed. *Jordan v. Adams*, 7 Jur. N. S. 973.

Where there was a devise to a trustee to receive the rents and profits of certain property for the maintenance of a married woman and the issue of her body for life, and after her death upon trust for the heirs of her body, their heirs and assigns forever, without regard to seniority of age or priority of birth, and in default of such issue, to the use of the right heirs of the testatrix, it was held that she took only an estate for life, the words "without respect to seniority of age or priority of birth," etc., being held plainly to show an intent that they should take as purchasers. *Doe ex dem. Hallen v. Ironmonger*, 3 East, 533.

But a devise to trustees on trust for the use of testatrix's son for life after his death in trust for the use of the heirs male of his body, lawfully begotten, according to their respective seniorities and priorities of birth, in tail, and in default of such issue male, in trust for the use of all and every the daughter and daughters of his body, lawfully begotten, as tenants in common, and not as joint tenants, etc., and in default of such issue, over, was held to give the son an estate tail, notwithstanding the words, "according to their respective seniorities and priorities of birth, in tail," and the words, "in default of such issue." *Johnson v. Rutherford*, 3 L. T. N. S. 649.

⁵⁵ In *Johnson v. Smith*, 108 Va. 725, 62 S. E. 958, the words "heirs of her body" were held equivalent to the word "children" in a devise to one "during her natural life, and then to the heirs of her body, if any; if no children, to her sisters."

Where the limitation was to the heirs of the devisee's body by him begotten, if any such heirs should survive him, it was held that the modifying words used in connection with "heirs of his body" limited that phrase to "children" almost as definitely as if the word "children" had been used itself; and that therefore the rule in *Shelley's Case* had no application. The court said that it was true that the words "heirs of his body," standing by themselves, might mean any person in the line of descent from the life tenant, and who might in law be entitled to inherit from him,—his issue general. Certainly, however, the only ones of all such heirs that could be by him begotten would be his own natural born chil-

dren. A man cannot beget anyone except his own children. He may have numerous heirs, but the only heirs begotten by him are his own sons and daughters. To beget is as strong a word as child itself. It is the act by which a child is brought into being. In a measure the same relation exists between the word "beget" and the word "child," that exists between the word "create" and the word "creation;" between "cause" and "effect." *Granger v. Granger*, 147 Ind. 95, 36 L.R.A. 186, 44 N. E. 189, 46 N. E. 80.

But where the devise was to the testator's daughter for her benefit during her life, the husband to have no control over the property, which was to "remain the property of the heirs of her body after her death," it was held not to be inferable from the express exclusion of the daughter's husband that the testator used the words "heirs of the body" in the sense of "children," on the theory that the exclusion was needless had he intended an estate tail, since the intention to create a separate use free from the control of the husband was sufficient to account fully for the presence of the clause respecting him. *Wilkerson v. Clark*, 80 Ga. 367, 12 Am. St. Rep. 258, 7 S. E. 319.

Where the limitation was to the heirs of the bodies of the life tenants, the qualifying words, "any such shares as they would take as their representatives at law, free and discharged of all further trust and limitations," were held not alone to take the devise out of the operation of the rule. *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400.

In *Elton v. Eason*, 19 Ves. Jr. 73, in a residuary trust created by will to apply the rents and profits for a person for life, and afterwards for the heirs of his body, if any, and in default of such issue, over, the words "if any" were held to have no restrictive effect, the first taker taking an estate tail in the real and an absolute interest in the personal property.

Where there was a devise to trustees to pay debts, and then to stand seised to the use of a person for life, without impeachment of waste, and after his death to the use of the heirs male of his body, severally, respectively, and in remainder, it was held that this created an estate tail in the devisee. *Jones v. Morgan*, 1 Bro. Ch. 206.

Where the limitation after the life estate was to the heirs of the body of the life tenant who should live to attain the age of twenty-one years, and to his heirs and assigns forever, but in default of such heirs male, or, there being such, if he or they should die before he or either of them should attain the age of twenty-one, without lawful issue, it was held that the words "heirs male of the body" were not converted into words of description by the words "should they live to attain the age of twenty-one years." *Toller v. Attwood*, 20 L. J. Q. B. N. S. 40.

A fee in the first taker under a devise to

strument before a decision can be reached.⁹⁴ As has been pointed out heretofore, the courts are not in harmony apparently as to

the effect of words importing a distribution at a definite time,⁹⁵ or the word "descend,"⁹⁶ or of the word "begotten."⁹⁷ A

a woman for life, and the heirs of her body at her decease, is not cut down to a life estate by the succeeding clause, "and in case of her or her children dying without leaving issue, the said real estate I give to," etc., the word "children" in this clause being used in the sense of "heirs of the body." *Hastings v. Engle*, 217 Pa. 419, 66 Atl. 761.

⁹⁴ Where the will provided that if the devisee of certain property should die and leave an heir or heirs of her body, "in that case said heirs, being her children or child, is to hold, occupy, and possess all the property herein given, to them and their heirs forever," it was held that these words, together with the whole instrument, showed clearly that the words "heir or heirs of her body" were used in the sense of "child or children," so that the children took as purchasers, the rule in *Shelley's Case* not applying. *Doe ex dem. Williams v. Beasley*, 60 N. C. (1 Winst. L.) 102.

An estate tail is created by a devise of real estate to a person for life, remainder to trustees to preserve contingent remainders, remainder to the heirs of his body, with remainders over for life and in tail male, and an absolute estate in personal property is created by the same terms. *Browncker v. Bagot*, 19 Ves. Jr. 574.

Where a bequest was made to a woman for life, the property being given at her death to her lawful heirs of her body, it was held that the fact that the word "heirs" might have been used in the sense of "children" in a preceding and succeeding clause of the will would not convert the word "heirs" as used in this clause into a word of purchase. *Lloyd v. Rambo*, 35 Ala. 709.

If the words are "if there be but one such child, to such child, his or her heirs forever," the term "heirs of the body," theretofore used, will not be held to mean "children" if there are no words to carry the fee to them except in the event of there being only one child. *Bridge v. Chanman*, Notes of Cases, L. J., July 10, 1875, 118, Theobald, Wills, 421.

⁹⁵ In a devise to a woman for life, "the reversion and fee thereof to the heirs of her body at and after her decease," the words "heirs of her body" were held to be employed as words of description, designating the children of the life tenant as the persons who should take the fee of the estate, and that notwithstanding the fee might vest immediately, the enjoyment was postponed until at and after her decease. The court said that the very fact that the enjoyment of the estate was postponed until at and after the decease of the life tenant, and then became absolute, showed beyond doubt that the testatrix did not use the words "heirs of her body" in the common-law sense of words of limitation to indicate a class of persons to take from generation to genera-

tion. Butler v. Huestis, 68 Ill. 594, 18 Am. Rep. 589.

In *Warner v. Mason*, 5 Munf. 242, a testator gave his son a tract of land for life, and provided that it should then go to his heirs lawfully begotten of his body,—"that is, born at the time of his death, or nine calendar months thereafter,"—and for want of such heirs, then to two grandsons named, etc. The first devisee entered and died seised without having had any issue, and having devised the land to his sister, the grandsons brought ejectment and were held entitled to possession.

But where the devise was to a woman for life, and after the determination of that estate, then to the heirs of her body, lawfully issuing, and for default of such issue lawfully begotten, the property was to return to the grantor and his heirs forever, the words, "after the determination of that estate," etc., were held not to change the legal effect of the words "heirs of the body." *Polk v. Farris*, 9 Yerg. 209, 30 Am. Dec. 400.

In *Tunis v. Passmore*, 32 U. C. Q. B. 419, it is said there is no difference between the expressions, "on the determination of the life estate," or "of that estate," and "on the determination of the life" or "on the death of the tenant for life." In every such case there is the limitation of the freehold and the limitation to the heirs, or heirs of the body, in the same instrument, to the same person, and that is all that is necessary to constitute the one enlarged estate by reason of the two limitations.

In *Williams v. Williams*, 10 Heisk. 566, it was said that a devise to testator's grandson for life, and then to the heirs of his body by legal marriage, and in the event of his death without such heirs, then to testator's residuary legatee and his heirs, would fall precisely within the rule.

⁹⁶ In *Smith v. McCormick*, 46 Ind. 135, a testator gave his daughters a certain sum of money which they might take in real estate, if they liked, and if necessary to pay the same, real estate was authorized to be sold, said daughters to enjoy the use of the money bequeathed to each during their lives, and at their deaths the same to revert and descend to the heirs of their body. It was held that the devisees took title in fee simple to the lands, and that the money paid to them would be theirs absolutely.

⁹⁷ In *Verulam v. Bathurst*, 13 Sim. 375, under a devise of certain property in trust to permit the daughter of the testatrix to receive the rents and interests for life for her separate use, the will providing that after her death the rents and interests should go to the heirs of the body of the daughter, lawfully begotten, but that in case the daughter should happen to die without leaving any lawful issue living at her death, then over, it was held that the daugh-

limitation of the remainder to the heirs "male" is within the rule.⁹⁸

4. As qualifying the word "issue."

(a) Deeds.

A deed of certain lands to a person and to his heirs and assigns forever, "for and during his natural life, and to the issue and heirs of the body of the said party," would, under the rule in Shelley's Case, undoubtedly give the devisee a fee tail in the property.⁹⁹

But it was held that where the conveyance was to one during her life, with re-

mainder over to the issue of her body, born alive, and in the event of the grantee dying without issue of her body, born alive, remainder over to another person named in the deed, the rule in Shelley's Case did not apply, since the word "issue" used in the deed was to be taken as a word of purchase.¹⁰⁰

(b) Wills.

The word "issue," being of a flexible nature, it is quite easy to qualify it so that it may be taken as a word of purchase.¹ It is quite commonly used in the sense of "children."² And when used in this sense, of course, takes the devise out of the opera-

ter took an absolute estate, there being nothing in the will which of necessity restrained the general import of the words "heirs of the body," there being no words of limitation superadded, no reference to children, no reference to sons or daughters, or no gift of property to the heirs of the body by a description different from that by which it was given in the first instance for life.

Under a devise to testator's son of the free use of certain land, with the house and improvements thereon during his life, and after his death, unto the heirs of the said son, lawfully begotten of his body, forever, and for want of such heirs, over, it was held that the son took an estate in fee tail general. *Keys v. Goldsborough*, 2 Harr. & J. 369.

But the word "heirs" in the devise to one for life, and after his death to the heirs of his body begotten in lawful wedlock, and none others, was held to have been used in the sense of "children," so that the rule in Shelley's Case did not apply, the devisee taking only a life estate. *Millett v. Ford*, 109 Ind. 159, 8 N. E. 917.

⁹⁸In *Rundale v. Eeley*, Carter, 170, testator devised certain land to his son J., to have and to hold the same to the said J. for life, under certain conditions specified, and after his death, then to the use and behoof of the heirs male of his body, and for default of such issue, over. The court held that this devise, though limiting the property to the son for life, was nevertheless an estate tail to him, as well in a will as in any other conveyance; that the estates could not stand together, but that the estate for life was swallowed up in the tail.

An estate tail male is created under a devise to testator's son for life and to the lawful male heirs of his body and their descendants, with remainder over in case he should die without such male heirs of his body, or other descendants living at the time of his death. *Jillson v. Wilcox*, 7 R. I. 515.

See *Shelley's Case*, supra, II.

⁹⁹*Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

¹⁰⁰*McIlhinney v. McIlhinney*, 137 Ind. 29 L.R.A. (N.S.)

411, 24 L.R.A. 489, 45 Am. St. Rep. 186, 37 N. E. 147.

¹In *Leightner v. Leightner*, 87 Pa. 144, there was a devise of testator's farm to his two grandsons, "the one half to each for life, and after the death of either to his issue in fee simple, and if either should die without issue, then his half should go to the issue of the other in fee simple, and upon the death of both without issue, then the whole to go to his other heirs," it was held that the word "issue" was used in the sense of "children," and was so in effect defined by him in the limitations over.

In *Shalters v. Ladd*, 141 Pa. 349, 21 Atl. 506, a testator provided that property devised to his daughter in terms purporting a fee was to be enjoyed by her during her natural life, to her sole and separate use, to the exclusion of her husband, and that she should not be at liberty to sell or encumber it, and that her receipts from time to time should be a sufficient discharge for the rents thereof, and that immediately after her death the said property should vest in and be enjoyed by her lawful issue, excepting that if her husband should survive her, he should, during his lifetime, enjoy the rents and profits of one-third of the said property. It was held that the exclusion of the husband's curtesy, together with the language of a later provision of the will, directing the executors in a certain event to invest the shares of the daughters "for the sole and separate use of my said daughters, respectively, during their lives, and after their deaths to go in fee simple to their children or lawful issue, the same as I devised to them the other real estate in the former part of my will," indicated that the word "issue" had been used as a word of purchase. This case was followed in *Shalters v. Ladd*, 163 Pa. 509, 30 Atl. 283.

Where the limitation after the life estate was: "That in case of the death of the life tenant without issue or issues of her children, then reversible to the testator's right consanguineal heirs," it was held that the first taker took but a life estate. *Peirce v. Hubbard*, 10 Pa. Co. Ct. 63, affirmed in 152 Pa. 18, 25 Atl. 231.

²In *Heiss's Estate*, 17 W. N. C. 285, a

tion of the rule.⁸ In holding that a son to whom the testator had devised land for life, the will providing that after his death it should go to his lawful issue and their heirs forever, if any, and if he should die without leaving any children born in wedlock, then to another son and his heir, took but an estate for life, the word "issue" be-

ing used in the sense of "children," Jessel, M. R., said upon this point: "The word 'children' has, both in law and common parlance, only one meaning, though you may by a context show it is improperly used; that it is written by mistake for descendants or something else. But the word 'issue' has two meanings. It may mean 'descendants'

testator gave certain property in trust to his son for life, with power of appointment "among his children in such manner as he might think proper," and in default of appointment, "to the use of his issue, if any, and for want of issue, then to the use of my surviving children and their lawful issue, as by the law of Pennsylvania the estates of persons dying intestate are disposed of," with a discretion to sell if the property could not be equally divided. It was held that the word "issue" was not used as a word of limitation.

Where a testator gave legacies to his nieces, with power to his executors to settle them upon the nieces for life, and at their deaths for the benefit of their issues, and also gave them the residue of his estate, with like power to settle it on his nieces for the benefit of "their respective children" as provided with respect to the legacies, it was held that the word "issues" was used in the sense of "children." *Baker v. Bayldon*, 31 Beav. 209.

In a devise of property in equal proportions to testatrix's brothers and sisters named, the will providing that if any of them should die without leaving issue, that such share or shares should go to the survivors or survivor of them, but that, if leaving issue, such share to go to their children, the word "issue" was held to have been used in the sense of "children." *Benn v. Dixon*, 16 Sim., 21.

Where the testator gave certain property to trustees, to invest and pay the income to each of his four sisters for life, and upon the death of any of them without leaving issue, to divide her share among his surviving sisters and the issue of any who might then be dead, in equal shares, such issue to take only their respective parent's share, and upon the death of any of his sisters, leaving issue, then in trust to call in the share of her or them so dying leaving issue, and pay the same to such respective issue, if more than one child, equally, it was held that the word "issue" was used in the sense of "children." Sir R. Malins, V. C., said: "It is not questioned that, as a general rule, where there is a gift for life, with remainder to the issue of the tenant for life, the word 'issue' will comprehend issue to the remotest generation, unless there be something to restrict or qualify the words of the gift. But in this case the testator has interpreted his own language, and shown that by 'issue' he means 'children,' or issue only of the first generation, for he says the share is to go to 29 L.R.A. (N.S.)

the 'issue, if more than one child.'" *Bryden v. Willett*, L. R. 7 Eq. 472.

Under a devise to testator's sister for life, remainder to trustees to preserve contingent remainders, remainder to the issue of the first and every other son of the sister in tail male, and for want of such issue, remainder to the issue female of the sister, and to the heirs of their bodies, with power to the sister to charge £1,000 as portions for younger children, with remainder over, was held to give the sister an estate for life, with remainder to her first and other sons in tail male. *Hamilton v. West*, 10 Ir. Eq. Rep. 75.

Where a testator gave a certain portion of his real and personal property upon trust, to pay the income equally amongst all his children who should be living when his youngest child attained the age of twenty-one years, for their respective lives, and after the death of any of them, upon trust as to an equal portion of the property proportionate to the number of children then living, for the use of the issue of such child or children so dying, absolutely, forever, it was held that the word "issue" was used in the sense of "children." *McGregor v. McGregor*, 1 De G. F. & J. 63.

A devise of freehold and copyhold lands to trustees for the use of testator's daughter for life, and after her death to the use of the issue of her body, lawfully begotten, and in default of issue, or in case none of such issue live and attain the age of twenty-one years, then over, was held to create an estate for life only in the daughter. *Merest v. James*, 1 Brod. & B. 484.

In *Montgomery v. Montgomery*, 3 Jones & L. 47, there was a devise of lands to testator's son W., to hold the same with the rents, issues, and profits thereof to the said W. and his heirs and assigns during his life, and no longer, unless it should so happen that the son should survive his wife, then living, and marry a second wife, by whom he should have lawful issue living at the time of his death; and in that case, testator devised the lands upon the death of his son to such issue male, share and share alike, and for want of issue male, to the issue female of such second marriage, share and share alike, and in case the son should die without leaving any such issue of a second marriage, then over. It was held that the son took an estate for life only.

Where a limitation over after a life estate was in effect that "in case of any lawful issue by him," the life tenant, the property should descend to his child or children, for their use and benefit, to be used or dis-

and it may mean 'children,' the common use of the word in ordinary parlance being 'children,' though in legal parlance its proper meaning is 'descendants.' You require a context of a different character to show that the testator has made a mistake in writing one word for another from what you do when you wish to ascertain which of two meanings that the word properly

bears is to be affixed to it. Looking at it in this way, it appears to me that in this case we must read 'issue' as meaning 'children,' and 'children' as meaning 'children,' and in no other sense."⁴ The word "issue," however, has been frequently held to be a word of limitation, although used in connection with qualifying words,⁵ it appearing to the

posed of as they might deem proper, but in event of no lawful issue, that the property should be equally divided among the testator's relatives named in the will, it was held that the words "lawful issue by him" were used in the sense of "children," and that the children of the life tenant took as purchasers. The court said that the fact that the children were to have the property for their use and benefit, to be disposed of as they might think fit, negated the idea of the creation of an estate tail by inheritance, and that the testator did not intend to create such an estate was manifest by the fact that in event a son left no lawful issue, he gave the property to his relatives specially named, never contemplating that anyone should take his property as heir or heirs by operation of the law, but, on the contrary, specifying in his will who should take it. *O'Byrne v. Feeley*, 61 Ga. 77.

In *Craig v. Warner*, 5 Mackey, 460, 60 Am. Rep. 381, where the devise was to the testator's sister and her son as joint tenants during their lives, and the life of a survivor of them, and in case the son should marry and die leaving lawful issue of such marriage, or, if not leaving such lawful issue, then leaving the lawful descendants of such children, and if such lawful issue, or if not such lawful issue, then if their lawful children shall be in being at the death of the survivor of said sister and son, then the premises to go in fee simple to such issue and children, according as the one or other should be the persons in being at the time of the death of such survivor; but if the said son should die without having been married, and without leaving either such lawful issue or the children of such lawful issue surviving him, then the premises to go to the testator's right heirs,—it was held that by the issue of the marriage of the son, the immediate issue or children were to be understood, and that by the descendants or children of such issue, the testator equally meant to designate particular persons, and not a line of inheritors, and therefore the rule in *Shelley's Case* did not apply.

In *Craig v. Rowland*, 10 App. D. C. 402, this devise was conceded not to be within the rule in *Shelley's Case*.

Where, after a life estate was given to a testator's widow, and the remainder was limited to the issue of her body by the testator begotten, the subsequent words, "provided also that such issue live to lawful age," were held to take the devise out of the rule in *Shelley's Case*. *Helm v. Frisbie*, 59 Ind. 526.

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⁴ *Morgan v. Thomas*, L. R. 9 Q. B. Div. 643.

After a devise of property for life to the testator's children, the will provided that if any of them should die without issue, the "properties herein willed to them, or either of them, or any part of them, shall revert equally to the legal heirs of the other children," it being the will of the testator that the title should rest and abide in the hands of the legal heirs of his lawful heirs. It was held that this language did not bring the will within the rule in *Shelley's Case*, as it was evident that the testator used the words "heirs," "issue," and "children," interchangeably or synonymously in the sense of "children." *Stisser v. Stisser*, 235 Ill. 207, 85 N. E. 240.

In *Taylor v. Taylor*, 63 Pa. 481, 3 Am. Rep. 565, the testator gave his wife and daughter, or, in the case of the death of one of them, to the survivor, all his real estate during their natural lives, and in case his daughter should die leaving lawful issue, he provided that his real estate was to descend to such lawful issue, their heirs and assigns forever, and immediately added these words: "And further, it is my will that in case my daughter shall depart this life before her mother, leaving lawful issue, then such issue shall enjoy and inherit their mother's right from the time of her death." It was held that no declaration could well be more express to show that by "issue" testator meant "children," since they were to inherit and enjoy "their mother's right" from the time of her death, and consequently the first taker was held to have only a life estate.

⁵ Where a testatrix bequeathed personal property to a woman for life, and after her death to her lawful issue, if any, but, in default of issue, over, it was held that the issue did not take as purchasers. *Moore v. Paul*, 7 Rich. Eq. 362. The court said there was nothing in the terms of the direct gift which could restrict the word "issue" so as to make it mean issue living at the death of the immediate legatee.

And a devise of lands in trust for testator's son and his assigns, for the term of his natural life, and his issue male, in succession, so that every such son may take an estate for life, with remainder to his first and every subsequent son, successively, according to seniority, in tail male, was held to give him an estate tail, under the rule in *Shelley's Case*. *Re Keane* [1903] 1 Ir. Ch. 215.

By a devise of lands to testator's daugh-

court that the life tenant's heirs were meant.⁶

It has been said that while issue may be used as a word of limitation, it may also be used as a word of purchase; and in a will such construction should be given as will best effectuate the intention of the testator. His intention may be collected from the contingency on the occurrence of which a devise to one and his issue is limited over to another. If the limitation over is made to de-

pend on the event of the first taker dying without leaving issue living at the time of his death, it is plain that the testator does not use the word in the sense which comprehends an indefinite lineal succession of heirs of the body, but the individuals then living, who answer the description of issue; that is, children and their descendants; so it was held that where land was devised to testator's daughter for life, the will providing that it should then descend to her issue,

ter for life, and to her lawfully begotten issue, the will providing that, in the event of her leaving no issue, the property should go to another, if living at the daughter's death, and if not, to the second devisee's eldest son, lawfully begotten, with other remainders, followed by a provision that in the event of the daughter not leaving lawful issue, she might charge the property by will or deed to the amount of £1,000 if she should think fit, it was held that the daughter took an estate tail. The fact that an express estate for life was given to her, and that her issue could take the fee, and the fact that an express power was given her to charge the lands in a particular event, and the fact that the devise over was not upon a general failure of issue, being considered not sufficient to show that the word "issue" was not used in its technical sense. *Sandes v. Cooke*, Ir. L. R. 21 Eq. 445.

In *Sparrow v. Shaw*, 3 Bro. P. C. 120, under a devise of property in trust for testator's two sisters, equally betwixt them during their natural lives, without committing any manner of waste, the will providing that, for the purpose of raising a specified sum of money, coal might be taken from the premises, and then providing that if either of the sisters should happen to die leaving issue or issues of her or their bodies, lawfully begotten, or to be begotten, the mother's share of the property was to be held in trust for such issue or issues, or else in trust for the survivor or survivors of them, or their respective issue or issues, and that if it should happen that both of the sisters should die without issue, as aforesaid, and their issue or issues die without issue or issues, lawfully to be begotten, then it was held that the sisters took an estate tail, the word "issue" being used as a word of limitation. See also same will in *Shaw v. Way*, 8 Mod. 253.

And by a devise of estates to three sons during their lives, and after their deaths, leaving issue male, to such issue male according to the priority of birth and seniority of age, but in case of the decease of the three sons without issue, or, there being such, that such male issue should die before attaining twenty-one, then as to them or any son so dying, for the survivors and another son named in tail, it was held that the word "issue" must be understood as a word of limitation, and that the three sons consequently took estates tail in their respective shares. *Warren v. Travers*, Ir. Rep. 2 Eq. 455. The court said that it may be con-

sidered as settled that when there is a gift to one for life, with remainder to his issue, in such language as of itself will carry the inheritance to the issue, accompanied by directions which are incompatible with an estate tail in the ancestor, such as a distribution in shares among the issue, then the issue take as purchasers, according to the doctrine established by *Lees v. Mosley*, 1 Younge & C. Exch. 500, 25 Eng. Rul. Cas. 643, and followed in *Bradley v. Cartwright*, L. R. 2 C. P. 511, 25 Eng. Rul. Cas. 661; but when the devise is in language which would not carry the fee to the issue, then, notwithstanding superadded words of distribution, or the like, the ancestor takes an estate tail, according to *Roddy v. Fitzgerald*, 6 H. L. Cas. 823, and this, even though the gift over is on failure of issue, specially mentioned to be "at the time of his death," as was held in *Doe ex dem. Cannon v. Ru-castle*, 8 C. B. 876.

Where the testator gave his son Henry a life estate, with remainder to the eldest son of Henry for life, and in default of such issue on the part of Henry, to William, another son of the testator, for life, etc., and the will then provided: "But if my said natural son Henry shall have a son, as aforesaid, and such son should die without issue male, it is my intention that if the said Henry should have a second son, or any heir male of his body, lawfully begotten, that such son or heir male should have the aforesaid property, to him and his eldest heir male forever," it was held that the general intent was manifest that all the heirs male of the body of Henry should be entitled before the devise over to William would take effect, and that this intent could not be gratified without vesting in Henry an estate tail male; the particular intent to be found in the words which gave a life estate to Henry could not control the manifest general intent of the testator; to give to them such effect would be to repeal or disregard the established rules of interpretation. *Simpers v. Simpvers*, 15 Md. 160.

A devise to a woman for life, and upon her death to her lawful issue, should she leave any, with remainder over, was held to vest an estate tail in the devisee, there being nothing to contradict unequivocally the presumed intention that the devise over should not take effect until the whole line of issue was extinct. *Kleppner v. Lavery*, 70 Pa. 70.

In a devise of lands to testator's son for life, and at his death to the lawful issue

and that if she should die without any living issue, to return to the testator's living heirs, the daughter took an estate for life, with remainder to her issue in fee.⁷ Words importing a definite time of distribution generally among the life tenant's issue are held to show that the testator used the word "issue" as a word of purchase.⁸

But under a devise to a woman for life, and then to descend to her issue, the life estate and remainder are merged in an estate of inheritance in the first taker by the rule in Shelley's Case.⁹ It was held, however, that the use of the word "inherit" in a devise of property to testator's niece for life, the will then providing that it should be inherited by the surviving issue of the niece, share and share alike, did not indicate an intention on his part to use the

word "issue" as equivalent to "heirs of the body."¹⁰

Where an estate was devised to testator's two daughters equally, to be divided between them, one moiety to go to one and her heirs, and the remaining moiety to the other for life, and after her death to the issue of her body, and her heirs forever, it appearing that she had a child living at the time of the devise, it was held that the second daughter took only an estate for life, with remainders to her children as purchasers.¹¹ Where there was a devise to testator's nephew G., to hold unto him, the said G., for and during the term of his natural life, and after his death to the use of the issue male of his body, lawfully to be begotten, and the heirs male of the body of such issue male, and for want of such issue

of his body, and if he should die without lawful issue living at the time of his death, then over, it was held that the words, "to the lawful issue of his body," enlarged the estate of the son to a fee conditional. *Whitworth v. Stuckey*, 1 Rich. Eq. 404.

⁷ *Williams v. Caston*, 1 Strobh. L. 130.

⁸ The rule in Shelley's Case does not apply where an estate for life only is given to a woman with remainder to her issue who might be living at the time of her death, the term "issue" in such a devise being a word of purchase. *Cushney v. Henry*, 4 Paige, 345.

In *Kern's Estate*, 5 Pa. Dist. R. 264, where the limitation after the life estate was to such issue of the life tenant as "he may leave surviving him," it was held that the word "issue" was used as a word of purchase.

Where the limitation was to the issue of the body of the life tenant "who may be then living," it was held that the latter words negated any intent that the issue should take in indefinite succession, but, on the contrary, indicated an intent that certain issue not susceptible of designation by name, and therefore described as a class, should take as purchasers. *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706.

In *Fairfield v. Bushell*, 32 Beav. 158, the word "issue" was held to have been used in the sense of "children" in a devise to a woman for life, and after her death to her lawful issue then living, and the children of such of them as should be then dead, in equal shares, the children of such issue to take their parents' share.

Where there was a devise to A for life, and if he die without issue living at his death, then to B in fee, but if A should have issue living at his death, then the fee to remain to his right heirs forever, it was held that A was but a tenant for life. *Plunget v. Holmes*, 1 Lev. 11.

In *Parkhurst v. Harrower*, 142 Pa. 432, 24 Am. St. Rep. 507, 21 Atl. 826, the word "issue" was held to have been used as a word

of purchase; that is, in the sense of "children and grandchildren," in a devise to the ancestor for life, remainder to his issue in fee simple, if there were any at his death, the issue of any deceased child to take the same share and estate as his parents would have been entitled to if living at the time of the ancestor's death, but, on failure of issue of the ancestor, or his deceased child or children at the time of his death, the property to vest in the heirs of the testator in fee simple, etc.

In a devise to a grandson of the testator's interest in certain property for life, and after his death to his issue, should he die leaving issue surviving him, and in case of his death without issue, then over, it was held that the grandson took only a life estate. *Nes v. Ramsay*, 155 Pa. 628, 26 Atl. 770.

In *Hadwen v. Hadwen*, 23 Beav. 551, a testator having empowered his trustees to purchase freeholds for the use of his son for life, the property then to be divided among his issue, if any, it was held that the son took an estate for life only.

But in a devise to testatrix's daughters for their natural lives, and after their deaths, then to their lawful issue, and the heirs and assigns of such issue, it was held that the word "such," as used, was not sufficient to show that by issue the testatrix meant "children," so as to take the case out of the operation of the rule, and prevent a fee tail converted into a fee simple by statute from vesting in the daughters. *Carroll v. Burns*, 108 Pa. 386.

⁹ *Williams v. Caston*, 1 Strobh. L. 130.

Likewise, under a devise of a farm to grandchildren, to descend to their issue at their death, it was held that the word "issue" meant "heirs of the body," and that an estate tail was created in the grandchildren, enlarged by statute to a fee. *Stayman v. Paxson*, 221 Pa. 446, 70 Atl. 803.

¹⁰ *Hill v. Giles*, 201 Pa. 215, 50 Atl. 758.

¹¹ *Doe ex dem. Cooper v. Collis*, 4 T. R. 294.

male, over, the fact that the word "heirs" in the will had been scratched out and the word "issue" substituted was held not to show that the word "issue" was used as a word of purchase.¹²

5. *Qualifying words in habendum.*

It has been held that in a devise to a son for life, and to the children of his body lawfully begotten, after his death, to hold unto the said son "for and during his natural life, and after his decease to the heirs of his body lawfully begotten, and to their heirs and assigns forever," it must be considered that the words in the habendum clause were used by him to designate the persons named in the preceding clause, and that a life estate was given to the first taker, with a remainder to his children after his death.¹³ But in a devise to a woman for life, then to descend to her heirs, children of her husband, after her death, the subsequent words in the habendum clause, "to have and to hold to them . . . and their heirs forever," were held not to qualify the estate given to the life tenant.¹⁴

6. *Direct conveyance to heirs.*

A conveyance of property to the heirs of the body of a woman, she to have the use and benefit thereof during her life, but not to dispose thereof, has been held a gift of the property to the children of the life tenant living at the death of the testator, as purchasers, the testator's intention being held to have been to vest the

immediate estate in the heirs of the body of the life tenant.¹⁵ But a devise to testator's son in trust for his heirs, the son to have the income arising from the property for his support and maintenance, and the support and education of his heirs until they should reach the age of twenty-one years, was held to give the son the fee.¹⁶

XV. *Limitations over.*

a. *Effect in general.*

Limitations over, on failure of heirs or issue, are often of considerable importance in determining the intention of a grantor or deviser, and these limitations over may have the effect of creating either an estate in remainder to the heirs or issue of the life tenant, or they may tend to explain the meaning of the words "heirs" or "issue" in the direct devise of a remainder after a life estate. For example, in a grant of land to A for life, remainder to B on failure of heirs of A, there is no express limitation of a remainder to the heirs of A, but, as the estate is not to go over until failure of A's heirs, the natural inference is that the remainder is first to go to A's heirs, if there are any; hence the limitation is equivalent to a limitation to A for life, remainder to his heirs, remainder to B. This would give A an estate in fee, under the rule in Shelley's Case. Therefore, since the remainder is given by implication by reason of the limitation to B on failure of the heirs of A, it is said that A obtains a fee simple by implication, under the rule.¹⁷ If the

¹² Roe ex dem. Dodson v. Grew, Wilmot's Notes, 272.

¹³ Rogers v. Rogers, 3 Wend. 503, 20 Am. Dec. 716.

¹⁴ Hodges v. Fleetwood, 102 N. C. 122, 9 S. E. 640.

¹⁵ Roberts v. Ogbourne, 37 Ala. 174. The court said the attempt to bring this case within the rule in Shelley's Case—erroneously so called when applied to personality—could not succeed without transposing and omitting words found in the will, and adding others not used by the testator. The proposition is that the clause as it stands is the same in effect as if it read, "to Sarah Bledsoe during her lifetime one part, but not to sell or dispose thereof, and after her death to the heirs of her body."

¹⁶ Barcus's Petition, 3 Pa. Dist. R. 324.

¹⁷ In Burton v. Black, 30 Ga. 639, it is said that, "the question whether or not an estate tail is created is always resolvable into two others, of which one is, What persons are intended to take the property? and the other is, Do these persons constitute a class having succession from generation to generation, down to the end of the blood? The cases which have caused such difficulty and conflict of decisions, are those where

the persons intended to take the property are to be ascertained, not by designation in the conveyance, but by inference. This inference is generally associated with a limitation over, the inference itself being that those are intended to take the property who are designated to prevent its going over. The inference is a sound one, only when carefully applied and put under certain restrictions. There should be great care in adhering strictly to the description of the persons who are to prevent the property from going over; for whatever persons these may be, the only just inference is that those same persons, by the same description, are intended to take. If property is given to A for life, and if he shall die without issue, then over to B, the issue of A are the persons whose existence is to prevent the property from going over to B, and the just inference is that the 'issue,' without further description, are intended to take it. This, therefore, is equivalent to a gift to A for life, remainder to his issue, if any, and if none, then over to B; or, under the rule in Shelley's Case, a gift to A and his issue, which is an express entail, issue being a class which has succession from generation to generation, till the lineal blood is ex-

limitation to B had been on failure of the heirs of the body of A, this would have given A an estate tail by implication. The maker of a deed or will may limit the remainder over in various ways. He may, for instance, grant real estate to A for life, and provide that, on failure of the heirs of A the property shall go to B; or the limitation to B may be on failure of the heirs of the body of A or on default of issue of A or on default of heirs or issue of A living at A's death, etc. Since these limitations are equivalent to limitations to A for life, remainder to his heirs or heirs of the body or issue, or remainder to the heirs of A or issue of A living at his death, the question in such cases always is: In what sense were the words "heirs," "heirs of the body," or "issue" used in the limitation "on failure of heirs," etc? This is a question of intention, and is to be determined in the same manner that the intention would be determined if these words had been found in a direct limitation in remainder to the life tenant. If they stand alone,—that is, if they are not explained or qualified by other words,—they are subject to the same presumption to which they would be subject if standing in a direct limitation in remainder; and these presumptions may be overcome in the same manner.

If there is a limitation to A for life, remainder to the heirs of his body living at the death of A, remainder to B, the question would be whether the explanatory words "living at his death" indicated that he wanted only the heirs living at his death to take, rather than all of his heirs in succession from generation to generation. If the limitation, instead of being to A for life, remainder to the heirs of his body living at the death of A, remainder to B, had been to A for life, remainder to B on default of heirs of the body of A "living at his death," precisely the same question as to the qualifying effect of the words "living at his death" would arise as if they had

appeared in a direct limitation to the remainder. As has been repeatedly pointed out in this note, this is a preliminary inquiry, uninfluenced by the rule in Shelley's Case, the question being simply this: What did the author of the instrument mean by the words "heirs" or "heirs of the body" or "issue?" Having determined that he meant the whole line of heirs to take in succession from generation to generation, there is nothing left to do but to apply the rule, and give A an estate in fee. Having come to the conclusion that he meant less than that, the rule has no application.

Only the simplest form of estates by implication has been mentioned, that is, where there are no intermediate remainders between the life estate and the limitation over; but if there is a limitation of a remainder to only a portion of the heirs of the life tenant, followed by a limitation over on failure of heirs of the life tenant, this might also be held to create an estate in fee by implication. It has been held that an express estate for life cannot be enlarged by implication,¹⁸ but by weight of authority it may be.

Limitations over may be of some assistance also in the discovery of the sense in which certain words were intended to be used in direct limitations in remainder after a life estate; and on the other hand they may tend to confuse the meaning. To illustrate, a will contains a devise to A for life, remainder to his issue, remainder to B on failure of heirs of the body of A. The question in this case is: In what sense was the ambiguous word "issue" used in the devise in remainder to the issue of A? The limitation over "on failure of the heirs of the body" of A helps to clear this up, and to show that the word "issue" was used in the sense of heirs of the body. But suppose the limitation had been to A for life, remainder to the heirs of A, remainder to B on default of children of A. It is certain that if the limitation had stopped

hausted. Here, 'issue' prevents the property from going over, and 'issue' by the same description, no more, no less, are inferred to have been intended to take it. But if property is given to A for life, and if he shall die 'without issue living at his death' then over to B, the issue of A 'living at his death' are the persons who are to prevent the property from going over, and the just inference is that only such issue are intended to take it as shall be living at A's death. Here, there is no estate tail, for 'issue living at the death of A' cannot embrace persons in future generations."

In *Roy v. Garnett*, 2 Wash. (Va.) 9, it is said that the most prevalent rule seems to be that an express devise for life is not to be changed into an estate of inheritance by 29 L.R.A. (N.S.)

implication, unless that implication be a necessary one because the testator's intention to be collected from the whole will cannot otherwise be effectuated.

In *Benson v. Linthicum*, 75 Md. 141, 23 Atl. 133, it is said to be well settled that where real estate is devised with a limitation over upon dying without heirs of the body of the first taker, the devisee takes an estate tail, even though such limitation may be to one capable of being an heir of the devisee.

¹⁸ In *Ives v. Legge*, 3 T. R. 488, note, it is said that when an estate for life is expressly given, no greater estate shall arise by implication, subsequent words of contingency enlarging the estate only where no express estate for life is devised.

before the limitation to B, that is, if it had been to A for life, remainder to the heirs of A, the word "heirs" would have been a word of limitation. But here there is a limitation over to B on failure of children of A, and thus the intention of the author of the instrument is rendered uncertain, for the question at once arises: Did he intend to use the word "heirs" in the sense of children?

Under this subdivision of the note, limitations over of the first class only will be considered, that is, where the limitation over follows a limitation to one for life, without the interposition of a direct limitation to the heirs or issue of the life tenant, as where A grants land to B for life, remainder to C on failure of heirs of B.

b. As enlarging estates by implication.

If an estate is given to A, and if he dies

without issue to B, that is the same as if it is given to A, remainder to his issue, etc., and that, according to the doctrine in Shelley's Case, is an estate tail, for the two estates unite.¹⁹ So, where a testator lent a tract of land to his son for life and directed that if he should die without lawful issue, the land be given to testator's grandson, to him and his heirs forever, but expressed the desire that, should the son leave lawful issue, he might dispose of such land to such issue as he thought fit. It was held that the son took an estate tail by implication, which by statute was enlarged to an estate in fee simple, the provision that the son might dispose of his land to his issue as he might think fit not showing an intention to restrict the previous words to the failure of issue at the death of the first taker.²⁰

And a devise to one for life, and in case he should die without issue, then over, was

¹⁹ Lethieulier v. Tracy, 1 Ld. Kenyon, 56.

A gift over on failure of issue of the life tenant gives the life tenant an estate tail. Wollen v. Andrewes, 2 Bing. 126.

And the rule is not prevented from operating because the limitation over is on the event of the first taker's dying without living issue. Ibid.

But a devise in trust for testator's daughter, and then over in case she should die without issue, was held not within the rule in Shelley's Case. Goldsborough v. Martin, 41 Md. 488.

A devise to a woman for life, and then to a specified devisee in case she died without issue, was held to vest an estate tail general in her, under the rule in Shelley's Case. Dickson v. Satterfield, 53 Md. 317.

A devise in trust for two of the testator's daughters named, for their lives for their separate use, the will providing that if both should die without leaving issue, the property should go over, was held to give estates tail to the daughter by implication, with cross remainders in tail. Stanhouse v. Gaskell, 17 Jur. 157.

"A. devised certain lands to his eldest son for life, without impeachment of waste, remainder to J. S., his grandchild, for life, without impeachment of waste, with a power to him to limit a jointure of the same land to any woman he should marry for her life; and after his death he devised the lands to the first son of J. S., the grandchild, in tail, and so to the sixth son, and then devised that if J. S., the grandchild, should die without issue male, the land should remain to J. B., and the question was what estate J. S. took by the will; and it was certified by the court of Common Pleas that he took an estate tail; which was decreed accordingly." Langley v. Baldwin, 1 Eq. Cas. Abr. 185, pl. 29.

A deed of property in trust for the use of the donor's son and the heirs of his body during their lives, but providing that should

the son die leaving no issue, the property was to revert to the grantor's estate, was held to convey to the son an equitable estate in fee simple, the intention of the donor being to create an estate tail, which the statute converted into an absolute fee. Durant v. Muller, 88 Ga. 251, 14 S. E. 612.

In McCullough v. Johnetta Coal Co. 210 Pa. 222, 59 Atl. 984, a testatrix directed that her executors should collect notes due her and invest the money derived therefrom in land, the rents and profits to go to her son, and provided that should the son die without issue, the land should be sold and the proceeds divided among her brothers and sisters for their heirs, but should her son have heirs or issue, "then this land shall be his and his heirs." It was held that the son took an estate tail, converted by statute into an estate in fee.

Where a testator devised real estate to his daughter, to hold the same during her natural life, the will providing that if she should die without lawful issue of her body, the property should be equally divided among other children, it was held that the words implied an indefinite failure of issue, and that the daughter took an estate tail, enlarged by statute to a fee simple. Mast's Appeal, 2 W. N. C. 404.

Where there was a devise to one for life, with power of trustees to settle a jointure on his wife, and subject thereto in strict settlement on the issue of the marriage, the will providing that if the devisee should die without issue of his body, the property should go over, it was held that the proviso as to dying without issue gave him an estate tail by implication. Allanson v. Clitherow, 1 Ves. Sr. 24.

²⁰ Callis v. Kemp, 11 Gratt. 78.

Where the devise was to trustees to pay the income to M. & N., share and share alike, during their joint lives, and upon the death of M. without leaving male issue in the lifetime of N., to pay the whole income to N. for life, and upon the death of both

held to create a fee tail in the first taker, the court considering it to be a settled point that whether an estate be given in fee or for life, or generally without any particular limit as to its duration, if it were followed by a devise over in case the devisee die without issue, the devisee would take an estate tail.²¹

And conceding that a devise to a man for life, and afterwards to the heir male of his body, will not create an estate tail, it was held that the subsequent words, "and for want of such heir male, to be and re-

main with" a designated person, would effectually create such an estate.²²

But where a testator devised real estate to his son for life, and provided that if the son should die without issue, the property should go back to other sons named, but that if the first devisee should have lawful issue at the time of his death, the property should go to him and his heirs forever, it was held that the limitation over in this case was after a definite failure of issue, and therefore did not raise an estate tail by implication in the first taker.²³ And

M. & N. without leaving issue male, the will providing that the trustee should convey the real estate to the testator's right heirs, and transfer and pay the personal estate to his next of kin, it was held that N., the survivor, took an estate tail by implication in the real estate, and an absolute interest in the personal property. *Franks v. Price*, 3 Beav. 182.

In *Croly v. Croly*, Batty, 1, the testator devised certain lands to trustees, etc., to the use of his younger son, R. C., for life, and after his death to the use of his issue, male or female, in such proportion or proportions as he should think proper to devise to the same, with power to R. C. to charge part of the lands with a jointure; but in case he should die leaving no issue, male or female, the testator devised the lands, subject to a jointure and power to charge, to the trustees to the use of another son of the testator, J. C., for life, and after his death to the use of his issue, male or female, in like manner and with like power to devise the same to his issue, male or female, at the time of his death, as in the case of the son R. C.; but in case the sons should both die leaving no issue, then, subject as aforesaid, over. Neither R. C. nor J. C. had any issue at the time of the devise. R. C. entered, and died without issue. J. C. died leaving a son, R. C., the younger, and other children. It was held that R. C. took an estate tail general under the will of his grandfather, the deviser.

An estate tail general was held to have vested in the first taker under a devise to S. C., to have and to hold for and during the term of his natural life, and from and after his death to the eldest son of S. C., and for want of such issue, then to his daughter or daughters, share and share alike forever; but in case S. C. have no issue, then to hold to him, his heir and assigns forever. *Doe ex dem. Burrin v. Charlton*, 1 Mann. & G. 429.

Under a devise of an estate to A, and after his death to his first and other sons, and in default of male issue, then to the eldest and other daughters of A, and to their heirs male forever, on a certain condition, it was held that A took an estate tail. *Wight v. Leigh*, 15 Ves. Jr. 564. The court said that it was necessary, in order to effectuate the general intention in favor of issue male, to consider some

of the antecedent takers as having by implication such an estate as would enable all the issue male to take, which can only be by giving an estate tail either to the father or his first and other sons. The male issue intended in this case were the male issue of the father, not of the sons.

Where there was a devise to testator's nephew for life, without impeachment of waste, remainder to his eldest son and the heirs of such eldest son, and in default of issue male of the nephew, then over, and the nephew never had issue, it was held that this was the same as if the devise had been to the nephew for life, and in default of issue male, then over, and he was therefore held to have taken an estate tail in remainder by implication. *Doe ex dem. Bean v. Halley*, 8 T. R. 5.

In *Atty. Gen. v. Sutton*, 1 P. Wms. 754, and note, a devise of land to a nephew for life, and afterwards to the first son or issue male of his body lawfully to be begotten, and to the heirs male of the body of such first son, remainder to the said nephew's second son and his issue male in tail, and after the death of the nephew without issue male of his body, then over, was held to create an estate tail.

²¹ *Machell v. Weeding*, 8 Sim. 4.

²² *Dubber ex dem. Trollope v. Trollope*, 1 Ambl. 453.

²³ *Beckley v. Riegert*, 212 Pa. 91, 61 Atl. 641.

And where a bequest was to the testator's daughter and her lawful issue during life, and in event of her death without child or children or issue surviving her, to designated persons, it was held that this was equivalent to a gift to the daughter for life, remainder to lawful issue, and that these words, as used in the will, were words of purchase. *Gaboury v. McGovern*, 74 Ga. 133.

And an estate tail by implication was held not to have been given by a devise to A., the son of testator's son B., the will providing that if he should die without issue, the property should return to the testator's family, but that if he lived to have children, he should have power to make a will of it to his children, since the word "issue" was used in the sense of children, the devisee taking only an

vey to testator's grandson for life and to the first son for life, and afterwards to convey the premises to the first son of that son for life, and in failure of such issue of the first devisee, to convey it over for life etc., it was held that the limitation over, if one to the issue male of the first devisee, did not by implication create an estate tail in the first taker precedent to the next remainder.⁴⁶

But where a testator devised his estate to A for life, charged with certain annuities, and in case any of the annuitants survived A the will provided that the estate should go to A's eldest surviving son charged with

the annuities, but in default of issue male that it should go to B charged in like manner, and unto his eldest son upon the same conditions, but in default of issue male to descend to testator's heirs, it was held that the words "default of issue male" did not mean default of an eldest son surviving, but were to be taken generally so as to give A an estate tail male.⁴⁷

And under a devise to one for life and no longer, and after his death to such son as he should have lawfully begotten, and in default of such issue, over, it was held that the first devisee took an estate tail.⁴⁸ Likewise it was held that an estate tail was

issue. It is equally well established that when the terms of the gift to the issue in such cases are sufficient to carry the fee, the ancestor takes an estate for life only. The gift in fee need not be an express gift, but may be made by any words which, prior to the wills act, would have been sufficient to carry the fee, or may be implied with a power to appoint to the issue in fee without a gift to the issue in default of appointment."

⁴⁶*Humberston v. Humberston*, 1 P. Wms. 332.

⁴⁷*Key v. Key*, 4 De G. M. & G. 73.

⁴⁸*Robinson v. Hicks*, 3 Bro. P. C. 180.

In *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450, 3 A. & E. Ann. Cas. 397, a devise to testator's grandson for life, then to the lawful heirs of his body in fee simple, and on failure of such heirs of his body, to his right heirs in fee, was held to give the grandson an estate in fee simple, the operation of the rule in Shelley's Case not being affected by the devise over.

In *Elton v. Eason*, 19 Ves. Jr. 73, in a residuary trust created by will by which rents and profits were directed to be applied for a person during his life, and afterwards for the heirs of his body, if any, and in default of such issue, over, the words "in default of such issue" were held to have in them nothing restrictive, the issue mentioned and referred to being the heirs of the body generally.

A limitation over after a limitation to the lawful heirs of the body of the life tenant in fee simple, "on failing of such lawful heirs of the body then to his right heirs in fee," does not prevent the operation of the rule. *Tyson v. Sinclair*, *supra*.

Where a remainder is to the heirs of the body of the life tenant, the subsequent words, "in default of such issue living at the time of the death of the life tenant," do not so modify the meaning of the words "to the heirs of the body" as to make them a particular designation of certain persons as a root from which the inheritance is to emanate, and therefore the life tenant would take a fee tail at common law, but under the statute law of Maryland a fee simple. *Thomas v. Higgins*, 47 Md. 439.

In *Roe ex dem. Thong v. Bedford*, 4 Maule & S. 363, where after a devise to 29 L.R.A. (N.S.)

testator's daughter for life subject to the payment of an annuity, with remainder to trustees to preserve contingent remainders, the property was devised to the heirs of her body lawfully begotten, and for want of such issue, over, the daughter was held to have taken an estate tail, although the testator also stated that it was his will, and meaning that his daughter should have only an estate for life in the premises, and that after the death of his daughter the premises should go to and vest in the heirs of the body of his daughter, and for want of, or in default of, such issue, over. *Le Blanc, J.*, said that the plain intention of the testator was to give his daughter an estate tail, for it was not to go over until there was a failure of her issue, and the testator had not superadded words of limitation to the heirs of her body to show that he meant the children of the daughter only. At the same time he intended to prevent her barring the issue, but this he could not do. *Bayley, J.*, said: "I have always understood the rule to be that wherever an estate for life is given to the first taker, and afterwards to any branch of his heirs as a class, so that the whole line of heirs to the first taker who answer to the description in the will should succeed him as such, there the first taker cannot have an estate for life because all heirs claiming as heirs must take by descent; and therefore the words 'heirs of the body' do not operate as a *designatio personarum*, but are words of limitation. The words heirs of the body are properly words of limitation, and not words of purchase." *Dampier, J.*, said that it seemed clear, by the limitation over for want of issue of his daughter, that the testator used "heirs of the body" as words of limitation.

In *Goodright v. Pullynn*, 2 Ld. Raym. 1437, there was a devise to one for life and after his death to the heirs males of his body lawfully to be begotten and "his" heirs forever, the will providing that if the devisee should happen to die without such heir male, the property should go over. It was held that the subsequent words "his" and "if he dies without such heir male" were not sufficient to restrain and alter the operation of the words "heirs males" and so

his body begotten, the property should go over, it was unanimously agreed that the first taker had only an estate for life, and that it was a fixed rule of law that an express estate for life cannot be enlarged by implication.²⁶ Where, however, there was a devise of land to A for life, and if he should die without issue, then to B, it was held that, although the devise to A was expressly for life, the subsequent words would create in him an estate tail.²⁷

c. As explaining or modifying preceding limitations.

1. The word "heirs."

It has been seen that the words "heirs," "heirs of the body," or "issue" may be explained or modified by words of distribution, as, "to be equally divided," etc., and by superadded words of limitation, as, "and their heirs," "in fee," etc., and by various other explanatory expressions. So, the words "heirs," "heirs of the body," or "issue" may be explained by limitations over, as where A devises an estate to B for life, remainder to the issue of B, and if B die without heirs of the body, then to C. And where the limiting words in the remainder after the life estate are accompanied by explanatory words, it is often necessary to look also to the form in which an ultimate remainder over is limited, in order to dis-

cover a grantor's or testator's intention. The expressions in different instructions vary so much that little help may be had from individual cases unless the language of the instrument construed coincides with that of the instrument before the court. The whole object of the inquiry being to ascertain the intention of the author of the instrument, which is to be gathered from the language of the entire instrument, it is not strange that the courts should reach different conclusions in construing writings which appear to be similar in import. The language by which a remainder is limited after a direct limitation to the heirs or heirs of the body or issue of the first taker is only one of the various guides to the discovery of the sense in which the words were used. The rule in Shelley's Case has no bearing upon this problem.

A gift by a testator to his daughter of the interest on certain moneys, for life, together with a gift to her of the rents and profits of all his real estate during her life, all his real and personal property being devised and bequeathed to her heirs after her death as tenants in common, the will providing that if the daughter had but one child, such child was to possess the whole, but that if she should die without issue, then certain legacies were to be given, etc., was held to vest an estate tail in her as to the real estate, and an absolute interest as to the personalty.²⁸ And where the limita-

²⁶ *Bamfield v. Popham*, 2 Vern. 449. It was said that by express words it may; as, in the common case, if an estate be given to A for life, and after his death to the heirs of his body, that, by express words, enlarged his estate, and made him tenant in tail. But it was otherwise in this case, where an express estate for life was limited to him and his first and other sons in tail, provided if he should die without an heir male, or if he die without issue male, or for want of issue male,—although such words were sufficient to create an estate tail, yet it was only by implication, and when an express estate for life was not before limited.

²⁷ *Blackborn v. Edgley*, 1 P. Wms. 600.

²⁸ *Dunk v. Fenner*, 2 Russ. & M. 557. The court said that the direction that the heirs shall take as tenants in common, and not as joint tenants, manifested the intention of the testator to modify the estate in a manner which the rules of law would not permit, but did not manifest an intention to exclude any heirs of the body, and that the gift to one child, if there should be but one, did not narrow the general devise to the heirs of the body, because such one child being an heir of the body, the gift to such child was consistent with the general intention.

In *Curtis v. Longstreth*, 44 Pa. 302, where the gift was to the devisee for life, with 29 L.R.A. (N.S.)

remainder to his heirs as tenants in common, the will providing that if he should die without issue, the property should go over to the surviving heirs of the testator, it was held that such limitation indicated that the testator used the word "heirs" in the sense of heirs of the body, and that the direction that the heirs of the tenant for life should take as tenants in common did not show that the testator used the word "heirs" as a word of purchase. The court said that that had always been held insufficient to overcome the presumption that the testator did not intend the remaindermen to take as the root of a new succession, nor describe them as heirs or heirs of the body, the technical words of limitation. "It is at best equivocal," said the court, "or, if regarded as repugnant to the gift to heirs as such, why should it prevail over the rational presumption that when a testator uses technical words of limitation, he means to use them in a technical sense, especially when that sense corresponds with common understanding? Standing alone, as in this case, it never does."

And by a devise of real and personal property to testatrix's two sons for their life, subject to the payment of legacies, the will providing that if the sons should marry and have issue, their father's share be given to each of their heirs, and to their heirs forever, and that if there is no male

tion is to the heirs of the life tenant, followed by a limitation to the heirs of the testator if the life tenant should die without heirs, the word "heirs" is used in the sense of issue, giving the life tenant an estate tail.²⁹

lot for her use and profit during her natural life, the will providing that if she left no heirs, the property was to be sold, and the proceeds divided among her brothers and sisters and their heirs, and in a devise to her of other property for her sole use and benefit during her life, and for her heirs, the will providing that if she should die leaving no heirs, then over, the word "heirs" was held not to have been used as a word of purchase, in the sense of children, but that it was a word of limitation.³⁰ Where the limitation was such as to bring the rule into operation, it was held that a devise

In a devise to a daughter of a house and would not be taken out of its operation by a bequest over in these words: "I bequeath

my said three lots," etc., on the theory that this plainly implied that the testator understood that he had an estate left in him.³¹

2. The words "heirs of the body."

Under a devise of property to the testator's son for life, and after his death to the oldest male heir of his body lawfully begotten, and in case he should die without such male heir, then to the next eldest male heir bearing the family name, and for want of male issue, then to the next eldest female heirs in the testator's family forever, the son was held to take an estate of inheritance.³² And a will providing in substance that a plantation be given to a woman for life, with remainder to the heirs of her body in fee simple forever, but if she should die without leaving issue living at her death, that the same be given to the children of testator's sister, was held to create an estate tail general in the first taker.³³

issue of either of the sons, and there is female issue, then the father's share should be divided between them, share and share alike, as tenants in common, and to their heirs forever, and that should either of the sons die without issue, then such son's share should go to the other son, and to his heirs forever, and that should both of the sons die without issue, then, at the death of the last of them, the property was devised to the whole of testator's grandchildren, share and share alike, as tenants in common, and their heirs forever. It was held that the sons took an estate tail. *Tolman v. Score*, 57 L. T. N. S. 40.

In *King v. Beck*, 12 Ohio, 390, a devise over in case of the failure of heirs of the life tenant, to children of specified persons in equal shares, was held not to give such character to the limitation to the heirs of the life tenant as to imply a corresponding intention of selecting the life tenant's children as the objects of his bounty.

In *Dengel v. Brown*, 1 App. D. C. 423, there was a devise of land to a woman, "the said premises at her decease to descend to her lawful heirs; and should she die without legal issue, then and in that case the aforesaid premises shall revert to my estate to be disposed of as best my executors may think proper for the carrying out my desire hereinbefore expressed or hereinafter named." It was held that but for the devise over, she would plainly have taken a fee, under the rule in *Shelley's Case*, but that in what followed it appeared that the word "heirs" was intended to be restricted to mean heirs of the body or issue of the body, and that therefore instead of a fee simple, an estate in fee tail general, according to the common law, was devised.

When a devise of real and personal property is to the testator's daughter for life, "and her heirs after her," and the will

provides that in case she should die without an heir, the property then to be equally divided among the rest of the testator's heirs, it was held that the limitation over upon the death of the first taker without heirs, with the direction that the property should be then divided, did not qualify the word "heirs," so as to give it the signification of children, and that therefore the rule in *Shelley's Case* applied and merged the limitation over to the heirs with the life estate, enlarging and expanding the life estate into a fee. *Parish v. Parish*, 37 Ala. 591.

²⁹ *Seely v. Seely*, 44 Pa. 437.

A devise to a woman for life, and to her heirs, the issue of her body, forever, for their lives, and in case the first devisee should have no son, then to her eldest daughter, followed by a proviso containing a devise over on failure of issue, was held to create an estate tail in the first taker, by reason of the fact that there was first a gift which would create an estate tail, and then a proviso containing a limitation over on failure of issue. *Reece v. Steel*, 2 Sim. 233.

³⁰ *Reimer v. Reimer*, 192 Pa. 571, 73 Am. St. Rep. 833, 44 Atl. 316.

³¹ *Haverstick v. Duffenburgh*, 2 Edm. Sel. Cas. 465. The court said that this expression was held as a description of the property devised, and not as limiting, or in any wise describing, the estate which was to pass, and that to give to these words the force claimed would necessarily be to hold the fee in abeyance during the life estate, and that abeyance was one of the very things which the rule in *Shelley's Case* was intended to prevent.

³² *Griffith v. Derringer*, 5 Harr. (Del.) 284.

³³ *Price v. Taylor*, 28 Pa. 102, 70 Am. Dec. 105.

So, the expressed intention of the testator that, if the life tenant dies without heirs of his body, the estate shall then vest in his sister's children, was held not to exempt the devise from the operation of the rule.³⁴ And under a devise to one for life and then to trustees to preserve contingent remainders, etc., but to permit the first devisee to receive the profits for life, and after his death to the heirs of his body forever, with a devise over in case of failure of issue, it was held that the first taker took an estate tail.³⁵ But where a testator loaned certain property to his daughter for life, and then gave it to the heirs of her body, it

was held that the explanatory words following, viz., "if my daughter . . . should not have no lawful heirs of her body, said land at her death shall go back to my son . . . and the heirs of his body," took the devise out of the rule.³⁶

3. The word "issue."

In a devise of a life estate to one and after his death to his issue, and in default of issue to the next of kin, the word "issue" was held to be a word of limitation, and not of purchase, and to give to him an estate tail.³⁷ But under a devise to a man

³⁴ King v. Beck, 12 Ohio, 390.

³⁵ Measure v. Gee, 5 Barn. & Ald. 910.

³⁶ Bird v. Gilliam, 121 N. C. 326, 28 S. E. 489.

³⁷ Armstrong v. Michener, 160 Pa. 21, 28 Atl. 447.

In a devise of the use of property to one for life, the will providing that at his death the property should be vested in his male issue, and in default of such, in the issue female surviving him, and that if there should be a general failure at his death, then over, it was held that the issue, if there had been any, under the rule in Shelley's Case, would have taken by way of limitation, and not as purchasers. Buist v. Dawes, 4 Strobb. Eq. 37.

But on appeal in 4 Rich. Eq. 423, it was held that the whole estate was given to the first devisee for life, with a good remainder to his issue, male or female, living at his death, which words were synonymous here with "children" or "grandchildren," who consequently took as purchasers, with a good executory devise over to persons in being.

In Doe ex dem. Cannon v. Rucastle, 8 C. B. 876, a man devised land to his son for life, and from and after his death to the issue of his body lawfully begotten, if more than one, equally amongst them, and in case he should not leave any issue of his body lawfully begotten at the time of his death, then over. It was held that the son took an estate tail. The court said it is well settled that the word "issue" in a will means heirs of the body, unless there are words therein which are inconsistent with or control that construction.

Where there was a devise of freehold and leasehold property to trustees upon trust, and then, without taking any further notice of the trust, there was a devise to A of seven freehold houses, to have and enjoy the same to the exclusion of her husband for her life, and at her death the same to go to her lawful issue, share and share alike, but if A should die without lawful issue, then over, it was held that the first taker took an estate tail, notwithstanding it was provided that the issue were to take, share and share alike. Heather v. Winder, 5 L. J. Ch. N. S. 41.
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Under a devise of a freehold estate to testator's son to have and to hold during his life, the will providing that in case he has issue that they should jointly inherit the same after his death, the will of the testator afterwards bequeathing the rest of his real estate and personalty to his son, and in case the son should die without issue, then over, it was held that the son took an estate tail in the real estate and an absolute interest in the personalty. Ward v. Bevil, 1 Younge & J. 512.

In Gonzales v. Barton, 45 Ind. 295, it was held that a devise to a person for life, and then to his lawful issue, and in default of such issue to his heirs in fee, gave the devisee a fee simple, under the rule in Shelley's Case, and under a statute abolishing estates in tail. The court in this case held that the intention of the testator did not control; that it was the intention of the testator to give a life estate only.

A devise of property to one for life and if he should leave lawful issue, to such issue, but in case of his dying without issue, or they dying under twenty-one without lawful issue, then over, was held to create an estate tail in the first taker. Roe ex dem. Evans v. Davis, 1 Yeates, 332.

Where a testator gave certain property to his wife and granddaughter during their lives, and then gave his mansion house to his wife for life, and provided that if the granddaughter should die leaving issue all his freehold lands were to be distributed among them, share and share alike, after the death of his wife and sister, but in case the granddaughter should die leaving no issue and after the death of his wife, that the same lands should go to trustees to sell and distribute the purchase money among certain other devisees, it was held that the granddaughter took an estate tail in the mansion house premises, this being a gift to one for life with a gift over to the issue of the first taker expressed in terms in the first instance not sufficient to carry more than a life estate to that issue, with a clear gift over upon an indefinite failure of issue of the first taker. Kavanagh v. Morland, 18 Jur. 185.

use and benefit of testator's son during his life and at his death for the use and benefit of all his children who should attain the age of twenty-one years or marry, not to be within the rule in Shelley's Case, the court said that in determining the construction of any instrument of entailment the word "children" is rarely held synonymous with "heirs" or "heirs of the body." The principal cases in which it is so held are instances illustrating the rule announced in Wild's Case, 6 Coke, 16, that is to say, where there is an immediate grant or devise to a man and his children, and the grantee is without children. It being manifest in such cases that the intent was to vest an estate *in prasenti*, and that being impossible by reason of the nonexistence of a portion of those named, in order to effectuate the intention the word "children" must be construed as a word of limitation, and not of purchase, because otherwise there would be a grant or devise of a life estate only, and the fee would remain in the heirs of the deviser, or the person of the grantor, as the case might be.⁵⁶

b. Effect of qualified limitations.

1. Modifying words in general.

The word "children" being *prima facie* a word of purchase, wherever explanatory or modifying words are added, the question, as before stated, always is whether these additional words indicate that the word "children" was used in its ordinary sense, or in the sense of heirs of the body or heirs. If used in the sense of heirs, the word "children" manifestly becomes a word of limitation, otherwise not. This preliminary inquiry is directed to the discovery of the intention of the grantor or deviser in the use of the word "children." The rule in Shelley's Case has no influence whatever upon this question, which is altogether apart from and independent of the rule; that is, it may be conceded that the rule applies, where the limitation is to the heirs of the life tenant, and that it does not apply where the limitation is to the children of the life tenant; but the limitation to be construed by the court is to the children of the life

profits of certain property during his natural life, and at his death to descend to his children, and in the event that they should not live to be twenty-one years, then over, the word "children" is used as a word of purchase. *Tate v. Townsend*, 61 Miss. 316.

Where a devise of property is to the devisee for life, and provides that if she should die without leaving any children it is to be divided among the rest of her heirs, there is no room for the operation of the rule, all the authorities agreeing that the use of the word "children" is not sufficient to indicate an intention to create an estate of inheritance. *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756.

A deed by which the grantor "lends" to his son-in-law and his daughter a slave during the daughter's life, and after her death gives the slave to the child or children of the daughter, if any of them arrive at a certain age, or leave heirs of their body, and, if none, provides that the property revert to the grantor, was held not within the rule. *Hughes v. Cannon*, 2 Humph. 589. The court said that the general intent was not to limit the reversion over upon an indefinite failure of issue. The particular intent was to give to the first taker only a life estate. The remainder was an independent donation to the child or children of the wife surviving at her death. The terms used were the very terms appropriate to exclude a case from the operation of the rule. The remainder was vested in the child or children living at the death of the wife, contingent, however, upon their arrival at the age of twenty-one years, or if dying before that time, upon their leaving children then surviving.
29 L.R.A. (N.S.).

In *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056, a testator, by the first clause of his will, devised land to his wife and two daughters absolutely, share and share alike, and by the second clause provided that if his daughters should arrive at maturity and marry, his desire was that the property given to them should not in any instance be liable for the debts of their husbands, but should descend from testator's daughters to their children. He also provided that "should either of my children before mentioned die without a child, then the property given to it shall descend to that [daughter] who may be living, in the manner above specified." It was held that the rule in Shelley's Case did not apply.

In *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97, it was held that the rule does not apply where the remainder is devised to an unborn child of the devisee of the life estate, though the child is spoken of in the will as the heir of such devisee.

The rule does not apply to a devise of an estate for life to testator's three children, with remainder to the children of each, and in case of the death of either without children, remainders over to the survivor or survivors of his own children. *Smith v. Chapman*, 1 Hen. & M. 240.

In *Beacroft v. Strawn*, 67 Ill. 28, in a grant to a woman for life free from the debts and liabilities of her husband, the property at her death to go to the children of her body, it was held that the words "children of her body" were words of purchase, and that the rule in Shelley's Case therefore did not apply.

⁵⁶ *Cannon v. Barry*, 59 Miss. 289.

tenant with certain explanatory or qualifying words. The question being what did the grantor or testator mean by the word "children," manifestly such an inquiry might arise as well in a jurisdiction in which the rule in Shelley's Case is not in force as in one in which it is. Any difficulty of interpretation, or conflict in interpreting similar phrases, as hereinbefore repeatedly pointed out, is not a difficulty arising from the application of the rule in Shelley's Case, but one relating only to the discovery of the intention of the author of the instrument, due to the ambiguous language used; a difficulty which is as present in jurisdictions where the rule in Shelley's Case does not prevail as in those in which it holds full sway.

The language of a deed limiting the remainder to the lawful children of the life tenant does not bring it within the rule in Shelley's Case,⁵⁷ or after his death to the then living children of his body,⁵⁸ or to the children by a particular husband.⁵⁹ Nor does it apply to a devise of property to

trustees to the use of A for life, and then to his children in priority in case he could marry, the sons to inherit before the daughters, but over in case the said A should die unmarried.⁶⁰

Where the devise was to a testator's son and daughter during the term of their natural lives, and after their decease to their children, the heirs of their bodies forever, it was held that the words "heirs of their bodies" did not militate against the previously expressed intent of the devisor, because the heirs of their bodies were, of course, their children, and the devise was still nothing more than a devise to the children of those to whom the life estate was given; that although the words in their legal import were words of limitation, in the connection in which they were used, it was obvious that the testator intended them in a restricted sense to mean their children.⁶¹ The question raised by the qualifying words is whether they indicate that the word "children" was used in the sense of heirs.⁶² Where the gift is to the children

⁵⁷ *McDill v. Meyer* (Ark.) 128 S. W. 364.

⁵⁸ In *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. 897, it was held that the rule in Shelley's Case did not apply where the grant was to a man for life, and after his death to the then living children of his body, it being expressly understood that the grantee was to have no greater estate than a life estate, and at his death the property was to go to the children of his body then living, the children being alive at the time of the making of the deed, and being capable of taking.

⁵⁹ *Berry v. Spivey*, 44 Tex. Civ. App. 18, 97 S. W. 511.

⁶⁰ *Savile v. Savile* [1896] 1 Ir. Ch. 240.

⁶¹ *Doe ex dem. Patterson v. Jackman*, 5 Ind. 283.

⁶² In a limitation after the life estate to the "children and heirs" of the life tenant, it was held that the word "children" was controlling, and that, giving the word "heirs" the force of the word "children," it became a word of purchase, taking the devise out of the rule in Shelley's Case. *Cowell v. Hicks* (N. J. Eq.) 30 Atl. 1091.

Where the devise was to the testator's son during his natural life, and at his death to his children, "if he have any, and if he have no children, or if there be no heirs of his body, then . . . to his other heirs of his own blood equally," it was held that the son did not take a fee. *Ridgeway v. Lanphear*, 99 Ind. 251.

In *Bissey's Estate*, 4 Pa. Co. Ct. 458, there was a devise to testator's son of the interest of the sum of \$2,500, to be paid to him annually during his life, the principal sum at his death to be paid to his children, the will providing that in case the son should die without children living, or the issue of any deceased child or children living, then over. It was held that the bequest of the 29 L.R.A. (N.S.)

interest of the \$2,500 strongly indicated a purpose to use the word "children" in its ordinary and accepted sense, and that the expression "issue of any deceased child or children" did not change this, it being merely descriptive.

Where the remaindermen were designated as "the children left by my daughter Mary of her body, or the descendants of such child or children, if she leaves no child," it was held that it was evident that the testatrix did not by this language contemplate the remaindermen as constituting an unbroken line of descent, to take in succession from generation to generation, but that she intended in the first place that the children of her daughter, if she left children, should take the entire estate in fee, and only in case she left no child were the descendants of children to take at all, and that in that event the descendants of her children living at her death should in like manner take the entire estate in fee. *Boutelle v. City Sav. Bank*, 18 R. I. 177, 26 Atl. 53.

After life estates to testator's children, the will provided that the property was to go and be divided between the children and lawful heirs of testator's children. It was held that the words "lawful heirs" did not explain and enlarge the preceding word "children," so as to bring the devise within the rule in Shelley's Case. *Reilly v. Britton*, 105 Md. 326, 66 Atl. 262.

The rule does not apply to a devise to a woman for life, and at her death to her child or children lawfully begotten, but providing that if she should leave no child, the property was to be equally divided between testator's grandchildren, it being his intention to entail as far as the grandchildren, since, while the words, "to her for life, and at her decease to her children lawfully begotten," are ordinarily words designating heirs of

estate tail to the first, since the words must be taken to mean if he should die without such issue.⁴¹

But where there was a devise to each of testator's daughters for life, remainder to descend to the child or children, and the gift to lapse if the daughter should die leaving no lawful issue, the court said that the rule that the words of ulterior limitation are referable to the object of the first limitation, and not to an indefinite failure of issue, was never applied when the word "children" was evidently intended to define an entire line of succession, and did not apply in this case where there was no devise over after the land "descends" to the child or children. Manifestly the only purpose of the testator expressed in the sentence containing the limitation was to declare anew

the duration of the interest he had previously given. In doing so he had defined the sense in which he had used the words "child" and "children" and "issue," and shows an intent to express heritable succession.⁴²

And where a testator directed his executors to pay the interest arising from a portion of his estate to his daughter for life, and at her death provided that the principal should be equally divided between her children, share and share alike, and that in case the daughter should die without leaving issue, the interest devised to her should revert to testator's estate, it was held that by the word "children" the testator meant issue; that the life tenant therefore took an estate tail enlarged by statute to a fee.⁴³

⁴¹Blackburn v. Edgley, 1 P. Wms. 600.

In *Goymour v. Pigge*, 8 Jur. 526, where a testator devised copyhold premises to his daughter for life, and from and after her death to the first child of her body, male or female, and to his or her heir and assigns forever, and if such child should die under twenty-one without leaving issue, then to the second child of his daughter, etc., it was held that by a subsequent provision that, in case his daughter should die without leaving issue of her body lawfully begotten, or, having issue, and such issue should die under the age of twenty-one years without leaving lawful issue, over, the life estate in the daughter was not enlarged to an estate tail, but that this limitation must be considered with reference to the class previously mentioned, and that such issue must mean children to whom subject to the daughter's life interest the estate was previously devised.

Where after a limitation to a married woman for life, remainder to trustees to preserve contingent remainders, etc., remainder to the first and other sons in tail male, remainder to her daughters in tail, it followed, in the words of the will, "and in case she shall depart this life without issue of her body living at the time of her decease," etc., it was held that this did not create an estate tail by implication. *Lethieulier v. Tracy*, 1 Id. Kenyon, 56.

In *Powell v. Domestic Missions*, 49 Pa. 46, in a devise to one for life and after his death to his lawful issue; if one, to him or her, his or her heirs and assigns forever, but if more than one, to be equally divided amongst them, their heirs and assigns forever, remainder over if the life tenant die without lawful issue,—it was held that the words "die without lawful issue" referred to the issue as defined by the testator, namely "children."

Where the testator devised land to his son for life, with a limitation to trustees to preserve contingent remainders, the will providing that after the death of the son the property should go "to the issue of all and every the issue child and children 29 L.R.A. (N.S.)

of the body" of the said son, "lawfully to be begotten, in such shares and proportions, manner and form," as the son should appoint, "and in default of such issue" to the use of other sons of the testator in fee, it was held that, in default of appointment, the children of the son took an estate in fee, and that consequently he was entitled to an estate for life only, and not to an estate tail. *Bradley v. Cartwright*, 36 L. J. C. P. N. S. 218, 25 Eng. Rul. Cas. 661.

And where the devise was to testator's son A, on his attaining the age of twenty-one, of the issues and profits of certain property for life, the properties to remain and become properties of any legal issue he might have as he should appoint by deed or will, and for want of legal issue of said son, over, it was held that the devise took issue, even considering the word in its largest sense, being of the fee, the gift over would not give A an estate tail. *Whitelaw v. Whitelaw, Jr.* L. R. 5 Eq. 120.

⁴²*Haldeman v. Haldeman*, supra.

⁴³*Robinson's Estate*, 149 Pa. 418, 24 Atl. 297.

So a devise of property to testatrix's son for life and after his death to his legitimate child or children, if there be any, but if he dies without issue, to another son during the term of his life, and afterwards to his legitimate child or children, if any, and if he should die without issue, then over, it was held by three of the judges, two judges dissenting, that the first son took an estate tail. *Bowen v. Lewis*, L. R. 9 App. Cas. 890.

In *Bennett v. Tankerville*, 19 Ves. Jr. 170, by a devise to the use of the testator's second son for life without impeachment of waste, and after his death to the heirs of his body to take as tenants in common, and not as joint tenants, and in case of his death without issue, over, it was held that the first taker took an estate tail, the intention being that the estate should not go over except upon an indefinite failure of issue.

Under a devise of freehold, copyhold, and leasehold estates to trustees and their heirs

to make them words of limitation.⁶⁵ And a devise to one for life and then to her children or issue, and in default of these, to the testator's heirs, was held to be only another way of devising to the first taker for life, remainder to her heirs. The court said that her heirs were, first, her descendants, and next, her next of kin on the side of the testator, that is, his heirs, and that this was just the line of inheritance described by him⁶⁶.

was held that the testator intended to limit the estate given to his children to their lineal heirs or issue, and that he intended to use the word "children" in its comprehensive and extended sense, meaning issue or heirs of the body, so as to create an estate tail in the first takers, which was enlarged by statute to a fee.

Where the limitation was to the "children and heirs of the body" of the life tenant, it was held that the word "children" was to be construed as a word of limitation. *Wilson v. Heilman*, 219 Pa. 237, 68 Atl. 674.

In *Pifer v. Locke*, 205 Pa. 616, 55 Atl. 790, a devise of real estate to testator's daughter for life, the will providing that at her death the property should go to her children or issue in fee simple, was held to vest in the daughter an estate in fee tail, converted by statute into an estate in fee simple, the words "children" or "issue" being used in the sense of heirs.

⁶⁵ *Mason v. Ammon*, 117 Pa. 127, 11 Atl. 449.

And an estate tail was held to have been created in testator's daughter by a devise of real estate to a trustee, to permit the daughter not only to receive the rents and profits to her own use, or to sell or mortgage any part if occasion required, but to settle on any husband she might take some or any part thereof, should he survive her, on certain conditions, the will providing that, should the daughter have a child, the use of the property should go to the child after the daughter's death, with a reasonable maintenance for the education of the child in the meantime, the word "child" being held not to be a *designatio personæ*, but to comprehend a class. *Doe ex dem. Jones v. Davies*, 4 Barn. & Ad. 43.

In *Brinton v. Martin*, 197 Pa. 615, 47 Atl. 841, the rule was held applicable to a devise to a son for life, at his death the same to descend to his children, or in default of children to his legal heirs. The court said that where the intention of the testator was that the second taker should take not from him, but from the first taker, then the words "children," "issue," etc., as well as "heirs," become words of limitation.

In *Sayer v. Masterman*, 1 Ambl. 344, under a devise of certain property to testator's brother for life, with power of jointuring, and after his death to such child or children as should lawfully be begotten by him, the males to be preferred before the females, and they to succeed according to their birth, and in trust to preserve contingent remainders during the life of the 29 L.R.A. (N.S.)

2. Words of distribution.

It would seem to be very plain that words of distribution added to a word of purchase would not change it into a word of limitation, and so the cases hold where the limitation is to the children of the life tenant. The rule does not apply to a deed to one for life, the property at his death to

brother, and on the death of the brother and "on failure of issue as aforesaid," then over, *Smythe*, Lord Commissioner, said that if it were necessary to determine it, he was strongly inclined to think that the brother took an estate tail.

Under a devise of freehold estate to a woman for life, and in case she should marry and have issue to her children, and in case she should have no issue, then over, it was held that the word "children" was used as synonymous with the word "issue," and that she therefore took an estate tail. *Voller v. Carter*, 1 Jur. N. S. 278.

In *Dick v. Ricker*, 222 Ill. 413, 113 Am. St. Rep. 428, 78 N. E. 823, a grant to a woman for life, and after her death to the use of the children of her body begotten, in fee tail forever, was held to create an estate tail in the first taker, which, under § 6 of the Illinois conveyance act, conveyed to her an estate for life, remainder in fee simple to her children.

A devise of real and personal property to testator's daughter for life, and afterwards to her children "and the heirs of her body forever," was held to be within the rule in *Shelley's Case*. *Calmes v. Caruth*, 12 Rob. (La.) 660.

Where the remainder was to the devisee's children or legal heirs, to come into their possession when they became twenty-one years of age, if their father was then dead, it was held that these words must be regarded as words of limitation, having the same effect as a devise to one for life and to the heirs of his body in fee simple. *Sheeley v. Neidhammer*, 182 Pa. 163, 37 Atl. 939.

In *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537, the devise was to the testator's four sons during their natural lifetime, to be equally divided amongst them in quantity and quality, the will providing that if any of them should die without heirs, the share of the deceased should be divided amongst the surviving ones, and then provided that at their death it be divided amongst their children, and so on from one generation to another, and it was held that the rule in *Shelley's Case* was applicable, since nothing but the whole line of issue, the heirs of the body, answered the testator's description of those who were to take by this limitation.

⁶⁶ *McKee v. McKinley*, 33 Pa. 92.

Likewise a conveyance to trustees for the sole and proper benefit and behoof of a person during her natural life, and at her death to descend to her children, if she have any, and if not, to her assigns forever, was held to be within the rule in *Shelley's Case*. *Nelson v. Davis*, 35 Ind. 474.

vey to testator's grandson for life and to the first son for life, and afterwards to convey the premises to the first son of that son for life, and in failure of such issue of the first devisee, to convey it over for life etc., it was held that the limitation over, if one to the issue male of the first devisee, did not by implication create an estate tail in the first taker precedent to the next remainder.⁴⁶

But where a testator devised his estate to A for life, charged with certain annuities, and in case any of the annuitants survived A the will provided that the estate should go to A's eldest surviving son charged with

the annuities, but in default of issue male that it should go to B charged in like manner, and unto his eldest son upon the same conditions, but in default of issue male to descend to testator's heirs, it was held that the words "default of issue male" did not mean default of an eldest son surviving, but were to be taken generally so as to give A an estate tail male.⁴⁷

And under a devise to one for life and no longer, and after his death to such son as he should have lawfully begotten, and in default of such issue, over, it was held that the first devisee took an estate tail.⁴⁸ Likewise it was held that an estate tail was

issue. It is equally well established that when the terms of the gift to the issue in such cases are sufficient to carry the fee, the ancestor takes an estate for life only. The gift in fee need not be an express gift, but may be made by any words which, prior to the wills act, would have been sufficient to carry the fee, or may be implied with a power to appoint to the issue in fee without a gift to the issue in default of appointment."

⁴⁶*Humberston v. Humberston*, 1 P. Wms. 332.

⁴⁷*Key v. Key*, 4 De G. M. & G. 73.

⁴⁸*Robinson v. Hicks*, 3 Bro. P. C. 180.

In *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450, 3 A. & E. Ann. Cas. 397, a devise to testator's grandson for life, then to the lawful heirs of his body in fee simple, and on failure of such heirs of his body, to his right heirs in fee, was held to give the grandson an estate in fee simple, the operation of the rule in Shelley's Case not being affected by the devise over.

In *Elton v. Eason*, 19 Ves. Jr. 73, in a residuary trust created by will by which rents and profits were directed to be applied for a person during his life, and afterwards for the heirs of his body, if any, and in default of such issue, over, the words "in default of such issue" were held to have in them nothing restrictive, the issue mentioned and referred to being the heirs of the body generally.

A limitation over after a limitation to the lawful heirs of the body of the life tenant in fee simple, "on failing of such lawful heirs of the body then to his right heirs in fee," does not prevent the operation of the rule. *Tyson v. Sinclair*, *supra*.

Where a remainder is to the heirs of the body of the life tenant, the subsequent words, "in default of such issue living at the time of the death of the life tenant," do not so modify the meaning of the words "to the heirs of the body" as to make them a particular designation of certain persons as a root from which the inheritance is to emanate, and therefore the life tenant would take a fee tail at common law, but under the statute law of Maryland a fee simple. *Thomas v. Higgins*, 47 Md. 439.

In *Roe ex dem. Thong v. Bedford*, 4 Maule & S. 363, where after a devise to 20 L.R.A. (N.S.)

testator's daughter for life subject to the payment of an annuity, with remainder to trustees to preserve contingent remainders, the property was devised to the heirs of her body lawfully begotten, and for want of such issue, over, the daughter was held to have taken an estate tail, although the testator also stated that it was his will and meaning that his daughter should have only an estate for life in the premises, and that after the death of his daughter the premises should go to and vest in the heirs of the body of his daughter, and for want of, or in default of, such issue, over. *Le Blanc, J.*, said that the plain intention of the testator was to give his daughter an estate tail, for it was not to go over until there was a failure of her issue, and the testator had not superadded words of limitation to the heirs of her body to show that he meant the children of the daughter only. At the same time he intended to prevent her barring the issue, but this he could not do. *Bayley, J.*, said: "I have always understood the rule to be that wherever an estate for life is given to the first taker, and afterwards to any branch of his heirs as a class, so that the whole line of heirs to the first taker who answer to the description in the will should succeed him as such, there the first taker cannot have an estate for life because all heirs claiming as heirs must take by descent: and therefore the words 'heirs of the body' do not operate as a *designatio personarum*, but are words of limitation. The words heirs of the body are properly words of limitation, and not words of purchase." *Dampier, J.*, said that it seemed clear, by the limitation over for want of issue of his daughter, that the testator used "heirs of the body" as words of limitation.

In *Goodright v. Pullyn*, 2 Ld. Raym. 1437, there was a devise to one for life and after his death to the heirs males of his body lawfully to be begotten and "his" heirs forever, the will providing that if the devisee should happen to die without such heir male, the property should go over. It was held that the subsequent words "his" and "if he dies without such heir male" were not sufficient to restrain and alter the operation of the words "heirs males" and so

created in the first devisee by a devise of property to testatrix's grandson A, to have and to hold the same and every part thereof for life, and after his death to the heirs of his body, should he leave any such him surviving, and in the event of his dying leaving no such heirs, then the property to be divided equally amongst his brothers and sisters him surviving.⁴⁹

XVI. Limitations to children.

a. Effect of unqualified limitations.

The rule in Shelley's Case does not operate when the limitation in remainder is to the children of the life tenant. The reason

to qualify them as to make them a description of the person.

⁴⁹ Re Cleator, 10 Ont. Rep. 326. Proudfoot, J., in a dissenting opinion, took the position that the devise over in the event of his leaving no such heirs, to his brothers and sisters him surviving, etc., so qualified the words "heirs of the body" as to mean heirs of the body living at the death of the first taker.

A conveyance by marriage settlement to a trustee for the use of the wife during her natural life, and from the termination of that estate to the heirs of her body and their heirs forever, and in case she should die without such heirs, or having such heirs they should die before they arrived at mature age, then to her brothers by her mother's side and their heirs forever, was held to vest the property absolutely in the wife under the rule in Shelley's Case. *Carroll v. Renich*, 7 Smedes & M. 798.

Where the devise is to one for life, remainder to the heirs of her body lawfully begotten, subsequent words "and for want of such issue living at the time of my daughter's death, then to go to" specified persons, do not prevent the rule in Shelley's Case from operating. *Travers v. Wallace*, 93 Md. 507, 49 Atl. 415.

But in *Price v. Price*, cited in *Theebridge v. Kilburne*, 2 Ves. Sr. 234, a man on his marriage settled a leasehold estate to trustees to the sole and separate use of his intended wife for life for her jointure, and after her death to the use of the heirs of the body of the wife by the husband to be begotten, and for want of such issue to the use of the husband and his heirs forever. The wife died leaving a son. The husband took out administration to her, insisting that the whole interest vested in her. It was held, however, that the term vested in the heirs of the body of the wife as purchasers.

In *Irwin v. Cuff*, *Hayes*, Exch. 30, there was a devise in trust for testatrix's son for life without impeachment of waste, and after his death in trust for such of his issue male and their issue male as he should appoint, and in default of such issue, over. The court, without disclosing the grounds

for this is that this takes the estate out of the statutory course of descent, and therefore creates an estate of purchase in the children. When qualifying or ambiguous explanatory terms are added, the question arises: When the grantor or deviser used the word "children" did he mean children or did he mean heirs? This has nothing to do with the rule in Shelley's Case; but if from the language in the instrument it is evident that the word "children" was used in the sense of heirs, the rule in Shelley's Case at once applies.

Whether the word "children" is used in a deed or will to limit a remainder after a life estate makes no difference. In either case it is considered as a word of purchase,

of its opinion, decided that the son took an estate tail.

In a devise in trust to permit children to receive the rents during their lives, the property after their deaths being devised equally between all their issue, male and female, and for want of such issue, over, the word "issue" was considered as a word of *nomen collectivum*, notwithstanding the use of words creating a tenancy in common and the limitation over in default of such issue. *Woodhouse v. Herrick*, 1 Kay & J. 352.

But in *Farrant v. Nichols*, 9 Beav. 327, under a devise in which the testator directed certain property to be held in trust for three daughters named during their lives, and after their deaths in trust for the issue of the daughters, whether sons or daughters, living at the time of their respective deaths, in equal shares and proportions, to be paid if the sons attained the respective ages of twenty-one years and the daughters the ages of twenty-three years, the will providing that if the daughters should die without leaving any such issue, or leaving any issue, etc., remainder over, it was held that the restriction placed on the word "issue" by the words "whether sons or daughters" was not enlarged by the subsequent expressions.

In *Golder v. Cropp*, 5 Jur. N. S. 562, where a house and lot was devised to a woman for life and immediately after her death to the issue of her body, to hold to them and their heirs forever as tenants in common, and then over in case she should die without leaving such issue, it was held that the first devisee took as tenant for life, with remainder to her children as tenants in common. Sir J. Romilly, M. R., says: "I have always considered that where an estate is given to the ancestor and there is a direction that it is afterwards to go to the issue of his body, and the mode in which the issue are to take is specified, with words added giving them the absolute interest, there the ancestor takes an estate for life, and not an estate tail, although there is a devise over in the event of the ancestor not having any issue. No one can doubt that the word 'issue,' is here used as equivalent to 'children.'"

unless it clearly appears to have been used in the sense of heirs, or heirs of the body.⁵⁰ The technical and legal meaning of the word "child" or "children" is the immediate offspring, and not an indefinite line of heirs.⁵¹

It is said that the word "children" is not a word of art; it has a natural sense in which it is most generally used; when applied to the remote descendants of any person it is altogether a figurative expression; thus we read of the children of

Seth; the children of Ham; and the children of Israel. In the latter instance it is used to designate a whole nation. But when not used in this figurative sense it means the immediate offspring of a man or woman; it has indeed in a few cases been construed to mean grandchildren, and even great grandchildren, but this construction is to be admitted only when no other construction can be made.⁵² If the limitation to the children is unqualified, the rule in Shelley's Case, of course, does not apply.⁵³ As where the de-

⁵⁰ On the question whether the word "children" is a word of limitation or word of purchase generally, see note to *Wills v. Foltz*, 12 L.R.A. (N.S.) 283.

In cases where the subsequent takers are designated as children, the rule does not apply. *Wilkinson v. Boyd*, 136 N. C. 46, 48 S. E. 516.

The rule does not apply when the limitation is to "children," for such word is one of purchase. *Brown v. Brown*, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81.

Where the remainder after a life estate is limited to the child or children, or descendant or descendants of any child or children of the life tenant, the rule does not apply. *Williams v. Mears*, 2 Disney (Ohio) 604.

The word "children" is essentially a word of purchase and is never construed as a word of limitation, unless absolutely necessary to give effect to the clear intention of the grantor or deviser. *May v. Ritchie*, 65 Ala. 602.

The word "children" is a word of purchase, and not of limitation, and when used without words adding to its force, the first taker of the estate does not take the fee. *Ridgeway v. Lamphear*, 99 Ind. 251.

The word "children" has always been held in Indiana to be a word of purchase, and not of limitation. *Bonner v. Bonner*, 28 Ind. App. 147, 62 N. E. 497.

The word "children" is not a word of limitation, but a word of purchase, when used in its ordinary and natural sense. It is descriptive of a particular class or generation of issue. *Masurie v. Pennsylvania Annuity Co.* 11 Phila. 208.

A devise over to the children of the life tenant does not enlarge the life estate, since the word "children" is a word of purchase. *Stonebraker v. Zollickoffer*, 52 Md. 154, 36 Am. Rep. 364.

It is well settled that the words "child or children" are to be construed as words of purchase, and not of limitation. *Connecticut Mut. L. Ins. Co. v. Skinner*, 2 Ohio C. D. 688.

The word "children" is ordinarily a word of purchase. *Mannerback's Estate*, 133 Pa. 342, 19 Atl. 552; *Shalter v. Ladd*, 8 Pa. Co. Ct. 528.

"Children" is primarily a word of purchase, and is never to be construed otherwise except where the testator has clearly used it as a word of limitation. *Hoover v. Strauss*, 215 Pa. 130, 64 Atl. 333. 29 L.R.A. (N.S.)

Prima facie "children" is a word of purchase, and not of limitation, and uncontrolled by the context must be so construed. But where it is clear that it was used in the sense of heirs, or heirs of the body, it must be so construed and the intention of the testator permitted to prevail. *Hastings v. Engle*, 217 Pa. 419, 66 Atl. 761.

Prima facie the word "children" is a word of purchase, and not of limitation, and must be so construed unless it is clear that the grantor used it in the other sense. *Shapley v. Diehl*, 203 Pa. 566, 53 Atl. 374.

As a general rule of construction the words "child" and "children" in a disposition of property by a will are words of purchase, and not of limitation, the rule in Shelley's Case not applying to a devise in which such words are used. *Pearson v. Willis*, 1 Pa. Co. Ct. 520.

The word "children" is a word of purchase unless there is other language in the will clearly purporting an intent not to use the word in that sense, but as a *collectivum*, signifying heirs, and consequently as a word of limitation; and the intent must appear so plainly that no one can misunderstand it. *Ibid.*

The term "children" shall be held to be a word of purchase unless it clearly appears by the will that the testator intended to use it in a different sense, as "heirs" or "issue of the body." *Bissey's Estate*, 4 Pa. Co. Ct. 458.

The word "children" is a word of purchase, and is always so regarded unless it plainly appears from the context, or to the will generally, that the testator intended to use it in the sense of issue as standing for the whole line of direct succession. *King v. Savage Brick Co.* 30 Pa. Super. Ct. 52. To the same effect *Fitler's Appeal*, 10 W. N. C. 429; *Stubbs v. Stubbs*, 11 Humph. 43.

⁵¹ *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056.

⁵² *Smith v. Chapman*, 1 Hen. & M. 240. Although the words "issue" and "children" both mean the same thing in a natural sense, it does not follow that they mean the same thing in a technical sense, so that where the word "issue" would be construed to be a word of limitation, the word "children" would also be so construed. *Ibid.*

⁵³ The word "children" is strictly a word of purchase, and must be so construed unless it clearly appears that it was intended to be a word of limitation; and as a

vise after the life estate is not to the heirs, or to the issue, but simply to the children of the life tenant;⁵⁴ or to the children, with

other words which do not qualify or indicate that it was used in the sense of heirs.⁵⁵

In holding that a grant in trust for the

general rule such intention must be gathered from the instrument itself. *Williams v. Sneed*, 3 Coldw. 533.

It has been uniformly held in Tennessee that the word "child" or "children" is properly a word of purchase, and not of limitation, unless from the context of the will it is made to appear that they are intended as words of limitation. *Collins v. Williams*, supra.

In *Connor v. Gardner*, 230 Ill. 258, 15 L.R.A. (N.S.) 73, 82 N. E. 640, the court said: "The rule in Shelley's Case often defeats the clearly expressed intention of the testator. In a devise to one for and during his natural life, with remainder to his heirs in fee, the inexorable rule of the common law, from which courts cannot escape without legislative aid, requires them to set at naught the clearly expressed intention, and decide that the testator gave a fee simple title to the first taker, although he expressly limited it to a life estate by apt words. When, however, the testator has used other words such as 'child' or 'children' the rule in Shelley's Case has no application, and the court is left free to adopt a construction which will carry into effect the intention of the testator. It is true, the intention, when discovered, may lead to the same result as is reached under the rule in Shelley's Case, where the word 'heirs' is used, but if this be so, it is because the intention is carried out by adopting such construction. It will never be so construed to defeat the intention, as may follow from the rigor of the rule in Shelley's Case."

The rule does not apply if the words "children," "issue," or "descendants" are employed. The reason for this distinction is apparent. A man may have children not born in lawful wedlock; his issue may be illegitimate; his descendants bastards. Property may be devised to them, but they necessarily take by purchase, and a new stock is thus created. *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72.

The rule in Shelley's Case does not apply to the word "children" in a devise. As one of the principal reasons for establishing this rule was to prevent the abeyance or suspension of the inheritance, it is only applied to limitations in which the word "heirs" is used, on account of the maxim that *nemo est hæres viventis*. *Smith's Estate*, 9 Phila. 348.

The word "children" is not a word of limitation, but of personal description. *Guthrie's Appeal*, 37 Pa. 9. It was said not to be deniable that the word "children" might be used by a testator as a *nomen collectivum*, signifying "heirs of the body," but the court declared that it had found no case in which it had been held to have been so used, unless the testator had also employed the words "heirs of the body," or "issue," as descriptive of the same objects. Nothing less appeared to be sufficient to

repel the presumption that the testator did not intend a limitation by the use of this word of purchase.

But in *Trumbull v. Trumbull*, 149 Mass. 200, 4 L.R.A. 117, 21 N. E. 366, it was said that the construction given to the words "children" and "issue" is that which is given to the words "heirs of the body."

If the term made use of in the limitation is "son" or "child," and it is used in the sense of heirs, and not as *designatio personæ*, but comprehending a class to take by inheritance, it is to be taken as a term of limitation, and accordingly brings the case within the rule in Shelley's Case. So it is with the word "issue." The context in these cases may be resorted to, to get at the sense in which the term or terms are used. And if, as thus construed, heirs in the technical sense are intended, the case would come within the rule. 2 Washb. Real Prop. 274; *Nelson v. Davis*, 35 Ind. 474.

⁵⁴ *Stump v. Jordan*, 54 Md. 619.

The first devisee takes a life estate only under a devise of a farm to testator's son for his support, the will providing that if he should be spared to have family the estate should go to the use of his children, the word "children" being used as a word of purchase. *Oyster v. Knoll*, 137 Pa. 448, 21 Am. St. Rep. 890, 20 Atl. 624.

In *Emerick v. Emerick*, 219 Pa. 187, 68 Atl. 183, land was devised to testator's sons in trust to make their living, and to their children after them. It was held that the word "children" was used as a word of purchase.

Where an express estate for life was devised, it was held that a devise over in case of the death of the first taker without children could not enlarge the estate of the tenant for life. *Fitler's Appeal*, 10 W. N. C. 429.

The rule does not apply to a devise to testator's daughter for life, the property after her death to be divided among her children. *Bannister v. Bull*, 16 S. C. 220.

The rule does not apply to a devise to testator's son for the sole use and benefit of testator's daughter and her children, the will providing that should the daughter die without any child or children, that the property was to return to testator's children and be equally divided among them, because the limitation was not to the heirs or heirs of the body of the daughter to take as a class in succession, but to the children of the daughter who might be living at her death. *Turner v. Ivie*, 5 Heisk. 222.

Where the limitation after the life estate was for the use and benefit of the children of the life tenant, it was held that the rule did not apply; there being nothing in the will which required the court to construe the word "children" as synonymous with the words "heirs" or "issue" or "heirs of the body." *Smith v. Smith*, 24 S. C. 304.

⁵⁵ Under a devise to one of the use and

use and benefit of testator's son during his life and at his death for the use and benefit of all his children who should attain the age of twenty-one years or marry, not to be within the rule in Shelley's Case, the court said that in determining the construction of any instrument of entailment the word "children" is rarely held synonymous with "heirs" or "heirs of the body." The principal cases in which it is so held are instances illustrating the rule announced in Wild's Case, 6 Coke, 16, that is to say, where there is an immediate grant or devise to a man and his children, and the grantee is without children. It being manifest in such cases that the intent was to vest an estate *in præsenti*, and that being impossible by reason of the nonexistence of a portion of those named, in order to effectuate the intention the word "children" must be construed as a word of limitation, and not of purchase, because otherwise there would be a grant or devise of a life estate only, and the fee would remain in the heirs of the deviser, or the person of the grantor, as the case might be.⁵⁶

b. Effect of qualified limitations.

1. Modifying words in general.

The word "children" being *prima facie* a word of purchase, wherever explanatory or modifying words are added, the question, as before stated, always is whether these additional words indicate that the word "children" was used in its ordinary sense, or in the sense of heirs of the body or heirs. If used in the sense of heirs, the word "children" manifestly becomes a word of limitation, otherwise not. This preliminary inquiry is directed to the discovery of the intention of the grantor or deviser in the use of the word "children." The rule in Shelley's Case has no influence whatever upon this question, which is altogether apart from and independent of the rule; that is, it may be conceded that the rule applies where the limitation is to the heirs of the life tenant, and that it does not apply where the limitation is to the children of the life tenant; but the limitation to be construed by the court is to the children of the life

profits of certain property during his natural life, and at his death to descend to his children, and in the event that they should not live to be twenty-one years, then over, the word "children" is used as a word of purchase. *Tate v. Townsend*, 61 Miss. 316.

Where a devise of property is to the devisee for life, and provides that if she should die without leaving any children it is to be divided among the rest of her heirs, there is no room for the operation of the rule, all the authorities agreeing that the use of the word "children" is not sufficient to indicate an intention to create an estate of inheritance. *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756.

A deed by which the grantor "lends" to his son-in-law and his daughter a slave during the daughter's life, and after her death gives the slave to the child or children of the daughter, if any of them arrive at a certain age, or leave heirs of their body, and, if none, provides that the property revert to the grantor, was held not within the rule. *Hughes v. Cannon*, 2 Humph. 589. The court said that the general intent was not to limit the reversion over upon an indefinite failure of issue. The particular intent was to give to the first taker only a life estate. The remainder was an independent donation to the child or children of the wife surviving at her death. The terms used were the very terms appropriate to exclude a case from the operation of the rule. The remainder was vested in the child or children living at the death of the wife, contingent, however, upon their arrival at the age of twenty-one years, or if dying before that time, upon their leaving children then surviving.

29 L.R.A. (N.S.).

In *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056, a testator, by the first clause of his will, devised land to his wife and two daughters absolutely, share and share alike, and by the second clause provided that if his daughters should arrive at maturity and marry, his desire was that the property given to them should not in any instance be liable for the debts of their husbands, but should descend from testator's daughters to their children. He also provided that "should either of my children before mentioned die without a child, then the property given to it shall descend to that [daughter] who may be living, in the manner above specified." It was held that the rule in Shelley's Case did not apply.

In *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97, it was held that the rule does not apply where the remainder is devised to an unborn child of the devisee of the life estate, though the child is spoken of in the will as the heir of such devisee.

The rule does not apply to a devise of an estate for life to testator's three children, with remainder to the children of each, and in case of the death of either without children, remainders over to the survivor or survivors of his own children. *Smith v. Chapman*, 1 Hen. & M. 240.

In *Beacroft v. Strawn*, 67 Ill. 28, in a grant to a woman for life free from the debts and liabilities of her husband, the property at her death to go to the children of her body, it was held that the words "children of her body" were words of purchase, and that the rule in Shelley's Case therefore did not apply.

⁵⁶ *Cannon v. Barry*, 59 Miss. 289.

tenant with certain explanatory or qualifying words. The question being what did the grantor or testator mean by the word "children," manifestly such an inquiry might arise as well in a jurisdiction in which the rule in Shelley's Case is not in force as in one in which it is. Any difficulty of interpretation, or conflict in interpreting similar phrases, as hereinbefore repeatedly pointed out, is not a difficulty arising from the application of the rule in Shelley's Case, but one relating only to the discovery of the intention of the author of the instrument, due to the ambiguous language used; a difficulty which is as present in jurisdictions where the rule in Shelley's Case does not prevail as in those in which it holds full sway.

The language of a deed limiting the remainder to the lawful children of the life tenant does not bring it within the rule in Shelley's Case,⁵⁷ or after his death to the then living children of his body,⁵⁸ or to the children by a particular husband.⁵⁹ Nor does it apply to a devise of property to

trustees to the use of A for life, and then to his children in priority in case he could marry, the sons to inherit before the daughters, but over in case the said A should die unmarried.⁶⁰

Where the devise was to a testator's son and daughter during the term of their natural lives, and after their decease to their children, the heirs of their bodies forever, it was held that the words "heirs of their bodies" did not militate against the previously expressed intent of the deviser, because the heirs of their bodies were, of course, their children, and the devise was still nothing more than a devise to the children of those to whom the life estate was given; that although the words in their legal import were words of limitation, in the connection in which they were used, it was obvious that the testator intended them in a restricted sense to mean their children.⁶¹ The question raised by the qualifying words is whether they indicate that the word "children" was used in the sense of heirs.⁶² Where the gift is to the children

⁵⁷ *McDill v. Meyer* (Ark.) 128 S. W. 364.

⁵⁸ In *Jackson v. Jackson*, 127 Ind. 346, 26 N. E. 897, it was held that the rule in Shelley's Case did not apply where the grant was to a man for life, and after his death to the then living children of his body, it being expressly understood that the grantee was to have no greater estate than a life estate, and at his death the property was to go to the children of his body then living, the children being alive at the time of the making of the deed, and being capable of taking.

⁵⁹ *Berry v. Spivey*, 44 Tex. Civ. App. 18, 97 S. W. 511.

⁶⁰ *Savile v. Savile* [1896] 1 Ir. Ch. 240.

⁶¹ *Doe ex dem. Patterson v. Jackman*, 5 Ind. 283.

⁶² In a limitation after the life estate to the "children and heirs" of the life tenant, it was held that the word "children" was controlling, and that, giving the word "heirs" the force of the word "children," it became a word of purchase, taking the devise out of the rule in Shelley's Case. *Cowell v. Hicks* (N. J. Eq.) 30 Atl. 1091.

Where the devise was to the testator's son during his natural life, and at his death to his children, "if he have any, and if he have no children, or if there be no heirs of his body, then . . . to his other heirs of his own blood equally," it was held that the son did not take a fee. *Ridge-way v. Lanphear*, 99 Ind. 251.

In *Bissey's Estate*, 4 Pa. Co. Ct. 458, there was a devise to testator's son of the interest of the sum of \$2,500, to be paid to him annually during his life, the principal sum at his death to be paid to his children, the will providing that in case the son should die without children living, or the issue of any deceased child or children living, then over. It was held that the bequest of the 29 L.R.A. (N.S.)

interest of the \$2,500 strongly indicated a purpose to use the word "children" in its ordinary and accepted sense, and that the expression "issue of any deceased child or children" did not change this, it being merely descriptive.

Where the remaindermen were designated as "the children left by my daughter Mary of her body, or the descendants of such child or children, if she leaves no child," it was held that it was evident that the testatrix did not by this language contemplate the remaindermen as constituting an unbroken line of descent, to take in succession from generation to generation, but that she intended in the first place that the children of her daughter, if she left children, should take the entire estate in fee, and only in case she left no child were the descendants of children to take at all, and that in that event the descendants of her children living at her death should in like manner take the entire estate in fee. *Boutelle v. City Sav. Bank*, 18 R. I. 177, 26 Atl. 53.

After life estates to testator's children, the will provided that the property was to go and be divided between the children and lawful heirs of testator's children. It was held that the words "lawful heirs" did not explain and enlarge the preceding word "children," so as to bring the devise within the rule in Shelley's Case. *Reilly v. Bristol*, 105 Md. 326, 66 Atl. 262.

The rule does not apply to a devise to a woman for life, and at her death to her child or children lawfully begotten, but providing that if she should leave no child, the property was to be equally divided between testator's grandchildren, it being his intention to entail as far as the grandchildren, since, while the words, "to her for life, and at her decease to her children lawfully begotten," are ordinarily words designating heirs of

as remaindermen, it is to them distributively as tenants in common, or to their heirs. This shows that it was not intended that they should take as heirs of the life tenant.⁶³ But the word "children" was held to have been used as a word of limitation in a devise of real estate to testator's sons for their use and support during their natural lives, and at their deaths to descend to their

children, if any; if no children, then to descend to the brothers and sisters and their children, so that the first taker took a fee simple in the land devised to him.⁶⁴ And in a devise to testator's sister, and at her death to her child, children, or other lineal descendants, it was held that the words "child," "children," were so qualified by the words "other lineal descendants" as

the body, if uncontrolled by other provisions, the devise to the children is in unequivocal words designating a fee simple, and since there is a clear implication that the entail was not to extend beyond the grandchildren. *Wight v. Baurly*, 7 Cush. 105.

⁶³ *Guthrie's Appeal*, 37 Pa. 9. "True," said the court, "it has been ruled that in cases where the remainder is limited to 'heirs of the body,' a direction that they shall take distributively will not prevent the application of the rule in *Shelley's Case*; but this is because the presumption of limitation arising from the use of the word 'heirs' is too strong to be rebutted by the repugnant provision for distribution. It never yet has been held that such a provision can be rejected when the remainder is limited to objects described by apt words of purchase. So, too, it has been held that the rule applies, though, in addition to the first words of inheritance, *viz.*, 'heirs' or 'heirs of the body,' there are superadded words of limitation similar to the first, but this is for the same reason. It is a mistake to argue that, because certain things will not suffice to convert 'heirs' or 'heirs of the body' into words of purchase, they are of no consequence when the search is for the meaning of 'children' or any other word naturally descriptive of persons rather than estates. And even when the limitation is to heirs of the body, to take distributively, with similar words of limitation added, such a direction is held to convert even the technical words 'heirs of the body' into words of purchase."

Where the habendum clause was to have and to hold to the party of the second part, to his own use, benefit, and behoof, during his natural life, and at his death to descend to and be vested in the children of the said party of the second part by him lawfully begotten, and if any of the children of the said party of the second part should die leaving lawful issue, such issue to take the share of the dead parent, the heirs and assigns of such children and issue forever, it was held that it was vain to say that the intention of the grantor that the remaindermen should take by descent, and not as purchasers, was to be inferred from the expression that after the decease of the tenant for life the land should descend and title be vested in his children. The court said that the heritable succession from the tenant for life was not intended by the grantor was manifest in three ways, by the use of apt words of purchase, that is "children;" in describing the remaindermen by giving the land to them distributively as tenants

in common; and by adding words of limitation in fee to the grant to them. *Tyler v. Moore*, 42 Pa. 374.

Under a deed of gift to testator's daughter for life, and at her death to her children or to their lineal descendants, it was held that the daughter took only a life estate, the rule in *Shelley's Case* not being applicable. *Brown v. Brown*, 125 Iowa, 238, 67 L.R.A. 629, 101 N. W. 81.

⁶⁴ *Potts v. Kline*, 174 Pa. 513, 34 Atl. 191.

In *Haldeman v. Haldeman*, 40 Pa. 29, the words "child or children" in a devise to testator's daughter for life, remainder to descend to the child or children, and the gift to lapse if the daughter should die, and leave no lawful heir, were held to be used in the sense of issue. The court said it was evident that the point of time when the testator intended the estate given to the daughter and her child or children to cease, and when the property was intended to fall into the residue of his estate, was the same. The termination of the estate and the lapse were in his mind contemporaneous. Here he used the words "child," "children," and "issue" as meaning the same thing, as meaning heirs of the body, and not as descriptive of mere individuals.

In *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499, a testator devised to his daughter a certain portion of his estate for life only, and the remainder, after her death, to her child or children in fee, the will providing that if the daughter at the time of her death should have neither husband, child, or children, she might dispose of the property as she thought proper. The will also directed that if any of the devisees named there should refuse to take their devise, it should revert back to testator's estate, and be divided among his other "said heirs equally." It was held that the testator had used the words "child" or "children" as describing and applying to a class, the legally lineal descendants of his daughter, the same as if he had used the words "heirs of the body."

In *Vilsack's Estate*, 207 Pa. 611, 57 Atl. 32, a testator devised all his real and personal estate to his wife for life, and at her death the proceeds to sons and daughters during their lives, share and share alike, and after the death of either of the sons and daughters, he bequeathed to their child or children the shares held by the sons and daughters at the time of his or her death, but in case of dying without heirs, the share of the deceased son and daughter was to be divided equally between the testator's grandchildren, share and share alike. It

to make them words of limitation.⁶⁵ And a devise to one for life and then to her children or issue, and in default of these, to the testator's heirs, was held to be only another way of devising to the first taker for life, remainder to her heirs. The court said that her heirs were, first, her descendants, and next, her next of kin on the side of the testator, that is, his heirs, and that this was just the line of inheritance described by him.⁶⁶

was held that the testator intended to limit the estate given to his children to their lineal heirs or issue, and that he intended to use the word "children" in its comprehensive and extended sense, meaning issue or heirs of the body, so as to create an estate tail in the first takers, which was enlarged by statute to a fee.

Where the limitation was to the "children and heirs of the body" of the life tenant, it was held that the word "children" was to be construed as a word of limitation. *Wilson v. Heilman*, 219 Pa. 237, 68 Atl. 674.

In *Pifer v. Locke*, 205 Pa. 616, 55 Atl. 790, a devise of real estate to testator's daughter for life, the will providing that at her death the property should go to her children or issue in fee simple, was held to vest in the daughter an estate in fee tail, converted by statute into an estate in fee simple, the words "children" or "issue" being used in the sense of heirs.

⁶⁵ *Mason v. Ammon*, 117 Pa. 127, 11 Atl. 449.

And an estate tail was held to have been created in testator's daughter by a devise of real estate to a trustee, to permit the daughter not only to receive the rents and profits to her own use, or to sell or mortgage any part if occasion required, but to settle on any husband she might take some or any part thereof, should he survive her, on certain conditions, the will providing that, should the daughter have a child, the use of the property should go to the child after the daughter's death, with a reasonable maintenance for the education of the child in the meantime, the word "child" being held not to be a *designatio personæ*, but to comprehend a class. *Doe ex dem. Jones v. Davies*, 4 Barn. & Ad. 43.

In *Brinton v. Martin*, 197 Pa. 615, 47 Atl. 841, the rule was held applicable to a devise to a son for life, at his death the same to descend to his children, or in default of children to his legal heirs. The court said that where the intention of the testator was that the second taker should take not from him, but from the first taker, then the words "children," "issue," etc., as well as "heirs," become words of limitation.

In *Sayer v. Masterman*, 1 Ambl. 344, under a devise of certain property to testator's brother for life, with power of jointuring, and after his death to such child or children as should lawfully be begotten by him, the males to be preferred before the females, and they to succeed according to their birth, and in trust to preserve contingent remainders during the life of the 29 L.R.A. (N.S.)

2. Words of distribution.

It would seem to be very plain that words of distribution added to a word of purchase would not change it into a word of limitation, and so the cases hold where the limitation is to the children of the life tenant. The rule does not apply to a deed to one for life, the property at his death to

brother, and on the death of the brother and "on failure of issue as aforesaid," then over, *Smythe*, Lord Commissioner, said that if it were necessary to determine it, he was strongly inclined to think that the brother took an estate tail.

Under a devise of freehold estate to a woman for life, and in case she should marry and have issue to her children, and in case she should have no issue, then over, it was held that the word "children" was used as synonymous with the word "issue," and that she therefore took an estate tail. *Voller v. Carter*, 1 Jur. N. S. 278.

In *Dick v. Ricker*, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823, a grant to a woman for life, and after her death to the use of the children of her body begotten, in fee tail forever, was held to create an estate tail in the first taker, which, under § 6 of the Illinois conveyance act, conveyed to her an estate for life, remainder in fee simple to her children.

A devise of real and personal property to testator's daughter for life, and afterwards to her children "and the heirs of her body forever," was held to be within the rule in *Shelley's Case*. *Calmes v. Caruth*, 12 Rob. (La.) 660.

Where the remainder was to the devisee's children or legal heirs, to come into their possession when they became twenty-one years of age, if their father was then dead, it was held that these words must be regarded as words of limitation, having the same effect as a devise to one for life and to the heirs of his body in fee simple. *Sheeley v. Neidhammer*, 182 Pa. 163, 37 Atl. 939.

In *Seybert v. Hibbert*, 5 Pa. Super. Ct. 537, the devise was to the testator's four sons during their natural lifetime, to be equally divided amongst them in quantity and quality, the will providing that if any of them should die without heirs, the share of the deceased should be divided amongst the surviving ones, and then provided that at their death it be divided amongst their children, and so on from one generation to another, and it was held that the rule in *Shelley's Case* was applicable, since nothing but the whole line of issue, the heirs of the body, answered the testator's description of those who were to take by this limitation.

⁶⁶ *McKee v. McKinley*, 33 Pa. 92.

Likewise a conveyance to trustees for the sole and proper benefit and behoof of a person during her natural life, and at her death to descend to her children, if she have any, and if not, to her assigns forever, was held to be within the rule in *Shelley's Case*. *Nelson v. Davis*, 35 Ind. 474.

vest absolutely in fee simple in his surviving children, if any there be, as tenants in common, and in case he should die without issue alive, then over.⁶⁷ Likewise, it was said that where a term was bequeathed to A for life, and after his death to B, for

life, and after the death of the survivor to the children of A, share and share alike, and if A should die without issue of his body, then to C for life, this was not such a limitation as must, in its legal operation, create an estate tail.⁶⁸ So the cases hold.⁶⁹

In *Shapley v. Diehl*, 203 Pa. 566, 53 Atl. 374, a limitation after the death of the life tenant to his children or heirs was held to mean heirs of the grantee of the life estate, the word "heirs" being used as a synonym to enlarge and explain the preceding word, which might otherwise fail of its real intentment, the rule in *Shelley's Case* applying.

But where the devise was to each of two daughters, the income of one half of the testator's real estate for life only, and on the decease of either her share to go to her children in fee simple, it was held that by the use of the words, "to go to her children in fee simple," and by a provision that the husband of her daughters should not control, inherit, or even claim a life estate therein, and by the use of the words "to inherit" in a clause as follows: "I further provide that in case neither of my daughters are living at the time of my death, or children of theirs living to inherit the property which I give to my daughters, I then give," etc., there was no indication that the word "children" was used in the sense of the word "heirs." *Foster v. McKenna*, 8 Sadler (Pa.) 538, 11 Atl. 674.

⁶⁷ *Williams v. Hedrick*, 37 C. C. A. 552, 96 Fed. 657.

So, where the testator gave land to his son, "to hold the same to him during his natural life, and after his decease to his children lawfully begotten, share and share alike," it was held that the rule did not apply. *Gernet v. Lynn*, 31 Pa. 94. The court said: "The rule in *Shelley's Case* is of high antiquity. It did not originate in that case. It existed long before. It is stated in our law books thousands of times, by judges and elementary writers; but in every statement of it the most careless student will perceive that its object is to fix the legal meaning of the word 'heirs,' when used in the connection set forth in the rule. It does not profess to seize upon any other term, and make it subservient to the same policy, regardless of the intention of the grantor or deviser. It is true that in some cases the word 'issue' has been subjected to its operation; but this is never the case when the word appears to have been used to describe definite objects of the testator's bounty. The rule only operates on the word 'issue' when it appears to have been used to mean an indefinite succession of lineal descendants, in which case it is synonymous with the term 'heirs of the body.' When it is used as synonymous with 'children,' it is not within the meaning of the rule. It is, therefore very clear that when the term 'children' is used to designate the object of the testator's bounty, and some of them are *in esse* at the date of the will, and also at the time

it takes effect, neither the policy nor the words of the rule apply. In such a case the remainder neither hangs in abeyance, nor vests in the life estate to await the coming of claimants who may answer the description of heirs of the first taker at the time of his death."

The rule does not apply to a limitation after the life estate to "such of her children or their heirs as may survive her [the life tenant] as tenants in common, that is, the child or children of any deceased child of hers shall hold the same interest and right that the deceased parent would have held if living." *Guthrie's Appeal*, 37 Pa. 9.

Under a deed to a trustee in trust for the sole use of a woman for life, the property at her death to be divided amongst her children surviving her, grandchildren to represent the share of a deceased child, it was held that the first taker took but a life estate. *Clark v. Neves*, 76 S. C. 484, 12 L.R.A. (N.S.) 298, 57 S. E. 614.

A devise of property to the separate use of testator's daughter, not to be subject in any event to the debts or contracts of her husband, but to be hers during life, and at her death to be equally divided among her children, is not within the rule. *Williams v. Sneed*, 3 Coldw. 533.

The rule does not apply to a devise of a tract of land and a slave to a testator's son, the will providing that at the latter's death the property shall be equally divided among his children. *Stubbs v. Stubbs*, 11 Humph. 43.

In *Moon v. Stone*, 19 Gratt. 130, where the testator lent land to his daughter to be possessed by her during her life and the life or widowhood of any husband she might have, and at her death, and the death, or after the marriage, of her husband, then to be equally divided among her children, if she should have any, and if none, then over, it was held that the word "children" was used as a word of purchase.

In *Hall v. Smith*, 25 Gratt. 70, the court calls attention to the arguments of counsel in the last-mentioned case, "which," says the court, "for painstaking industry and thorough research, have rarely, if ever, been equalled, and never surpassed, by any argument before this court."

⁶⁸ *Doe ex dem. Lyde v. Lyde*, 1 T. R. 593.

⁶⁹ Where the devise over is to the children of the life tenant's body "lawfully to be begotten forever, which children of her body lawfully to be begotten are to share the same equally amongst them, be they son or daughter, or sons and daughters," it was held that the word "children" would not be construed as equivalent to the words "heirs of the body," where, at the time of the making of the will, the rules of descent

3. *Superadded words of limitation.*

There is a conflict on the question whether words of limitation superadded to a limitation to the children of the life tenant change it to a word of limitation, the prevailing and better opinion being that it does not. When such words are added to the word "heirs," the contention is that they reduce that word from a word of limitation to a word of purchase, by showing that the author of the instrument intended to make the heirs the original stock from which the inheritance was to spring; but,

cast the estate upon the males in exclusion of the females, and of the males preferred the eldest to the exclusion of the others, since the devise here gave the estate over to the children, both males and females, and thus precluded the possibility of the children taking by descent. *M'Nair v. Hawkins*, 4 Bibb, 390.

In *Doe ex dem. Liversage v. Vaughan*, 5 Barn. & Ald. 464, it was held that the word "children" was not used as *nomen collectivum* in a devise in which the testator bequeathed property to his nephew for life, and after his death to all and every child and children of the nephew lawfully begotten or to be begotten, whether sons or daughters, they, if more than one, to take as tenants in common in equal shares and proportions, and for want of such issue, to his own right heirs forever.

The rule does not apply to a devise of real estate to a daughter for life, remainder at her death to her child or children then living, and the descendants of those who may be dead, equally to be divided *per stirpes*. *Turley v. Turley*, 11 Ohio St. 173. The court said that the express devise to her was for life, and that the employment of descriptive words which were peculiarly words of purchase, and not of limitation, to indicate the recipients of the fee, added to the special reference made to the descendants of predeceased children, clearly evinced an intention on the part of the testator to create a life estate only in the daughter, and to make the children and their descendants primary donees of the remainder.

In *Harris v. McElroy*, 5 Phila. 81, an estate was limited in trust to a woman for life, and at her death in trust for her husband for his life, and upon the death of the survivor, for the use, benefit, and behoof of such of the children of the wife as should then be living in fee, in equal shares as tenants in common, the issue of any then dead to take the same share as their parent would have taken if living, and in case the wife should die without leaving any child or children, then in trust for her right heirs. It was held that the children took as purchasers, there being nothing in the limitation to show that the word "children" was used to designate the heirs of the first taker.

The rule in *Shelley's Case* has no application *L.R.A. (N.S.)*

as applied to children, it has been held that these superadded limitations have an enlarging effect, indicating that the testator or grantor used the word "children" in the sense of "heirs," therefore converting it into a word of limitation.

A devise to testator's grandson for life, and after his death to his children, to have and to hold unto his children, their heirs and assigns forever, was held not within the rule in *Shelley's Case*, the words "heirs and assigns" not referring to the grandson, but to his children, to indicate that they were to take in fee.⁷⁰ And the limitation of the

tion to a devise to a woman to be held and enjoyed by her during her life, and after her death to be equally divided between her children, if she leave children, and if not, then to be equally divided among the testator's other children, there being nothing whatever to indicate that the testator did not use the term "children" of the life tenant in its primary sense. *Rosenau v. Childress*, 111 Ala. 214, 20 So. 95.

⁷⁰ *Hoover v. Strauss*, 215 Pa. 130, 64 Atl. 333.

In a grant to two persons during their lives, to hold in moieties, and at their death one moiety to the children of one and their heirs, and one moiety to the children of the other and their heirs, the words "children and their heirs" were held to be words of purchase, and not of limitation, by any principle of construction the rule in *Shelley's Case* had ever received. *Perry v. Calhoun*, 2 Humph. 551.

The rule does not apply to a devise to testator's sons for life, with ultimate devise after the deaths of their wives to their children respectively, and their heirs forever. *Re Sharon*, 12 Ont. L. Rep. 605.

Where the limitation was to the children of the life tenant successively and their heirs, the will providing that if the life tenant should die without issue, then over, it was held that the first taker had only an estate for life. *Ginger v. White*, Willes, Rep. 348.

And where the limitation was to the male children of the life tenant for their lives, and so to the male children descending from them, and on their decease or failure, over, it was held that the first taker took only an estate for life. *Goodtitle ex dem. Cross v. Woodhull*, Willes, Rep. 692.

The rule in *Shelley's Case* has no application to a devise, in effect, to the testator's son for life, and in case of the latter's death leaving child or children or the issue of such, remainder to such child or children or the issue of such child or children, their heirs and assigns, etc., since neither in the construction of a deed or will where the words "child or children" are used, and not "heirs or heirs of the body," has the rule any place. *Jamison v. McWhorter*, 7 Houst. (Del.) 242, 31 Atl. 517.

A grant to one during her natural life, and to her children and their assigns for-

remainder to children surviving the first tenant of the freehold, and to children of children who may be deceased at the death of that tenant, was held not unequivocally to indicate an intention that they shall take as heirs of the tenant for life; that, at most, this was but a description of persons with the part to be taken by each, and pointed

to no line of succession.⁷¹ But under a limitation after a life estate given to the testator's nephew, to the child or children which the nephew might leave living at the time of his death, their heirs and assigns forever, the child or children or descendants of a deceased child or children of the nephew to take the part to which the parent

ever, was held not to be within the rule in Shelley's Case, there being no words of inheritance in the conveyance, and those used, "her children," being words of purchase, and not of limitation. *Sordon v. Gatewood*, 1 Ind. 107.

In *Doe ex dem. Patterson v. Jackman*, 5 Ind. 283, a devise to a son and daughter during the term of their natural lives, and after their decease to their children, the heirs of their bodies forever, was held obviously to import a life estate in the testator's son and daughter, and a remainder to their children.

Where there is a limitation to an individual or individuals of the family of the first taker, as to a son, sons, or children, with superadded words of limitation, to his or their heirs in fee or in tail, such selection being a manifestation of the testator's intention to constitute the person or persons selected a stock from which the inheritance shall be deduced, there can be no doubt that the ancestor referred to will take an estate for life only, notwithstanding the person or persons so selected may also fill the character of heir or heirs to such ancestor, as in the case of a limitation in strict settlement on first and other sons. *Lyles v. Digges*, 6 Harr. & J. 364, 14 Am. Dec. 281.

After an express limitation to a man for life in a devise of land, if the remainder is given or limited to his sons or his children and their heirs or the heirs of their bodies, he takes an estate for life only, and the sons or children, and not the father, take the residue of the estate by way of remainder. *Re Sanders*, 4 Paige, 293. The court said that the term "children" in its natural sense is a word of purchase, and it is to be taken to have been used as such, unless there are other expressions in the will which show that the testator intended to use it as a word of limitation only.

⁷¹ *Guthrie's Appeal*, 37 Pa. 9.

The words "and their descendants" in a devise of land to one for life, and at her death to go to her children and their descendants, was held not to indicate that the word "children" was used as a word of limitation. *Giffin's Estate*, 138 Pa. 327, 22 Atl. 91. The court said that the limitation to the descendants of the remaindermen showed that it was the intention of the testatrix that the children should become the root of a new succession, and take under the law as purchasers, and not as heirs.

Where a testatrix devised land subject to her husband's life estate, to her three daughters during their lives, to be equally divided between them, upon condition that they should hold the property free from the 29 L.R.A. (N.S.)

control of their husbands, the property to descend and be inherited by the daughters' children and their heirs forever, it was held that the word "children" and "heirs" were not used in such close connection as to denote that the testatrix intended them as synonymous expressions, and that they did not raise the life estate to a fee on the theory that the word "heirs," being the technical word, was therefore the dominant and controlling expression, and should govern in the conclusion. The daughters were therefore held to take only a life estate. *Lewis v. Bryce*, 187 Pa. 362, 41 Atl. 275.

In *Jordan v. Gatewood*, Smith (Ind.) 82, land was conveyed to a woman "during her natural life and to her children and their assigns forever." It was held that there being no words of inheritance in the conveyance, and the words "her children" being words of purchase, and not of limitation, the rule in Shelley's Case did not apply.

A deed to a child for life, and on her death to her children and their descendants who may be alive at the time of her death, gives the first taker only an estate for life. *Snyder v. Greendale Land Co.* (Ind. App.) 91 N. E. 819.

Where the secondary devise upon the death of the life tenant leaving lawful issue is to his child or children, and to his, her, or their heirs or assigns, the rule in Shelley's Case does not apply. *Chrystie v. Phyfe*, 19 N. Y. 344. The court said: "The contingency is her leaving issue; but the devise is to her child or children, and to him, her, or them as the stock or stocks of their descent, and not as the stock of the mother. In such cases 'child or children' are never deemed words of limitation."

Where a testator, after giving a life estate to his daughters in certain property, provided that after their death or second marriage, it should go to the use, benefit, and behoof of their children respectively, in fee simple and forever, it was held that the word "children" was not here to be understood as a word of limitation, so as to vest the fee in the daughters. *Owen v. Cooper*, 46 Ind. 524.

The rule does not apply to a devise to one, and upon his death to his children absolutely and in fee, and in case he should die without children, then over. *King v. Savage Brick Co.* 30 Pa. Super. Ct. 582. In this case it was contended that the testatrix in the first part of the section of her will, in which this devise was made, had used the terms "children" and "issue" interconvertibly, and that therefore the latter word should be substituted for the former whenever the word "children" occurred.

would if living be entitled, it was held that the use of the word "heirs" had the effect to enlarge the meaning of the word "children," and that the testator's general intent being that the estate should descend to the heirs rendered the rule in Shelley's Case applicable, so that the nephew took the fee.⁷²

4. Words of distribution and super-added limitations.

If words of distribution alone, or super-

⁷² Cook v. Councilman, 109 Md. 622, 72 Atl. 404.

And a devise of real estate to each of four nieces, the will providing that after the death of each niece the property to go to her children and their heirs and assigns forever, was held to create an estate tail in each niece, converted by statute into a fee simple. Sechler v. Eshleman, 222 Pa. 35, 70 Atl. 910. The court said that each share was to go to the lineal heirs as pointed out by law, on the death of each niece, and that the word "children" was synonymous with the words "heirs of the body." "The word 'children,'" continued the court, "is not a *designatio personæ*, as none of the nieces had any children, and all were unmarried at the time of testator's death. The use of the words 'children and their heirs and assigns forever,' therefore, was only another way of devising the undivided part of the land to each niece and the heirs of her body, and the roundabout way which the testator takes to say 'heirs' does not affect the substance."

Under the rule in Shelley's Case, if an estate given to the life tenant was devised after death to the use of the children of her body begotten, in fee tail forever, the first taker would have a fee-tail estate. Dick v. Ricker, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823.

In Fletcher v. Fletcher, 88 Ind. 418, it was held that where a deed conveyed property to certain persons during their lives, one undivided moiety to each, and then after their death to their children respectively in fee simple, the grantees, upon the birth of children, took a fee, and Shelley's Case is cited among others as authority for the holding. But the case was overruled in McIlhinny v. McIlhinny, 137 Ind. 411, 24 L.R.A. 489, 45 Am. St. Rep. 186, 37 N. E. 147, in which it is said that the word "children" used in a deed has always been held to be a word of purchase, and not a word of limitation.

⁷³ A grant of lands to one for life and at death "unto those of his children who shall survive him, or shall have died before him, leaving lineal descendants surviving," "their heirs and assigns forever, in equal shares, in fee simple, as tenants in common," the lands to be subject to the support and maintenance of the wife of the grantor during her widowhood, habendum, to have and to hold unto the grantee, his heirs and assigns, to and for his and their sole and

added words of limitation alone, will not convert the word "children" into a word of limitation, it would seem as if both words of distribution and words of super-added limitation would not do so, when it is remembered that such words, when added to the word "heirs," tend to have a reducing effect, that is, tend to show that the word "heirs" was used as a word of purchase.⁷³ Still, such words, together with other explanatory or modifying words,

only use forever, was held not within the rule, the grantee taking only a life estate. Mulock, C. J., said that if the rule in Shelley's Case were to apply, whereby the grantee took the fee, there would be no estate in the children charged with the support and maintenance of the widow, for it was not the estate granted to her husband which was so charged, but the estate granted to the children, being the estate which the grantor had purported to grant to them in fee simple as tenants in common. Purcell v. Tully, 12 Ont. L. Rep. 5.

A deed conveying land to the grantor's daughter for life, and after her death to such of her children, their heirs and assigns forever, as she and her first husband should limit, direct, and appoint, and for want of such appointment, to all her children equally, their heirs and assigns forever, was held not to fall within the rule in Shelley's Case, the word "children" being used as a word of purchase. Haywood v. Moore, 2 Humph. 584.

In Chew's Appeal, 37 Pa. 23, a limitation was to the testator's brother for life, and after his death to his several children, their heirs, executors, and administrators, as tenants in common, and with the direction that should any of the children of the life tenant die leaving children, the children so left should stand in the place of and represent their parents. The court said that the remainder was to them as tenants in common, and it was to them with super-added words of limitation. In such a case the remaindermen take as purchasers, and not as heirs of their immediate ancestor; that even if the gift had been to them under the description of the technical words of limitation, "heirs," or "heirs of the body," instead of the word of purchase, "children," they must have taken as purchasers, and not as heirs.

In Pearson v. Willis, 1 Pa. Co. Ct. 520, there was a devise to testator's daughters for life, and upon the death of either of the daughters, her share of the property was devised to her children, their several and respective heirs, executors, administrators, and assigns, in equal shares, and in case of the death of either of the daughters without issue, the share of the one so dying was directed to be divided between the survivors or survivor of them, and the issue of such of them "who may then be deceased, such issue taking, however, such part or share thereof as his, her, or their deceased par-

have been held to convert the word "children" into a word of limitation.⁷⁴

5. Limitations over.

Where the devise after the life tenancy was to the children of the life tenant, the succeeding words, "in the event, however, of her death without lawful issue, I give and bequeath the said land to my next kindred by law," were held not to enlarge the meaning of the word "children," previously used, from a word of purchase to a word of limitation, so as to give the first taker an estate tail.⁷⁵

XVII. Miscellaneous Limitations.

The rule does not apply when the words

ent or parents would have taken had she or they been living." It was held that the devise was plainly one to the daughters for life, with remainder in fee to the children of the daughters, with an executory devise or alternative limitation over, in case any of the daughters should die without a child, to the surviving daughters or their issue.

A devise to the testator's daughter for life, and at her death to such child or children as might survive her, and the descendants of such child or children as might then be dead, share and share alike, was held in *Terrell v. Reeves*, 103 Ala. 264, 16 So. 54, to create a life estate in the daughter.

⁷⁴In *Workingmen's Protection & Bldg. Assn. v. Hausman*, 8 W. N. C. 517, a deed of real estate to a trustee for the use of a woman during her life, provided that if she should die during the lifetime of her husband, the property should be held for the use of her husband during his life, and that after the death of both of them, that it should be held by the trustee upon the further trust to convey the premises to the lawful children of the husband, "now born," and such other child or children as might be born of the bodies of the husband and wife, "and the lawful issues of such of them as may be dead leaving lawful issue, their heirs and assigns forever, to be equally divided between them, share and share alike, as tenants in common, and not as joint tenants." The words "child" and "children" were held to be words of limitation.

In *Browning's Petition*, 16 R. I. 441, 3 L.R.A. 209, 16 Atl. 717, it was held that a devise to two persons for and during the term of their lives, and after them equally to their children, their heirs and assigns forever, explained in a later clause as meaning that after the death of either, half of the estate was to descend to the heirs and assigns of one, and the other half to the heirs and assigns of the other, must be construed, under the rule, to give estates in fee simple to the first takers, especially when a charge of legacies was made thereon.

⁷⁵*Stump v. Jordan*, 54 Md. 619. The court said that in the devise after the life estate, the testator had used the most ap-
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"lawful issue," "issue," "sons," or "children" are used instead of "heirs." These words are regarded as words of purchase, and not of limitation, and the ancestor therefore would take only a life estate, and his sons or children would take by purchase for the reason that they are a designation of persons to take originally in their own right. But when the limitation is to the heirs, it is, in legal intendment, a limitation to them as a class or denomination of persons to take in succession from generation to generation.⁷⁶ Nor does it apply where the limitation is to the sons of the life tenant.⁷⁷ A limitation to the "lineal descendants" of the life tenant may or may not be taken to mean

appropriate word, and the word was adopted in order to avoid the operation of the rule in *Shelley's Case*, and to enable the children to take as purchasers, and prevent the ancestor from depriving them of the estate by alienation in the devise to his next of kindred. He again avoided the use of the words "heirs or heirs of her body," and adopted the term "issue,"—a word which might be employed either as a word of purchase or limitation, as would best effectuate the testator's intention; a word which was much more flexible than "heirs of the body," and which the courts more readily interpreted the synonym of "children," and as a mere description of the person or persons to take; a word which was not, *ex vi termini*, in the rule in *Shelley's Case*, and which was dependent upon the context as to whether it would give an estate tail to the ancestor. There was nothing to indicate that the testator had a general intent requiring the sacrifice of the particular intent for the enlargement of the estate for life into an estate of inheritance.

⁷⁶*Baker v. Scott*, 62 Ill. 86.

⁷⁷In *Forsbrook v. Forsbrook*, 14 L. T. N. S. 282, there was a devise to A and B for life, and after their deaths, to their eldest sons for life, and so on, the eldest son of each of the two families to inherit said property forever. It was contended that the testator clearly intended the issue male of A and B to take forever, and this wish would be best carried into effect by allowing A and B to have estates tail male as tenants in common; but the court held that these eldest sons must take by purchase, because each of them was clearly pointed out and *persona designata* in existence and certain at the time of the testator's death, but that the eldest sons took an estate tail.

A devise to one for life, and after his death to his sons and their heirs forever, equally to be divided among them, was held not to be within the rule, the word "son" being a word of purchase. *Walker v. Lewis*, 90 Va. 578, 19 S. E. 258.

The rule does not apply to a devise to a woman for life, remainder to her sons as tenants in common, share and share alike,

heirs of the body; ⁷⁸ likewise a limitation to the "offspring." ⁷⁹ A devise of property to sons and daughters, to be equally divided between them, the will providing that all property the daughters received

should be kept for the sole and separate use and benefit of each during their respective lives, and at their deaths that it go to their nearest of kin by blood, was held to give a life estate to the daughters,

and to the heirs of their bodies, it being well settled that a limitation by way of remainder to the sons of the first taker, as tenants in common, manifests the intent of the testator that the ancestor should not take an estate in fee or in tail, and that the sons should take as purchasers. *Webster v. Cooper*, 14 How. 488, 14 L. ed. 510.

In *Lyles v. Digges*, 6 Harr. & J. 364, 14 Am. Dec. 281, the devise was to the testator's son for life, and after his death to the testator's grandson, the eldest son of the first devisee, and after the death of the said grandson, then to remain to the first son of the grandson and the heirs of the body of such first son, lawfully issuing, and for default of such issue, then to the use and behoof of the second, third, fourth, and fifth, and all and every other sons of the said grandson, to be lawfully begotten, the elder of such son or sons, and the heirs of his body, lawfully issuing, always to be preferred to take before the younger of such sons and the heirs of his body, and for default of such issue, then to the testator's grandson named Thomas, second son of the first devisee for life, and after his death to his issue in tail, in such manner as the property was limited to the first grandson and to his issue, and for default of such issue, to another grandson in the same manner, and in default of such issue, to the testator's right heirs forever. The second grandchild, designated Thomas, having entered under the will, it was held that he took only a life estate.

In *Re Bird*, 59 L. T. N. S. 166, a testator gave a freehold message to A for life, and if he should have no son, over. This was held to be a gift to A for life, with an implied gift over to his son; but the court held that this did not make the son take the estate by implication, but that the limitation to him coalesced with the gift to A for life, and by virtue of the rule in *Shelley's Case* gave an estate in tail male to A.

Under a devise to testator's nephew for life, without impeachment of waste, remainder to his eldest son and the heirs of such eldest son, and in default of issue male of the nephew, over, it was held that in order to carry out the general intention of the testator, the nephew would take an estate for life, remainder to his eldest son in tail, remainder to himself in tail. *Doe ex dem. Bean v. Halley*, 8 T. R. 5.

⁷⁸ In *M'Lure v. Young*, 3 Rich. Eq. 559, a testator having devised property to his daughter for life, and providing that, at her death, it should go absolutely and forever to her lineal descendants, and in case she should die without lineal descendants living at the time of her death, then over, it was held that the daughter took a life

estate, with remainder to her lineal descendants as purchasers.

Where, in one clause of a will, a testatrix gave an estate for life to her sister, and then to a certain woman and her heirs forever, and in another devised property in trust to be divided between her three children, through a trustee, share and share alike, and in case of the death of any one or more of the children, the share or shares of such child or children to go to his or her lineal descendants, and in case either of the said children should die without leaving issue, the share of such child to go to testatrix's surviving child or children equally, share and share alike, it was held that the careful avoidance of words of limitation and inheritance was suggestive of an earnest solicitude on the part of the skilful draftsman to escape from the operation of the rule in *Shelley's Case*, and that the rule therefore did not apply so as to create an absolute interest in the children of the testatrix. *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72.

In *Paine v. Sackett*, 27 R. I. 300, 61 Atl. 753, the testator left a portion of his estate to trustees, with ample power of management and investment, to hold equally for the benefit of the testator's three daughters named, and provided that "they shall hold the remainder of the property and estate herein devised to each of my said children, after payment to them of the sums called for as aforesaid, and pay to each of them the rents, profits, and income of his or her portion of said property and estate during his or her natural life, and at his or her death shall transfer and convey the same to his or her lineal descendants, if any there be, and, if there be no lineal descendants, then equally to the survivors of my said children, or to their lineal descendants, if any there be; the descendants of any child to have the portion which their parent, if living would have taken." It was held that equitable estates in fee tail were given to the testator's three children, with contingent cross remainders to the survivors, or their descendants, if either child should die without issue. That the words "lineal descendants" in the will should have their natural meaning and the same legal effect as the words "heirs of the body."

⁷⁹ "Offspring" is a word of limitation, not of purchase. *Barber v. Pittsburgh, Ft. W. & C. R. Co.* 26 Pittab. L. J. N. S. 32.

But a devise of real estate to testator's son during his natural life, at his death to descend to his legitimate offspring forever, and in case of his issue becoming extinct, to go over to devisees named in the will, was held within the rule. *Allen v. Markle*, 36 Pa. 117. The court said that the words

remainder to their children as purchasers.⁸⁰ And the rule was held not to apply to a devise of property to a son on attaining the age of twenty-one years, to have and to hold the same for life, the property after his death to go to his next nearest blood relations, share and share alike.⁸¹ And where the testator devised the income of certain property to her daughter as long as she lived, and provided that should she die without leaving a family, then over to the testator's brothers and sisters, it was held that by the words, "die without leaving a family," the testator meant die without issue or heirs of her body, which refers to an indefinite failure of issue, which creates a fee tail in the first taker, enlarged to a fee simple by statute.⁸²

"legitimate offspring" and "issue" were used interchangeably, as having the same meaning, and that if he had not defined the term "offspring," the law had in repeated instances, it being regarded as a *nomen collectivum*.

In *Seekright ex dem. Bramble v. Billups*, 4 Leigh, 90, in a devise of real estate to testator's daughter and her husband during the life of the longest liver of them, and then to their offspring, as they shall think best to give it, and in default of such offspring, over, the superadded words, as "they should think best to give it," do not tie up the contingency to the death of the tenant for life, so as to show that the word "offspring" was used as a word of purchase.

Nor does the power of appointment under such a devise make the word "offspring" a word of purchase. *Ibid*.

⁸⁰ *Terrell v. Cunningham*, 70 Ala. 100.

⁸¹ *McCann v. McCann*, 197 Pa. 452, 80 Am. St. Rep. 846, 47 Atl. 743. The court said that while the next nearest blood relations might be heirs, they were not necessarily all of the heirs. It was only in the event of their being all equally remote from their ancestor that the qualifying words "next nearest" would apply.

⁸² *Beilstein v. Beilstein*, 194 Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73.

⁸³ Where there is an executory trust created, the rule in *Shelley's Case* has no application. *Bennett v. Bennett*, 217 Ill. 434, 4 L.R.A.(N.S.) 470, 75 N. E. 339; *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339; *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161.

In *Henderson v. Henderson*, 64 Md. 185, 1 Atl. 72, it was said, however, that in regard to all executory trusts, the rule will be adhered to only in cases literally within it; and where circumstances take the case out of the letter of the rule, it will be held subservient to the manifest intention which led to the creation of the trust.

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XVIII. Executory trusts.

a. In general; what constitutes.

1. Rules for determining.

The rule in *Shelley's Case* does not apply to executory trusts.⁸³ In cases of such trusts it is said that the court will give effect to the intention of the parties, which will not be allowed to be controlled by the rule.⁸⁴ This means that the court will give effect to the intention to give the first taker a life estate only; for, as already pointed out, it is incorrect to state in general terms that the application of the rule to legal estates defeats the intention of the author of the instrument. But

⁸⁴ The only modification or qualification of the rule in its application to equitable estates is where a court of equity is called upon to direct the execution of an executory trust. In such a case the court will apply the rule or not, as will best subserve the purposes and intent of the author of the trust. *Sims v. Georgetown College*, 1 App. D. C. 72.

In respect to the execution of executory trusts, the court, in decreeing the execution, departs from what would be the legal operation of the words "limiting the trust," when applied to legal estates, and consults the intention of the testator, as plainly manifested by the language of the will. *Tallman v. Wood*, 26 Wend. 9.

Instead of there being a positive rule which excepts an executory trust from the operation of the rule in *Shelley's Case*, courts will except from the operation of the strict rule of law those cases of executory trusts in which they can see from the instrument itself that the rule would contravene the intention of the party. *Angell's Petition*, 13 R. I. 630.

In matters executory, or in cases of articles, or a will directing a conveyance, where the words of the articles or wills are improper or informal, the court will not direct a conveyance according to such improper or informal expressions, but will order the conveyance or settlement to be made in a proper and legal manner so as may best answer the intent of the parties. The origin of the rule may be traced to the desire to obviate the consequences of the extremely technical doctrine in *Shelley's Case*. *Sackville-West v. Holmesdale*, L. R. 4 H. L. 543.

And there can be no rational ground for distinguishing between an executory trust created by will, and one created by deed, in which the grantor makes a purely voluntary donation for the benefit of his own descendants. *Berry v. Williamson*, 11 B. Mon. 245.

in no case whatever of a trust executed have the words "heirs or heirs of the body," following a limitation to the ancestor for life, received a construction in equitable estates different from that which the same limitation would receive in legal estates.⁸⁵

Executory trusts constituting a well-settled exception to the operation of the rule in Shelley's Case, the only difficulty is to determine what an executory trust is, within the meaning of this exception.⁸⁶ The rule in Shelley's Case can be of no assistance in deciding that question, which depends upon general rules relating to trust estates. No attempt has been here made to obtain an exhaustive collection of cases discussing the question of what constitutes

an executory trust. Enough, however, are included to show the bearing of that question upon the operation of the rule in Shelley's Case.

It is said that when the testator, instead of passing the legal estate by his will, leaves something to be done by the trustees, so that the parties are obliged to come to a court of equity to have the benefit of it, then even if the legal operation of the words constituting the trust would convey a fee simple or fee tail to the first taker, if there is any language in the will showing a different intention, the court will direct the conveyance to be made so as to carry out the intention, and not the strict rule of law.⁸⁷

⁸⁵ *Cushing v. Blake*, 30 N. J. Eq. 689.

The rule in Shelley's Case applies to legal estates and to executed trusts, but does not apply to trusts executory, where the testator plainly intimates an intention that it shall not apply. *Edmondson v. Dyson*, 2 Ga. 307.

⁸⁶ The difference between the two trusts may be said to be this: In executed trusts the rules of property govern, and not the intention of the settlor, if it is contrary to the rules of property; but an executory trust is settled and carried into effect according to the intention of the settlor. *Mack v. Champion*, 11 Ohio Dec. Reprint, 327.

The trust test seems to be, says the court in *Tillinghast v. Coggeshall*, 7 R. I. 383, has the creator of the trust been his own conveyancer? Has he left it to the court to make out, from general expressions, what his intention is, or has he so defined his intention that you have nothing to do but to take the limitations he has given to you, and to convert them into legal estates?

In *Davenport v. Davenport*, 3 New Reports, 26, Wood, V. C., said that the only meaning to be attached to the expression, "the testator being his own conveyancer," was that no further deed was required to be executed. If a deed was required, the court at once acquired control over the limitations to be inserted in it.

The test is whether any duty is imposed upon the trustee which renders it necessary that he should retain the legal estate in order to enable him properly to conform to such rules. *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161.

"All trusts are executory in one sense of the word, that is, the trustee must have some duty, either active or passive, to perform, so that the statutes of uses shall not execute the estate in the *cestui que trust*, and leave nothing in the trustee. But such is not the meaning of judges when they speak of executed trusts and executory trusts. These words refer rather to the manner and perfection of their creation, than to the action of the trustee in administering the property. Thus, a trust created by a deed or will, so clear and certain in all its terms and limitations that a

trustee has nothing to do but to carry out all the provisions of the instrument according to its letter, is called an executed trust. In these trusts, technical words receive their legal meaning, and the rules applicable to legal estates govern the equitable estates thus created. On the other hand, executory trust is where an estate is conveyed to a trustee upon trust, to be by him conveyed or settled upon other trusts in certain contingencies, or upon certain events, and these other trusts are imperfectly stated, or mere outlines of them are stated, to be afterwards drawn out in a formal manner, and are to be carried into effect according to the final form which the details and limitations shall take under the direction thus given. They are called executory, not because the trust is to be performed in the future, but because the trust instrument itself is to be molded into form and perfected according to the outlines or instructions made or left by the settlor or testator." *Perry, Tr. § 359; Mack v. Champion, supra.*

When the limitations and trusts are fully and perfectly declared, the trust is regarded as an executed trust, and the distinction thus made between executed and executory trust as administered in a court of chancery have been recognized since the difference was first explained by Lord Chancellor Cowper in *Stamford v. Hobart* (1710) 3 Bro. P. C. 31. It is only when the limitations are imperfectly declared and the intent of the creator is expressed in general terms, leaving the manner in which the intent is to be carried into effect substantially in the discretion of trustees, that a court of equity regards the trust as an executory trust, and will assume jurisdiction to direct the trust to be executed upon a construction different from that which the instrument creating it would receive in a court of law. *Ibid.*

⁸⁷ *Angell's Petition*, 13 R. I. 630. To the same effect, *Bucklin v. Creighton*, 18 R. I. 325, 27 Atl. 221.

A trust is said to be executed when no act is necessary to be done to give effect to it, the limitation being originally complete, as where the estate is conveyed or devised unto and to the use of A and his heirs, in trust for B and the heirs of his body, and

And it was held that the rule in Shelley's Case is not applicable to an executory trust which is to be carried into effect by a conveyance from trustees of the legal estate, and where it is apparent from the will or instrument creating the trust that the testator or donor only intended to give

a life estate to the first taker, and that the heirs of the first taker should have the remainder in fee as purchasers.⁸⁸ Where the trustees are required or may be called on to do any act, or to exercise a discretion to which the seisin and possession of the legal estate are necessary, they will take

it is further stated that the mere direction to convey upon certain trusts will not render these trusts executory in the sense in which the word is used, if the author of the trust has, as it were, taken upon himself to be his own conveyancer, and instead of leaving anything to be done beyond a mere execution of a conveyance, has defined what the trusts are to be in accurate and technical terms. *Ferris v. Ferris*, 9 Ont. Rep. 324.

In *Boswell v. Dillon*, Dru. 291, the court said: "Every trust, is, it is true, in a certain sense executory. Where, however, there is a trust the nature and extent of which is ascertained, we are not in the habit of calling it an executory trust. By the term 'an executory trust,' when used in its proper sense, we mean a trust in which some further act is directed to be done. Executory trusts in this way may be divided into two classes: one in which, though something is required to be done, for example, a settlement to be executed, yet the testator has acted as his own conveyancer, as it is called, and defined the settlement to be made, and the court has nothing to do but to follow out and execute the intentions of the party as appearing on the instrument. Such trusts, though executory, do not differ from ordinary limitations, and must be construed according to the principles applicable to legal estates depending upon the same words. The other species of executory trust is where the testator, directing a further act, has imperfectly stated what is to be done. In such cases the court is invested with a larger discretion, and gives to the words a more liberal interpretation than they would have borne if they had stood by themselves."

In *Wayne v. Lawrence*, 58 Ga. 15, the court says: "The rule is not applicable if the trust be executory in either of two ways; first, where some direction is to be obeyed before the limitations are complete; and, secondly, where, though all the limitations are complete in substance, there is a direction for an actual conveyance to be made to the persons described as heirs, or heirs of the body. In the former instance, the maker of the instrument either postpones the limitations until after some preliminary is arranged, such as the purchase of property, or else whispers them, as it were, to the trustee, leaving him to utter them aloud; in the latter, the utterance, though clear and distinct at first, is, for greater certainty, to be repeated in a formal and ceremonious manner,—that is, a direction to convey is to become an actual conveyance."

⁸⁸ *Wood v. Burnham*, 6 Paige, 513.
29 L.R.A. (N.S.)

In *Edmondson v. Dyson*, 2 Ga. 307, it was contended that if the limitations of a devise are perfect, if the character of the estates is ascertained, the trust is executed. That the something left to be done has no reference to any mere act of conveyancing which might be necessary to effectuate limitations which the testator has fully declared, but that the trust is executory only where the limitations themselves are not defined, where the estates are not ascertained, and in cases where the testator leaves only loose statements or notes of his intention, requiring careful and responsible deeds or other instruments to be by the trustee executed, which in themselves create and define estates, or which require a decree of chancery to award the estates according to such loose memoranda. That it is immaterial whether the limitations are legal or equitable; that is, whether the estate in the devisee may be asserted at law or a decree in chancery be necessary to its perfect enjoyment, if the limitations are complete, and there is no doubt about the quantity or quality of the estate. The court admitted that it was hard, upon principle, to escape from the conclusiveness of this reasoning, saying: "It is difficult to see any reason why an estate to A, in trust to B for life, with remainder to the heirs of B, is an executed trust, and an estate to A, in trust to B, for life, with remainder in fee, to be conveyed to the heirs of B, is an executory trust. In both cases the intention of the testator is the same, the estates limited are the same. The only difference is found in the fact that in the first case the testator is his own conveyancer, and the heirs take directly, and in the second he makes his trustee his conveyancer, and the heirs take through his deed. The thing to be done in the last case, to wit, convey, neither restricts nor enlarges the estate to the heirs, and yet the authorities . . . make this very act of conveyancing the test, or one of the principal tests, of an executory trust." It was accordingly held that where property was bequeathed to a trustee in trust for the use of one during his life, with instructions to the trustee to convey to whomsoever the latter by will should appoint, the will providing that if the latter should die intestate, that the property be conveyed to his heirs absolutely, that this was an executory trust to which the rule in Shelley's Case did not apply.

In *Rife v. Geyer*, 59 Pa. 393, 98 Am. Dec. 351, the court said that "the true test is whether a court of equity in Pennsylvania would decree a conveyance of the legal title. In our mixed system of law and equity it has always been received as an universal

it, and the person beneficially interested will be entitled only to a trust.⁸⁹

2. Illustrative cases.

A few illustrative cases are here collected, to show the facts which have been held to constitute an executory trust. Where there was a devise in which the testator directed his trustees to convey certain property to the sole use of his daughter for life, or such person as she should appoint, to take and receive the rents and profits thereof, and after her death in trust for the heirs of her body forever, it was held to create an executory trust, so that the daughter took only an estate for life.⁹⁰

In a leading English case the devise was to trustees and their heirs in trust, to hold certain property to the use and behoof of testator's nephew for and during the term of his natural life, without impeachment of waste, and from and after the termination of that estate, the testator devised the same to the trustees for the life of the nephew, to preserve contingent remainders; and from and after the nephew's death, then to the use and behoof of the heirs of his body, lawfully begotten, and for want of such heirs, over. The question was whether the estate devised to the nephew was a trust or a legal estate; that is, a use executed, or a mere trust in equity; and whether if a trust, an estate tail passed, or an estate for life, with contingent remainders to all the issue of the body. It was held that it was a trust estate, the nephew taking only an estate for life. That the testator intended the

words "heirs of his body" to be words of purchase was held shown by the direct devise for life, by the direction "without impeachment of waste," and by the limitation to the trustees to preserve contingent remainders; and it was held that this intention would be given effect for the reason that the limitations were the directions of a trust which the court was bound to carry into execution according to the intent of the testator, the court saying that greater latitude was therefore to be allowed in the construction to make it agree with the intent of the testator. The chancellor deemed all trusts in the notion of the law executory, and to be executed by the court.⁹¹

In another case it was conceded that under a devise to trustees and their heirs and assigns forever, to the use of them, their heirs and assigns forever, the property upon trust, in such manner as they should approve, for the benefit of testator's daughter, the rents and profits thereof applied for her advantage until she should attain the age of twenty-one, or be married, and on her attaining that age, that the trustee or the survivor of them, etc., as counsel should advise, convey, settle, and share the property to the use of or in trust to the daughter for her life, and after her death to the heirs of her body, lawfully issuing, but in case the daughter should die without leaving issue of her body, lawfully begotten, then over, that this was an executory trust, and the court directed the estate to be settled on the daughter for her life, with remainder to her

rule that whatever a chancellor would decree to be done shall be considered as though it were actually done. . . . Many trusts which would be classed as active ones in England would be regarded here as passive: as, for example, the distinction between a trust to receive and pay, and one to permit and suffer the *cestui que trust* to receive, is not recognized. Whenever the entire beneficial interest is in the *cestui que trust*, without restriction as to the enjoyment of it, there is no reason why it should not be considered as actually executed. No formal conveyance of the legal estate is necessary, though it will be decreed, because the nominal trust beclouds the title, and embarrasses the rights of alienation which belong to the true owner."

⁸⁹ Crosby v. Davis, 2 Clark (Pa.) 408.

In Hemphill's Estate, 18 Pa. Co. Ct. 527, it is said that an analysis of the cases in Pennsylvania which have settled the distinction between active and dry trusts will show that in the former clause the duty to be performed by the trustee must not only involve some positive action on his part, but an action attended with some discretion. 3 L.R.A. (N.S.)

The automatic function of merely receiving for the *cestui que trust*, and immediately paying over to him the trust fund or its income, will not make a trust active. The *cestui que trust* could perform the act as well, and he has no protection in the superior judgment of the trustee, because the trustee is not empowered to exercise his judgment. The cases particularly describe him as a mere conduit. But when the trustee is invested with a discretion, however slight, he takes the place of the donor, and the trust committed to him is active.

A trust for the protection of the beneficiary, who may be a spendthrift or a married woman, or a party in remainder, stands, of course, on a different footing, and is valid whether the duties of the trustee are active or passive. Ibid.

As to what constitutes an executory trust, see also STEELE v. SMITH.

⁹⁰ Roberts v. Dixwell, 1 Atk. 607.

⁹¹ Bagshaw v. Spencer, 2 Atk. 570.

Mr. Fearne deemed this to be an anomalous case, applicable only to its facsimile in *specie et terminis*. 1 Fearne, Contingent Remainders, 4th ed. 205.

first and other sons in tail general, with remainder to her daughters in tail general, etc.²² The rule was also held to apply to a devise of lands in trust for the benefit of A during his natural life, without impeachment of waste, and from and after

the determination of that estate, in trust for the heirs of the body of him, the said A, and in default of such issue, then in trust for the next heirs of the testator, the first devisee taking an estate for life.²³

A bequest in trust to pay over the income,

²² *Bastard v. Proby*, 2 Cox, Ch. Cas. 6.

In *Glenorchy v. Bosville*, Cas. t. Talb. 3, 14 Eng. Rul. Cas. 724, the testator devised his real estate to his sisters and their heirs and assigns, upon trust to receive the rents and profits thereof until his granddaughter, A. P., should marry or die, and out of it to pay her £1,000 a year for her maintenance, and as to the residue, to pay his debts and legacies, and after the payment thereof to hold in trust for his said granddaughter, and upon the further trust that if she live to marry a Protestant under certain conditions to convey the estate with all convenient speed after such marriage, to her use for life, without impeachment of waste, remainder after her death to her husband for life, remainder to the issue of her body, with several remainders over. It was held that the granddaughter would have taken an estate tail but for the fact that this was an executory trust, by reason of which the testator's intention must prevail. She was therefore held to take an estate for life without waste, remainder to her husband for life, remainder to their first and every other son, with remainder to the daughters.

In *Roberts v. Dixwell*, West, Ch. 537, it was held that under a devise of real estate to trustees upon trust for the separate use of testator's daughter for life, after her death in trust for the heirs of her body, lawfully begotten, forever, and if she should die without issue, and there should be no issue left of his body, then to his own right heirs forever, that the trusts were executory, and that the daughter took only a life estate.

In *Stoner v. Curwen*, 5 Sim. 264, it was held that an executory trust was created by a devise of a portion of testator's estate to his niece, to be settled by his executors on her for her separate use for her life, but to devolve to her issue at her death, and failing issue, over. It was held that the niece took only a life estate.

In *Withers v. Algood*, cited in 1 Ves. Sr. 150, "J. A. seised in fee of ground rents, and possessed of terms for years in houses, conveyed to trustees to hold such as were freehold to the use of the trustees and their heirs, the leasehold to the trustees, their executors and administrators in trust, to apply the rents and benefit of redemption to Hannah Withers for life, and afterward to the heirs of her body and of J. and M., their heirs, etc. After the testator's death, Hannah Withers brought a bill for redemption and performance of the trust. Upon a question whether she took an estate for life or in tail in her share by this trust, Lord Talbot held it only an estate for life, decreeing a redemption for her as tenant for life; the words were 'heirs of 29 L.R.A. (N.S.)

the body' and yet were held words of purchase."

In *Burchett v. Durdant*, 2 Vent. 311, a testator devised lands to trustees during the life of R. to permit and suffer R. during his life to have and receive the money and profits thereof, the said R. committing no waste, the property from and after the death of R. being given to the heirs male of his body, "now living, and to such other heirs, male and female, as he shall hereafter happen to have of his body, and for want of such heirs," then over. This was resolved to be an unexecuted trust in R. Mr. Fearne says that this was a point the court had no occasion to enter into, or give any resolution upon, unless the subsequent limitation had vested in the ancestor in the case of a use executed.

²³ *Tunis v. Passmore*, 32 U. C. Q. B. 419. The court said that the rule is that whenever there is a limitation to trustees, although with words of inheritance, the trustees are to take only so much of the legal estate as the purposes of the trust require. If the trustees have to pay rents over, they take the legal estate, because they must receive the rents before they can pay them over. But if they are to permit the *cestui que trust* to take the rents, he can do that without their intervention, and he takes the legal estate.

In *Berry v. Williamson*, 11 B. Mon. 245, a trust established by a conveyance of real estate to a trustee, to sell and invest in such other property as testator's daughters might desire to have purchased, each of them to have the direction of the investment of one third of the said funds, and to convey or cause to be conveyed to them, the property in which investments might be made, to have and to hold the same, and the rents, issues, and profits thereof, "to each of them during their respective lives, and the remainder to the heirs of my said daughters, respectively, after their respective deaths," being executory, was held exempt from the operation of the rule in *Shelley's Case*, and it was declared that it must therefore be executed according to the intention of the grantor, and not in the words used by him, if those words would defeat his intention.

A devise of real and personal estate to executors, with the direction to divide the estate into as many shares as there shall be children of the testator alive at his death, and as many as shall die leaving lawful issue, and by some proper deed to convey one of the shares to each of said children and to the lawful issue of any deceased child, the grants to be limited to the grantees for life, with remainder over to the right heirs of such grantees, their heirs and assigns forever, was held to

etc., to the testatrix's brother, the will declaring that the brother was indebted to divers persons to a greater extent than he was able to pay, and that the purpose of the trust was to provide for his support and subsistence, and then providing that if he should sell, encumber, charge, or anticipate his right or interest in the profits of the property, or any portion of it, or if any portion of the same or all should be sold and disposed of or appropriated by him under or by virtue of any legal or equitable proceedings instituted against him, or against the trustee or his successor, to compel the brother to pay all or any portion of his debt, then the right or interest of the brother should wholly cease and determine, and that the trustee should pay over

the profits to the heirs at law of the brother, and divide the estate in the same proportion and among the same parties that the same would have fallen to had the brother been the owner of the property in fee and died, was held to vest only an equitable life estate in the trust fund.⁹⁴ Where there was a devise of lands to trustees in trust to pay certain annuities, and then in trust to the use of one and his assigns for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the use of the heirs of the body of the life tenant, remainder to testator's own right heirs, the will providing that after the payment of certain pecuniary legacies, the residue of the testator's personal property should

create an executory trust, and that therefore the rule in Shelley's Case did not apply so as to enlarge the life estates to fees. *Tallman v. Wood*, 26 Wend. 9.

In *Bucklin v. Creighton*, 18 R. I. 325, 27 Atl. 221, the testatrix devised certain sums of money to trustees, to pay the net income to her nephew during his life, and provided that the trustees might, whenever they deemed it necessary for the support and maintenance of the nephew, appropriate from the capital or principal of the trust fund such portion as they might think necessary, and by a codicil gave the trustees full power to make partition and changes, and to mortgage or sell any investment of the trust fund, and also provided that the moneys arising therefrom, or such portion as they might deem expedient, should be paid over to or in any manner applied to the support, use, or benefit of the nephew, the will also providing that on the death of the nephew, all the property and estate then held in trust should be conveyed to his heirs at law, their heirs and assigns, for their own use. It was held that the *cestui que trust* took a life interest only.

⁹⁴*Nightingale v. Phillips*, 29 R. I. 175, 72 Atl. 220. This was said to be a spendthrift trust, and in commenting on the case, the court said that even if it should be admitted that the doctrine therein laid down is contrary to the weight of authority, the court was satisfied that it best subserved the purpose of carrying into effect the plain intention of the testator, and that spendthrift trusts ought to be considered as forming an exception to the rule. The court declared that the rule in Shelley's Case did not apply, for the reason that the trust was a spendthrift trust. The court said that spendthrift trusts ought to be considered as forming an exception to the rule.

The rule was held not to apply to a devise of negroes and other personalty, in trust for the maintenance and support of testator's son and daughter during their lives, the will providing that after the

death of the son the property should go to his heirs forever, that should the daughter survive the son, the trustee should keep in his hands sufficient property to support the daughter, and the balance, if any, shall go to the heirs of the son forever, since this was an executory trust. *Porter v. Doby*, 2 Rich. Eq. 49.

Where the testator devised property generally to his daughters, for their use and benefit during their lifetime, and then to their heirs and assigns, specific real estate not being devised, and a very full and discretionary power was given to the executors to divide or exchange real estate of which he died seised for other real estate, or to sell and purchase other land to comply with and fulfil the bequests of the will, and the demand of the daughters was for their share of a fund raised through the sale of real estate of the testator, over which the administrator might exercise a discretionary power and control as the successor of the executors in trust, this was held to be an executory trust to which the rule in Shelley's Case did not apply. *Siceloff v. Redman*, 26 Ind. 251.

A devise of a certain portion of testator's property in trust for the benefit of his daughters, who were to receive the income thereof for life, the trustees being directed at the death of the daughters to convey the property to their rightful heirs, share and share alike, was held to be an active trust, so that the rule in Shelley's Case, was inapplicable. *Wagstaff v. Low-erre*, 23 Barb. 209.

In *Loving v. Hunter*, 8 Yerg. 4, a testator directed that money arising from the sale of his land should be laid out in young negroes, one third to be loaned to his wife for life, and the remaining two thirds together with the one third upon the death of the wife, to be loaned to his three daughters, to be equally divided among them during their natural lives, and then given to the lawfully begotten heirs of their bodies. It was held that the rule in Shelley's Case could have no application, the trust being executory, each daughter taking only an interest for life.

be held by the trustees in trust to purchase real estate which should be held in trust for the same purposes that the previous real estate had been devised. The question was what estate the first taker took in the personal property; whether an estate for life or in tail in the lands to be purchased, the limitation of the real estate being too clear to admit of discussion. It was held that this was not such an executory trust as to take the devise of the personalty out of the operation of the rule. The court said: "The true criterion is this: wherever the assistance of the trustees, which is ultimately the assistance of this court, is necessary to complete a limitation, in that case, the limitation in the will not being complete, that is sufficient evidence of the testator's intention that the court should model the limitation. But where the trusts and limitations are already expressly declared, the court has no authority to interfere and make them different from what they would be at law."⁹⁵

⁹⁵ Austin v. Taylor, 1 Eden, 361.

Mr. Ambler states in his report of the case that this opinion was very dissatisfactory to the bar in general. But it is stated in a note to 1 Eden, 369, that the accuracy of his information may be doubted, as the authority of the determination has never been questioned.

Where the trustees were directed, in case M., after the death of certain persons specified, should die before N., leaving issue male of his body, to convey certain portion of the testator's real estate and copyhold estates to trustees for the use of the first and every other son and sons of M., severally and successively, in tail male, and in default of such issue, remainder to N. for the term of his life, with remainder to his first and other sons severally and successively in tail male, and in default of such issue, the testator's right heirs, the will directing that in case of the death of M. before N., and in case M. should leave issue male, that the trustees should lay out half of testator's personal estate and other specified property in the purchase of lands of inheritance, and that they convey the same to trustees to like uses, it was held that the trust was not executory so as to prevent N., who survived M., from taking an estate tail by implication. Franks v. Price, 3 Beav. 182.

Where there was a devise to trustees to pay debts, and then to stand seised to the use of a person for life, without impeachment of waste, and after his death to the use of the heirs male of his body, severally, respectively, and in remainder, it was held that this created an estate tail in the devisee. Jones v. Morgan, 1 Bro. Ch. 206.

A deed to a trustee to receive and pay rents, hires, and profits of land and slaves to a woman for her sole use and support 29 L.R.A. (N.S.)

Where the trust created was that the trustee stand seised and possessed of certain negroes for the use and benefit of testator's son, that he permit the son to have the labor, hire, and services of the slaves and their increase during the life of the son, and at his death, if there were no child of the son twenty-one years old, to hold the slaves and their increase for the use and benefit of the children of the son until a child should arrive at that age, and if the child were dead, until such time as such child would have arrived at such an age, if living, and then to convey and deliver the said slaves and their increase to the children of the said son, or the survivors of them, the child or children of any such child or children to represent or receive the share or shares that the parent or parents would have received if living, it was held not to have been an executed trust, so as to permit the operation of the rule in Shelley's Case, if otherwise applicable.⁹⁶

during her life, and after her death to pay over in remainder to her heirs, for their exclusive use, the profits accruing from time to time from the property, vests the whole estate in trust in the life tenant, under the operation of the rule in Shelley's Case, the trust not being executory. Williams v. Houston, 57 N. C. (4 Jones, Eq.) 277.

Where property was conveyed to a certain trustee, to be held by him in trust for the use of a person named, and in case of his death, for the benefit of his heirs, the trustee to hold the premises, sell and convey the same in any way he might choose, mortgage, lease, and convey the same, being directed to pay the income derived therefrom to the *cestui que trust* or his order, should the trustee so choose, and it was also provided that he might, at his discretion, convey the premises to the *cestui que trust*, or might turn over to him the entire net proceeds of the sale of said premises, and by so doing the trustee was to be discharged from all liability under the trust, which was then to cease and determine, it was held that the trust was executed, and that the rule in Shelley's Case applied. Mack v. Champion, 11 Ohio Dec. Reprint, 327.

Where the estate was conveyed to the ancestor by a defective conveyance, so that he held only an equitable title, and the ancestor devised the property to his daughter for life, and after her death to her heirs, share and share alike, it was held that this was not the case of an executory trust, so as to take it out of the rule in Shelley's Case. Sims v. Georgetown College, 1 App. D. C. 72.

⁹⁶ Smith v. Smith, 24 S. C. 304.

For other cases discussing the question whether trusts are executed or executory, see *supra*, X.

b. Marriage settlements.

The larger number of cases in which this principle has been applied consists of cases on marriage articles, where the articles direct a more formal conveyance to be made, and themselves express the limitations in an informal manner; the more frequent circumstances being those of a limitation to the intended husband for life, with a subsequent remainder to the heirs or heirs male of his body, or to his issue, or the like, which limitation, if introduced literally into the formal settlement, would, by operation of the rule in Shelley's Case, at once vest an estate of inheritance in the husband which he could formally, by fine and recovery, and now by deed, put an end to, thus destroying the very object of the settlement. The purpose of the instrument has been held in such cases sufficient to indicate the intent of the parties to be that the property should be limited in what is called "strict settlement."⁹⁷

It has been said that "there is a difference in one respect between marriage articles and a devise by will. Under the artificial rule in Shelley's Case, a gift to the ancestor for life, with a limitation over to heirs, or heirs of the body, creates in him an estate in fee or in tail, and the limitation over is capable of destruction by him by conveyance or devise if the estate be a fee simple, or by fine and common recovery if it be a fee tail. When these technical terms are used in an agreement for a settlement in view of marriage, the court will infer from the nature of the agreement that the parties contemplated provisions for the issue of the marriage which should not be liable to immediate destruction by the act of the parties, and will direct the settlement to be made in such a manner as will prevent the destruction of the limitations over to issue."⁹⁸ But marriage agreements already executed, are, of course, subject to the rule in Shelley's Case, like other instruments.⁹⁹ So, where there was a limitation in a mar-

⁹⁷ Sackville-West v. Holmesdale, L. R. 4 H. L. 543.

⁹⁸ Cushing v. Blake, 30 N. J. Eq. 689.

⁹⁹ Carroll v. Renich, 7 Smedes & M. 798.

The doctrine that agreements for a settlement of a wife's separate estate in view of marriage are excepted from the operation of the rule in Shelley's Case does not apply where the settlement has been actually completed by a formal deed. *Brown v. Wadsworth*, 32 App. Div. 423, 53 N. Y. Supp. 215.

In *Tillinghaast v. Coggeshall*, 7 R. I. 383, where property was purchased by the trustees of a married woman at her request, under a settlement of her property, made after marriage, and was conveyed to such trustees for her sole and separate use for life, and, in default of her appointment by will, was to be conveyed by the trustees to her heirs at law or other persons in fee simple, or in such other estate therein, and in such proportions, as they would respectively be entitled to by the statutes then in force in the state of Rhode Island, it was held that the trusts, being executed, and both equitable, there was nothing wanting to warrant the enlargement of her estate under the rule in Shelley's Case to an equitable fee.

By an antenuptial agreement the grantor provided that he would transfer certain property for the joint use and benefit of himself and his intended wife during the term of their joint lives, and from and after the death of either of them to the use of the survivor of them during the term of his or her natural life, and from and after the death of the survivor, then to the use of his heirs, as he might by will direct. After the marriage, certain land was conveyed, pursuant to the agreement, to trustees, upon trust, with the consent of the grantor and his wife, or the survivor, to

sell, lease, or otherwise convey the same, and to hold the moneys thereon arising upon the trust, and subject to the powers contained in the antenuptial agreement, after which the wife died leaving children. It was contended that the trusts and the settlement were executory, not executed trusts; that the children are always within the purview of a marriage settlement; and that when the trusts are executory, the husband and wife are not permitted to have control over the property, so as to defeat the children; but the court held that the trusts were executed, and that the husband, under the rule in Shelley's Case, took the equitable fee. *Ferris v. Ferris*, 9 Ont. Rep. 324.

In *Burton v. Hastings*, Gilb. Eq. Rep. 113, marriage articles were entered into for settling certain lands to the husband for life, remainder to the wife for life, remainder to trustees to preserve contingent remainders, with remainder to the heirs of the body of the wife by the husband to be begotten, with other remainders over. The marriage took effect and a settlement was made to the husband and wife successively for life, remainder to trustees to preserve contingent remainders, remainder to the first son of that marriage, and the heirs of the body of such first son, and so on to the second and other sons of the marriage in like manner, with a remainder to the heirs of the body of the wife "by my said husband." They had issue, one daughter only. The husband died and the wife remarried, and the wife and the second husband joined in a fine and recovery by which the daughter, being at law divested of her inheritance, brought a bill to carry the articles into execution. The lord chancellor said that if no settlement had been made, the law would have taken care of the daughter, but here a settlement

riage settlement to the husband for life, then to the wife for life, then to the heirs of the body of the wife, and their heirs, it was said that there had been no case, from Shelley's Case down, in which it had not been held that words in a deed similar to these did not create an estate tail.¹⁰⁰ If they are executory, they will be given effect accord-

ing to the intention of the grantor,¹ which means as to the intention as to the estate given the first taker. A deed of marriage settlement by which property was held by a trustee for the use of the wife for life, and to convey to such persons as she should appoint, and, on failure of such appointment, to her heirs at law, to hold to them, their

being actually made and accepted by the parties, though the provision for sons be stricter than the clauses themselves imported, yet the next remainder, being limited in the very terms of the article, would not now be altered.

¹⁰⁰ *Alpass v. Watkins*, 8 T. R. 516.

A father having, by marriage articles, covenanted to convey an estate to trustees for the benefit of his son for life, with remainder for the use and benefit of the issue of his son by his intended wife, their heirs and assigns forever, it was held that the settlement ought to be framed so as to give an estate tail to the son, with remainder to the daughters, as tenants in common, in tail, with cross remainders between them. Lord Justice Knight Bruce, dissenting, was of the opinion that the children were entitled to the inheritance as tenants in common or joint tenants. *Phillips v. Jones*, 3 De G. J. & S. 72.

In *Dafforne v. Goodman*, 2 Vern. 362, where the owner of a term of ninety-nine years in certain lands, on his marriage assigned the term to trustees, in trust for himself for life, remainder as to a moiety to his intended wife for life, for her jointure, remainder to the heirs of the body of the wife, by him to be begotten, remainder as to the other moiety to the children of the body of the wife, it was held that the words "heirs of the body" were words of purchase.

¹ In *Trevor v. Trevor*, 1 P. Wms. 622, affirmed in 5 Bro. P. C. 122, A., in consideration of his intended marriage, covenanted with trustees to settle upon them as they should direct and appoint certain premises, to be limited and agreed upon by A. and the trustees, to the use of A. for life, without waste, remainder to the use of his intended wife for her life, remainder to the use of the heirs male of A. on her body to be begotten, and the heirs male of such heirs male, lawfully issuing, remainder to his own right heirs. No settlement was made pursuant to the articles, and E., the son of A., having incurred his father's displeasure, A. and his wife levied a fine on the premises, declaring the uses thereof to himself and his wife for their lives, remainder to the second son, J., in tail male, and so to the younger sons in tail male, successively. It was urged for the younger son that, according to the articles, the limitation to the heirs male of A.'s body created an estate tail in him, and that the use being to A. "without waste" made no alteration; but the court held that the articles being executory, the intention should be given effect.

In *Rochford v. Fitzmaurice*, 1 Connor & L. 158, a marriage settlement provided, sub-
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ject to an allowance for the wife, that the trustee should permit J. F. to take and receive the rents, etc., for life, without impeachment of waste, and after the determination of that estate, to the use of the trustees for preserving contingent remainders, etc., and from and after the death of J. F., the land, subject to certain charges, to be settled to the use of H. F., the eldest son of J. F., to permit H. F. and his assigns during his life to take the rents, etc., of the premises, and from and after the death of H. F., to the use and behoof of the heirs male of the body of H. F., lawfully begotten, and in default of such issue, to the use of T. F., second son of J. F., during life, etc., with like remainders, etc., and for want of such issue, to the use and behoof of the third, fourth, fifth, sixth, and all other sons, etc., then, after other limitations, to the daughter, ultimate remainder to J. F., his heirs and assigns forever. It was held that a strict settlement was intended, and H. F. therefore took but an estate for life, with remainder to his sons, as purchasers. To the same effect, *Brennan v. Fitzmaurice*, 2 Ir. Eq. Rep. 113.

Where by marriage articles a husband and wife covenanted to settle an estate to his own use, and after his death to the use of his heirs on the body of his intended wife, and on failure of such issue, to his own right heirs forever, the articles not expressing any further intention of providing for the children of the marriage, and making a provision for the intended wife in lieu of dower, it was held that the husband took only a life estate in the property. The court said that it adopted in these cases the principle that there shall not be such an estate in the parent as wholly to deprive the children of the marriage of any benefits; for this purpose, where an estate of inheritance is by marriage articles given to the parent, the court, in executing the settlement, will cut it down to a life estate. In order to effect the intention of providing for the issue of the marriage. *Davies v. Davies*, 4 Beav. 54.

"Upon a marriage, articles were entered into whereby it was agreed that the wife's portion should be laid out in the purchasing of lands, which should be settled on the husband and wife for their lives, and the life of the longer liver of them, and after to the heirs of the body of the wife, by the husband to be begotten; yet the master of the rolls decreed the settlement to be to the first and other sons, etc., so as the husband and wife might not have the power to bar the issue." *Jones and Langton*, 1 Eq. Cas. Abr. 392.

heirs and assigns forever, was held not to constitute an executory trust, so as to take it out of the rule in *Shelley's Case*.²

In an oft-cited English case the testator devised lands to four persons and their heirs for the payment of debts, and afterwards to the use of them and their heirs, after which, by a codicil, he provided that his will should stand, saving that when his debts were paid, A, who was one of the four devisees of the will, should have his share of the lands to himself for life, with a power to make leases for ninety-nine years, determinable on three lives, remainder to the

heirs male of his body, remainder over. It was held that this created an estate tail in A, but it was said that it could not be inferred with any certainty from the power of leasing given by the testator that no estate tail was intended. Lord Chancellor Cowper was of the opinion that A ought to be tenant for life only, since, being the case of a will, and an express estate for life being limited to A, remainder to the heirs male of his body, it differed from an immediate devise; that it was rather to be looked upon as an executory devise, to take effect after debts paid, or in the nature of mar-

² *Cushing v. Blake*, 30 N. J. Eq. 689.

And where, by an antenuptial settlement, property was conveyed to trustees, their heirs, administrators, and assigns, the fact that there was a power in the instrument enabling the trustees, upon the request of both consorts, "to grant, bargain, and sell all or any part of the property, they preserving, investing, settling, and assuring the proceeds of any such sale upon the same uses, trusts, intents, and purposes as are herein contained and expressed," was held not to render the trust executory, so as to make the rule in *Shelley's Case* inapplicable. *Wayne v. Lawrence*, 58 Ga. 16. The court said: "The power given is to sell and to reinvest upon the same uses, etc. There is no authority to vary the uses, or to create new ones, or to make more perfect those already declared. To ascertain the uses after reinvestment, as well as before, there is no occasion to look out of the original conveyance. In that one instrument all the uses are expressed, and fully expressed, not only in respect to the original property, but in respect to any other into which it might, under the power, be converted. To decide on the exact character and immediate effect of every limitation, there is no occasion to wait for any act to be performed by the trustees; and no act they could perform in pursuance of the power would make a better or more complete title in any person or persons than the original instrument confers."

But the rule in *Shelley's Case* does not apply to a deed to a trustee for the separate use of a woman so long as a marriage contract remained in force, and in event of her death with or without issue having been born to her, to hold the same to the use of her husband, if he should survive her, during his natural life, and when the uses and trusts created should have ceased, then to her right heirs, and it was held that after the death of the wife, followed by that of her husband, her intention that it should be conveyed to whomsoever should then be her right heirs should be carried out. *Kirby v. Brownlee*, 13 Ohio C. C. 86, affirmed without opinion in 55 Ohio St. 676, 48 N. E. 1114.

In *Webb v. Webb*, 1 P. Wms. 132, certain lands were assigned to trustees for the remainder of the term of one thousand

years, upon trust to permit the grantor's son to enjoy the same as long as he should live, and after his death, then to his wife, as long as she should live, and after their decease to permit the heirs of the bodies of the said son and his wife to be begotten, to hold the premises during the remainder of the term, and for want of such issue, to be enjoyed by the right heirs of the son. The wife died, leaving issue. It was held that the whole term vested in the husband.

A marriage settlement by which certain property was to remain to the separate use of the wife during her life, and after her death to her husband for his life, and after his death to his heirs generally, was held to give the husband, by the operation of the rule in *Shelley's Case*, an absolute estate after the death of his wife. *Varner v. Boynton*, 46 Ga. 508.

An antenuptial settlement by which certain property was conveyed to trustees, their heirs, executors, administrators, and assigns, for the use of the woman for life, and after her death for the use of the heirs of her body by her husband to be begotten, and in default of such issue, to the issue of the survivor of the husband and wife, their executors, administrators, and assigns forever, was held to vest a fee in the wife. *Wayne v. Lawrence*, supra.

Under a marriage settlement in which it was recited that it was agreed that the remainder of a term should be settled on the husband for life, and after his death on the wife for life, by way of jointure, and after their several deaths, on the issue of the marriage, and in default of issue, over, the grantor assigned the property to a trustee, in trust, to permit the husband to receive the rents for as many years of the term as would expire in his lifetime, and after his death, in trust, to permit the wife to receive the rents for life, and after their several deaths, to permit the heirs of the body of the husband, begotten on the body of the wife, to receive the rents for as many years of the term as would expire in their lives, and after their deaths, in default of issue on the body of the husband and wife, as before limited, over, it was held that the term vested absolutely in the husband. *Bartlett v. Green*, 13 Sim. 218.

riage articles for the conveyancing and settling of an estate for life, with remainder to the heirs male of his body; in which case it had often been decreed that the conveyance or settlement should not be made pursuant to the words, but the intention of the parties. On the rehearing before Lord Harcourt, the latter said that this, being the case of a will, differed from a case of marriage articles, in the nature of which the issue are particularly considered, and looked upon as purchasers. It could not reasonably be supposed that a valuable consideration would be given for the settlement of an estate which, as soon as settled, the husband might destroy. In all cases the testator's intent must be presumed to be consistent with the rules of law, and at law the words would certainly create an entail.³

Where a woman, in contemplation of a second marriage, vested certain property in a trustee for her sole use during the marriage, reserving a power of appointment, and providing that, among other things, in event of surviving her husband, at her death the said trust estate should descend to and be conveyed over by the trustee to her heirs at law, whoever they might be, and terminate the deed, it was held that the *cestui que trust* took an equitable fee. The court said that it was true that courts of equity do not apply the rule in Shelley's Case in question to marriage articles whol-

ly executory in their character and providing merely for a settlement afterwards to be made in conformity to them, unless, indeed, the application of the rule would better carry out the intention of the parties to the settlement. But this was not a case of marriage articles, nor of a settlement made under articles to guide the settlement, but a settlement without articles, in which case equity, in pursuance of its well-known maxim, followed the law.⁴

XIX. Application of rule to limitations of personal property.

a. In general.

There is some conflict on the question whether the rule in Shelley's Case applies to personal property. In terms, of course, it does not; but it has often been applied by way of analogy; and it will be observed that the cases in which the rule has been extended to personalty greatly outnumber those in which its force is denied. It has been said that there is no case which does not establish the rule that you may apply the rule in Shelley's Case to a gift of personalty; that although the rule is drawn from principles of feudal law it is no less applicable to gifts of personalty.⁵ Other courts hold that the rule in Shelley's Case is in truth not applicable to personal es-

³ *Bale v. Coleman*, 1 P. Wms. 142.

⁴ *Eaton v. Tillinghast*, 4 R. I. 276.

In *Atty. Gen. ex rel. Folkes v. Sutton*, 1 P. Wms. 754, note, there was a devise of an equitable estate in certain lands to a nephew for life, and afterwards to the first son or issue male of his body, lawfully to be begotten, and to the heirs male of the body of such first son, remainder to the said nephew's second son and his issue male in tail, and after the death of the nephew without issue male of his body, then over, and it was held that this did not create such an estate in the equitable property in the nephew as could be defeated by him by suffering a recovery.

Cases covering the construction of marriage settlements in which no point is made of that fact will also be found in other subdivisions of the note.

⁵ *Comfort v. Brown*, L. R. 10 Ch. Div. 146.

In *Mason v. Pate*, 34 Ala. 379, it was held that although the rule in Shelley's Case embraces only titles to real property, yet most of its principles and incidents are in this country alike applicable to wills and other conveyances of personal property.

In *Engle v. Mades*, 25 Wash. L. Rep. 229, it was said that when language is employed in a will in regard to personal property which, according to the rule in Shelley's Case, would give a fee simple in real property, the first taker of the property will take the whole interest.
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But it has also been held in Delaware that the rule does not extend to bequests of personalty. *Jones v. Rees* (Del.) 16 L. R.A. (N.S.) 734, 69 Atl. 785; *Gross v. Sheeler*, 7 Houst. (Del.) 280, 31 Atl. 812.

In Florida it has been held that where personal estate is bequeathed in language which if applied to real estate would create an estate tail, it vests absolutely in the person who would be the immediate donee in tail, and it is immaterial whether the bequest itself contained the words of limitation, or refer to the devise of realty creating an estate tail. *Watts v. Clardy*, 2 Fla. 369.

In *Edmondson v. Dyson*, 2 Ga. 307, it was held that the rule applied to personal property as well as to real estate.

In North Carolina the rule in Shelley's Case has been held to extend to chattels personal. *Ham v. Ham*, 21 N. C. (1 Dev. & B. Eq.) 598.

The rule in Shelley's Case covers personal property. *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347.

The rule in Shelley's Case applies to a gift of personal property, and the limitation to the heirs of the body of the first taker gives him an entire interest in the property. *Polk v. Farris*, 9 Yerg. 209, 30 Am. Dec. 400.

tates at all; but the courts, in construing the instrument, give the interest, that is the nearest thing to the estate tail, namely an absolute interest.⁶

Mr. Hargrave, in his essay on the rule, says that it professedly and directly operates

upon all the real property of the Kingdom, and though its original was quite foreign to personal estates, yet these, from subsequent causes and by a sort of adoption, have in some degree been brought within the sphere of its action.⁷

⁶ Re Cullen [1907] 1 Ir. Ch. 73.

So, where the bequest was of personalty to a woman for life, with remainder to her issue in tail male, and in default thereof to her daughters, and then over, it was held that she took a life interest only. The court said that where there is no estate of inheritance upon which the rule can operate, since it was not capable of any kind of descent, the court is free to have regard to the intentions of the testator as expressed in the will. *Ibid.*

And in *Powell v. Boggis*, 35 Beav. 541, it is said that it is quite true that the rule in *Shelley's Case* is a technical rule, and applies only to real estate.

Likewise in *Herrick v. Franklin*, L. R. 6 Eq. 593, it was said that there is no authority for holding that, because the rule in *Shelley's Case* applies to real estate, it is to be applied to personal estate also.

In *Smith v. Butcher*, L. R. 10 Ch. Div. 113, there was a bequest of personalty to certain children for their lives, and, on the death of either of them, his or her share of the principal to go to his or her lawful heir or heirs. It was urged that the rule in *Shelley's Case*, while not applying directly to personal estate, might nevertheless be applied by analogy as indicating the testator's possible intention. The court, however, was of the opinion that the rule had no application to this case.

In *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012, it was held that the rule in *Shelley's Case* does not apply to personal property, even though it be bequeathed in the same instrument with real estate, and as to the real estate the rule must be applied.

Where, however, the plain intention of the testator, by the limitations over, is that the real and personal estate should go together, it has been held that the words must receive the same construction in both estates. In this case the limitation of the real estate being such as to create an estate tail, it was held to carry the absolute interest in the personal property to the devisee. *Dunk v. Fenner*, 2 Russ. & M. 557.

In *Tucker v. Adams*, 14 Ga. 548, the court said that the rule in *Shelley's Case* by its terms does not apply to gifts of personalty. "But then," continued the court, "instead there has come to be adopted, with reference to gifts of personalty, a rule which practically amounts nearly to the same thing. That rule is, that if personalty be given in language which, if applied to realty, would create an estate tail, it vests absolutely in him who would, if the property were realty, be the immediate donee in tail. Still, each species of property has its own decisions for its government, and these decisions differ in some respects. The differ-

ence may be resolved into this; the decisions in reference to personalty show a much greater disposition to consult the real intention of the donor, than do those in reference to realty."

The rule in *Shelley's Case* applies to grants or devises of real estate only. *Siceloff v. Redman*, 26 Ind. 251. But see *Smith v. McCormick*, 46 Ind. 135.

In *Sands v. Old Colony Trust Co.* 195 Mass. 575, 81 N. E. 300, 12 A. & E. Ann. Cas. 837, the question was whether the statutes in Massachusetts abolishing the rule as to real estate left it in operation as to personal property. The court said: "We are of the opinion that, in this commonwealth at any rate, in the construction to be given to the trusts created by a settlement of personal property, whether executed voluntarily or upon valuable consideration, there is no inflexible rule of law which requires us to apply the rule in *Shelley's Case*."

But the fact that the devise to the tenant for life was not of the land itself, but of the rents, issues, and profits, will not take it out of the operation of the rule; since, where the devise is of the rents and profits for life, the devisee takes the land itself for life. *Haverstick v. Duffenburgh*, 2 Edm. Sel. Cas. 463.

⁷ Hargrave's Law Tracts, 551.

The rule applies by analogy to personal property. *Knox v. Barker*, 8 N. D. 272, 78 N. W. 352.

The rule so applies unless a contrary intent appears. *Evans v. Weatherhead*, 24 R. I. 502, 53 Atl. 806.

The principle is well settled that generally, and with but few exceptions, where personal estate, including, of course, terms of years of whatever duration, is bequeathed in terms which if applied to real estate would create an estate tail, such a bequest, in analogy to the operation of the rule in *Shelley's Case*, will vest the subject of it absolutely in the person who would be the immediate donee in tail. *Seeger v. Leakin*, 76 Md. 500, 25 Atl. 862.

The rule does not apply to limitations of personal estate, but by analogy to it, under the rule that words which create an estate tail, where the subject is realty, confer an absolute estate where the subject is personalty. *Keys's Estate*, 4 Pa. Dist. R. 134.

In *Austin v. Payne*, 8 Rich. Eq. 9, it was held that the rule has no relation to personalty.

But in *Markley v. Singletary*, 11 Rich. Eq. 393, it is said that "the rule in *Shelley's Case* has, it is true, no direct application to estates in personalty, but when it is said that terms which create an estate in

In some of the cases it is suggested that the rule is more flexible when applied to personalty.⁸ It is not strictly accurate to say this. It may be that, in construing the terms of a deed or will to determine the sense in which certain limitations are used, the courts may be more inclined to look upon them as words of purchase, rather than words of limitation. But aside from the fact that a testator or grantor, in using words of limitations with reference to personal property, may have understood them in a different sense than he would have understood them in case he had used them in a devise of real estate, there is no reason for making a distinction between real estate and personal property. It would seem to be the business of the court to find out, first of all, what the real intent of the testator or grantor was, with reference to the limitation in remainder after the life estate. Having determined

fee conditional in realty carry the absolute ownership of personalty, it becomes necessary to inquire what terms do create an estate in fee conditional in realty, and when to this inquiry it is, among other things, answered that an estate for life to one followed in the same instrument by an estate in remainder to the heirs of his body, etc., becomes an estate in fee conditional in the first taker, it seems to result that instruments creating estates in personalty cannot escape wholly from the operation of the rule; it becomes therefore important, in cases like the present, to inquire into the extent of its application, and how far, if at all, that intent is modified when the subject of the gift is personalty by the flexibility of the principles of interpretation."

⁸Burges v. Thompson, 13 R. I. 712.

The rule, though often applied to grants of personalty by way of analogy for purposes of construction, when so applied, yields more readily to the apparent intention of the grantor, than it does in grants of realty. *Monast v. Letourneau*, 87 Ill. App. 300; *Glover v. Condell*, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173.

But in a late Illinois case it was held that, on authority and reason, the rule in *Shelley's Case* should not be held to apply to gifts of personalty. *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012.

In *Taylor v. Lindsay*, 14 R. I. 518, it is said that it is doubtless true that the rule in *Shelley's Case* is applied to grants of personalty rather by way of analogy for the purposes of construction, than as a rule *stricti juris*, and that it therefore yields more readily to the apparent intention when so applied than when it is applied to a grant of realty; but that where personal and real estate are given in the same clause and in the same words, and there is nothing to indicate a different intention in relation

that the remainder was intended to go in indefinite succession, it would seem that the rule should be applied,—where it is recognized as applying to personal property at all,—otherwise not. The rule itself is inflexible.⁹

b. Unqualified Limitations.

1. Heirs.

In some cases the rule has been applied or rejected where the limitation in remainder has been simply to the heirs of the first taker, or if qualifying words have appeared they were not taken into consideration in the decision. Where a term of years was bequeathed to a daughter for life and then to her heirs, it was held that by analogy to the rule in *Shelley's Case* she took the entire interest.¹⁰

But it has been said that where person-

to the personalty from that manifested respecting the real estate, the words are to be construed in the same manner as applicable to both species of property.

That which will demonstrate the intention to designate by the words "heirs of the body" issue, not the indefinite succession, but particular individuals or classes as the objects of donation, especially present to the donor's contemplation when the subject of donation is personalty, is often wholly ineffectual for the same purpose when it is realty. *Markley v. Singletary*, supra.

So, too, words of distribution, as "share and share alike," etc., or words of limitation as "to the heirs of the body of A, and their heirs and assigns forever," superadded in the terms of direct gift, to the words "heirs of the body," "issue," etc., as to personalty, but not as to realty, are equally held to indicate by such words particular individuals or class of persons who, at a certain point of time, were in existence. *Ibid*.

⁹For other cases in which the rule has been invoked as to bequests of personal property, see the following subdivisions of the note.

Cases in which limitations of personal property were construed, but in which it was conceded that the rule applied to personal property, will also be found in other subdivisions of the note.

¹⁰*Horne v. Lyeth*, 4 Harr & J. 431.

In *Cutlar v. Cutlar*, 3 N. C. (2 Hawy.) 154, negroes were given by deed to grantor's daughter and son for their lives and the life of the longest liver or survivor, remainder to the heirs of the survivor. It was held that the absolute property was in suspense until the death of one of the devisees, but that upon that death the absolute property immediately vested in the survivor.

The bequest of a negro girl to a daughter for life, and then to her heirs, gives her an absolute title; there being nothing to show

alty is given to one for life and after his death to his heirs, there should be no doubt that the expression "heirs" would apply to children.¹¹

Where personal property was devised in trust for the sole and separate use of testator's daughters, in certain proportions, the income to be received and paid over to the daughters by the trustees in the same manner, for the sole and separate use of each daughter during life, and then to her husband in case a husband should survive,

the income to be received and enjoyed by the husband during his life, from and after the death of his daughters and their husbands respectively, the share of each daughter to go to her right heirs forever, it was held that an absolute interest in the property was not conveyed to the first taker.¹²

2. Heirs of the body.

It has been said that the words "heirs of the body" in a gift of personal property are

that the word "heirs" was used in the sense of "children." *Kiser v. Kiser*, 55 N. C. (2 Jones, Eq.) 28.

Where a testator bequeathed the interest arising out of £15 consols to his granddaughter during her life, and at her death to descend to her heirs, male or female, the stock not to be sold except for failure of issue, and then to descend to the testator's son and his heirs forever, it was held that the granddaughter took an absolute interest in the stock. *Ousby v. Harvey*, 17 L. J. Ch. N. S. 160.

Where it was provided, by an agreement in settlement of an estate, that a certain sum of money belonging to the widow, which had come to her from her father and which had been put into the hands of her husband, should be drawn out of his estate and retained in the hands of trustees, who were to pay the widow the annual interest, and in case of sickness or other need, to apply as much of the principal as in their discretion they might deem necessary, for her use, and at her death to pay the remainder to her heirs, it was held that by this agreement the widow had the absolute interest in the property. *Charles's Appeal*, 2 Pennyp. 164.

A devise of property to be invested in safe stocks, the income to be for the sole use of testator's daughter during her life, with the provision that after her death the property was to go to her heirs, was held to give her the entire interest. *Engle v. Mades*, 25 Wash. L. Rep. 229.

Where freehold and leasehold lands were devised and bequeathed to testator's daughter for life, remainder to her first and other sons successively in tail, remainder to her daughters as tenants in common and in tail, and in case of default of issue of the daughter, to her right heirs forever, it was held that she took an absolute interest in the leaseholds. *Comfort v. Brown*, L. R. 10 Ch. Div. 146.

In *Lewis v. Hopkins*, 3 Drew. 668, a testator devised leasehold estates to trustees on trust for his son A, to take the rents until the son should attain the age of twenty-one, remainder on trust to support contingent remainders, and subject thereto on trust for such son for life, remainder to his heirs male, remainder to the second and other sons of A and the heirs male of their bodies, with like remainder over in favor of other children of the testator 29 L.R.A. (N.S.)

and their sons. It was held that A's son took an absolute estate in the property.

A bequest of a term to trustees upon trust to preserve contingent uses, but nevertheless to permit and suffer testator's first son to receive the rents and profits thereof for life, "and after his death to the heirs male of such son, and for want of such issue to the second, third, fourth, fifth, and all and every other son and sons of the body of the said . . . [sons] lawfully to be begotten, and the several respective heirs male of the body and bodies of all and every such son and sons lawfully issuing," was held to vest the term absolutely in the son. *Williams v. Lewis*, 5 Jur. N. S. 323.

In a deed of gift by which certain negroes were given to a person for life, in trust for his heirs after his death, it was held that the word "heirs" was used as a word of limitation, and that the property vested in the first taker. *Kay v. Connor*, 8 Humph. 624, 49 Am. Dec. 690.

¹¹ *Bull v. Comberbach*, 25 Beav. 540.

In *Powell v. Boggis*, 35 Beav. 541, it is said that it is true that the word "heirs" in a will of personalty never is a word of limitation.

It was said that where the limitation after the life estate in a will of personal property was to the effect that if the life tenant should die without making a will, to her right heirs forever, it was held that the word "heirs" meant executors and administrators. *Ibid*.

¹² *Bacon's Appeal*, 57 Pa. 504.

The fact that a will vesting a fund in a trustee, with directions to pay the income to the testator's son until he attains a certain age, when the fund shall become his absolutely, provides that in case the son dies before reaching such age, it shall go to his heirs, was held not to bring the bequest within the rule in *Shelley's Case* so as to vest the legacy in the *cestui que trust*, in spite of the intention of the testator, on the theory that the testator having used the word "heirs" in this manner, the law will give that word controlling effect, and deny to him the power to direct his estate in a channel contrary to the course fixed by the law. *Bennett v. Bennett*, 217 Ill. 434, 4 L.R.A. (N.S.) 470, 75 N. E. 339. The court says that as applied to a devise of real estate this position is sound for the reason that the policy of the law has been to give sta-

not appropriate, and much less, technical words. They do not import a succession in a direct line of descent, because by law there is not and never was such a succession in the case of chattels. They must have some other meaning, and therefore in prosecuting the inquiry as to what that meaning is, so strong a demonstration that the phrase was used as a designation of individuals is not demanded as is indispen-

sable, where, as in devises of real estate, it is attempted to override its precise legal signification.¹³

A limitation of the remainder after the life estate to the heirs of the body of the life tenant vests the absolute interest in the property in the person designated to take for life, where the rule in Shelley's Case is held applicable to personal property.¹⁴ Where there is a bequest to one for life,

bility to titles to such property, and to hold them vested when it can. As applied to gifts or conveyances of personality the word "heirs," strictly speaking, has no application. If in a devise of the latter class of property additional words were necessary, the words "executor, administrator, and assigns" would be the proper ones to show the extent of the estate to the first taker, and indicate absolute property. By analogy, however, the rule in Shelley's Case is applied to gifts of personality, but in all cases where the word is used in the devise of personality, it is held to yield to the express intention of the testator.

In *Ware v. Sharp*, 1 Swan, 489, where there was a deed of gift of slaves and other personal property to a married woman for her sole and separate use apart from the control of her husband, free and discharged from his debts and liabilities, to hold the same during her life, with power of appointment, in default of the exercise of which it was provided that the property should go to her heirs forever, it was contended that the use of the word "heirs" in default of appointment made it a word of limitation, having a technical meaning which would control all other evidences of intention, carrying to the first taker the entire estate under the rule in Shelley's Case. The court said that if the inquiry were as to the quantity of estate given to the first taker, there would be much force in this position, but as the inquiry in the case was as to the marital rights of the husband, that the intention must control. That in such a case the word "heirs" has no artificial meaning, and is not used technically; and that in determining the sense in which it is used the context of the instrument must be looked to, and in this particular case the intention was to exclude the husband.

In *Evans's Estate*, 155 Pa. 650, 26 Atl. 739, there was a bequest of a sum of money to a trustee for the use of testator's son for life, not to be subject to his debts or contracts, and the balance remaining after the death of the son to be paid to his heirs at law. The court said there was nothing in the context of the will to indicate an intention to take the case out of the rule; that when the word "heirs" is used in a gift of personality it is employed to denote those who are entitled to take under the statute of distribution. The heirs here, under the rule, were evidently the children of the life tenant, the *cestui que trust*, and as such these children took, not as by rep-

resentation, but directly under their grandfather's will.

¹³ *Allen v. Pass*, 20 N. C. 207 (4 Dev. & B. L. 77).

¹⁴ A gift of a leasehold interest to a woman during her natural life, with remainder over to the heirs of her body, it she should have any, as a class of persons to take in succession from generation to generation, is within the rule in Shelley's Case, entitling her to the absolute interest, which is not restricted by the words "if she should have any" heirs. *Hughes v. Nicklas*, 70 Md. 484, 14 Am. St. Rep. 377, 17 Atl. 398.

A bequest of personal property to be invested for the use of testator's son, so that the latter might have the interest of it for life, and for the lawful heirs of his body, the will providing that if the son should die without heirs the property should go to the testator's youngest son and the lawful heirs of his body, was held to vest the whole estate in the first taker. *Butterfield v. Butterfield*, 1 Ves. Sr. 133.

In *Floyd v. Thompson*, 20 N. C. 616 (4 Dev. & B. L. 478), the court said that when there is a gift of personality to one and his heirs, or to one for life and then to the heirs of his body, or to his heirs generally, although the term "heirs" is inappropriate as a word of limitation of such property, yet the court is obliged to receive it in that sense, because it cannot be rejected altogether, and because no other certain or probable meaning can be given to it.

A bequest of two negroes to a person for life, and then to her "bodily heirs," was held under the rule in Shelley's Case to vest the absolute title in the first taker, no estate tail being permitted in personal property, there being nothing in the will to show that the term "bodily heirs" were used as synonymous with children. *Machen v. Machen*, 15 Ala. 373.

A bequest of a slave for the use of a woman during her life, and after her death to be the general property of the heirs of her body, was held to vest the entire interest in the first taker, the words "heirs of the body" by analogy to the rule in Shelley's Case being considered as words of limitation. *Lenoir v. Rainey*, 15 Ala. 667.

Where a will provided that the property which the testator's daughter obtained under his will, after her death was to descend to her bodily heirs, it was held that in the absence of statute the devisee would, under the rule in Shelley's Case, have taken an

the limitation over to the heirs of the body of the life tenant enlarges the life estate to an absolute estate, as in the case of real property.¹⁵ But the words "heirs of the body" were held to be words of purchase in a conveyance of a term to trust-

absolute title to the property. *Mason v. Pate*, 34 Ala. 379.

A deed of a slave to a woman for life, with a limitation after her death to the heirs of her body, vests an absolute estate in her. *Denson v. Thompson*, 19 Ark. 66.

Where the testator by will loaned certain negroes to his daughter during life, and then to her bodily heirs, it was held that she took an absolute estate therein. *Jones v. Jones*, 20 Ga. 699.

A bequest of a negress to a woman for life, and at the latter's death to the heirs of her body, was held to vest an absolute estate in the devisee. *Childers v. Childers*, 21 Ga. 377.

A bequest of a leasehold estate to a daughter and "her bodily heirs if any she shall have," reserving such tenement to the daughter during her natural life, remainder over if she should die without bodily heirs, was held to confer upon her an absolute interest in the leasehold estate by analogy of the rule in *Shelley's Case*. *Seeger v. Leakin*, 76 Md. 500, 25 Atl. 862.

Where a woman was to take the use and labor of a slave and her increase during the grantee's natural life, and at her death, the slave was to go to the heirs of her body lawfully begotten, it was held that the absolute title vested in her. *Nichols v. Cartwright*, 6 N. C. (2 Murph.) 137.

A devise of a slave to testator's daughter for life, and then to her bodily heirs, vests the entire interest in her, there being nothing in the context to control the technical meaning of the term "bodily heirs." *Donnell v. Mateer*, 40 N. C. (5 Ired. Eq.) 7.

¹⁵ *Myers v. Pickett*, 1 Hill, Eq. 35.

A limitation of personal property to a man and, after his death, to the heirs lawfully begotten of his body, gives him the absolute title by virtue of the rule in *Shelley's Case* as applied to personal chattels. *Sanderlin v. Deford*, 47 N. C. (2 Jones, L.) 74.

Under a deed of gift of slaves to a trustee to manage for the benefit of the grantor's daughter until she should arrive at the age of twenty-one years, or should marry, and then to deliver possession of the slaves to the daughter or her husband, and account for the profits of the same, and also after that event to see that the property and its future increase should not be sold or disposed of and should be preserved for the benefit of the heirs of the body of the daughter, and should vest in the heirs of her body upon her death, and then over in case she should die without living heirs of her body, it was held that the daughter took an estate of freehold, or what would be an equivalent estate of freehold in real estate within the meaning of the rule in *Shelley's Case*. *Carradine v. Carradine*, 33 Miss. 698.

In *McCullough v. Gliddon*, 33 Ala. 208, 29 L.R.A. (N.S.)

it was held that in a deed of gift in which a slave was conveyed to a trustee and his heirs and assigns for the sole use of a woman during the time she should remain the wife of a person named, and which provided that if the wife should die before her husband, the slave should be for the use and benefit of the heirs of her body forever; to remain for the sole use of the wife for life, and after her death to the heirs of her body,—the words "heirs of her body" were words of limitation, and not of purchase.

The fact that a testator uses the words "heirs of her body" in disposing of his residuary personalty, the income of which he had directed his executors to pay to a woman for life, does not show an intention to use such words as words of purchase. *Re Brand*, 4 Ont. Week. Rep. 473, opinion adhered to on reargument in 5 Ont. Week. Rep. 297.

Where the dividends on certain bank stock and other personal property were given to one for life, and after his death the property was devised to the heirs male of his body lawfully begotten forever, and for want of such issue, over, it was held that the first devisee took an absolute interest in the property. *Chatham v. Tot-hill*, 7 Bro. P. C. 453.

In *Elton v. Eason* (1811) cited in *Mogg v. Mogg*, 1 Meriv. 671, Sarah Marwood by her will gave several annuities to her daughters for their lives; and gave all her mesuages, land, etc., and all her moneys and personal estate to trustees, their executors, administrators, and assigns, in trust for the payment of her debts, annuities, and legacies, and to keep her leaseholds and copyholds for lives full stated, and in trust to apply the residue of the rents (for certain purposes) for her son J. T. B. Marwood, during his life and afterwards for the heirs of his body, if any, and in default of such issue to testatrix's grandson. The bill was filed by the grandson to establish the limitation in the will. It was admitted on all hands that the will created an estate tail in the freeholds and copyholds of inheritance, but it was contended that the limitation over was not good as to personalty. The court decided that the son took the absolute interest in the chattels.

Where the interest of a sum of money is given to one for life and after his death to the heir of his body, with remainder over, this was held to vest the principal sum absolutely in the first taker. *Robinson v. Fitzherbert*, 2 Bro. Ch. 127.

Where a trust of a term was given to the daughter for life and immediately after her death to the heirs of her body, with remainder over, it was held that she took the whole interest. *Theebridge v. Kilburne*, 2 Ves. Sr. 233.

tees, to permit the grantor's wife to receive the rents during the term if she should so long live, and after her death to permit him to enjoy the rents during his life, and after his death in trust for the heirs of the body of his wife by him, and in default of such issue, over.¹⁶ And where a term was assigned in trust to a man and a woman for their lives, remainder in trust for the heirs of the body of the woman by the man, it was held that the words "heirs of the body" were used as *descriptio personæ*.¹⁷ And where a testator gave to his son a certain sum of money to be placed at interest by testator's executors, the interest to be paid annually to the son during his life, and in case the son should die and leave no legitimate heirs of his own body, it was provided that the sum bequeathed to him should revert to the testator's other heirs. It was held that the words "heirs of his own body" meant children, and that the mere technical rules of construction must give way to the plainly expressed intention of the testator if the intention was lawful.¹⁸

3. Issue.

There has been an inclination on the part

of the courts to regard the word "issue" in limitations of personal property, rather as a word of purchase,¹⁹ than as a word of limitation; but the cases are in conflict.²⁰

c. Qualified limitations.

1. Modifying or explanatory words in general.

As in the case of real property where there are modifying or explanatory words, words of distribution, or superadded words of limitation, the question for determination is first in what sense was the word "heirs" used? If in its technical sense, the rule applies; otherwise not. It will be observed that where an attempt has been made to apply the rule, in cases in which the limitation in remainder is to the heirs of the body of the life tenant, the courts are not in harmony as to the effect of added words of distribution, superadded words of limitation, or modifying or explanatory words in general.

A deed of slaves to a woman "and to her children, the natural heirs of her body, at her death," was held to convey a life estate

¹⁶ *Hodgeson v. Bussey*, 2 Atk. 89.

¹⁷ *Peacock v. Spooner*, 2 Vern. 195, affirmed by House of Lords, see foot note, p. 196.

¹⁸ *Eichelberger's Estate*, 135 Pa. 160, 19 Atl. 1006, 1014.

¹⁹ An executory devise of personal property to one for life, "at her death leaving no lawful issue," over, was held not enlarged to a fee. *Moore v. Howe*, 4 T. B. Mon. 205. The court said: "We are aware of no case of an executory devise of personal estate where the devise is thus expressly made for life and no express devise over to the issue, in which it has been determined that the issue should take by representation instead of taking by purchase, and we may venture to say that no case of the kind, unless peculiarly circumstanced, can be so determined without a total disregard of the intention of the testator."

A bequest of personalty to one for life, with remainder to his issue, does not confer an absolute interest upon the first taker,—a remainder given to the heirs may; a remainder to issue does not. In gifts of personalty a different meaning is attached to the word "issue" from that which it bears when used in devises of realty. The remaindermen take as purchasers, and hence such a remainder does not enlarge the particular estate. *Sheets's Appeal*, 52 Pa. 257.

In *Heiss's Estate*, 17 W. N. C. 285, it is said that it must be regarded as settled that the word "issue" following a life estate in personalty is a word of purchase, and that the rules governing the construction of gifts or personal estate are applied though the will disposes also of real estate in the same clause.

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In *Goldney v. Crabb*, 19 Beav. 338, in a bequest of leaseholds to a woman for life and after her death to the issue of her body, and in case of dying without issue, then over, it was held that the words "issue of her body" were words of purchase, the bequest being of personal estate.

Where, after a life estate in the interest of certain moneys, the moneys were given to the male issue of the life tenant, and in default, over, it was held that had the devisee not died without issue the issue would have taken as purchasers. *Knight v. Ellis*, 2 Bro. Ch. 570.

Under a grant of a negro girl to the grantor's daughter for her support during her natural life, and providing that at the daughter's death the slave, together with her increase, should be the property of the issue of the daughter, the word "issue" was held to have been used as a word of purchase. *Markley v. Singletary*, 11 Rich. Eq. 393.

²⁰ In *Potts's Appeal*, 30 Pa. 169, it was held that where the limitation after the life estate is to the issue, the life tenant gets the absolute title to personal property.

And in *Manning v. Moore, Alcock & N.* 96, the testator devised certain estates for lives renewable forever to his daughter, and after her death to the issue of her body lawfully begotten, and in case she should happen to die without such issue, remainder over. It was held that the daughter took an estate in the nature of an estate tail.

But under a bequest to a married woman of an annuity for her life and the issue from her body lawfully begotten, to revert on failure of issue, to testator's heirs, with

to her, the words "children" being explanatory and restrictive of the words immediately following.²¹ But the word "then" preceding the words "to the heirs of their bodies," following a limitation to the first taker for life, was held not to tie up the limitation to the time of the first taker's death, so as to make the words "heirs of their bodies" merely descriptive of a class of persons to take the estate as purchasers.²²

Where the testator lent a certain portion of his estate to his three daughters for their lives, and then gave it to the lawfully begotten heirs of their bodies, it was held that the use of the word "lend" and the

word "give" in contradistinction showed that by the words "heirs of their bodies" the testator meant children.²³ And a bequest of leaseholds to testator's daughter for life, and after her death "to and amongst the issue of his said daughter lawfully begotten, and in such shares and proportions as the said daughter should by her last will and testament appoint, provided such child or children should arrive at the age of twenty-one years, and for want of such issue or in case of the death of such issue; and the death of his wife," over, was held to give the daughter only an estate for life.²⁴

And where a testator in devises to his daughters provided that in case they should

a request that certain persons should act as trustees for her, so that the annuity might be secured for her sole use and benefit, it was held that she took an interest for life only, with a gift in the nature of a remainder to her issue. *Re Wynch*, 5 De. G. M. & G. 188.

²¹ *Elmore v. Mustin*, 28 Ala. 309.

The grant of a negress to a daughter for life, at her death to descend to the natural heirs of her body, but in case she should die leaving no natural heirs of her body, then to revert to the grantor's estate, etc., was held not to create an absolute interest in the daughter, the words, "in case she should die leaving no natural heirs of her body," being held to be descriptive of a particular class of persons who were to take, that is, the issue of the daughter living at her death, and, consequently, the rule, which enlarges the first estate for life into an absolute interest, and cuts off the limitation over in default of issue, did not apply. *McVay v. Ijams*, 27 Ala. 238.

Where the testator by deed of gift loaned a negro girl to his sister for life, and then to her bodily heirs, and provided that if the sister should die without issue, the said negress and her increase, if any, should be divided between the devisee's brothers and sisters that should be alive at that time, or, if any of them should be dead, that their children should be entitled to a proportional share of the property, it was held that the words "at that time" contained in the deed meant at the time of the devisee's death, and that therefore she took only an estate for life and her children the remainder. *Jones v. Jones*, 20 Ga. 699.

²² *Myers v. Pickett*, 1 Hill, Eq. 35.

So, a bequest of slaves to testator's daughters for life, then to descend to the heirs of their bodies, if not any heirs, then to their lawful heirs, was held to vest the entire interest in them. *Floyd v. Thompson*, 20 N. C. 616 (4 Dev. & B. L. 478).

²³ *Loving v. Hunter*, 8 Yerg. 4.

In *Vaden v. Hance*, 1 Head, 300, the testator lent two negroes and their increase to his son during his life, and at his death they were to be equally divided among the lawful heirs of his body. It was held that the words "lawful heirs of his body"

were used as words of purchase, and meant children.

In a deed of gift in the following words: "In consideration of the love and regard that I have for my daughter, Martha Evans, I have loaned to her the negroes aforesaid for her support, and no other, except she, the said Martha, should have issue or heirs of her body, and in that case I loan said negroes to her and her heirs for their mutual support. And if said negroes should remain in possession of said Martha until her death, and she should have legal heirs of her body, I give said negroes with their increase to them," it was held that the words "heirs of the body" were used in the sense of children, and not in their legal sense as respecting a class, and that the rule in *Shelley's Case* did not, therefore, apply. *Evans v. Wells*, 7 Humph. 569.

In a devise of personal property, "I lend to my daughter," etc., for life, and then to the heirs of her body, it was held that the word "then" did not tie up the limitation to the time of her death, so as to make the words "heirs of her body" merely descriptive of a class of persons who must then be in being, and take the estate as purchasers, and not by descent from her. *Myers v. Pickett*, supra.

²⁴ *Ryan v. Cowley*, 1 Lloyd & Goold (t. Sugden) 7.

In a bequest of personal property to a woman for life, and at her death to her heirs or children, it was held that the word "heirs" as here employed was a word of purchase. *Dunn v. Davis*, 12 Ala. 135.

Where the testator's real estate was directed to be sold and the income of one share directed to be paid to a certain person, the principal to be paid to his heirs after his death, it was held that as there was an equitable conversion, and in view of the plain intention of the testator, the word "heirs" must be construed as meaning children or next of kin, or those who would take as distributees under the statute. *Vogt v. Vogt*, 26 App. D. C. 46.

Where a deed conveyed a negress to a grantor's daughter for life, and to the heirs of her body, if she should have any

marry, certain sums be secured in such manner that they should receive the interests thereof for their sole and separate use during life, the principal sum to be divided equally among their lawful issue, and, in default of such issue, that the principal sum should revert to the testator's estate, and then provided that, in default of such issue of all of his three daughters, the property should be held in trust and secured to the use of the testator's son for life, and after his death to be equally divided among his lawful issue, and, in default of such issue, in trust to divide the residue equally among all the children of two persons named, share and share alike, and, in default of lawful issue of either of them, the whole of the residue to be divided equally among the children of the other, share and share alike, it was held that the word "issue" was used in the sense of children.²⁵ But a bequest of personal property to a man, "to hold and to have the issues, profits, rents, and interest from said bequeath during his natural life, but not to have and to hold it in fee simple, to sell and commit waste thereon, and at his decease to descend to his legal heirs at law," was held to give to the devisee an absolute interest in it.²⁶

And a bequest of slaves to the testator's

granddaughter for life, and at her death to the heirs of her body lawfully begotten, and if she should die without such issue, to two of the testator's grandchildren or the survivor of them, and the heirs of their bodies lawfully begotten, was held to vest an estate tail in the granddaughter, converted by statute into a fee.²⁷ Likewise, it was held that where the remainder of the estate in personal property is given to the devisee's "heirs," the qualifying words, "especially those who shall live longest with her," do not convert the word "heirs" into a word of purchase.²⁸ So, a clearly expressed intention that the word "heirs" should be regarded as a word of purchase was declared not to be inferred from a direction that money should be "paid" to a person during his life, and to his heirs after his death.²⁹ And a devise of a slave to a woman for life, then to descend to her lawful heirs, there being nothing in the devise to limit or qualify the words "lawful heirs," was held to vest the absolute title in the first taker.³⁰ And where a bequest of slaves to a woman for life, and then to her lawful heirs, would give her an absolute estate under the rule in Shelley's Case, and her husband, *jure mariti*, would be entitled to them, the fact that the limitation was to

by a specified person, and provided that should she die without such bodily heir, such negroes and her increase be divided among the grantor's heirs, share and share alike, it was held that the words "heirs of the body" meant children. *Dudley v. Porter*, 16 Ga. 613. The court says that it is the well-settled doctrine of all the modern cases that the words "heirs of the body" may be construed as words of purchase whenever there is anything in the instrument which shows that they were used to designate certain persons answering the description of heirs at the death of the party.

In *Myers's Appeal*, 49 Pa. 111, there was a legacy to trustees in trust for the use of a daughter during life, and after her death to such issue, if any, as she might leave, the will providing that "the interest on said legacy shall commence from the day of my death, and that the same shall be paid to my said daughter in monthly instalments of \$100." It was held that the issue took as purchasers. The court said that words importing a gift to issue, or a gift over on failure of issue when applied in a will of personality, received a different construction from what they would if applied to real estate.

In *Symers v. Jobson*, 16 Sim. 267, the words "heirs of the body" were held to have been used in the sense of children in a bequest of property in trust for testatrix's sister, the interest to be paid to her during her life, and the principal at her death to go to the heirs of her body,

share and share alike, and that consequently she took an estate for life, with remainder to her children as tenants in common.

In *Ashton v. Ashton*, cited in *Bagshaw v. Spencer*, 1 Ves. Sr. 149, "Joseph Ashton devised £6,000 South sea stock and £12,000 to trustees, to sell and lay out in the purchase of lands, to convey to George Joseph Ashton for life, and afterward to the issue of his body; in default of such issue, then over. George Joseph Ashton brought a bill for performance: The question was whether he had an estate for life or in tail? It was insisted for him that, had it been devise of land, he would be tenant in tail, and there should be the same construction; but the court held it an estate for life only of the lands to be purchased, which determination stands unappealed from."

²⁵ *Edward v. Edwards*, 12 Beav. 97.

²⁶ *Kay v. Kay*, 4 N. J. Eq. 495.

²⁷ *Pournell v. Harris*, 29 Ga. 736.

²⁸ *Hammer v. Smith*, 22 Ala. 433.

²⁹ *Little's Appeal*, 117 Pa. 14, 11 Atl. 520. The court said that the substance of the legacy was money which must be "paid" to somebody, and the direction to pay to the life tenant during his life, and to his heirs after his death, was the appropriate form of expression for transferring or delivering the gift, and had no significance as affecting the legal character of the gift.

³⁰ *Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298.

the husband, as well as the wife, for their lives, was held to put him in no worse situation.³¹

2. Words of distribution.

Where personal estate constituted the bulk of testator's property, a devise and bequest of real and leasehold estates together to A for life, and after his death to the male issue of his body in equal shares and proportions, was held to give A only an estate for life in the leaseholds, the devise of the real estate not carrying with it the devise of the personality.³² And where personal property was bequeathed to the sisters of the tes-

tatrix, the will providing that in case of the death of either or any of the sisters leaving issue, the share of the sister so dying should go to such child or children equally, it was held that the word "issue" was used in the sense of children.³³ So, under a will providing that testator's daughter shall receive the income of certain personal property for life, the property at her death to be equally divided among her children or legal heirs, it was held that a life estate was given to the daughter, the term "legal heirs" being intended merely as a *descriptio personarum* of the purchasers to take at the daughter's death.³⁴ And a bequest of personal property to the use of a woman for

³¹ *Hodges v. Little*, 52 N. C. (7 Jones, L.) 145.

³² *Jackson v. Calvert*, 1 Johns. & H. 235.

³³ *Goldie v. Greaves*, 14 Sim. 348.

Likewise in a deed of gift of certain negroes to the testator's son for life, at his death to be equally divided among the heirs of his body, the words "heirs of his body" were construed to be words of purchase, the superadded words "at his decease" to be equally divided" excluding the idea of perpetuity, and taking from the words their technical signification. *Sharman v. Jackson*, 30 Ga. 224.

Where the property was given to a woman for life, and after her death was to be equally divided between the heirs of her body, it was held that an estate tail was not created. *Herring v. Rogers*, 30 Ga. 615. The court said: "This language indicates division,—but one division, and that one an equal division. When one equal division is made, the operation of the deed is exhausted. That one equal division being accomplished, the deed retires from the scene, and leaves the property forever afterwards at that place where that division places it. This is incompatible with an estate tail. An estate tail consists in a provision for the transmission of the property from generation to generation till the blood is exhausted, but this deed contemplates no control over the course which the property will take after the one equal division. In gain, the equality of the division is incompatible with an estate tail. An estate tail requires a division, or rather a succession of divisions, to be made not *per capita* among those who take, as this deed does, it *per stirpes*."

In *Ellis v. Essex Merrimack Bridge*, 2 Ark. 243, a bequest of personal property to testator's daughter for life, at her death to be equally divided among her heirs, it was held to convey only a life estate to the daughter, the word "heirs" being used in the sense of children.

In *Prescott v. Prescott*, 10 B. Mon. 56, needing the rule in Shelley's Case to be authoritative, the words "heirs lawfully gotten of her body" were held to be words of purchase, where the limitation to the life estate was that the property

be equally divided between the heirs lawfully begotten of the body of the life tenant, and for want of such heirs, over to testator's daughter, since the testator did not use the words in the technical sense, as embracing the whole line of descendants in succession, but in the restricted and untechnical sense of denoting the individuals who might be the heirs of the life tenant's body at the time of her death.

Where the will provided that a granddaughter should have a number of negroes for life, and at her death that they should be equally divided among the heirs of her body, or in case she should die without a surviving child or children, that the negroes, with their increase, should return to specified persons or their heirs, it was held that, by the term "heirs of the body," the testator did not contemplate a class of persons to take by transmission from and through the first donee in the nature of heirs, but that he did intend a class of individuals to take as original and independent objects of his bounty, and that the first taker took only a life estate. *Allen v. Pass*, 20 N. C. 207 (4 Dev. & B. L. 77).

In a bequest of the use of slaves for the life of the devisee, then "to be equally divided among the heirs of her body forever," the words "heirs of her body" were held to mean children, each child taking a vested interest at its birth, subject to be partially divested in favor of the other children as they were born. *Chambers v. Payne*, 59 N. C. (6 Jones, Eq.) 276.

The words "bodily heirs" were held to be words of purchase in a devise of the annual interest of a fund to a daughter for life, the will providing that upon her death the principal sum should be paid to her bodily heirs in equal shares, and in case the daughter should die without leaving bodily heirs, the money should revert to testator's estate. *Gerhard's Estate*, 160 Pa. 253, 28 Atl. 684.

³⁴ *Hall v. Gradwohl* (Md.) 77 Atl. 480.

Similarly, in a devise to testator's son for his use for life, and upon his death to go to his heirs at law "him surviving, share and share alike," the words "him surviving" and "share and share alike" were held to indicate that the word "heirs" was not used

life, and from and immediately after her death to the heirs of her body lawfully begotten, equally to be divided between them, share and share alike, and in default of such issue, over, was held to give her a life estate only.³⁵ And in a case in which a testator bequeathed to his daughter \$1,000 to be invested in bank stock, the daughter to have the interest accruing therefrom during her natural lifetime, and afterwards the said sum to be equally divided amongst her heirs, in holding that the word "heirs" was used as a word of purchase, because qualified by the words "to be equally divided," the court said that when the property is

to be equally divided amongst the heirs, it shows that the word "heirs" cannot mean the heirs in a continual line of descent, which is necessary to create a fee, because it could not be divided equally among them; and therefore that it must mean children: that the same reasoning applies whether all the children take as heirs or only one.³⁶ But under a deed of gift by which the grantor loaned to his daughter for life certain negroes for her sole use and benefit, the property after her death to be equally divided among and between the heirs of her body," the court said that it would seem that the grantee took an absolute estate.³⁷

as a word of limitation. *Burges v. Thompson*, 13 R. I. 712.

Under a devise to a woman of the interest of a certain sum of money for life, and after her death the said sum to her issue, to be equally divided among them, share and share like, and their issue, and in case of only one child surviving her, then to such only surviving child, it was held that the word "issue" was used in the sense of children and grandchildren of the life tenant. *Burleson v. Bowman*, 1 Rich Eq. 111.

In *Bradley v. Jones*, 37 N. C. (2 Ired. Eq.) 245, it was said that a devise in the following words: "I lend to my daughter, P. J., one negro girl named Mary, for her life, and after her death to be equally divided among the heirs of her body forever," if it had applied to real estate, would have created an estate tail at common law, and therefore carried the absolute interest in the personal property.

But in *Swain v. Rascoe*, 25 N. C. (3 Ired. L.) 200, 38 Am. Dec. 720, the court regretted that in the last-mentioned case the effect of the words, "equally to be divided among the heirs of her body," after a previous limitation to the mother expressly for life, was overlooked. The case was not argued for the children, and so the point was not brought to the notice of the court, and was inadvertently passed over.

Where, after a devise of real and personal property to one for life, the will provided that after his death the proceeds thereof were to be divided equally between all his lawful heirs, first deducting the bequests already made, and when the others became equal then, the balance was to be divided between them, share and share alike, it was held that the estate for life could not be enlarged into a fee by the force of the term "lawful heirs," since these words were followed by words of partition and distribution, inconsistent with the devolution of the estate by inheritance, and the gift being of the proceeds to be divided in a manner specially prescribed, the terms of the gift must be construed as clearly indicative of an intent to give a life estate only to the first taker, with a gift over to those who might be deemed embraced within the term 29 L.R.A. (N.S.)

"lawful heirs," as purchasers. *Fulton v. Harman*, 44 Md. 251.

In a bequest to the testator's son for life of certain negroes, the will providing that at his death, if he should die leaving heirs lawfully begotten of his body, the said negroes should be equally divided between them, with a devise over in case of his dying without heirs, it was held that it was obvious that the testator intended that after the death of his son, the legatees should take distributively and as purchasers, and not in succession as heirs, but together as children. *Swain v. Rascoe*, supra.

In *Self v. Tune*, 6 Munf. 470, slaves were deeded to donor's daughter and her husband for and during their lives, or the longest liver of them, and it was provided that after their deaths the slaves and their increase should be equally divided among the heirs of the daughter's body, and in default of such heirs, to return and to be equally divided between the donor's son and other daughter, their heirs and assigns forever. It was held that the first grantee took an estate for life only, the words "heirs of her body," together with the words "equally to be divided between them," indicating that the former were words of purchase.

³⁵ *Jacobs v. Amyatt*, 4 Bro. Ch. 542.

³⁶ *Rogers v. Lowthian*, 27 Grant, Ch. (U. C.) 559.

³⁷ *O'Brien v. Hilburn*, 22 Tex. 616.

And under a deed "loaning" to a woman for life certain negroes, and after her death to the heirs of her body "which shall survive her, to be equally divided amongst them," it was held that she took the entire interest. *Watts v. Clardy*, 2 Fla. 369; *Bailey v. Clardy*, 2 Fla. 392.

And under a will by which the testator "loaned" unto his daughter certain property during her life, and after her death to the heirs of her body, "share and share about," it was held that absolute interest vested in her. *Ibid.*

Where the gift was of public funds upon trust to pay the dividends after certain life estates to and amongst the eldest sons or son of testator's brothers, and the survivors or survivor of them for their lives or life, and in equal shares and proportions, on

3. Superadded words of limitations.

A devise of personal property to a daughter for life, and then to the natural heirs of her body, to them and their heirs, being such as to create an estate tail if the devise had been of real estate, was held to create in the first taker an absolute title to the property.³⁸

But where a bequest of personal property was to testator's sister, and after her death to the heirs of her body, to them and their heirs and assigns forever, it was held that the words "heirs of the body" were words of purchase, since it was apparent that the heirs were not to take through the life tenant, who was given only the use of the property, the direct bequest being to the heirs.³⁹

4. Limitations over.

Where a testator gave a certain amount of personal property to a woman to receive the interest during her life, the will providing that it should then go to her issue, and in case of her death without is-

their attaining twenty-one, with a provision for maintenance in the meantime, and after the death of such eldest sons or son, to pay the dividends unto and amongst the eldest male issue only for the time being of their bodies *ad infinitum* forever, it was held that the sons took an absolute interest in their several shares of stock. *Harvey v. Towell*, 7 Hare, 231.

A will by which the testator lent to his daughter during life certain negroes, and bequeathed the same to her lawfully begotten heirs, to be equally divided among them at her death, was held to create an absolute interest in the first taker, under the rule in *Shelley's Case*. *Ewing v. Standefer*, 18 Ala. 400.

A bequest of personal property to the testator's daughters for life, remainder to their heirs, share and share alike, was held, under the rule in *Shelley's Case*, to vest an absolute title in the daughters. *Knox v. Barker*, 8 N. D. 272, 78 N. W. 362.

In *Cockin's Appeal*, 111 Pa. 26, 2 Atl. 363, a devise of personal property to the three nieces of the testator, share and share alike, during their lives, and at their deaths to their heirs, etc., was held, under the rule in *Shelley's Case* to give the devisees the personal property absolutely.

³⁸ *Coon v. Rice*, 29 N. C. (7 Ired. L.) 217.

And a gift to the use of a daughter for life, and after her death to the heirs of her body, their executors, administrators, and assigns, and in case she dies without heir of her body, remainder over, gives an estate tail to the daughter in the lands, and therefore an absolute property in the slaves. *Bradley v. Mosby*, 3 Call. (Va.) 50.

But a devise of chattels to the devisee

sue, over, it was held that she took an absolute interest in the property, and that this interest was not affected by the subsequent words of the will, the limitation over in case of her death without issue, unrestricted by any words limiting the generality of the expression "without issue," being void for remoteness.⁴⁰

d. Miscellaneous limitations.

A woman having, in contemplation of marriage, conveyed land and slaves in trust for her sole and separate use after the marriage, with power to dispose thereof by deed or will, and, in default of such disposition, to her issue, and, in default of issue, "to hold in trust to her heirs at law and distributees," it was held that she took the absolute estate, the word "distributees," as well as the word "heirs," being a word of limitation, and not of purchase.⁴¹ And it was held that the first devisee took an absolute interest under a bequest of personal property in trust for life, with remainder to her appointees by will, with remainder, in default of ap-

for life, and at her death to the heirs of her body and their heirs and assigns forever, was held not to be within the rule, the latter limitation restraining the general sense of the words "heirs of her body." *Dott v. Willson*, 1 Bay, 457.

An exception to the rule has always been made when to words of limitation, "heirs of the body," improperly applied to personal bequests, further words of limitation have been superadded, as "executors," "administrators and assigns," or the words "equally to be divided" and the like. It has always been inferred from the words so grafted upon the limitation "to the heirs of the body of the legatee," the testator could not intend the heirs to inherit *qua* heirs *ad infinitum*, but that they should take distributively, so as to give the legatee an interest for life only, with remainder to his children or heirs, as tenants in common. *Swain v. Rascoe*, 25 N. C. (3 Ired. L.) 200, 38 Am. Dec. 720.

Where a testator by will left negroes to a daughter during her lifetime or widowhood, and then gave them to her lawful heirs, for them and their heirs forever, it was held that the absolute interest in the slaves vested in the daughter. *Ham v. Ham*, 21 N. C. (1 Dev. & B. Eq.) 598.

In *Wicker v. Ray*, 118 Ill. 472, 8 N. E. 835, a limitation, after a devise of a life estate, was to the life tenant's right heirs forever. This was held, under the rule in *Shelley's Case*, to vest a fee in the first taker.

³⁹ *Lemacks v. Glover*, 1 Rich. Eq. 141.

⁴⁰ *Atty. Gen. v. Bright*, 2 Keen, 57.

⁴¹ *Boyd v. Small*, 56 N. C. (3 Jones, Eq.) 39.

pointment, to her executors and administrators.⁴² And where there was a bequest of personal property to unborn issue as tenants for life, and to the executors, administrators, and assigns of the survivor of the unborn issue, it was held that the gift to the executors, administrators, and assigns of the surviving tenant for life attached to the life estate, so as to give a contingent absolute interest to each tenant for life. That this contingent absolute interest vested in possession in the surviving tenant for life as soon as he was ascertained; that it attached the absolute interest as much to the life estate in the case of personal property, as the rule in Shelley's Case attached the inheritance to the life estate in a case of a contingent limitation to the heirs or heirs of the body of the tenant for life of a freehold estate, so as to make the heir take by descent when the contingency happens.⁴³

Where the conveyance of slaves was in trust for the use and benefit of a woman for and during the life of her husband, then in trust for the use of her child or children by her husband who may be living at the time of her death, if more than one, then to be divided among them, share and share alike, etc., it was held that the obvious intent of the conveyance was to constitute in her descendants a new stock of

inheritance, and not that her issue should take as heirs by descent and successively.⁴⁴

XX. Abolition of rule by statute.

In spite of the vigorous assaults made upon the rule, it has never been abolished by statute in England, and consequently still flourishes in the country in which it had its birth. On this side of the Atlantic, however, it has not been so fortunate, for in many jurisdictions it has been put aside, directly or indirectly, by legislative acts. The fact that it was necessary to appeal to the legislatures to change the rule shows how firmly it had taken root. A feeling of satisfaction on the part of the profession, however, has generally followed the adoption of these statutes, but occasionally there have been regrets, as well. In this connection the well-known lament of Chancellor Kent on the abolition of the rule in New York state will be recalled.⁴⁵

The point to be observed in connection with these statutes is that they do not obviate the difficulty which confronted the court in Shelley's Case. The various statutes relating to the rule have simply changed words which would be words of limitation under the rule in Shelley's Case, into words of purchase. They have created no new kind of an estate. Therefore it

⁴² Devall v. Dickens, 9 Jur. 550.

⁴³ Avern v. Lloyd, L. R. 5 Eq. 383.

⁴⁴ Dudley v. Mallery, 4 Ga. 52.

Where a testator lent certain negroes to his daughter for her life, and to her heirs lawfully begotten on her body, the will providing that after the daughter's death the slaves and their increase should be divided amongst her children, if living, otherwise over, it was held that this gave the daughter only a life estate in the slaves. Pryor v. Duncan, 6 Gratt. 27.

A bequest of personal property to a daughter for life, and then to her children, if she should die leaving any, and if she should die without issue, the property to be equally divided between other daughters, share and share alike, was held, under the laws of Pennsylvania, to give the first devisee only a life interest in the property. Crandell v. Barker, 8 N. D. 263, 78 N. W. 347.

But a legacy given to a woman with a proviso that the capital was to remain whole for her child or children or heirs at law was held to give her the absolute title. Pairo v. Pairo, 24 Wash. L. Rep. 822.

⁴⁵ "The juridical scholar," says the learned author of the Commentaries, "on whom his great master, Coke, has bestowed some portion of the 'gladsome light of jurisprudence,' will scarcely be able to withhold an involuntary sigh, as he casts a retrospective glance over the piles of learning, devoted 29 L.R.A. (N.S.)

to destruction by an edict as sweeping and unrelenting as the torch of Omar. He must bid adieu forever to the renowned discussions in Shelley's Case, which were so vehement and so protracted as to arouse the sceptre of the haughty Elizabeth. He may equally take leave of the multiplied specimens of profound logic, skilful criticism, and refined distinctions which pervade the varied cases in law and equity, from those of Shelley and Archer down to the direct collision between the courts of law and equity in the time of Lord Hardwicke. He will have no more concern with the powerful and animated discussions in Perrin v. Blake, which awakened all that was noble and illustrious in talent and endowment, through every precinct of Westminster Hall. He will have occasion no longer, in pursuit of the learning of that case, to tread the clear and bright paths illuminated by Sir William Blackstone's illustrations, or to study and admire the spirited and ingenious dissertation of Hargrave, the comprehensive and profound disquisition of Fearn, the acute and analytical essay of Preston, the neat and orderly abridgment of Cruise, and the severe and piercing criticisms of Reeve. What I have therefore written on this subject may be considered, so far as my native state is concerned, as a humble monument to the memory of departed learning." 4 Kent, Com. 233, note.

is as impossible to pass an estate by descent to the heirs now without giving the fee to the ancestor, as it ever was. Some of the statutes specify that the word "heirs" in a limitation to the heirs of the life tenant shall be deemed a word of purchase; others specify that the first taker shall be deemed to take an estate for life only, and the heirs an estate in fee; others, that the life estate shall not be deemed enlarged by virtue of the limitation in remainder. All of these statutes come to the same thing. They give effect to the intention to create a life estate in the first taker, and it necessarily follows that the heirs must be given an estate by purchase. This is the substitution of one arbitrary rule for another. See *supra*, XII.

The Nebraska statute providing that effect shall be given to the intention of the ancestor of the instrument is as indefinite a provision as well could be; since it is the purpose of the rule in Shelley's Case to give effect to the intention (see *supra*, XII.), the only question being what intention is meant. Probably what the Nebraska legislature meant was that effect should be given to the intention that the first taker have but a life estate. What the Nebraska legislature overlooked was the fact that, in giving effect to this intention, any intention that the whole line of the life tenant's heirs should take as the law would cast the

descent must be disregarded. If, for example, A should make a will devising land to B for life only, without power to dispose of it in any manner, the will then providing that the land at the death of B should go to B's heirs in the same manner as if B had died intestate, it would be impossible to give effect to both of these intents. If effect should be given to the intent that B take for life, then his heirs must take by purchase; it would be impossible for his heirs to take as the statute would cast the descent. The moment effect is given to the intention that the heirs shall take as the law casts the descent, B must be given a fee. Neither the Nebraska statute nor any other statute has created an estate which the ancestor may enjoy for life as a life estate, and which after his death will descend to the whole line of his heirs, in succession from generation to generation. As pointed out several times, the rule in Shelley's Case gives effect to the supposed intent as to the course the property shall take after the death of the life tenant; the statutes to give effect to the intent as to the first taker's estate. Neither the rule nor the statute can give effect to both intents. As to which is better calculated to carry out the main intention of the author of the instrument, see *supra*, VII.⁴⁶

Canada.

⁴⁶ The rule in Shelley's Case is in force in Canada. For cases discussing or applying the rule, see *Re Brand*, 4 Ont. Week. Rep. 473, s. c. on subsequent appeal 5 Ont. Week. Rep. 297; *Brown v. O'Dwyer*, 35 U. C. Q. B. 354; *Re Casner*, 6 Ont. Rep. 282; *Re Cleator*, 10 Ont. Rep. 326; *Ferris v. Ferris*, 9 Ont. Rep. 324; *Garriepie v. Oliver*, 8 B. C. 89; *Grant v. Squire*, 2 Ont. L. Rep. 131; *Haight v. Dangersfield*, 5 Ont. L. Rep. 274, 1 Ont. Week. Rep. 551; *Re Hamilton*, 18 Ont. Rep. 195; *Meyers v. Hamilton Provident & L. Co.* 19 Ont. Rep. 358; *Nealis v. Jack*, N. B. Eq. Cas. 426; *Purcell v. Tully*, 12 Ont. L. Rep. 5; *Rogers v. Lowthian*, 27 Grant, Ch. (U. C.) 559; *Romanes v. Smith*, 8 Ont. Pr. Rep. 323; *Re Sharon*, 12 Ont. L. Rep. 605; *Smith v. Smith*, 8 Ont. Rep. 677; *Re Thomas*, 2 Ont. L. Rep. 660; *Tunis v. Passmore*, 32 U. C. Q. B. 419.

Alabama.

The rule in Shelley's Case was repealed in Alabama by the Code of 1852. *Mason v. Pate*, 34 Ala. 379; *McQueen v. Logan*, 80 Ala. 304.

The statute now § 1085 (1898) first appeared as § 1304 of the Code of 1852. The latter statute appears, as imported by its title, to abolish the rule in Shelley's Case; the abolition being not in express terms, but by altering the effect of conveyances falling within that rule. *Wilson v. Alston*, 122 Ala. 630, 25 So. 225.
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Under a statute providing that "when a remainder, created by deed or will, is limited to the heirs, issue, or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the heirs, issue, or heirs of the body of such tenant for life, are entitled to take as purchasers, by virtue of the remainder so limited to them," a devisee under a will providing that the property given to the devisee at her death should descend to her bodily heirs would take only a life estate. *Mason v. Pate*, *supra*; *Alabama Code*, § 1304.

Prior to the adoption of the statute of 1852, the rule was in force. For cases in which the rule is discussed, see *McGraw v. Davenport*, 6 Port. (Ala.) 319; *Price v. Price*, 5 Ala. 578; *Woodley v. Findlay*, 9 Ala. 716; *Dunn v. Davis*, 12 Ala. 135; *Machen v. Machen*, 15 Ala. 373; *Lenoir v. Rainey*, 15 Ala. 667; *Ewing v. Standefer*, 18 Ala. 400; *Hammer v. Smith*, 22 Ala. 433; *Williamson v. Mason*, 23 Ala. 488; *McVay v. Ijams*, 27 Ala. 238; *Elmore v. Mustin*, 28 Ala. 309; *McCullough v. Gliddon*, 33 Ala. 208; *Shackelford v. Bullock*, 34 Ala. 418; *Lloyd v. Rambo*, 35 Ala. 709; *Roberts v. Ogbourne*, 37 Ala. 174; *Parish v. Parish*, 37 Ala. 591; *Twelves v. Nevill*, 39 Ala. 175; *Bradford v. Howell*, 42 Ala. 422; *May v. Ritchie*, 65 Ala. 602; *Terrell v. Cunningham*, 70 Ala. 100; *McQueen v. Logan*, 80

Ala. 304; *Terrell v. Reeves*, 103 Ala. 264, 16 So. 54; *Campbell v. Noble*, 110 Ala. 382, 19 So. 28; *Rosenau v. Childress*, 111 Ala. 214, 20 So. 95; *Holt v. Pickett*, 111 Ala. 362, 20 So. 432; *Watson v. Williamson*, 129 Ala. 362, 30 So. 281; *Findley v. Hill*, 133 Ala. 229, 32 So. 497; *Due v. Woodward*, 151 Ala. 136, 44 So. 44.

Arkansas.

The rule is in force in Arkansas. See *Maulding v. Scott*, 13 Ark. 88, 56 Am. Dec. 298; *Denson v. Thompson*, 19 Ark. 66.

The rule in *Shelley's Case* is in force in Arkansas under a statute (§ 566 of *Mansfield's Dig.*) providing that "the common law of England, so far as the same is applicable and of a general nature, and all statutes of the British Parliament in aid of or to supply the defect of the common law made prior to the fourth year of James I. (that are applicable to our own form of government), of a general nature, and not local to that Kingdom, and not inconsistent with the Constitution and laws of the United States or the Constitution and laws of this state, shall be the rule of decision in this state unless altered or repealed by the general assembly of this state." *Hardage v. Stroope*, 58 Ark. 303, 24 S. W. 490.

California.

Section 779 of the California Civil Code, providing that "when a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to it by virtue of the remainder so limited to them, and not as mere successors of the owner for life," was held in effect to abrogate the rule in *Shelley's Case*. *Barnett v. Barnett*, 104 Cal. 298, 37 Pac. 1049.

Prior to that, the rule was in full force in that state. See *McDonnell's Estate*, *Myrick Prob. Ct. Rep.* (Cal.) 94; *Norris v. Hensley*, 27 Cal. 449; *Re Utz*, 43 Cal. 200.

Connecticut.

The rule in *Shelley's Case* has been abolished by statute in Connecticut. *Throop v. Williams*, 5 Conn. 100.

The statute of 1821 was passed for the specific purpose of abolishing the rule. *Leake v. Watson*, 60 Conn. 498, 21 Atl. 1075.

For cases in which the rule is discussed, see *Bishop v. Selleck*, 1 Day, 299; *Goodrich v. Lambert*, 10 Conn. 448.

Delaware.

The rule in *Shelley's Case* is in force in Delaware. *Griffith v. Derringer*, 5 Harr. (Del.) 284; *Daniel v. Whartenby*, 17 Wall. 639, 21 L. ed. 661.

But only as to grants or devises of real estate. *Jones v. Rees*, 6 Penn. (Del.) 504, 16 L.R.A. (N.S.) 734, 69 Atl. 785.

For other cases discussing the rule, see *State use of Hoffner v. Lyons*, 5 Harr. 29 L.R.A. (N.S.)

(Del.) 196; *Doe ex dem. Wright v. Gooden*, 6 Houst. (Del.) 397; *Jamison v. McWhorter*, 7 Houst. (Del.) 242, 31 Atl. 517; *Gross v. Sheeler*, 7 Houst. (Del.) 280, 31 Atl. 812.

District of Columbia.

Since in Maryland the rule has been in full force and operation from the earliest settlement of the colony, as a rule of property, and as the laws of that state as they existed on the 27th day of February, 1801, were continued in force over the District of Columbia, except where they were, or might thereafter become, inconsistent or in conflict with the legislation of Congress, the rule is a part of the common law of the District of Columbia, and, said the court in *Sims v. Georgetown College*, 1 App. D. C. 72, while not disposed to enlarge or give the rule any new application, this court has no power whatever to depart from the rule, or in the least to restrict its application. To do so would be to disrupt the ligaments of title and to introduce confusion, where, for the good of the community, quiet and repose should be maintained.

For cases on the rule, see also *DeVaughn v. DeVaughn*, 3 App. D. C. 50; *Dengel v. Brown*, 1 App. D. C. 423; *Slater v. Rudderforth*, 25 App. D. C. 497; *Vogt v. Vogt*, 26 App. D. C. 46; *Craig v. Warner*, 5 Mackey, 460, 60 Am. Rep. 381; *Pairo v. Pairo*, 24 Wash. L. Rep. 822; *Engle v. Mades*, 25 Wash. L. Rep. 229.

Florida.

The rule is in force in Florida. See *Watts v. Clardy*, 2 Fla. 369; *Russ v. Russ*, 9 Fla. 105.

Georgia.

The rule used to be in force in Georgia. *Edmondson v. Dyson*, 2 Ga. 307; *Dudley v. Mallery*, 4 Ga. 52.

But the Code by §§ 2248, 2249, and 2250 abrogates the rule and wipes it out utterly as a rule of law in limitations over. *Wilkerson v. Clark*, 80 Ga. 367, 12 Am. St. Rep. 258, 7 S. E. 319.

The Code extirpates the rule in *Shelley's Case* and establishes the very reverse of its doctrine as to all limitations over. *Ewing v. Shropshire*, 80 Ga. 374, 7 S. E. 554.

Section 2249 of the Code of Georgia, providing that "limitations over to heirs, heirs of the body, lineal heirs, lawful heirs, issue, or words of similar import, shall be held to mean children, whether the parents be alive or dead; and under such words, children and the descendants of deceased children, by representation in being at the time of the vesting of the estate shall take," was held to be a virtual abolition of the rule in *Shelley's Case* as to limitations over in conveyances executed in Georgia since the adoption of the Code. *Smith v. Collins*, 90 Ga. 411, 17 S. E. 1013.

For other cases on the rule, see *Choice v. Marshall*, 1 Ga. 97; *Benton v. Patterson*, 8 Ga. 146; *Tucker v. Adams*, 14 Ga.

548; *Robert v. West*, 15 Ga. 124; *Dudley v. Porter*, 16 Ga. 613; *Jones v. Jones*, 20 Ga. 699; *Childers v. Childers*, 21 Ga. 377; *Pournell v. Harris*, 29 Ga. 736; *Shannon v. Jackson*, 30 Ga. 224; *Herring v. Rogers*, 30 Ga. 615; *Burton v. Black*, 30 Ga. 641; *Lillibridge v. Ross*, 31 Ga. 730; *Varner v. Boynton*, 46 Ga. 508; *Wayne v. Lawrence*, 53 Ga. 15; *O'Byrne v. Feeley*, 61 Ga. 77; *Gaboury v. McGovern*, 74 Ga. 133; *Craig v. Ambrose*, 80 Ga. 134, 4 S. E. 1; *Durant v. Muller*, 88 Ga. 251, 14 S. E. 612; *Carnes v. Baker*, 100 Ga. 779, 28 S. E. 496.

Hawaii.

In *Thurston v. Allen*, 8 Haw. 392, the court refused to adopt the rule in *Shelley's Case*.

Idaho.

The rule in *Shelley's Case* has been abolished by § 3076 of the Revised Codes of Idaho, providing that "when a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate are the successors or heirs of the body of the owner for life are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life." *Wilson v. Lindner* (Idaho) 110 Pac. 274.

Illinois.

The rule in *Shelley's Case* has been in force since Illinois was organized. *Ryan v. Allen*, 120 Ill. 648, 12 N. E. 65; *Lord v. Comstock*, 240 Ill. 492, 88 N. E. 1012; *Hall v. Hankey*, 98 C. C. A. 173, 174 Fed. 139.

The rule in *Shelley's Case* is the law of Illinois under an act providing that "the common law of England, so far as the same is applicable, shall be the rule of decision, and shall be considered of full force until repealed by legislative authority." *Baker v. Scott*, 62 Ill. 86.

The Illinois conveyance act, Rev. Stat. 1845, chap. 24, § 13, p. 105, providing that "every estate in lands which shall be granted, conveyed, or devised to one, although other words heretofore necessary to transfer an estate of inheritance be not added, shall be deemed a fee simple estate of inheritance, if a less estate be not limited by express words, or do not appear to have been granted, conveyed, or devised by construction or operation of law," does not abolish the rule in *Shelley's Case*. *Ibid*.

As far as estates tail are concerned, the rule in *Shelley's Case* has been repealed by § 6 of the Illinois conveyance act, and the rule can therefore operate only in one case, and that is, where the devise gives the ancestor a freehold for life and limits the inheritance in fee to the heirs without naming any particular class. *Butler v. Huestia*, 68 Ill. 594, 18 Am. Rep. 589.

The 6th section of the Illinois conveyance act provided that where, by the common law, any person might become seised 29 L.R.A. (N.S.)

in fee tail of any lands, tenements, or hereditaments, by virtue of any devise, gift, grant, etc., such persons, instead of becoming seised thereof in fee tail, should be deemed and adjudged to be and become seised thereof for his or her life only, and the remainder should pass in fee simple absolute to the person or persons to whom the estate tail would, on the death of the first grantee, donee, or devisee in tail, first pass according to the course of the common law by virtue of such devise, gift, grant, or conveyance. *Blair v. Vanblarcum*, 71 Ill. 290.

The rule applies only to limitations in which the word "heirs" was used, the rule by statute not applying to estates tail. *Schaefer v. Schaefer*, 141 Ill. 337, 31 N. E. 136.

The rule in *Shelley's Case* is still in force. *Johnson v. Buck*, 220 Ill. 226, 77 N. E. 163; *Lord v. Comstock*, *supra*.

For cases on the rule, see *Brislain v. Wilson*, 63 Ill. 173; *Beacroft v. Strawn*, 67 Ill. 28; *Riggin v. Love*, 72 Ill. 553; *Lynch v. Swayne*, 83 Ill. 336; *Belslay v. Engel*, 107 Ill. 182; *Wicker v. Ray*, 118 Ill. 472, 8 N. E. 835; *Carpenter v. Van Olinder*, 127 Ill. 42, 2 L.R.A. 455, 11 Am. St. Rep. 92, 19 N. E. 868; *Hageman v. Hageman*, 129 Ill. 164, 21 N. E. 814; *Griswold v. Hicks*, 132 Ill. 494, 22 Am. St. Rep. 549, 24 N. E. 63; *Fowler v. Black*, 136 Ill. 363, 11 L.R.A. 670, 26 N. E. 596; *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751; *Vangieson v. Henderson*, 150 Ill. 119, 36 N. E. 974; *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325; *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013; *Glover v. Condell*, 163 Ill. 566, 35 L.R.A. 360, 45 N. E. 173; *Davis v. Sturgeon*, 198 Ill. 520, 64 N. E. 1016; *Deemer v. Kessinger*, 206 Ill. 57, 69 N. E. 28; *Bennett v. Bennett*, 217 Ill. 434, 4 L.R.A. (N.S.) 470, 75 N. E. 339; *Strawbridge v. Strawbridge*, 220 Ill. 61, 4 L.R.A. (N.S.) 948, 110 Am. St. Rep. 226, 77 N. E. 78; *Rissman v. Wierth*, 220 Ill. 181, 110 Am. St. Rep. 243, 77 N. E. 108; *Dick v. Ricker*, 222 Ill. 413, 113 Am. St. Rep. 426, 78 N. E. 823; *Pease v. Davis*, 225 Ill. 408, 80 N. E. 249; *Miller v. Mowers*, 227 Ill. 392, 81 N. E. 420, *Connor v. Gardner*, 230 Ill. 258, 15 L.R.A. (N.S.) 73, 82 N. E. 640; *Stisser v. Stisser*, 235 Ill. 207, 85 N. E. 240, *McFall v. Kirkpatrick*, 236 Ill. 281, 86 N. E. 139; *Monast v. Letourneau*, 87 Ill. App. 300; *Hicks v. Deemer*, 87 Ill. App. 384, reversed on another point in 187 Ill. 164, 58 N. E. 252.

Indiana.

The rule is in force in Indiana. *Doe ex dem. Patterson v. Jackman*, 5 Ind. 283; *Hull v. Beals*, 23 Ind. 25; *Andrews v. Spurlin*, 35 Ind. 262; *Ridgeway v. Lanphear*, 99 Ind. 251; *Fountain Co. Coal & Min. Co. v. Beckleheimer*, 102 Ind. 76, 52 Am. Rep. 645, 1 N. E. 202; *Allen v. Craft*, 109 Ind. 476, 58 Am. Rep. 425, 9 N. E. 919; *Taney v. Fahnley*, 126 Ind. 88, 25 N. E. 882; *Earnhart v. Earnhart*, 127 Ind. 397, 22 Am. St. Rep. 652, 26 N. E. 895;

Chamberlain v. Runkle, 28 Ind. App. 599, 63 N. E. 486; Snyder v. Greendale Land Co. (Ind. App.) 91 N. E. 819.

The rule was adopted by a statute adopting the common law. Siceloff v. Redman, 26 Ind. 251.

In Millett v. Ford, 109 Ind. 159, 8 N. E. 917, the court said that it is difficult to reconcile the rule in Shelley's Case with the accepted rule sometimes called the cardinal rule for testamentary construction and interpretation, that is, that the intention of the testator shall control; but the rule is binding upon the courts of Indiana as a law of real property.

The rule applies to devises. Perkins v. McConnell, 136 Ind. 384, 36 N. E. 121.

For cases discussing or applying the rule, see also Jordan v. Gatewood, Smith (Ind.) 82; Sorden v. Gatewood, 1 Ind. 107; Small v. Howland, 14 Ind. 592; Prior v. Quackenbush, 29 Ind. 475; McCray v. Lipp, 35 Ind. 116; Nelson v. Davis, 35 Ind. 474; Gonzales v. Barton, 45 Ind. 295; Smith v. McCormick, 46 Ind. 135; Owen v. Cooper, 46 Ind. 524; King v. Rea, 56 Ind. 1; Helm v. Frisbie, 59 Ind. 526; Stilwell v. Knapper, 69 Ind. 558, 35 Am. Rep. 240; McMahan v. Newcomer, 82 Ind. 565; Fletcher v. Fletcher, 88 Ind. 418; Shimer v. Mann, 99 Ind. 190, 50 Am. Rep. 82; Hadlock v. Gray, 104 Ind. 596, 4 N. E. 167; Hochstedler v. Hochstedler, 108 Ind. 506, 9 N. E. 467; Conger v. Lowe, 124 Ind. 368, 9 L.R.A. 165, 24 N. E. 889; Jackson v. Jackson, 127 Ind. 346, 26 N. E. 897; Lane v. Utz, 130 Ind. 235, 29 N. E. 772; McIlhinny v. McIlhinny, 137 Ind. 411, 24 L.R.A. 489, 45 Am. St. Rep. 186, 37 N. E. 147; Waters v. Lyon, 141 Ind. 170, 40 N. E. 662; Granger v. Granger, 147 Ind. 95, 36 L.R.A. 186, 44 N. E. 189, 46 N. E. 80; Teal v. Richardson, 160 Ind. 119, 66 N. E. 435; Bonner v. Bonner, 28 Ind. App. 147, 62 N. E. 497; Burton v. Carnahan, 38 Ind. App. 612, 78 N. E. 682; Reddick v. Lord (Ind.) 30 N. E. 1085.

Iowa.

In Brown v. Brown, 125 Iowa, 218, 67 L.R.A. 629, 101 N. W. 81, the court said that whether the rule in Shelley's Case was in force in Iowa was a question upon which the members of the court were not agreed.

In Hambel v. Hambel (Iowa) 75 N. W. 673, it was questioned whether the rule was in force.

As to deeds, the rule was held in force in Wilson v. Rusk (Iowa) 103 N. W. 204.

It was finally decided to be in force, in Doyle v. Andis, 127 Iowa, 36, 69 L.R.A. 953, 102 N. W. 177, 4 A. & E. Ann. Cas. 18, in which there is an able discussion on both sides of the question as to the desirability of adopting the rule.

In Kepler v. Larson, 131 Iowa, 438, 7 L.R.A. (N.S.) 1109, 108 N. W. 1033, a majority of the court were of the opinion that the rule was in force.

But the rule in Shelley's Case was 29 L.R.A. (N.S.)

abrogated by chap. 159, p. 157, Acts 32d General Assembly. Brokaw v. Brokaw (Iowa) 113 N. W. 469; Daniels v. Dingman, 140 Iowa, 286, 118 N. W. 373.

For other cases on the rule, see Zuver v. Lyons, 40 Iowa, 510; Hanna v. Hawes, 45 Iowa, 437; Slemmer v. Crampton, 50 Iowa, 302; Pierson v. Lane, 60 Iowa, 60, 14 N. W. 90; Kiene v. Gmehle, 85 Iowa, 312, 52 N. W. 232; Zavitz v. Preston, 96 Iowa, 52, 64 N. W. 668; Westcott v. Binford, 104 Iowa, 645, 65 Am. St. Rep. 530, 74 N. W. 18; Ault v. Hillyard, 138 Iowa, 239, 115 N. W. 1030.

Kansas.

The rule has been abolished as to wills in Kansas by statute providing that "when lands, tenements, or hereditaments are given by will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such part taken, and a remainder in fee simple in his heirs." Kan. Gen. Stat. 1897, chap. 110, § 52.

Kentucky.

The rule in Shelley's Case is not in force in Kentucky. Williamson v. Williamson, 18 B. Mon. 329.

It has never prevailed there. Allen v. Terrell, 1 Ky. L. Rep. 336.

In Truman v. White, 14 B. Mon. 560, the court said that as there had been no reported case in which the court had applied the rule with the effect of determining by it the rights of property involved, it could not be said to have become a rule of property in Kentucky, and especially as it had not been so construed and acted upon in the community.

The rule in Shelley's Case was abolished by the Revised Statutes of Kentucky, the abolition arising from an affirmative enactment in direct opposition to the rule, that when an estate is given to one for life and after his death to his heirs, or the heirs of his body, etc., it shall be construed as an estate for life only in the first donee and a remainder in fee simple to his heirs or the heirs of his body, etc. Stephenson v. Hagan, 15 B. Mon. 282.

Section 10, art. 1. chap. 63, of the Kentucky General Statutes (also 2 Rev. Stat. chap. 88, § 10, Ky. Stat. § 2345) provides: "If any estate shall be given by deed or will to any person for his life, and after his death to his heirs or the heirs of his body, or his issue or descendants, the same shall be construed to be an estate for life only in such person, and a remainder in fee simple in his heirs, or the heirs of his body, or his issue or descendants." Brown v. Ferrell, 83 Ky. 417; Clay v. Chenault, 10 Ky. L. Rep. 779, 10 S. W. 650; Montgomery v. Montgomery, 11 Ky. L. Rep. 87, 11 S. W. 596; Jones v. Carlin, 29 Ky. L. Rep. 1077, 96 S. W. 885.

For Kentucky cases, however, in which rule is discussed, see also M'Nair v. Hawkins, 4 Bibb, 390; Moore v. Howe, 4 T. B. Mon. 206; Prescott v. Prescott, 10 B. Mon. 56; Berry v. Williamson, 11 B. Mon. 245;

Wedekind v. Hallenberg, 88 Ky. 114, 10 S. W. 368.

Maine.

The rule in Shelley's Case was abolished in Maine by Rev. Stat. chap. 73, § 6. Buck v. Paine, 75 Me. 582; Plummer v. Hilton, 78 Me. 26, 3 Atl. 649.

Maryland.

The rule, with all its qualifications, must be regarded as part of the system of real law of Maryland. Ware v. Richardson, 3 Md. 505, 56 Am. Dec. 782.

The rule has long been recognized. Tongue v. Nutwell, 13 Md. 415.

It was introduced into Maryland as part of the common law. Simpvers v. Simpvers, 15 Md. 160.

It has not been abolished by statute. Griffith v. Plummer, 32 Md. 74.

It is still in force. Thomas v. Higgins, 47 Md. 439; Dickson v. Satterfield, 53 Md. 317; Stump v. Jordan, 54 Md. 619; Travers v. Wallace, 93 Md. 507, 49 Atl. 415; Waller v. Pollitt, 104 Md. 172, 64 Atl. 1040; Cook v. Councilman, 109 Md. 622, 72 Atl. 404.

There is perhaps no rule of property more deeply rooted in the jurisprudence of Maryland. Hughes v. Nicklas, 70 Md. 484, 14 Am. St. Rep. 377, 17 Atl. 398.

In Hall v. Gradwohl (Md.) 77 Atl. 480, however, the court said that the rule in Shelley's Case is not a favored rule in the law of Maryland, although the court will never refuse to apply it in a proper case.

For cases discussing or applying the rule, see also Keys v. Goldsborough, 2 Harr. & J. 369; Horne v. Lyth, 4 Harr. & J. 431; Lyles v. Digges, 6 Harr. & J. 364, 14 Am. Dec. 281; Clagett v. Worthington, 3 Gill, 83; Chelton v. Henderson, 9 Gill, 432; Goldsborough v. Martin, 41 Md. 488; Shreve v. Shreve, 43 Md. 382; Fulton v. Harman, 44 Md. 251; Timanus v. Dugan, 46 Md. 408; Thomas v. Higgins, 47 Md. 439; Clarke v. Smith, 49 Md. 106; Josetti v. McGregor, 49 Md. 202; Stonebraker v. Zollickoffer, 52 Md. 154, 36 Am. Rep. 364; Dickson v. Satterfield, 53 Md. 317; Stump v. Jordan, 54 Md. 619; Nevin v. Gillespie, 56 Md. 320; Brown v. Renshaw, 57 Md. 67; Donnelly v. Turner, 60 Md. 81; Warner v. Sprigg, 62 Md. 14; Henderson v. Henderson, 64 Md. 185, 1 Atl. 72; Handy v. McKim, 64 Md. 560, 4 Atl. 125; Pennington v. Pennington, 70 Md. 418, 3 L.R.A. 816, 17 Atl. 329; Benson v. Linthicum, 75 Md. 141, 23 Atl. 133; Seeger v. Leakin, 76 Md. 500, 25 Atl. 882; Mercer v. Hopkins, 88 Md. 292, 41 Atl. 156; Mercer v. Safe Deposit & T. Co. 91 Md. 102, 45 Atl. 865; Reilly v. Bristow, 105 Md. 326, 66 Atl. 262; Stafford v. Martin (Md.) 23 Atl. 734.

Massachusetts.

The rule was abrogated in Massachusetts as to wills, as early as 1791. Steel v. Cook, 1 Met. 281.

It was, without doubt, the intention of the legislature to abolish the rule in Shelley's Case by statute of 1791, chap. 60, § 3, 29 L.R.A. (N.S.)

which enacts "that whenever any person shall hereafter, in and by his last will and testament, devise any lands, etc., to any person for and during the term of such person's natural life, and after his death, to his children or heirs or right heirs in fee, such devise shall be taken and construed to vest an estate for life only in such devisee, and a remainder in fee simple in such children, heirs, or right heirs, any law, usage, or custom to the contrary notwithstanding." Bowers v. Porter, 4 Pick. 198.

This provision was re-enacted and extended to lands given by deed as well as by will, by Rev. Stat. chap. 59, § 9. Richardson v. Wheatland, 7 Met. 169.

Where by construction of law a life estate is created, and in the same will a remainder to the heirs or children in fee, the statute will operate to prevent the application of the rule in Shelley's Case. Bowers v. Porter, supra.

Under a statute providing that "when lands are given by deed or will to a person for life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee simple in his heirs" (Mass. Pub. Stat. chap. 126, § 4), it was held in Trumbull v. Trumbull, 149 Mass. 200, 4 L.R.A. 117, 21 N. E. 366, that a devise to a son for life and to his lawful issue forever if he should die leaving any such issue, but in case of dying without issue to certain named persons, to be divided equally among them, share and share alike, and to their heirs and assigns forever, gave a life estate to the first devisee.

The rule of construction as to the words "children" and "issue" was abolished in Massachusetts so far as devises are concerned, by the statutes of 1791, chap. 60, and in the Revised Statutes this change was extended to conveyances by deed. Ibid.

General statutes, chap. 89, § 12, and Public Statutes, chap. 126, § 4, provide: "When lands are given by deed or will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker and a remainder in fee simple to his heirs." Putnam v. Gleason, 99 Mass. 454; Sims v. Pierce, 157 Mass. 52, 31 N. E. 718.

This has been the law of the commonwealth as to wills since 1792, and as to deeds since 1836. Sims v. Pierce, supra; Bullard v. Goffe, 20 Pick. 252; Sands v. Old Colony Trust Co. 195 Mass. 575, 81 N. E. 300, 12 A. & E. Ann. Cas. 837.

For cases discussing or applying the rule, see also Davis v. Hayden, 9 Mass. 514; Ellis v. Essex Merrimack Bridge, 2 Pick. 243; Canedy v. Haskins, 13 Met. 389, 46 Am. Dec. 739; Brown v. Lawrence, 3 Cush. 390; Wight v. Baur, 7 Cush. 105; Trumbull v. Trumbull, supra.

Michigan.

The rule has been abolished in Michigan by statute. Rev. Code, 1846, § 28, p. 252.

Fraser v. Chene, 2 Mich. 81; Wilson v. Terry, 130 Mich. 73, 89 N. W. 566; Fullagar v. Stockdale, 138 Mich. 363, 101 N. W. 576.

Minnesota.

The rule in Shelley's Case has been abolished in Minnesota. Whiting v. Whiting, 42 Minn. 548, 44 N. E. 1030.

Mississippi.

The rule in Shelley's Case, so far, at least, as personalty is concerned, was held not abolished in Mississippi, in Powell v. Brandon, 24 Miss. 343. To the same effect, Hampton v. Rather, 30 Miss. 193; Carradine v. Carradine, 33 Miss. 698.

The rule has since, however, been abrogated by a statute which provides: "A conveyance or devise of land or other property to any person for life, with remainder to his heirs, or heirs of his body, shall be held to create an estate for life in such person, with remainder to his heirs, or heirs of his body, who shall take as purchasers by virtue of the remainder so limited to them." Miss. Anno. Code 1892, § 2446.

For other cases discussing or applying the rule, see Carroll v. Renich, 7 Smedes & M. 798; Hampton v. Rather, supra; Gray v. Bridgeforth, 33 Miss. 342; Cannon v. Barry, 59 Miss. 289; Tate v. Townsend, 61 Miss. 316; Harris v. McCann, 75 Miss. 805, 23 So. 631.

Missouri.

The rule in Shelley's Case was adopted in the territory of Missouri in 1816, and was not abolished until the revision of 1845, § 7, of the act concerning conveyances, declaring that "where a remainder shall be limited to the heirs, or the heirs of the body, of a person to whom a life estate in the same premises shall be given, the persons who, on the termination of the life estate, shall be the heirs, or heirs of the body, of such tenant for life, shall be entitled to take as purchasers by virtue of the remainder so limited in them." Muldrow v. White, 67 Mo. 470; Tesson v. Newman, 62 Mo. 198; Emmerson v. Hughes, 110 Mo. 627, 19 S. W. 979; Godman v. Simmons, 113 Mo. 122, 20 S. W. 972.

The rule in Shelley's Case was abrogated in Missouri as to wills, by § 18 of the statute of wills, of 1825, and in regard to conveyances by § 7, act of 1845, concerning conveyances. Riggins v. McClellan, 28 Mo. 23.

Nebraska.

In § 53, chap. 73, of the Nebraska Compiled Statutes (Anno. Stat. 10256) providing that "in the construction of every instrument creating or conveying, or authorizing or requiring the creation or conveyance, of any real estate, or interest therein, it shall be the duty of the courts of justice to carry into effect the true interest (intent) of the parties so far as such intent can be collected from the whole instrument and so far as such intent is consistent with the rules of law," the court in Albin v. Par-

mele, 70 Neb. 740, 98 N. W. 29, 99 N. W. 646, deemed the rule partially curtailed, saying, however, that it did not wish to be understood as asserting that the rule was wholly abolished. It would, perhaps, be more correct to say that it exists in a restricted and qualified form, and would be enforced in some instances in which it was not in conflict with the otherwise expressed intention of the instrument.

New Hampshire.

In Hall v. Nute, 38 N. H. 422, the court said it was unnecessary to inquire whether the rule in Shelley's Case had ever been adopted in New Hampshire.

But in Dennett v. Dennett, 43 N. H. 499, it was said the rule in Shelley's Case was part of the law of New Hampshire in 1818.

It remained in force until, as to devises, it was abolished by statute in 1843. Comp. Stat. 400, § 5. Crockett v. Robinson, 46 N. H. 454.

The New Hampshire Revised Statutes, chap. 156, § 5, provides that "no express devise of any estate for life, or other limited estate, shall be enlarged or construed to pass any greater estate by reason of any devise to the heirs or issue of such person."

The rule in Shelley's Case was abolished so far as it applied to devises of real estate, by the New Hampshire legislature. Gen. Laws, chap. 193, § 5. Cloutman v. Bailey, 62 N. H. 44; Sanborn v. Sanborn, 62 N. H. 631.

New Jersey.

The rule in Shelley's Case, so far as wills are concerned, was in effect abolished in New Jersey by § 1 of the act of June 13, 1820, Rev. Laws, 774; Quick v. Quick, 21 N. J. Eq. 13.

The rule in Shelley's Case has been superseded in New Jersey by an express legislative enactment passed the 13th of June, 1820, Rev. Laws, 774, § 1, which provides: "That in case any lands, tenements, hereditaments, or real estate, situate, lying, or being in this state, shall hereinafter be devised by the owner thereof, to any person for life, and at the death of the person to whom the same shall be so devised for life, to go to his or her heirs or to his or her issue or to the heirs of his or her body, then and in such case, after the death of such devisee for life, the said lands, tenements, hereditaments, or real estate shall go and be vested in the children of such devisee, equally to be divided between them as tenants in common in fee; but if there be only one child, then to that one in fee, and if any child be dead, the part which would have come to him or her, shall go to his or her issue in like manner." Den ex dem. Hopper v. Demarest, 21 N. J. L. 525.

The rule in Shelley's Case is abolished in New Jersey by § 10 of the act concerning descents only so far as it relates to wills. Rev. p. 299. Badgley v. Hanford, 12 N. J. L. J. 75.

The 10th section of the New Jersey statute of descent has abolished the rule in

Shelley's Case in devises where the first taker has lineal descendants. *Zane v. Weintz*, 65 N. J. Eq. 214, 55 Atl. 641.

The act of 1820 does not relate to estates arising by force of such rule out of the limitation of a deed, nor to estates tail special. *Zabriskie v. Wood*, 23 N. J. Eq. 541.

The act of 1820 is limited to cases within its terms. *Lamprey v. Whitehead*, 64 N. J. Eq. 408, 54 Atl. 803.

The rule in Shelley's Case is still the law of New Jersey, as regards the construction of deeds. *Quick v. Quick*, supra.

For other cases discussing or applying the rule, see *Den ex dem. M'Ginnis v. M'Peake*, 2 N. J. L. 291; *Den ex dem. Pinkerton v. Laqueur*, 4 N. J. L. 302; *Demarest v. Den*, 22 N. J. L. 599; *Kennedy v. Kennedy*, 29 N. J. L. 185; *Lippincott v. Davis*, 59 N. J. L. 241, 28 Atl. 587; *Kay v. Kay*, 4 N. J. Eq. 495; *Cushing v. Blake*, 30 N. J. Eq. 689; *Martling v. Martling*, 55 N. J. Eq. 771, 39 Atl. 203; *Robeson v. Duncan*, 74 N. J. Eq. 745, 70 Atl. 685; *Cowell v. Hicks* (N. J. Eq.) 30 Atl. 1091.

New York.

The rule in Shelley's Case was the law of New York state previous to January 1, 1830, when the Revised Statutes went into effect. *Wood v. Burnham*, 6 Paige, 513; *Seaman v. Harvey*, 16 Hun, 71; *Brown v. Wadsworth*, 168 N. Y. 225, 61 N. E. 250.

The rule in Shelley's Case was abrogated in New York by the Revised Statutes of 1830, and the act provides that where a remainder shall be limited to the heirs or heirs of the body of the person to whom a life estate is given in the same premises, the persons who shall be the heirs or heirs of the body of the tenant for life at the termination of the life estate shall take as purchasers. 1 Rev. Stat. 719, § 28. *Tallman v. Wood*, 26 Wend. 9; *Taylor v. Gould*, 10 Barb. 388; *Spader v. Powers*, 56 Hun, 153, 9 N. Y. Supp. 39; *Peterson v. De Baun*, 36 App. Div. 259, 55 N. Y. Supp. 249; *Sheridan v. House*, 4 Keyes, 569.

The rule was abolished in 1830 with a view to give full effect to the intent of donors and testators in all cases, unembarrassed by the technical rule. *Lytle v. Beveridge*, 58 N. Y. 592.

The rule nevertheless applies to wills made before 1830. *Brown v. Lyon*, 6 N. Y. 419.

When a remainder is limited to the heirs or heirs of the body of a person to whom a life estate in the same premises is given, the persons who, at the time of the termination of the life estate, are the heirs or heirs of the body of such tenant for life, are entitled to take as purchasers by virtue of the remainder so limited to them. 1 Rev. Stat. 725, § 28. *Moore v. Littell*, 40 Barb. 488, affirmed in 41 N. Y. 66.

For other cases discussing or applying the rule, see *Vanderheyden v. Crandall*, 2 Denio, 9; *Schoonmaker v. Sheely*, 3 Denio, 485; *Kingsland v. Rapelye*, 3 Edw. Ch. 1; *Brant ex dem. Provost v. Gelston*, 2 Johns. Cas. 384; *Re Sanders*, 4 Paige, 293; *Cush-*

ney v. Henry, 4 Paige, 345; *McWhorter v. Agnew*, 6 Paige, 111; *Conklin v. Conklin*, 3 Sandf. Ch. 64; *Rogers v. Rogers*, 3 Wend. 503, 20 Am. Dec. 716; *Tanner v. Livingston*, 12 Wend. 83; *Barber v. Cary*, 11 N. Y. 397; *Campbell v. Rawdon*, 18 N. Y. 412; *Chrystie v. Phyte*, 19 N. Y. 344; *Striker v. Mott*, 28 N. Y. 91; *Smith v. Scholtz*, 68 N. Y. 41; *Hennessey v. Patterson*, 85 N. Y. 91; *Brown v. Wadsworth*, 168 N. Y. 225, 61 N. E. 250; *Wagstaff v. Lowerre*, 23 Barb. 209; *Post v. Post*, 47 Barb. 72; *Brown v. Wadsworth*, 32 App. Div. 423, 53 N. Y. Supp. 215; *Haverstick v. Duffenburgh*, 2 Edm. Sel. Cas. 463; *Bond v. McNiff*, 9 Jones & S. 543.

North Carolina.

The rule in Shelley's Case is in force in North Carolina. *Tyson v. Sinclair*, 138 N. C. 23, 50 S. E. 450, 3 A. & E. Ann. Cas. 397.

In *Howell v. Knight*, 100 N. C. 254, 6 S. E. 721, it was said that the Revised Code of North Carolina, chap. 32, § 5, declaring that the limitation in any writing "to the heirs of a living person" shall be construed to be to the children of such person, unless a contrary intention be apparent in the instrument," may have the effect of abolishing the rule.

But it has since been declared that the rule is still in force. *Chamblee v. Broughton*, 120 N. C. 170, 27 S. E. 111; *Nichols v. Gladden*, 117 N. C. 497, 23 S. E. 459; *May v. Lewis*, 132 N. C. 115, 43 S. E. 550; *Tyson v. Sinclair*, supra.

The rule in Shelley's Case was not abolished in 1854 in North Carolina by Rev. Code, chap. 43, § 5, the Code § 1329 providing that "any limitation by deed, will, or other writing, to the heirs of a living person, shall be construed to be to the children of such person, unless a contrary intention appears by the deed or the will." *Starnes v. Hill*, 112 N. C. 1, 22 L.R.A. 598, 16 S. E. 1011.

The act of 1874, chap. 204, § 5, Code § 1325, converting estates tail into estates fee simple, has no bearing upon the principle of law decided in Shelley's Case. The rule of law established in that case prevailed before the act of 1784, and has always prevailed since. *Dawson v. Quinnerly*, 118 N. C. 188, 24 S. E. 483.

For other cases discussing or applying the rule, see *Cutlar v. Cutlar*, 3 N. C. (2 Hayw.) 154; *Williams v. Lane*, 4 N. C. (2 Car. Law Repos. 266), 6 Am. Dec. 561; *Nichols v. Cartwright*, 6 N. C. (2 Murph.) 137; *Jarvis v. Wyatt*, 11 N. C. (4 Hawks) 227; *Doe ex dem. Ross v. Toms*, 15 N. C. (4 Dev. L.) 376; *Allen v. Pass*, 20 N. C. 207 (4 Dev. & B. L. 77); *Floyd v. Thompson*, 20 N. C. 616 (4 Dev. & B. L. 478); *Ham v. Ham*, 21 N. C. (1 Dev. & B. Eq.) 598; *Payne v. Sayle*, 22 N. C. (2 Dev. & B. Eq.) 455; *Swain v. Rascoe*, 25 N. C. (3 Ired. L.) 200, 38 Am. Dec. 720; *Coon v. Rice*, 29 N. C. (7 Ired. L.) 217; *Den ex dem. Folk v. Whitley*, 30 N. C. (8 Ired. L.) 133; *Moore v. Parker*, 34 N. C. (12 Ired. L.)

123; *Donnell v. Mateer*, 40 N. C. (5 Ired. Eq.) 7; *Ward v. Jones*, 40 N. C. (5 Ired. Eq.) 400; *Sanderlin v. Deford*, 47 N. C. (2 Jones, L.) 74; *Hodges v. Little*, 52 N. C. (7 Jones, L.) 145; *Kiser v. Kiser*, 55 N. C. (2 Jones, Eq.) 28; *Boyd v. Small*, 56 N. C. (3 Jones, Eq.) 39; *Williams v. Houston*, 57 N. C. (4 Jones, Eq.) 277; *Thompson v. Mitchell*, 57 N. C. (4 Jones, Eq.) 441; *Chambers v. Payne*, 59 N. C. (6 Jones, Eq.) 276; *Doe ex dem. Williams v. Beasley*, 60 N. C. (1 Winst. L.) 102; *Ex parte McBee*, 63 N. C. 332; *King v. Utley*, 85 N. C. 59; *Patrick v. Morehead*, 85 N. C. 62, 39 Am. Rep. 684; *Mills v. Thorne*, 95 N. C. 362; *Jenkins v. Jenkins*, 96 N. C. 254, 2 S. E. 522; *Graves v. Trueblood*, 96 N. C. 495, 1 S. E. 918; *Leathers v. Gray*, 96 N. C. 548, 2 S. E. 455, s. c. on subsequent appeal, 101 N. C. 162, 9 Am. St. Rep. 30, 7 S. E. 657; *Hodges v. Fleetwood*, 102 N. C. 122, 9 S. E. 640; *Starnes v. Hill*, supra; *Crawford v. Wearn*, 115 N. C. 540, 20 S. E. 724; *Tucker v. Williams*, 117 N. C. 119, 23 S. E. 90; *Bird v. Gilliam*, 121 N. C. 326, 28 S. E. 489; *Edgerton v. Aycock*, 123 N. C. 134, 31 S. E. 382; *Hauser v. Craft*, 134 N. C. 319, 46 S. E. 756; *Wilkinson v. Boyd*, 136 N. C. 46, 48 S. E. 516; *Morrisett v. Stevens*, 136 N. C. 160, 48 S. E. 661; *Britt v. Rowland Lumber Co.* 136 N. C. 171, 48 S. E. 576; *Marsh v. Griffin*, 136 N. C. 333, 48 S. E. 735; *Wool v. Fleetwood*, 136 N. C. 460, 67 L.R.A. 444, 48 S. E. 785; *Thompson v. Crump*, 138 N. C. 32, 107 Am. St. Rep. 514, 50 S. E. 457; *Pitchford v. Limer*, 139 N. C. 13, 51 S. E. 789; *Smith v. Proctor*, 139 N. C. 314, 2 L.R.A. (N.S.) 174, 51 S. E. 889; *Perry v. Hackney*, 142 N. C. 368, 115 Am. St. Rep. 741, 55 S. E. 289, 9 A. & E. Ann. Cas. 244; *Faison v. Odom*, 144 N. C. 107, 56 S. E. 793; *Walker v. Taylor*, 144 N. C. 175, 56 S. E. 877.

Ohio.

In *McFeeley v. Moore*, 5 Ohio, 464, 24 Am. Dec. 314, and in *Jenkins v. Artz*, 6 Ohio S. & C. P. Dec. 439, the rule in Shelley's Case was said to be in force in Ohio.

But the rule was abrogated as to wills in 1840. *McDaniel v. Hays*, 74 Ohio St. 515, 78 N. E. 1131, affirming 6 Ohio C. C. N. S. 257; *Kiersted v. Smith*, 8 Ohio N. P. 378.

By the 47th section of the wills act of 1840, it was declared that "when lands, tenements, or hereditaments are given by will to any person for his life, and after his death to his heirs in fee, or by words to that effect, the conveyance shall be construed to vest an estate for life only in such first taker, and a remainder in fee simple in his heirs." By this statute it was intended to give a controlling effect to the clear intention of the testator, and to forbid the application of the rule in Shelley's Case, when such application would defeat the manifest intention of the testator. *Carter v. Reddish*, 32 Ohio St. 1.

The purpose and effect of this statute was to abrogate the rule as to wills. *Halley v. Hengstler*, 23 Ohio C. C. 504.

The rule, although not applicable to wills, 29 L.R.A. (N.S.)

since 1840, is in all other respects a rule of property. *King v. Beck*, 12 Ohio, 390.

As regards deeds, the rule in Shelley's Case has not been modified. *Patterson v. Patterson*, Dayt. 288, cited in 3 Laning's Ohio Cyc. Dig. 5865; *Connecticut Mut. L. Ins. Co. v. Skinner*, 2 Ohio C. D. 688; *Kepler v. Reeves*, 7 Ohio Dec. Reprint, 34; *Mack v. Champion*, 11 Ohio Dec. Reprint, 327; *Davis v. Saunders*, 8 Ohio N. P. 161; *Bates v. Winifrede Coal. Co.* 4 Ohio N. P. N. S. 265.

For other cases wherein the rule is discussed or applied, see *Armstrong v. Zane*, 12 Ohio, 299; *King v. Beck*, 15 Ohio, 559; *Turley v. Turley*, 11 Ohio St. 182; *Bunnell v. Evans*, 26 Ohio St. 409; *Kirby v. Bowdle*, 13 Ohio C. C. 86, affirmed without opinion in 55 Ohio St. 676, 48 N. E. 1114; *Brockschmidt v. Archer*, 64 Ohio St. 502, 60 N. E. 623; *McArthur v. Allen*, 3 Ohio L. J. 471; *Hess v. Lakin*, 7 Ohio S. & C. P. Dec. 300; *Williams v. Mears*, 13 Ohio Dec. Reprint, 369.

Pennsylvania.

The rule in Shelley's Case has been repeatedly recognized, and is still in force, in Pennsylvania. *George v. Morgan*, 16 Pa. 95; *Allen v. Markle*, 36 Pa. 117; *Simpson v. Reed*, 205 Pa. 53, 54 Atl. 499; *Crandell v. Barker*, 8 N. D. 263, 78 N. W. 347.

A determined effort was made to abolish or restrict the rule in Pennsylvania in 1877, and occasional efforts have been made since, but without success. "An inertia," said the court in *Peirce v. Hubbard*, 10 Pa. Co. Ct. 63, affirmed in 152 Pa. 18, 25 Atl. 231, "miscalled conservatism, to the discredit of that good word, having prevented such a wise measure of justice from being embedded in our law."

Under the statute of June 9, 1897, P. L. 213, providing: "That in any gift, grant, devise, or bequest of real or personal estate, the words 'die without issue' or 'die without leaving issue' or 'have no issue' or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intent shall appear by the deed, will, or other instrument in which such gift, grant, devise, or bequest is made and contained," it was held that where the testatrix devised property to her stepson for life, but provided that, in event of his death leaving issue, the property should go and vest in the said issue absolutely in fee, a definite failure of issue was meant, so that the first devisee took only a life estate. *Lewis v. Link-Belt Co.* 222 Pa. 139, 70 Atl. 967.

For cases in which the rule is discussed or applied, see *Findlay v. Riddle*, 3 Binn. 139, 5 Am. Dec. 355; *James's Claim*, 1 Dall. 47, 1 L. ed. 31; *Bender v. Fleurie*, 2 Grant. Cas. 345; *Paxson v. Lefferts*, 3 Rawle, 59; *Dun-*

woodie v. Reed, 3 Serg. & R. 435; Abbott v. Jenkins, 10 Serg. & R. 296; Carter v. Michael, 10 Serg. & R. 429; Way v. Gest, 4 Serg. & R. 40; Stewart v. Kenower, 7 Watts. & S. 288; Elliott v. Pearsoll, 8 Watts. & S. 38; Wells v. Ritter, 3 Whart. 117; Stout's Estate, 1 Wilcox, 9, cited in Brightly's Dig. (Pa.) 3471; Roe ex dem. Evans v. Davis, 1 Yeates, 332; Baughman v. Baughman, 2 Yeates, 410; Miller v. Lynn, 7 Pa. 443; Hileman v. Bouslaugh, 13 Pa. 351, 3 Am. Dec. 474; Auman v. Auman, 21 Pa. 343; Steacy v. Rice, 27 Pa. 75, 67 Am. Dec. 447; Price v. Taylor, 28 Pa. 102, 70 Am. Dec. 105; Rancel v. Creswell, 30 Pa. 58; Potts's Appeal, 30 Pa. 169; Gernet v. Lynn, 31 Pa. 94; McKee v. McKinley, 33 Pa. 92; Guthrie's Appeal, 37 Pa. 9; Chew's Appeal, 37 Pa. 23; Kay v. Scates, 37 Pa. 11, 78 Am. Dec. 399; Haldeman v. Haldeman, 40 Pa. 29; Criswell's Appeal, 41 Pa. 28; Tyler v. Moore, 42 Pa. 374; Angle v. Brosius, 43 Pa. 189; Curtis v. Longstreth, 4 Pa. 302; Seely v. Seely, 44 Pa. 437; Walter v. Milligan, 45 Pa. 178; Powell v. Domestic Missions, 49 Pa. 46; Myers's Appeal, 9 Pa. 111; Physick's Appeal, 50 Pa. 128; Rice's Appeal, 50 Pa. 143; Sheets's Appeal, 2 Pa. 257; Kepple's Appeal, 53 Pa. 211; Steiner v. Kolb, 57 Pa. 123; Quillman v. Luster, 57 Pa. 125; Bacon's Appeal, 57 Pa. 94; Melsheimer v. Gross, 58 Pa. 412; Rife v. Geyer, 59 Pa. 393, 98 Am. Dec. 351; Dodson v. Ball, 60 Pa. 492, 100 Am. Dec. 586; Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 65; Doeblor's Appeal, 64 Pa. 9; Hess v. Hess, 67 Pa. 119; Kleppner v. Laverty, 70 Pa. 70; Yarnall's Appeal, 70 Pa. 335; Robins v. Quinliven, 79 Pa. 333; Huber's Appeal, 80 Pa. 348; Ulrich v. Merkel, 81 Pa. 332; Williams's Appeal, 83 Pa. 377; List v. Rodney, 83 Pa. 483; Leightner v. Leightner, 87 Pa. 144; Daley v. Koons, 90 Pa. 246; Philadelphia Trust, S. D. & Ins. Co.'s Appeal, 93 Pa. 209; Criswell v. Grumbling, 97 Pa. 408; Carroll v. Burns, 108 Pa. 386; Lockin's Appeal, 111 Pa. 26, 2 Atl. 363; Towinckel v. Patterson, 114 Pa. 21, 6 Atl. 70; Little's Appeal, 117 Pa. 14, 11 Atl. 520; Mason v. Ammon, 117 Pa. 127, 11 Atl. 449; Bassett v. Hawk, 118 Pa. 94, 11 Atl. 802; Little v. Wilcox, 119 Pa. 439, 13 Atl. 468; Carson v. Fuhs, 131 Pa. 256, 18 Atl. 1017; Jannerback's Estate, 133 Pa. 342, 19 Atl. 52; Harbster's Estate, 133 Pa. 351, 19 Atl. 58; Eichelberger's Estate, 135 Pa. 160, 19 Atl. 1006, 1014; Kuntzleman's Estate, 136 Pa. 142, 20 Am. St. Rep. 909, 20 Atl. 645; Bull's Estate, 137 Pa. 112, 20 Atl. 418; Lyster v. Knull, 137 Pa. 448, 21 Am. St. Rep. 890, 20 Atl. 624; Giffin's Estate, 138 Pa. 327, 22 Atl. 91; Shalters v. Ladd, 141 Pa. 349, 21 Atl. 596; Parkhurst v. Harower, 142 Pa. 432, 24 Am. St. Rep. 507, 1 Atl. 826; Robinson's Estate, 149 Pa. 418, 4 Atl. 297; Peirce v. Hubbard, 152 Pa. 18, 5 Atl. 231; Nes v. Ramsay, 155 Pa. 628, 6 Atl. 770; Evans's Estate, 155 Pa. 646, 6 Atl. 739; O'Rourke v. Sherwin, 156 Pa. 85, 27 Atl. 43; Armstrong v. Michener, 160 Pa. 21, 28 Atl. 447; Gerhard's Estate, 160 Pa. 253, 28 Atl. 684; Hiester v. Yerger, 166 9 L.R.A. (N.S.)

Pa. 445, 31 Atl. 122; Grimes v. Shirk, 160 Pa. 74, 32 Atl. 113; Potts v. Kline, 174 Pa. 513, 34 Atl. 191; Moorhead's Estate, 180 Pa. 119, 36 Atl. 647; Shelley v. Neidhammer, 182 Pa. 163, 37 Atl. 939; Clemens v. Heckscher, 185 Pa. 476, 40 Atl. 80; Lewis v. Bryce, 187 Pa. 362, 41 Atl. 275; Shoup v. DeLong, 190 Pa. 331, 42 Atl. 680; Serfass v. Serfass, 190 Pa. 484, 42 Atl. 888; Reutter v. McCall, 192 Pa. 77, 43 Atl. 398; Reimer v. Reimer, 192 Pa. 571, 73 Am. St. Rep. 833, 44 Atl. 316; Stigers v. Dinsmore, 193 Pa. 482, 74 Am. St. Rep. 702, 44 Atl. 550; Beilstein v. Beilstein, 194 Pa. 152, 75 Am. St. Rep. 692, 45 Atl. 73; Eby v. Shank, 196 Pa. 426, 46 Atl. 495; Eshbach's Estate, 197 Pa. 153, 46 Atl. 905; McCann v. McCann, 197 Pa. 452, 80 Am. St. Rep. 846, 47 Atl. 743; Brinton v. Martin, 197 Pa. 615, 47 Atl. 841; Hill v. Giles, 201 Pa. 215, 50 Atl. 758; Jones v. Jones, 201 Pa. 548, 51 Atl. 362; Shapley v. Diehl, 203 Pa. 566, 53 Atl. 374; McCann v. Barclay, 204 Pa. 214, 53 Atl. 767; Pifer v. Locke, 205 Pa. 616, 55 Atl. 790; Vilsack's Estate, 207 Pa. 611, 57 Atl. 32; Graham v. Abbott, 208 Pa. 68, 57 Atl. 178; Schrecongost v. West, 210 Pa. 7, 59 Atl. 289; McCullough v. Johnetta Coal Co. 210 Pa. 222, 59 Atl. 984; Belcher's Estate, 211 Pa. 615, 61 Atl. 252; Beckley v. Riegert, 212 Pa. 91, 61 Atl. 641; Hoover v. Strauss, 215 Pa. 130, 64 Atl. 333; Hastings v. Engle, 217 Pa. 419, 66 Atl. 761; Xander v. Eastern Trust Co. 217 Pa. 485, 66 Atl. 759; Garver v. Clouser, 218 Pa. 611, 67 Atl. 909; Emerick v. Emerick, 219 Pa. 187, 68 Atl. 183; Wilson v. Heilman, 219 Pa. 237, 68 Atl. 674; Marsh v. Platt, 221 Pa. 431, 70 Atl. 802; Lewis v. Link-Belt Co. supra; Pearson v. Willis, 1 Pa. Co. Ct. 520; Bissey's Estate, 4 Pa. Co. Ct. 458; Shalter v. Ladd, 8 Pa. Co. Ct. 528; Moyer's Estate, 1 Pa. Dist. R. 581; Hemphill's Estate, 18 Pa. Co. Ct. 527; Best v. McClelland, 19 Pa. Co. Ct. 553; Jones v. Bower, 20 Pa. Co. Ct. 95; Barcus's Petition, 3 Pa. Dist. R. 324; Keys's Estate, 4 Pa. Dist. R. 134; Kern's Estate, 5 Pa. Dist. R. 264; Seybert v. Hibbert, 5 Pa. Super. Ct. 537; McGregor v. Davidson, 14 Pa. Super. Ct. 230; King v. Savage Brick Co. 30 Pa. Super. Ct. 582; Ackerman v. Ackerman, 34 Pa. Super. Ct. 162; Crosby v. Davis, 2 Clark (Pa.) 403; Frank v. Frank, 1 Monaghan (Pa.) 347, 17 Atl. 11; Henderson v. Walthour, 2 Monaghan (Pa.) 224, 15 Atl. 893; Charles's Appeal, 2 Pennyp. 164; Harris v. McElroy, 5 Phila. 81; Smith's Estate, 9 Phila. 348; Craige v. Craige, 9 Phila. 545; Masurie v. Pennsylvania Annuity Co. 11 Phila. 208; Foster v. McKenna, 8 Sadler (Pa.) 538, 11 Atl. 674; Root's Estate, 2 W. N. C. 156; Mast's Appeal, 2 W. N. C. 404; Workingmen's Protection & Bldg. Asso. v. Hausman, 8 W. N. C. 517; Fittler's Appeal, 10 W. N. C. 429; Norris v. Rawle, 16 W. N. C. 240; Heiss's Estate, 17 W. N. C. 285; McDonald v. Dunbar, 20 W. N. C. 559, 12 Atl. 553; Kountzleman's Estate, 21 W. N. C. 467; Blair v. Miller, 30 W. N. C. 486; Barber v. Pittsburgh, Ft. W. & C. R. Co. 26 Pittsb. L. J. N. S. 32; Re Voegtly, 29

Pittab. L. J. N. S. 30; Little v. Pittsburgh & C. R. Co. 34 Phila. Leg. Int. 68; Smith's Estate, 2 C. P. Rep. 181, cited in 3 Brightly's Dig. (Pa.) p. 5016.

Rhode Island.

The rule, until abolished, was frequently recognized in Rhode Island. *Burges v. Thompson*, 13 R. I. 712.

Public Statutes of Rhode Island, chap. 182, § 2, modified the rule in its application to wills. *Boutelle v. City Sav. Bank*, 18 R. I. 177, 26 Atl. 53.

It was abrogated as to devises of real estate only in case of a "devise for life to any person, and to the children or issue generally of such devisee in fee simple." *Bullock v. Waterman Street Baptist Soc.* 5 R. I. 273.

But the rule was abolished February 1, 1896, as to deeds or wills thereafter executed. Gen. Laws 1896, chap. 201, § 6, chap. 203, § 10. *Nightingale v. Phillips*, 29 R. I. 175, 72 Atl. 220; *Paine v. Sackett*, 27 R. I. 300, 61 Atl. 753; *Re Willis*, 25 R. I. 332, 55 Atl. 889.

General Laws, 1896, chap. 201, § 6, provide that when lands are devised to one for life, and after his death to his heirs in fee, the first taker will have an estate for life, with remainder in fee to his heirs. This section is the exact antithesis of the rule in *Shelley's Case*, by making the word "heirs" a word of purchase instead of limitation. It was intended to effectuate the common intent of giving a life estate only to the first taker, reserving the remainder to his heirs. *Re Tillinghast*, 25 R. I. 338, 55 Atl. 879.

Under a statute providing that "a devise for life to any person, and to the children or issue generally of such devisee in fee simple, shall not vest a fee-tail estate in such devisee, but an estate for life only," and declaring further that "the remainder shall on his decease vest in the children or issue generally, agreeably to the directions of such will," a devise to one for life, with remainder to her children, their heirs and assigns forever, is not enlarged to a fee. *Moore v. Dimond*, 5 R. I. 121.

For other cases discussing or applying the rule, see *Eaton v. Tillinghast*, 4 R. I. 276; *Moore v. Dimond*, supra; *Manchester v. Durfee*, 5 R. I. 549; *Cooper v. Cooper*, 6 R. I. 261; *Thurston v. Schroeder*, 6 R. I. 276; *Williams v. Angell*, 7 R. I. 145; *Tillinghast v. Coggeshall*, 7 R. I. 383; *Jillson v. Wilcox*, 7 R. I. 515; *Brownell v. Brownell*, 10 R. I. 509; *Angell's Petition*, 13 R. I. 630; *Sprague v. Sprague*, 13 R. I. 701; *Pierce v. Pierce*, 14 R. I. 514; *Taylor v. Lindsay*, 14 R. I. 518; *Browning's Petition*, 16 R. I. 441, 3 L.R.A. 209, 16 Atl. 717; *Andrews v. Lowthrop*, 17 R. I. 60, 20 Atl. 97; *Bucklin v. Creighton*, 18 R. I. 325, 27 Atl. 221; *De Wolf v. Middleton*, 18 R. I. 810, 31 L.R.A. 146, 26 Atl. 44, 31 Atl. 271; *Cowing v. Dodge*, 19 R. I. 605, 35 Atl. 309; *Mudge v. Hammill*, 21 R. I. 283, 79 Am. St. Rep. 802, 43 Atl. 544; *Re Manchester*, 22 R. I. 636, 49 Atl. 36; *McNeal v.* 29 L.R.A. (N.S.)

Sherwood, 24 R. I. 314, 53 Atl. 43; *Evans v. Weatherhead*, 24 R. I. 502, 53 Atl. 866.

South Carolina.

The South Carolina act of 1853, 12 Stat. 298, Gen. Stat. § 1862, providing that "whenever in any deed . . . an estate, either in real or personal property, shall be limited to take effect on the death of any person without heirs of the body or issue or issue of the body, or other equivalent words, such words shall not be construed to mean an indefinite failure of issue, but a failure at the time of the death of such person," was held by a divided court not to abrogate the rule in *Shelley's Case*. *Fields v. Watson*, 23 S. C. 42.

The rule is still recognized in that state. *Carrigan v. Drake*, 36 S. C. 354, 15 S. E. 339.

For cases in which the rule is discussed or applied, see also *Dott v. Cunningham*, 1 Bay, 453, 1 Am. Dec. 624; *Dott v. Willson*, 1 Bay, 457; *Warnock v. Wightman*, 1 Brev. 331; *Myers v. Pickett*, 1 Hill, Eq. 35; *Ramsay v. Joyce*, McMull. Eq. 236, 37 Am. Dec. 550; *Burleson v. Bowman*, 1 Rich. Eq. 111; *Lemacks v. Glover*, 1 Rich. Eq. 141; *Whitworth v. Stuckey*, 1 Rich. Eq. 404; *Porter v. Doby*, 2 Rich. Eq. 49; *McLure v. Young*, 3 Rich. Eq. 559; *Buist v. Dawes*, 4 Rich. Eq. 423; *Corbett v. Laurens*, 5 Rich. Eq. 301; *Danner v. Trescott*, 5 Rich. Eq. 356; *Fewell v. Fewell*, 6 Rich. Eq. 138; *Moore v. Paul*, 7 Rich. Eq. 362; *Austin v. Payne*, 8 Rich. Eq. 9; *Markley v. Singletary*, 11 Rich. Eq. 393; *Holbrook v. Gaillard*, *Riley*, Eq. 170; *Williams v. Caston*, 1 Strobb. L. 130; *Myers v. Anderson*, 1 Strobb. Eq. 344, 47 Am. Dec. 537; *Buist v. Dawes*, 4 Strobb. Eq. 37; *Swann v. Poag*, 4 S. C. 18; *Bannister v. Bull*, 16 S. C. 220; *McIntyre v. McIntyre*, 16 S. C. 290; *McCown v. King*, 23 S. C. 232; *Smith v. Smith*, 24 S. C. 304; *Gourdin v. Deas*, 27 S. C. 479, 4 S. E. 64; *Boykin v. Ancrum*, 28 S. C. 486, 13 Am. St. Rep. 698, 6 S. E. 305; *Gadsden v. Desportes*, 39 S. C. 131, 17 S. E. 706; *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161; *Simms v. Buist*, 52 S. C. 554, 30 S. E. 400; *Kennedy v. Colclough*, 67 S. C. 118, 45 S. E. 139; *Duckett v. Butler*, 67 S. C. 130, 45 S. E. 137; *Davenport v. Eskew*, 69 S. C. 292, 104 Am. St. Rep. 798, 48 S. E. 223; *Clark v. Neves*, 76 S. C. 484, 22 L.R.A. (N.S.) 298, 57 S. E. 614; *Arledge v. Arledge* (S. C.) 68 S. E. 549.

Tennessee.

The rule in *Shelley's Case* was recognized and in force in Tennessee, until it was abolished by statute. *Turner v. Ivie*, 5 Heisk. 222; *Duffy v. Jarvis*, 84 Fed. 731; *Polk v. Faris*, 9 Yerg. 209, 30 Am. Dec. 400.

The rule was abrogated in Tennessee by the Legislative Act of 1851-52, chap. 91, § 1, Code § 2008, which was as follows: "When a remainder is limited to the heirs of the body of a person to whom a life-estate in the same premises is given, the persons who, on the termination of the

life estate, are heirs or heirs of the body of such tenant, shall take as purchasers by virtue of the remainder so limited to them." *Williams v. Williams*, 10 Heisk. 566; *Williams v. Williams*, 11 Lea, 652; *Hurst v. Wilson*, 89 Tenn. 270, 14 S. W. 778; *Bigley v. Watson*, 93 Tenn. 353, 38 L.R.A. 679, 39 S. W. 525; *Robinson v. Blankenship*, 116 Tenn. 394, 92 S. W. 854; *Teague v. Sowder*, 121 Tenn. 132, 114 S. W. 484.

For cases in which the rule is discussed or applied, see also *Loving v. Hunter*, 8 Yerg. 4; *Haywood v. Moore*, 2 Humph. 584; *Hughes v. Cannon*, 2 Humph. 589; *Evans v. Wells*, 7 Humph. 559; *Perry v. Calhoun*, 8 Humph. 551; *Kay v. Connor*, 8 Humph. 624, 49 Am. Dec. 690; *Settle v. Settle*, 10 Humph. 474; *Stubbs v. Stubbs*, 11 Humph. 43; *Ware v. Sharp*, 1 Swan, 489; *Ward v. Saunders*, 2 Swan, 174 s. c. on subsequent appeal, 3 Sneed, 387; *Woodrum v. Kirkpatrick*, 2 Swan, 218; *Vaden v. Hance*, 1 Head, 300; *Cooper v. Coursey*, 2 Coldw. 416; *Williams v. Sneed*, 3 Coldw. 533; *Clopton v. Clopton*, 2 Heisk. 31; *Collins v. Williams*, 98 Tenn. 525, 41 S. W. 1056; *Lawrence v. Singleton*, 3 Shannon, Cas. 169; *Aydlett v. Swope* (Tenn.) 17 S. W. 209.

Texas.

The rule in *Shelley's Case* is recognized as the law in Texas. *Rodgers v. Burchard*, 34 Tex. 452, 7 Am. Rep. 283; *Calder v. Davidson* (Tex. Civ. App.) 59 S. W. 300; *Seay v. Cockrell*, 102 Tex. 280, 115 S. W. 1160, followed in (Tex. Civ. App.) 116 S. W. 652.

In January, 1840, the common law, as far as consistent with the Constitution and laws of Texas, was adopted as the rule of decision, and hence the rule in *Shelley's Case* must be regarded as the rule of property and of public policy, to be applied in the construction of wills in Texas as much as if it had been specifically thus adopted by legislative intent. *Brown v. Bryant*, 17 Tex. Civ. App. 454, 44 S. W. 399.

In *Tendick v. Evetts*, 38 Tex. 275, the court said that when a case should come before the court which invoked the application of the rule, it would not hesitate to be guided by authority, but that it might well be doubted whether, following the common law of England as a rule of decision, it was even now bound to recognize the rule in *Shelley's Case* as applied to wills.

For cases in which the rule is discussed or applied, see also *O'Brien v. Hilburn*, 22 Tex. 616; *Brooks v. Evetts*, 33 Tex. 732; *Singleton v. Hill*, 43 Tex. 588; *Simonton v. White*, 93 Tex. 50, 77 Am. St. Rep. 824, 53 S. W. 339, reversing on another point (Tex. Civ. App.) 49 S. W. 269; *Johnson v. Morton*, 28 Tex. Civ. App. 296, 67 S. W. 790; *Kesterson v. Bailey*, 35 Tex. Civ. App. 235, 80 S. W. 97; *Lacy v. Floyd* (Tex. Civ. App.) 84 S. W. 857; *Berry v. Spivey*, 44 Tex. Civ. App. 18, 97 S. W. 511; *Scott v.*

Brin, 48 Tex. Civ. App. 500, 107 S. W. 565; *Hopkins v. Hopkins* (Tex. Civ. App.) 114 S. W. 673.

Vermont.

The rule in *Shelley's Case* is regarded as of no special force in Vermont, except as to one of construction and intention. *Smith v. Hastings*, 29 Vt. 240.

For case in which rule was held not to apply, see also *Blake v. Stone*, 27 Vt. 475.

Virginia.

The Virginia statute of 1850 provides: "Where any estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs or to the heirs of his body, the conveyance shall be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body." Code, 1873, chap. 112, § 11; *Hood v. Haden*, 82 Va. 588.

Where the remainder was to such person or persons as should, at the death of the life tenant, answer the description of his heir or heirs at law, the fact that a statute (act of 1785) dispensing with the word "heirs" in the grant of an estate in fee simple converts such a remainder into a fee was held not to extend the rule in *Shelley's Case* to enlarge the estate of the life tenant to the fee. *Taylor v. Cleary*, 29 Gratt. 448.

The rule in *Shelley's Case* is now abolished in Virginia. *Walker v. Lewis*, 90 Va. 578, 19 S. E. 258.

For cases in which the rule is discussed or applied, see *Bradley v. Mosby*, 3 Call (Va.) 50; *Pryor v. Duncan*, 6 Gratt. 27; *Callia v. Kemp*, 11 Gratt. 78; *Moore v. Brooks*, 12 Gratt. 135; *Moon v. Stone*, 19 Gratt. 130; *Hall v. Smith*, 25 Gratt. 70; *Taylor v. Cleary*, 29 Gratt. 448; *Smith v. Chapman*, 1 Hen. & M. 240; *Seekright ex dem. Bramble v. Billups*, 4 Leigh, 90; *Warner v. Mason*, 5 Munf. 242; *Self v. Tune*, 6 Munf. 470; *Foxwell v. Craddock*, 1 Patton & H. (Va.) 250; *Ball v. Payne*, 6 Rand. (Va.) 73; *Roy v. Garnett*, 2 Wash. (Va.) 9; *Stokes v. Van Wyck*, 83 Va. 724, 3 S. E. 387; *Johnson v. Smith*, 108 Va. 725, 62 S. E. 958.

West Virginia.

The rule is abolished in West Virginia. *Irvin v. Stover* (W. Va.) 67 S. E. 1119.

A statute designed to abolish the rule in *Shelley's Case* was inserted in the Code of Virginia of 1849, the statute providing: "When an estate, real or personal, is given by deed or will to any person for his life, and after his death to his heirs or to the heirs of his body, the conveyance should be construed to vest an estate for life only in such person, and a remainder in fee simple in his heirs or the heirs of his body." Va. Code, 1849, chap. 116, § 11, p. 501. Code, 1860, pp. 559, 660, W. Va. Code, chap. 71, § 11, p. 461. This statute, if it does not

entirely abolish the rule, leaves but very few cases which can come within its operation. *Chippis v. Hall*, 23 W. Va. 504.

For discussion of rule, see also *Milhollen v. Rice*, 13 W. Va. 567.

Wisconsin.

The rule in *Shelley's Case* is not in force in Wisconsin. The opposite doctrine prevails there, and is contained in Revised Statutes, § 2052, which provides that the heirs shall take as purchasers by any cases wherein, under the rule in *Shelley's Case*, they would take by descent. *Jones v. Jones*, 66 Wis. 310, 57 Am. Rep. 266, 28 N. W. 177.

H. C. S.

OKLAHOMA SUPREME COURT.

CHARLES W. BOARD, Plff. in Err.,

v.

RALPH A. DILL.

(— Okla. —, 110 Pac. 1107.)

Appeal — record — separate parts.

1. Where a record constituting a purported case-made is filed in this court in two parts, marked respectively, "Part 1" and "Part 2," each bearing the title of the case, filed on the same day, under the same number, by the clerk of this court, and part 1, to which is attached the petition in error, and the certificate of the trial

Headnotes by DUNN, Ch. J.

Note. — Elections: assistance in preparing ballots, rendered by unauthorized person, as affecting their validity.

By "unauthorized person" in this note is intended a person not officially authorized to render assistance. The note does not cover cases passing on the question whether those duly authorized to render assistance have complied with the statutes in rendering the assistance.

Most of the cases passing on the question considered in this note are dealt with exhaustively in *BOARD v. DILL*. The courts seem agreed that where assistance in preparing a ballot is rendered by one not officially authorized to act in any case, the vote cast is invalid. See cases set out by the court in *BOARD v. DILL*.

In *Patterson v. Hanley*, 136 Cal. 265, 68 Pac. 821, where illiterate and disabled electors were assisted without regard to the conditions regulating assistance in such cases, and no one was appointed to render assistance according to the statute, the votes were held to be clearly illegal.

And in *Atty. Gen. ex rel. Harwood v. Stillson*, 108 Mich. 419, 66 N. W. 388, where, in a certain township, a Hollander was sworn to act as interpreter, and, although no one at the election requested the assistance of an interpreter, he was allowed

judge, signing and settling the same, contains unmistakable reference to part 2. The same will be considered as one record. Same — findings of fact — review.

2. In a case tried to the court, where, on request, findings of fact are made, and it is contended in this court that there is no evidence to sustain certain material findings, but that all of the evidence negated the same, this court will, on proper assignments, examine the record for the purpose of ascertaining that fact, and where such contention is sustained by the record, such finding will be set aside.

Statute — construction — election — secret ballot.

3. The primary purpose and object of the Australian ballot election law is to secure the independence of the elector by requiring of him the exercise of his right of franchise in absolute secrecy, and statutes, mandatory in their character, designed to accomplish this end, are mandatory on both the officials and the electors.

Same — noncompliance — effect.

4. Section 44, chap. 33, § 2949, Wilson's Rev. & Anno. Stat. (Okla.) 1903, providing that "any elector who declared that, by reason of physical disability or inability to read the English language, he is unable to mark his ballot, may declare his choice of candidates to the poll clerks, who, in the presence of the elector, and in the presence of each other, shall prepare the ballots," is mandatory as to such clerks, the electors, and all others, and ballots of electors prepared with the assistance of

to remain within the railing, and to talk with Hollanders after they had received their ballots, and before they marked them, the vote of the township was held invalid.

So, in *Banks v. Sergeant*, 104 Ky. 843, 48 S. W. 149, where the idea of the secret ballot was disregarded in a precinct by marking ballots in the presence of those not entitled to enter the booth, and by allowing communication with those outside, it was held that the entire vote should be disregarded.

It was held in *Sproule v. Fredericks*, 69 Miss. 898, 11 So. 472, that a person contesting an election on the ground of fraud might show that a large number of illiterate persons did not mark their ballots as provided by law, that the officer who distributed the ballots at the polls had marked them for such persons, and that they did not know for whom they were voting, and also that the inspector receiving the ballots knew that such assistance had been given.

A qualification to the general holding is established in *Moore v. Sharp*, set out in *BOARD v. DILL*, to the effect that if a blind man, without fault on his part, allows his ballot to be marked by an unauthorized person, believing him to be the officer holding the election, his ballot will not thereby be rendered void.

J. T. W.

any other person are invalid and fall within the provisions of § 5, chap. 17, Sess. Laws (Okla.) 1905, which provides for the exclusion of any exposed ballot except when made out by the poll clerks, as provided above.

Election — exposure of ballot — effect.

5. Where electors voluntarily permit other persons than the authorized or acting poll clerks to assist them in the preparation of their ballots, the said ballots will be held to be intentionally exposed, and will be rejected.

(April 19, 1910.)

ERROR to the District Court for Okfuskee County to review a judgment in plaintiff's favor in an action brought to determine who was elected to the office of register of deeds for Okfuskee County at a certain election. Reversed.

The facts are stated in the opinion.

Messrs. **Crump, Rogers, & Harris, Bailey & Wyand, and J. B. Patterson,** for plaintiff in error:

The provision relating to the preparation of ballots by the poll clerks is mandatory, and any vote cast contrary to its requirements is void and cannot be counted.

Rhodes v. Driver, 69 Ark. 501, 64 S. W. 273; *Kirkpatrick v. Deegans*, 53 W. Va. 275, 44 S. E. 465; *Mauck v. Brown*, 59 Neb. 382, 81 N. W. 313; *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 538, 25 L.R.A. 325, 58 N. W. 483; *People ex rel. Nichols v. County Canvassers*, 129 N. Y. 395, 14 L.R.A. 624, 29 N. E. 327; *People ex rel. Hasbrouck v. Dutchess County*, 135 N. Y. 522, 32 N. E. 242; *State ex rel. Phelan v. Walsh*, 62 Conn. 260, 17 L.R.A. 364, 25 Atl. 1; *Baxter v. Ellis*, 111 N. C. 124, 17 L.R.A. 382, 15 S. E. 938; *Spurgin v. Thompson*, 37 Neb. 39, 55 N. W. 297; *Bechtel v. Albin*, 134 Ind. 193, 33 N. E. 967; *Re Ballot Marks*, 18 R. I. 822, 27 Atl. 608.

Messrs. **John H. Burford, Frank B. Burford, and John G. Potter**, for defendant in error:

Statutes concerning the conduct of elections are directory unless a noncompliance is expressly declared to be fatal, and a failure to comply with such provisions will not invalidate the poll unless there has been fraud as a result of such irregularity.

Willeford v. State, 43 Ark. 62; *Andrews v. Saucier*, 13 La. Ann. 301; *Webre v. Wilton*, 29 La. Ann. 610; *State ex rel. Norton v. Van Camp*, 36 Neb. 9, 54 N. W. 113; *State ex rel. Waggoner v. Russell*, 34 Neb. 116, 15 L.R.A. 740, 33 Am. St. Rep. 625, 51 N. W. 465; *Barnes v. Pike County*, 51 Miss. 305; *Wheelock's Election*, 82 Pa. 297; *Ledbetter v. Hall*, 62 Mo. 422; *Lankford v. Gebhart*, 130 Mo. 621, 51 Am. St. 29 L.R.A. (N.S.)

Rep. 585, 32 S. W. 1127; *Marion v. Territory*, 1 Okla. 210, 32 Pac. 116; *Lee v. State*, 49 Ala. 43; *Varney v. Justice*, 86 Ky. 596, 6 S. W. 457.

The tendency of courts is liberally to construe election laws, to the end that the will of the electors may not be defeated by irregularities for which they are not responsible.

Marion v. Territory, supra; *Epley v. Moore*, 11 Okla. 335, 66 Pac. 337; *State ex rel. Manhattan Constr. Co. v. Barnes*, 22 Okla. 191, 97 Pac. 997; *Stearns v. State*, 23 Okla. 462, 100 Pac. 909; *Grove v. Haskell* (Okla.) 104 Pac. 56; *State ex rel. Edwards v. Miller*, 21 Okla. 448, 96 Pac. 747; *McClelland v. Erwin*, 16 Okla. 612, 86 Pac. 283; *Potts v. Folsom* (Okla.) 28 L.R.A. (N.S.) 460, 104 Pac. 353; *Jones v. State*, 153 Ind. 440, 55 N. E. 229; *Hall v. Schoenecke*, 128 Mo. 661, 31 S. W. 97; *Atkinson v. Lorbeer*, 111 Cal. 419, 44 Pac. 162.

Elections should never be held void unless clearly illegal. It is the duty of the court to give effect to them, if possible.

State ex rel. Love v. Hudson County, 35 N. J. L. 277.

A ballot marked by an unauthorized judge or officer should not be rejected.

State ex rel. Braley v. Gay, 59 Minn. 6, 50 Am. St. Rep. 389, 60 N. W. 676; *Hanscom v. State*, 10 Tex. Civ. App. 638, 31 S. W. 547; *Moore v. Sharp*, 98 Tenn. 491, 41 S. W. 587; *Re Walker*, 3 Luzerne Leg. Reg. 130; *Hope v. Flentge*, 140 Mo. 390, 47 L.R.A. 806, 41 S. W. 1002; *Carwile v. Jones*, 38 Mont. 590, 101 Pac. 153; *Pettit v. Yewell*, 113 Ky. 777, 68 S. W. 1075; *Pickett v. Russell*, 42 Fla. 116, 28 So. 764; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *Roper v. Scurlock*, 29 Tex. Civ. App. 464, 69 S. W. 456.

A vote deposited will be presumed to be legal until the contrary is proved.

Clark v. Robinson, 88 Ill. 498; *Blake v. Hogan*, 57 Minn. 45, 58 N. W. 867; *Gumm v. Hubbard*, 97 Mo. 311, 10 Am. St. Rep. 312, 11 S. W. 61; *People v. Cook*, 8 N. Y. 67, 59 Am. Dec. 451; *People ex rel. Boyer v. Teague*, 106 N. C. 576, 19 Am. St. Rep. 547, 11 S. E. 665.

Dunn, Ch. J., delivered the opinion of the court:

This case presents error from the district court of Okfuskee county, wherein **Ralph A. Dill** was plaintiff, and **Charles W. Board** was defendant. The object of the action was to determine who was elected register of deeds of that county in the election held September 17, 1907. The controversy has been by the parties narrowed down to the vote of **Van Zandt** precinct, one of the

voting places in that county. In this precinct, according to the returns made by the election board, the plaintiff, Dill, received 403 votes, and the defendant, Board, 14. This precinct was not canvassed by the board of county commissioners, and, as a consequence, the vote acknowledged and declared as between these parties in the county was Dill, 760; Board, 1,137. If Van Zandt precinct shall be received and counted, it will give Dill 1,163, and will give Board 1,151, making a difference of 12 votes in favor of Dill. The trial court held that the canvassing board was in error in rejecting the returns from this precinct, and that the same should be canvassed, and it is to reverse this holding that the cause has been brought to this court.

Two grounds are relied on by counsel for plaintiff in error for a reversal. The first is that the board organized to hold the election in this precinct was neither a *de jure* nor a *de facto* board, and that those who occupied the places of election officers were usurpers without color of office or authority. An examination of the findings of the court and the record in our judgment do not sustain this claim; but, from the view we take of the entire case, we do not deem it essential to pass on it, and we will, for the purpose of this decision, assume the board to have been legal. The second ground for reversal is raised by the finding by the court as follows: "The court further finds that judges and clerks indiscriminately directed voters in the preparation of their ballots, and that a majority of the votes cast were prepared under the direction of the judges and clerks; one judge or one clerk assisting the electors. The court further finds that in such Van Zandt precinct the plaintiff received 403 legal votes, and the defendant received 14 legal votes, and that in the county of Okfuskee and state of Oklahoma plaintiff received in said election 1,163 votes, and defendant received 1,151 votes, and judgment will be rendered for the plaintiff." It is counsel's contention that no one except the clerks of the election board can legally assist any voter to prepare his ballot, and that the ballot of any elector which is prepared with the assistance of the judges or anyone else than the clerks is void and should be excluded from the count, as the elector, by permitting a judge to thus assist him in the preparation of his ballot, instead of a clerk, intentionally exposes the same.

It will be noted that the finding of the court upon the question of the number of voters assisted by the judges or by the clerks contains no statement as to the number prepared by each. Preliminary to the consideration of the question upon its

merits, however, two propositions are raised and insisted upon by counsel for defendant in error which require notice. The first is that the evidence taken and considered by the trial court on the hearing of the case has not been properly brought to this court and is not before us. It appears that the instant case was one of several election contest cases which were tried in that county under the same issues and facts as are here involved. One of these, Ball v. McCulley, had been tried, and the evidence preserved, and at the inception of this case, counsel for both parties entered into the following several stipulations:

"It is hereby stipulated by and between the parties to the above-entitled action that the parties to this action are each duly qualified to hold the office of register of deeds of said county, and that the evidence as shown by the stenographer's transcript in the case of H. M. Ball v. Wm. N. McCulley, case No. 5, pending in said court, shall be accepted and considered as the evidence in this case, and it is agreed that the parties hereto received the following vote in said county, exclusive of Van Zandt precinct, to wit: Dill, 760; Board, 1,137 votes. And that the vote for said parties in said Van Zandt precinct, as shown by the certified returns from said precinct, is as follows: For contestant 406 votes, and for contestee 10 votes. And the right to have said votes counted from Van Zandt precinct shall be determined from the evidence taken in the said case of H. M. Ball v. Wm. N. McCulley." [Signed] Attorneys for respective parties.

"It is hereby stipulated and agreed by and between the parties hereto that the evidence taken in the case of H. M. Ball v. Wm. N. McCulley may be used in the above-entitled case, as to the evidence in said case; but each party reserves the right to introduce such other testimony as he may desire in addition to the testimony herein agreed upon." [Signed] Attorneys for respective parties.

Under the foregoing stipulations, the trial of the cause was had upon the evidence as shown by the stenographer's transcript in the case of Ball v. McCulley, which constitutes a typewritten record of evidence of nearly 500 pages. On the occasion of the filing of the petition in error and case made in this court, all of the record made in the instant case was compiled under one binding, while the record in the case of Ball v. McCulley was compiled under another binding, the first of which is marked "Part 1," and the second of which is marked "Part 2," and both entitled in this case, and identified by the same number in this court, and filed together on the same day. The

index to part 1 refers to the transcript of the testimony in part 2, giving the number of pages therein. The trial judge has attached to part 1 the usual certificate, and there is nothing to show that there was not at that time before him both part 1 and part 2 of the case-made, and in view of this evidence and the absence of any affirmative showing that the same is not a part of the case-made, and so duly considered by the parties and the judges who signed and settled it, we will not assume that it is not a part of the record as the case appears in this court. Moreover, this court held, in the case of *England Bros. v. Young* (Okla.) 105 Pac. 654: "When a case-made or record is filed in the supreme court, if any evidence heard on the trial of such case is omitted therefrom, such court may, on its own motion, order, within a reasonable time, to be fixed by said court, that such omitted parts, under the direction of the trial judge, may be incorporated in the case-made with the same effect as if it had been incorporated at the beginning. See § 1, art. 4, chap. 28, p. 322, Sess. Laws (Okla. Terr.) 1905. No appeal may be dismissed by reason of such omission until an opportunity for such correction has been allowed."

As there is no claim made that the evidence referred to was not that on which the case was tried and determined, and as we entertain no doubt on the subject, to sustain the contention of counsel would not result in a dismissal or affirmance of the case, but only in the delay incidental to a correction of the record. We therefore hold the record sufficient in this respect.

The second proposition is involved in the insistence of counsel for plaintiff in error that there is no evidence in the record sustaining the finding of the court that the clerks of the election board at any time assisted any of the electors in the preparation of their ballots, and that the inspector, the judges, and one outside party, who temporarily served in the place of one of the judges in his absence, assisted all of the voters who received help, and that this is the undisputed evidence of the record. A request was made that the court make special findings of fact. There was the exception taken to the findings made by the court in the way of a motion to make them more definite and certain or to make other or different findings, and it is the insistence of counsel for defendant in error that plaintiff in error is concluded by the findings made, and that error cannot be predicated upon failure to find facts unless a request for a special finding on each point is made in time, and that in this case, there being no request by plaintiff in error for additional or other

findings by the trial court, he is concluded by the findings made unless they are without any evidence to support them. If the voters were assisted, as is found by the court, by both the judges and the clerks, and assistance by others than the clerks is fatal to the ballots so prepared, and there is no showing as to how many voters each assisted, there might be grounds for contending that this court would presume, in order to sustain the judgment of the trial court, that a sufficient number were assisted by the clerks, so that the judgment could not be reversed on the facts. The evidence shows that the names of the members of the election board were Bradley, inspector, Kennedy and Myers, judges, Hill and Morgan, clerks. It also shows that one Boucher, without being sworn, took the place of Myers, one of the judges, at about 3 o'clock in the afternoon of election day, and continued to act until the closing of the polls. The testimony on the question as to which of the officials actually entered the booths and assisted the electors in the preparation of their ballots is shown to be substantially as follows:

Boucher, who took the place of Myers, judge, testified as follows:

Q. Did you act inside the room as one of the officers for a while?

A. Yes, sir.

Q. What time did you begin?

A. Three o'clock.

Q. Who was you working for?

A. Charley Myers.

Q. Were you sworn?

A. No, sir.

Q. Didn't take any oath of office?

A. No, sir.

Q. What did you do in the room?

A. I furnished the men with ballots as they came in to vote, and helped them to make out the tickets.

Q. How long did you usually remain in the booth?

A. Two minutes, I guess.

Q. Did you remain in there until after the voter had stamped his ballot?

A. Yes, sir.

Q. Did you see any of the ballots stamped by the voter whom you went into the booth with?

A. A number of them.

Q. A number of them?

A. Yes, sir.

Q. About how many did you see stamped?

A. Forty or fifty, I think. . . .

Q. You state that you saw probably forty or fifty tickets that were voted. Was your observation such as to enable you to state what particular persons were voted for after they stamped their tickets? You

stated in answer to one of Mr. Rogers' questions that you were able to see who some of them had voted for; is that a fact?

A. Yes, sir; I could tell whether it was a Republican or Democratic ticket.

Q. After you instructed them how to place the stamp on it, and after they had stamped it, then did you inspect them close enough to observe where the stamp mark was?

A. Yes, sir.

Q. About how many of those did you observe close enough to tell how they had voted?

A. Cannot say.

Q. As many as a half a dozen?

A. Yes, sir.

Q. Do you say there was more than half a dozen that you saw after the stamp mark was placed on them?

A. Yes, sir; practically all that I went to the booths with.

Q. About how many did you go in the booths with?

A. Forty or fifty.

Q. You say practically all that voted?

A. Yes, sir.

Myers, judge, whose place the foregoing witness took, testified as follows:

Q. Did you assist any of the voters that day?

A. Yes, sir.

Q. State what you did in the way of helping the voters or assisting them.

A. I didn't do anything, only showed him where to stamp the ballot.

Q. You went in the booths with them?

A. Yes, sir.

Q. About what portion of the voters that voted did you go in the booths with?

A. About one third of them, I suppose.

Q. Who else assisted the voters in voting except yourself?

A. Both the other colored men who was in there.

Q. What are their names?

A. Bradley, and I don't know the other's name.

Q. About what portion of the voters that came there that day were assisted by the two negroes?

A. More than one half, I think.

Q. How long did you remain in the booth when you would go in to assist them?

A. Sometimes I would stay in there until they came out, and sometimes I would not.

Q. Of the number you went in with, what part of them did you see put the stamp on their tickets?

A. I cannot tell the number; nearly every one that I was with, I would say nearly all of them.

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Hill, one of the clerks, testified as follows:

Q. Who instructed the voters during the day?

A. Kennedy and Bradley.

Q. Kennedy and Bradley?

A. Yes, sir.

Q. What offices did they hold?

A. Judges and inspector.

Q. They done the instructing?

A. Yes, sir.

Q. How many of the voters did they assist in making out their ballots?

A. About a third of them, I think.

Q. Where did they go to assist them?

A. In the booths.

Q. How (long) did they remain in the booths with them?

A. I cannot say.

Q. Did they stay in there until the voter had voted?

A. Yes, sir.

Q. And then the judge and the voter would come out together, and the voter would go out the door, and the judge would place his ballot in the ballot box?

A. Yes, sir.

Counsel for plaintiff in error call our attention to the foregoing evidence, and rely upon it as being the only evidence introduced on the subject. Counsel for the defendant in error in no way controvert the same, and a careful examination of the record does not disclose that there is any testimony to sustain the findings by the court that either of the clerks at any time during the day assisted any of the electors in the preparation of their ballots. Boucher testified that he assisted about forty or fifty of the electors and saw them stamp their ballots. Myers testified that he went into the booths and assisted in the preparation of the ballots of about one third of the voters who voted there that day. Hill testified that Kennedy and Bradley, the other judge and the inspector, assisted about one third of the voters in the preparation of their ballots, and the court finds from the evidence that a majority of the votes cast were with assistance.

The statutes which the questions raised by the foregoing facts involve, and which will be necessary to consider in order to determine, are as follows: Section 44, chap. 33, § 2949, Wilson's Rev. & Anno. Stat. (Okla.) 1903: "Any elector who declares that by reason of physical disability or inability to read the English language, he is unable to mark his ballot, may declare his choice of candidates to the poll clerks, who, in the presence of the elector, and in the presence of each other, shall prepare the

ballots in the manner hereinbefore provided, and on request shall read over to such elector the names of the candidates as marked. Anyone making a false declaration under the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction be fined in any sum not exceeding \$20; and any poll clerk or poll clerks who shall deceive any elector in selecting or marking any ballot, or mark the same in any other way than as requested by said elector, shall be guilty of a felony, and on conviction shall be imprisoned in the penitentiary for not less than one nor more than five years." And § 5, chap. 17, p. 234, Sess. Laws (Okla.) 1905, as follows: "If any elector shall intentionally expose his ballot or any part thereof to any person so as to disclose to him any of the candidates voted for or how said ticket has been stamped (except in cases where the ballot has been made out by the clerks, as provided in § 44), such ballot shall not be deposited in the ballot box. A minute of such occurrence shall be noted on the poll lists, and such person shall not be permitted to vote at said election. . . ."

By this it will be seen that we are again confronted with the eternal moot of whether an election statute is mandatory or directory. The perpetuity and virtue of popular government can only be secured and maintained by providing for the independence of the electors upon whose consent and will it exists. Widespread charges of improper influence, bribery, and corruption committed on the occasion of elections in many of the states of the Union, bringing in their wake defeat of the popular will and success to the corrupt schemes of designing men, brought about the election reform known as the Australian ballot system. Elections prior to it were held by an open-ticket system under which secrecy was almost, if not quite, impossible, and dependent or corrupt voters were equally at the mercy and under the control of those who would use them for corrupt ends.

The court of appeals of New York, in the case of *People ex rel. Nichols v. County Canvassers*, 129 N. Y. 395, 14 L.R.A. 624, 29 N. E. 327, says: "We know that the principal mischief which the statute was intended to suppress was the bribery of voters at elections, which had become an intolerable evil, and this was to be accomplished by so framing the law as to enable, if not compel, the voter to exercise his privilege in absolute secrecy."

The supreme court of Michigan, in the case of *Detroit v. Rush*, 82 Mich. 532, 10 L.R.A. 171, 46 N. W. 951, says: "The secrecy of the ballot is the great safeguard to the purity of elections. The vote by bal-

lot implies secrecy. This secrecy should not be confined to the time of depositing the ballot. It should accompany the voter through all the steps provided for the preparation of his ballot. Only in this way can he be freed from all intimidation, improper influences, reproach, and animadversion. When all knowledge of how he voted is the voter's own secret unless he chooses to divulge it, he is fully protected, and a free and honest vote will very uniformly be the result."

The supreme court of appeals of Virginia, in the case of *Pearson v. Brunswick County*, 91 Va. 322, 21 S. E. 483, says: "The object is to relieve the voter from every influence inimical to a free and deliberate exercise of the right of suffrage, to free him from all solicitation and annoyance, and to leave him a perfectly free agent to vote as to him seems best. These provisions seem to be not only reasonable, but well adapted to secure the end in view, so far as the voter is concerned who is able to prepare his own ballot. He goes to the judges, he receives an official ballot printed by authority of the state, upon which is to be found every office to be filled and every candidate for that office, whose name has been filed in accordance with the requirement of the law, and he retires to a booth where he is curtained off and secluded from all the world. No eye can see him and no ear can hear him; no evil agency can approach him; and, with these environments, he prepares his ballot, folds and delivers it to the judge, who, in his presence, places it in the ballot box. . . . The general scheme of the law is to secure the independence of the voter by secluding him within an isolated booth, surrounded by a neutral zone, within which none may enter save those charged with conducting the election."

Thus it is seen that the general scheme of the system is to secure the independence of the voter by requiring him to cast his vote in secret. Secrecy is the fundamental underlying primary essential of the system, and is the one element and condition which, paramount to all others, cannot be destroyed without destroying the reform intended, and re-establishing the evils it was designed to correct. Statutes which make, even incidentally, for its preservation and inviolability, are seldom directory, and without exception, where the language will admit of it, are held to be mandatory. Yet, great as the demand for secrecy is, it is manifest that there is a point beyond which it may be carried, and qualified electors will be virtually disfranchised unless assisted, and the end to be attained defeated by the means provided. Hence our stat-

ute, as is seen, provides that any elector who, by reason of physical disability or inability to read the English language, is unable to mark his ballot, may declare his choice to the poll clerks, and they may assist him. In such high esteem is the absolute secrecy of the ballot and the manner in which any elector may cast it held that many of the states have passed statutes requiring those who, by reason of physical or other disability, are unable to prepare their own ballots, to make oath to this effect before being permitted to secure assistance. Such a statute has Kentucky, and the court of appeals of that state, in the case of *Major v. Barker*, 99 Ky. 305, 35 S. W. 543, had occasion to pass on the question as to whether the taking of this oath was mandatory, and in that case it held in the syllabus as follows: "The provision of § 1475 of the Kentucky Statutes, requiring that a voter shall declare his disability on oath before his ballot can be marked for him by the clerk of the election, is mandatory to the voter, and a ballot so marked without the declaration on oath being made is an illegal vote, and should be excluded." In the consideration of the case, Judge DuRelle said: "In our view, the statute imperatively requires that the voter shall declare his disability on oath before his ballot can be marked for him by the clerk, and to permit the officers to assume, either from the voter's appearance or from their own alleged personal knowledge, that he is so disabled as to be unable to mark his own ballot, would be to open a door for wholesale evasion of the requirement of secrecy in the ballot. This rule may result in hardship to the individual voter in cases where the officers are neglectful of their duty in requiring the oath of disability to be made; but the requirement that the voter shall take the oath before his ballot can be marked and deposited, in order that he may be punished if he make a false declaration, is, in our judgment, mandatory to the voter. A ballot so marked without the declaration on oath being made is an illegal vote and should be excluded."

Michigan passed a statute which provides (§ 32, act No. 190, Laws 1891): "When any elector shall make oath that he cannot read English, or that because of physical disability he cannot mark his ballot, or when such disability shall be made manifest to said inspectors, his ballot shall be marked for him, in the presence of at least two of the inspectors, by an inspector designated by the board for that purpose, who is not a candidate on said ticket." This statute was before the supreme court of that state in the case of *Atty. Gen. ex rel. Reynolds v. May*, 99 Mich. 538, 25 L.R.A. 325, 58 N. 29 L.R.A. (N.S.)

W. 483, and the question presented was whether the ballots cast by certain electors who failed to take the oath prescribed were valid. The court, in the consideration thereof, said: "These provisions were intended to secure the entire secrecy of the ballot, except so far as was absolutely necessary to enable such electors as could not read English to have assistance in marking it. The only test, under this statute, which the inspector who is designated to assist the voter can apply to determine whether the elector can read English, is that the elector shall make oath of the fact. No other test is permissible, and it is unlawful for any inspector to assist in marking a ballot for any elector who claims that he cannot read English until such elector shall have first made oath to the fact. The construction contended for by the respondent cannot be given. Such interpretation would allow a voter to be assisted upon his own mere statement that he could not read English, and give inspectors unlimited discretion to mark ballots. The intention of the legislature was to limit the marking to those who made the oath, or to those who, from physical disability, could not mark them. This intent is evidenced by the other portions of the statute above quoted, as, by § 26, if the ballot is seen after it is marked by any other than the inspector lawfully assisting, so as to disclose any of the candidates voted for, such ballot shall not be received or deposited in the box; and, under § 45, a penalty by fine and imprisonment is imposed upon anyone disclosing the contents of a ballot seen by him. These provisions are mandatory."

The foregoing discussion and authorities cited are applicable to the propositions presented in this case to the extent that they show how jealously the courts guard the secrecy of the ballot. It cannot be exposed nor thrown open except *ex necessitate* as the result of a condition for which the voter alone, and not the law, is responsible, and it can then only when the voter himself declares it and solicits the assistance provided by law. Discussing this proposition, the supreme court of appeals of Virginia, in the case of *Pearson v. Brunswick County*, 91 Va. 322, 21 S. E. 483, said: "It is obvious that one who, either from physical or intellectual blindness, is unable to read, is wholly incapable of voting by ballot without assistance from some quarter. The law recognizes this and seeks to provide for it. The electoral board of the county is, by the 15th section, required to appoint a special constable. . . . The vote by ballot *ex vi termini* implies a secret ballot. The secrecy of the ballot is a right which inheres in the voter,

and of which he cannot against his will be lawfully deprived. It must be, however, in some degree subordinate to the right to vote by ballot, of which it is but a part; and the main object, which is the right to vote, must not be defeated by a too rigid observance of the incidental right, which is that of secrecy. A blind man or a man unable to read must, in the nature of things, so far compromise the secrecy of his ballot as to invoke and obtain the aid of others in the preparation of his ballot; but as it would be a violation of confidence were he to seek of a friend assistance on such an occasion, for that friend to betray the secret and disclose the vote, so it is a violation not only of confidence, but of official duty, for the constable to lift the veil of the secrecy which should be impenetrable, and violate the confidence which the law requires the voter to repose on him. The oath of office of the constable binds him to the performance of the duties imposed upon him, not only by statute, but by the Constitution. He must observe and respect all the rights of the voter; and among those rights not the least important is to have the secrecy of his ballot kept inviolate; and for a breach of this duty upon the part of the constable, he will become amenable to all the pains and penalties provided by law."

It may also be noted that our statute penalizes anyone who wrongfully asks for assistance by providing (§ 2949, Wilson's Rev. & Anno. Stat.): "Anyone making a false declaration under the provisions of this section shall be deemed guilty of a misdemeanor, and upon conviction be fined in any sum not exceeding \$20." Neither the Kentucky nor the Michigan statutes, nor the one of this state, has any provision requiring the rejection of ballots of electors who improperly secure assistance in their preparation; but, as we have seen in the states from whose decisions we have quoted, the courts of last resort have nevertheless held the ballots invalid, and we doubt not that such a precedent would be followed were the question presented under our own statute.

In line with this, we may notice that § 4, chap. 17, p. 233, Sess. Laws (Okla.) 1905, provides in substance that, leaving the booth, the voter shall deliver his ballot to the inspector or judge temporarily acting as inspector, and that such inspector shall forthwith, in the presence of the voter and members of the election board, etc., deposit the same in the ballot box. There is no provision of the statute providing that a ballot properly prepared shall be rejected for no other reason than that the same is delivered to another than the officer named in the statute, yet this court, where that

question was raised in the case of Rampen-dahl v. Crump (Okla.), 105 Pac. 201, held that the same was mandatory, and that ballots so polled should be rejected.

We have seen above that the laws of Michigan provide that, after an elector incompetent to act for himself shall have made the oath provided for therein, the ballot shall be marked for him in the presence of at least two inspectors, and § 26 of the same act, which is very similar to our law, provides: "If any elector shall show his ballot, or any part thereof, to any person (other than one lawfully assisting him in the preparation thereof), after the same shall have been marked, so as to disclose any of the candidates voted for, such ballot shall not be received or deposited in the ballot box. In case such elector shall so expose his ballot, his name shall be entered on the poll lists with a minute of such occurrence, and such elector shall not be allowed to vote thereafter at said election."

In the case of Atty. Gen. ex rel. Reynolds v. May, supra, it appears that a number of ballots were marked for electors by others than the legally selected inspectors. On a proceeding being brought to secure their rejection, the trial court instructed the jury that all such ballots were void, and that it was contrary to law to deposit them in the ballot box or count or consider them in determining the result of the election. In the consideration of this instruction on appeal, the supreme court of Michigan said: "The law aims to secure secrecy in the ballot, and does not attempt to disfranchise any voter. At the expense of this secrecy, and in order to enable electors to vote who are physically incapacitated from marking their ballots, the law provides a method for such aid, as well as to those who cannot read the English language. The law does not deprive these voters of any right, but rather secures to them aid in voting intelligently. It is plain and simple in its provisions. Every voter, however illiterate, or however much incapacitated physically, has a method pointed out by which he may exercise his right of franchise. The law does not shut off any class of voters from the ballot, and, we think, was designed by the legislature to accomplish the purpose specified in the Constitution. . . . Section 32 provides the only authority by which an elector may have a ballot marked. It has been quoted above. The marking can be done only by an inspector designated by the board for that purpose, and in the presence of at least two of the inspectors. Under this act, no other can lawfully mark ballots, and to no other can the ballot be exhibited, unless United States supervisors

of election may see them when a member of Congress is to be elected. The court was therefore right in its interpretation of this act."

The same question arose in Tennessee, and on the consideration thereof in the case of *Moore v. Sharp*, 98 Tenn. 491, 41 S. W. 587, the supreme court said: "The third assignment is that the court erred in not holding and decreeing those votes illegal where the ballots were marked by any person other than the voter himself or the officer holding the election. This assignment of error involves the proper construction of § 16 of what is commonly known as the Dortch election law, which provides, viz.: 'That any voter who declares to the officer holding the election that, by reason of blindness or other physical disability, he is unable to mark his ballot, shall, upon request, receive the assistance of the officer holding the election in the marking thereof, and such officer shall certify on the outside that it was so marked with his assistance, and shall give no information in regard to same.' The circuit judge held, under this section, 'that any ballot marked for a person neither blind nor physically disabled is void, whether marked by the deputy sheriff or coroner, a judge, clerk, receiver, register, or any other person.' He further held that the election is the only person who can lawfully mark ballots for persons blind or otherwise physically disabled from marking their own ballot. The court held further that, while a blind man is presumed to know the law, yet he cannot be expected to always recognize the distinction between persons officiating at the polls. Hence, if a blind man, in good faith, and believing he is submitting his case to the proper officer, blamelessly allows his ballot to be marked by some other person, it should not be rejected. The assignment of error under consideration is that those votes are illegal where the ballots are marked by any person other than the voter himself or the officer holding the election. This is precisely what the circuit judge held, with this qualification, that if a blind man, without fault on his part, allows his ballot to be marked by an unauthorized person, believing him to be the officer holding the election, his ballot is not thereby rendered void. In this ruling there was no error." In addition to the foregoing authorities, see also *McQuade v. Furgason*, 91 Mich. 438, 51 N. W. 1073; *Atty. Gen. ex rel. Seavitt v. McQuade*, 94 Mich. 439, 53 N. W. 944; *Vigil v. Garcia*, 36 Colo. 430, 87 Pac. 543; *Freeman v. Lazarus*, 61 Ark. 247, 32 S. W. 680.

The logic and the reasoning of the foregoing authorities appear to our minds 29 L.R.A. (N.S.)

to establish the mandatory character of this statute beyond the realm of real controversy. Further consideration of the election statutes, taken in connection with the foregoing discussion, tends to confirm us in the conclusion that the clerks alone possess the authority to assist in the preparation of elector's ballots. As we have observed, the purpose of the Australian ballot system is to make for the honesty of elections. This was to be attained by securing the independence of the elector through the secrecy of his ballot. Section 5 of the statute above quoted shows how jealously this secrecy is guarded. An elector preparing his own ballot cannot intentionally raise this veil except by sacrificing his right to vote. There is, as we have seen, but one statutory exception to this absolute rule, and this is contained in the law we are considering. Section 53, chap. 33, § 2958, Wilson's Rev. & Anno. Stat. (Okla.) provides: "If any person, being a member of an election board, or otherwise entitled to the inspection of the ballots, shall reveal to any other person how an elector has voted, or what other candidates were voted for on any ballot bearing a name not printed thereon by the board of election commissioners, or give any information concerning the appearance of any ballot voted, such person so offending shall be deemed guilty of a felony, and on conviction shall be imprisoned in the penitentiary for a period not exceeding five years." Paragraph 2961 of the same statutes provides: "No officer of election shall disclose to any person the name of any candidate for whom any elector has voted. No officer of election shall do any electioneering on election day. No person whatever shall do any electioneering on election day within any polling place or within 50 feet of any polling place. No person shall apply for or receive any ballot in any polling place other than that in which he is entitled to vote. No person shall show his ballot after it is marked to any person in such a way as to reveal the contents thereof, or the name of any candidate or candidates for whom he has marked his vote; nor shall any person examine a ballot which any elector has prepared for voting, or solicit the elector to show the same. No person except an inspector of election, or judge who may be temporarily acting for him, shall receive from any voter a ballot prepared by him for voting. No voter shall receive a ballot from any person other than one of the polls clerks, nor shall any person other than a poll clerk deliver a ballot . . . to an inspector except the one he received from the poll clerk. No voter shall place any mark upon his ballot, or suffer or permit any other

person to do so, by which it may be afterwards identified as the one voted by him. Whoever shall violate any provision of this section shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment in the penitentiary for a period not exceeding five years, or by a fine not exceeding \$300, or by both such fine and imprisonment, at the discretion of the court."

It will be noted that these penal sections of the election statute make felonies out of certain prescribed acts of all election officials and other persons as well as electors connected with the election. No specific official is named; but the entire board, as well as all other persons, are included generally within the penalty. This is not true, however, when it comes to the specific officials with which we are now dealing. Attention is called again to § 5, which provides for the rejection of any ballot intentionally exposed except in cases where the ballot has been made out by (not a member of the election board, but by) the clerks, as provided in § 44. Herein is a specific definite limitation to certain particular officials who may see the ballot, and yet its validity be not destroyed. Further, attention is also called to the latter clause of § 44, which provides a penalty (not for any member of the election board, judges, inspector, or other person, but) for any poll clerk or poll clerks who shall deceive any elector in selecting or marking any ballot. He, it is declared, shall be guilty of a felony, and on conviction be imprisoned for not less than one year nor more than five years. We do not pass on the question, for we need not, of whether a judge, inspector, or other person could be convicted for violating this section; but we submit that, when the act condemned is deemed to be a crime of such a grade and character that it is denounced a felony, the legislature would certainly have brought within the scope of its operation every one whom it regarded as being possibly subject to it. If it were deemed tolerable that under any contingency others than the clerks were to be permitted to assist in the preparation of the ballots, then the act would have been made sufficiently broad to have included them; and this is especially true when the other penal statutes to which we have referred are considered. Therefore, when these two sections dealing with the deception of voters and the exposure of ballots are taken together and placed in contrast to the other penal acts, we submit that there can be left no doubt whatever that the clerks, and the clerks alone, are entitled to see the ballots of the electors or to assist in their preparation, and that the exposure

of ballots to the judges, inspector, or any other persons, renders them invalid, and not proper to be deposited or counted. It seems to us there is a substantial reason for the rule. These highly trusted officials can be chosen with that purpose and end in view; men of discretion and known probity and integrity can be selected; and electors requiring assistance, attending upon the polls, may ascertain and learn in advance to whom they will be required to expose their choice in order to be entitled to enjoy the right of franchise.

Under the undisputed evidence and the findings of the court, this conclusion on our part results in a reversal of the judgment of the trial court.

The cause is, accordingly, remanded to the district court of Okfuskee county, with instructions to set aside the judgment heretofore rendered, and enter one in accordance with this opinion.

Turner, Kane, Hayes, and Williams, JJ., concur.

Petition for rehearing denied.

IOWA SUPREME COURT.

WILLIAM MOLLISON, Admr., etc., of
Christena Lawson, Deceased, Appt.,
v.

GEORGE W. RITTGERS.

(140 Iowa, 365, 118 N. W. 512.)

Evidence — error — waiver.

1. Objection to evidence of transactions with a person since deceased is waived by eliciting on cross-examination new matter as to such transactions, not pertaining to anything elicited on direct examination.

Trust — questioning acts.

2. Title to money distributed by one in whose hands securities were placed to be cared for, by the owner, who has since de-

Note. — Competency of interested witness to testify as to transactions with deceased in which he did not participate.

While modern legislation has swept away the old disqualification of parties and interested persons as witnesses in their own behalf, a fragment of the ancient rule has been retained in those statutes which exclude the testimony of the survivor of a transaction with one since deceased, when offered against the latter's estate. By this exception (to epitomize the statutory disqualification as found in most jurisdictions) no party to, or person interested in the event of, any action or proceeding in which the opposite party has succeeded to the interest of a deceased person, shall be

ceased, to which the owner consented, cannot be questioned after his death.

Evidence — transactions with deceased person.

3. Testimony of children of a property owner present when securities were placed in the hands of one of them to be distributed among the children, who did not participate in the conversation, is not within the operation of a statute forbidding evidence of transactions with persons since deceased.

Same — persons not interested.

4. Persons to whom money has been distributed in alleged accordance with directions of a person since deceased are not interested in the outcome of an action brought to compel the person who made the distribution to account for the amount to such person's estate, so as to prevent

their giving testimony of conversations concerning the distribution with such deceased person, under a statute prohibiting persons interested in the event of an action growing out of transactions with a person since deceased to give evidence concerning such transactions.

Same — parol — varying writing.

5. The execution of a power of attorney by one who has placed securities in another's hands, several years after it was done, which does not purport to embody the original agreement as to their disposition, will not exclude oral evidence of what the original agreement was, on the theory that it tends to vary the terms of a written instrument.

Same — best — parol — shorthand.

6. Testimony as to evidence given in an examination before court cannot be ex-

amined as a witness in his own behalf, in regard to any "personal communication or transaction" had by him with the deceased (or, as it is sometimes expressed, in regard to a transaction or communication "between the witness and the deceased"). It is superfluous to state that, therefore, as to transactions and communications within the purview of the statute, no party or person otherwise interested may testify against the deceased's estate. But the question often arises: Does this disqualification extend to all transactions or communications with the deceased person, or is it limited to those in which the person offered as a witness was actively engaged, thereby permitting him to testify as to matters in which he took no part and in regard to which he was a mere bystander? This question is to be distinguished from the question, which is not within the scope of this note, whether the mere presence of a disinterested third person capable of confirming or contradicting any version of the transaction renders the statute inapplicable.

The weight of authority supports the rule applied in *MOLLISON v. RITTEGERS*, that under such statutes a party to an action or a person interested in the event thereof is competent to testify to communications or transactions between a deceased and a third person had in his presence or within his hearing, if he took no active part therein himself, though the same may affect adversely the estate of the deceased, upon the ground that such transactions are not personal transactions, or transactions had between the witness and the deceased. *Blount v. Beale*, 95 Ga. 182, 22 S. E. 52; *Reid v. Sewell*, 111 Ga. 880, 36 S. E. 937; *Elliott v. Banks*, 115 Ga. 920, 42 S. E. 218; *Sweezy v. Collins*, 40 Iowa, 540; *Smith v. James*, 72 Iowa, 515, 34 N. W. 309; *Gable v. Hainer*, 83 Iowa, 457, 49 N. W. 1024; *Leipird v. Stotler*, 97 Iowa, 169, 66 N. W. 150; *Allbright v. Hannah*, 103 Iowa, 98, 72 N. W. 421; *Mallow v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; *Wright v. Reed*, 118 Iowa, 333, 92 N. W. 61; *Jacobs v. Jacobs*, 130 Iowa, 10, 114 Am. St. Rep. 402, 104 N. W. 489; *Foreman v. 29 L.R.A. (N.S.)*

Archer, 130 Iowa, 49, 106 N. W. 372; *Sarchfield v. Hayes* (Iowa) 112 N. W. 1100; *Barto v. Harrison*, 138 Iowa, 413, 116 N. W. 317; *Culbertson v. Salinger* (Iowa) 117 N. W. 6; *Wise v. Outtrim*, 139 Iowa, 192, 130 Am. St. Rep. 301, 117 N. W. 264; *McBride v. McBride*, 142 Iowa, 169, 120 N. W. 709; *McKean v. Massey*, 9 Kan. 600; *Fry v. Fry*, 56 Kan. 291, 43 Pac. 235; *Griffith v. Robertson*, 73 Kan. 666, 85 Pac. 748; *Cogswell v. Hall*, 185 Mass. 455, 70 N. E. 461; *Kroh v. Heins*, 48 Neb. 691, 67 N. W. 771; *Re Powers*, 79 Neb. 680, 113 N. W. 198; *Harnett v. Holdredge*, 5 Neb. (Unof.) 114, 97 N. W. 443; *McCall v. Wilson*, 101 N. C. 598, 8 S. E. 225; *Roe v. Harrison*, 9 S. C. 279; *Hughey v. Eichelberger*, 11 S. C. 36; *Shaw v. Cunningham*, 16 S. C. 631; *McLaurin v. Wilson*, 16 S. C. 402; *Colvin v. Phillips*, 25 S. C. 228; *Kenmore v. Kenmore*, 26 S. C. 251, 1 S. E. 881; *Moore v. Trimmier*, 32 S. C. 511, 11 S. E. 548, 552; *Brice v. Miller*, 35 S. C. 537, 15 S. E. 272; *Sullivan v. Latimer*, 38 S. C. 158, 17 S. E. 701; *Brock v. O'Dell*, 44 S. C. 22, 21 S. E. 976; *Brickley v. Leach*, 55 S. C. 510, 33 S. E. 720; *Sloan v. Hunter*, 56 S. C. 385, 76 Am. St. Rep. 551, 34 S. E. 658, 879; *Schultz v. Culbertson*, 125 Wis. 169, 103 N. W. 234.

Thus, in *Withers v. Sandlin*, 44 Fla. 253, 32 So. 829, it was held that though there was such a direct and certain interest on a witness's part as to disqualify him from testifying to any transaction or communication between himself and the deceased, he was not for that reason prohibited from testifying against the decedent's administrator, to a conversation had exclusively between the decedent and a third person, in which conversation the witness took no part, either actively or by acquiescence.

And in *Watts v. Warren*, 108 N. C. 514, 13 S. E. 232, it was declared that such statutory disqualification did not, by its terms and purpose, prevent the surviving party from testifying concerning transactions or communications between third persons and the deceased that affect adversely the latter's estate or the rights of persons in and to the same.

And in *Wollman v. Ruehle*, 104 Wis. 603,

cluded on the theory that it is not the best evidence of what was so given, although the evidence was taken down in shorthand.

Agency — revocation — death.

7. The authority of one in whose hands securities are placed to make distribution of them among the owner's children to whom they are given by the owner, and for whom delivery is made to such person, is not revoked by the latter's death.

(November 24, 1908.)

APPEAL by plaintiff from a judgment of the District Court for Polk County dismissing a petition to compel defendant to account for certain securities alleged to belong to the estate of Christina Lawson, deceased. Affirmed.

The facts are stated in the opinion.

Messrs. Myerly & Myerly for appellant.

Messrs. McHenry & Graham, for appellee:

The interest which will disqualify a witness must be present, certain, and vested.

Clinton Sav. Bank v. Underhill, 115 Iowa, 292, 88 N. W. 357; Bird v. Jacobus,

80 N. W. 919, it was held that such legislation did not forbid testimony of transactions or communications between the deceased and third persons in the witness's presence, if he did not participate therein and they were not affected by his presence. The court went on to say: "Unless the transactions or communications are personal, and had with the deceased by the party, either literally or in practical effect, as by participating in or influencing them, they do not fall under the prohibition of the statute."

And the same rule of construction will apply to a statute like that of Iowa, forbidding the husband or wife of a party to an action or of any person interested in the event thereof to be examined as a witness in regard to any personal transaction or communication with a person since deceased, and therefore a spouse of a party or person interested in the event of a suit will not be incompetent to testify to communications or transactions had between such party and the deceased. Johnson v. Johnson, 52 Iowa, 586, 3 N. W. 661; Auchampaugh v. Schmidt, 77 Iowa, 13, 41 N. W. 472, overruling 72 Iowa, 656, 34 N. W. 460; Erusha v. Tomash, 98 Iowa, 510, 67 N. W. 390; Dettmer v. Behrens, 106 Iowa, 585, 68 Am. St. Rep. 320, 76 N. W. 853; Allison v. Parkinson, 108 Iowa, 154, 78 N. W. 845; Lucas v. McDonald, 126 Iowa, 678, 102 N. W. 532; McElroy v. Allfree, 131 Iowa, 112, 117 Am. St. Rep. 412, 108 N. W. 116; Drefahl v. Security Sav. Bank, 132 Iowa, 563, 107 N. W. 179. Nor would a party or interested person be incompetent to testify to a conversation between his wife and the deceased, if he took no part therein. Smith v. Fry (Iowa) 103 N. W. 1002.

The following cases are offered as illustrative of the rule.

113 Iowa, 194, 84 N. W. 1062; Wormley v. Hamburg, 40 Iowa, 22; Dubuque Lumber Co. v. Kimball, 111 Iowa, 48, 82 N. W. 458; German American Sav. Bank v. Hanna, 124 Iowa, 374, 100 N. W. 57.

A witness may testify to conversations or transactions between deceased and another, in which he had no part; the prohibition relates to personal transactions alone.

Allbright v. Hannah, 103 Iowa, 98, 72 N. W. 421; Mallow v. Walker, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452; Wright v. Reed, 118 Iowa, 333, 92 N. W. 61; Foreman v. Archer, 130 Iowa, 49, 106 N. W. 372; Farmers' & T. Bank v. Creveling, 84 Iowa, 681, 51 N. W. 178; Sypher v. Savery, 39 Iowa, 258; Haverly v. Alcott, 57 Iowa, 171, 10 N. W. 326.

Parol testimony is admissible to establish parts of a contract not reduced to writing, where such testimony relates to matters about which the writing is silent.

Fawkner v. Lew Smith Wall Paper Co. 88 Iowa, 169, 45 Am. St. Rep. 230, 55 N. W. 200; 9 Enc. Ev. p. 350.

Illustrations of the application of the rule here discussed:

In McCamy v. Cavender, 92 Ga. 254, 18 S. E. 415, it was held that a general agent was not incompetent to testify to a particular transaction or communication at which he was present, but in which he took no part, between his principal and her debtor, since deceased, in an action between her executor and the administrator of her debtor.

And in Paul E. Wolff Shirt Co. v. Frankenthal, 96 Mo. App. 307, 70 S. W. 378, a secretary of a corporation suing the estate of a deceased person was held competent to testify to a conversation which he heard, but in which he took no part, between the deceased and the president of the corporation.

And in Alexander v. Ransom, 16 S. D. 302, 92 N. W. 418, a person was held to be competent to testify to a conversation which he heard between an intestate and the agent of a party to the action, though he was in company with the agent at the latter's request, and afterwards became the attorney of the party in the litigation.

So, in Costen v. McDowell, 107 N. C. 546, 12 S. E. 432, and in Worth v. Wrenn, 144 N. C. 656, 57 S. E. 388, a party was held to be competent to testify to what he had heard the opposite party's decedent testify to on a former trial of the action.

And in State ex rel. Dobbins v. Osborne, 67 N. C. 259, it was held in an action on a guardian's bond that, while the plaintiff was not competent to prove any transaction between himself and his deceased guardian, he was competent to prove any other transaction of the latter, such as a sale of the plaintiff's property by his guardian to a third person.

And in Johnson v. Cameron, 136 N. C.

Ladd, Ch. J., delivered the opinion of the court:

In 1880 the deceased delivered to her son, the defendant herein, certain notes and securities which he has cared for by collecting and reloading, save that distributed prior to the time of her death in April, 1905. Plaintiff, as the administrator of her estate, prays for the value of the property then delivered with accumulations, while defendant contends that deceased constituted him a trustee for her five children, directing him to divide among said children. The evidence shows that on March 15, 1887, he paid out of the funds so obtained \$134 to each of his sisters and a brother, and appropriated a like sum to his own use, with his mother's consent,

and on October 16, 1905, after her death, he distributed that remaining in his hands by paying each \$345.31. It is conceded that defendant's testimony of any personal transactions with deceased, if objected to, was inadmissible under § 4604 of the Code, providing that "no party to any action or proceeding, nor any person interested in the event thereof, nor any person from, through, or under whom any such party or interested person derives any interest or title by assignment or otherwise, and no husband or wife of any said party or person, shall be examined as a witness in regard to any personal transaction or communication between such witness and a person at the commencement of such examination deceased, insane, or lunatic, against

243, 48 S. E. 640, it was held that a witness interested in the result of an action concerning certain land might testify that she saw the person under whom the opposite party claimed deliver the deeds to the one under whom she claimed, both being deceased. See, however, *Harrell v. Ilagan*, 150 N. C. 242, 63 S. E. 952, *infra*.

But this transaction or communication with the deceased concerning which an interested party may testify must in reality be one between the deceased and a third person, in which the witness took no part, either passively or actively; if it is in fact a transaction between the witness and the deceased, his testimony will be inadmissible, though he took no physical part therein. Thus, in *Halyburton v. Dobson*, 65 N. C. 88, in which it appeared that the plaintiff's testator and the defendant, in the lifetime of the testator, went to a third person and had a conversation in relation to the subject in controversy between them, and the third person gave advice in regard to the matter, upon which the testator acted, the defendant was not permitted to testify to such conversation. The court said that it was "striking in the dark" to say that this transaction was not between the defendant and the testator.

And in *Boykin v. Watts*, 6 S. C. 76, in which the question was whether certain bills payable to a deceased person had been given by him to the plaintiffs, it was held that declarations of the decedent made at the very time of the alleged gift could not be testified to by the donee, though they were addressed to a third person.

And in *Goerke v. Goerke*, 80 Wis. 520, 50 N. W. 345, it was held that the beneficiary of a will could not testify that the will was read or explained to the testator in his presence, though the witness took no part in the matter at the time of the reading, where it appeared that he went with the testator to a lawyer's office to have the will drawn, and acted as a medium of communication between the testator and the draughtsman of the will. The court said that whether the witness actually took no part in the conversation at the time the

will was alleged to have been read was an unimportant fact, since it was admitted that he was with the testator to aid him in the making of the will, and that whether he was active in every minute detail of the business was immaterial, so long as it appeared that he took part either actively or by acquiescence in whatever was being done until the will was finally executed.

And in *Brader v. Brader*, 110 Wis. 423, 85 N. W. 681, which was an action by the widow of deceased against the latter's estate, and in which a certain note, the property of the plaintiff, was involved, which the defendant alleged had been paid, it was held that the plaintiff was incompetent to testify that payment of the note was made to her husband in her presence, but that she did not participate in the transaction. The court said that such transaction, although between the deceased and a third person, was so influenced by her presence that she was in effect a party to it.

And in *Morgan v. Henry*, 115 Wis. 27, 90 N. W. 1012, it was held that if the third person, with whom the deceased had the alleged transaction, was only a medium of communication between the party to the suit and the deceased, such fact would not render competent such party's testimony in regard to the transaction, and, accordingly, in an action by a daughter against the estate of her father for money alleged to have been given to him for investment for her, she was held incompetent to testify as to the delivery of the money, though she handed it to her mother, who gave it to her father.

So, in *Anderson v. Laugen*, 122 Wis. 57, 99 N. W. 437, the court refused to permit testimony as to transactions between the deceased and other persons, from witnesses who were parties and interested in establishing such transactions to support their contention in the controversy, where the record did not, in the language of the court, "justify the assumption that the witnesses . . . did not participate in the transactions or communications sought to be established by them, or that they were not affected by their presence."

the executors, administrator, heir at law next of kin, assignee, legatee, devisee, or survivor of such deceased person, or the assignee or guardian of such insane person or lunatic." When interrogated on cross-examination, he testified that the first distribution was with his mother's consent, and, as this was new matter, not pertaining to anything elicited on direct examination, plaintiff must be deemed, in eliciting it, to have waived the protection of the statute. *Walkley v. Clarke*, 107 Iowa, 451, 78 N. W. 70. As she consented thereto, title to the portion distributed in 1887 can no longer be questioned.

2. M. D. Rittgers, a brother of defendant, testified that he was present in March, 1880, when deceased delivered the notes

and securities, and that in doing so she stated that her husband had had all of her money she wished him to have, and "she wanted to fix her property, the money that that was there, so that her children would get it. . . . That she wanted it divided among her children. . . . That she wanted him to divide it among her children when it was collected. . . . She wanted my brother to take care of the property, and see that the children got it." The wife of the witness last named also was present, and testified that deceased then said that "she wanted to give them into his hands, that she wanted him to take charge of it, and it should be kept and divided among her children. She specified that . . . she said she wanted George

On the other hand, this rule permitting a party to testify as to a transaction with a deceased person which occurred in his presence was carried to such an extent by the supreme court of Iowa in *Mayes v. Turley*, 60 Iowa, 407, 14 N. W. 731; *Erusha v. Tomash*, supra; and *Powers v. Crandall*, 136 Iowa, 659, 111 N. W. 1010, as to permit a party to testify to a transaction between a coparty of his and the deceased.

And in *Eddy v. O'Brien* (Kan. App.) 57 Pac. 244, it was held that the fact that a witness was a party named in the record did not necessarily prevent him from testifying to transactions between the deceased and his codefendant, in which he took no part.

A different conclusion, however, was reached in *Wills v. Wood*, 28 Kan. 400, in which it was held that where there were two persons on the one side having like interests, they should, for the purpose of giving force to the statute prohibiting them from testifying as to personal transactions with the deceased, be considered as one, and neither be permitted to give his version of the conversation and statements of the deceased to the other in his presence.

And in *Larison v. Polhemus*, 36 N. J. Eq. 506, and *Matthews v. Hoagland*, 48 N. J. Eq. 455, 21 Atl. 1054, it was held that parties were not competent to testify adversely to one suing in a representative capacity, interchangeably in each other's behalf, each as to a transaction of the other with the deceased, where both were interested in the transaction, although such interests were divisible. It would seem, however, that under the New Jersey statute, such parties are incompetent to testify to any conversations or transactions of deceased in their presence, though they took no part therein, to judge from the conclusion reached in the later case from that jurisdiction. *Heinisch v. Pennington*, infra.

And in *Wilson v. Featherston*, 122 N. C. 747, 30 S. E. 325, a defendant was held to be incompetent to testify to a conversation between the deceased and a codefendant, upon the ground that there was no one to

contradict the witness, the codefendant being clearly incompetent.

Upon the same principle, in *Witty v. Barham*, 147 N. C. 479, 61 S. E. 373, a party defendant was held to be incompetent to testify to a conversation between the deceased and a person who, though not a party to the action, was a person interested in the event thereof.

The statutes construed in the cases heretofore cited to support the general rule that the testimony of an interested person is admissible as to transactions with a deceased person, in which he took no part, designated the transaction in regard to which the testimony of a party to an action or a person interested in the event thereof was to be inadmissible as "personal" or as had "between the witness and the deceased." In the statutes in the following cases, however, no such limitation was made, the statutory disqualification extending to "transactions" or "any transactions" with a deceased person. This difference in language may explain the conclusions reached in the following cases, though in none of them was this made the ground of the decision:

Thus, in *Comstock v. Comstock*, 76 Minn. 396, 79 N. W. 300, it was held that a party to an action or interested in the result thereof could not give evidence as to conversations with the deceased person, even though he took no part therein.

And in *Pederson v. Christofferson*, 97 Minn. 491, 106 N. W. 958, in which it was contended that the conversation which was sought to be proved by the party was with a disinterested third person who could contradict the testimony of the interested party if it was untrue, and that therefore the testimony was not within the statute, the court said that to permit the interested party to testify in such a case on that ground would be a violation of both the letter and the spirit of the statute.

And in *Heinisch v. Pennington*, 73 N. J. Eq. 456, 68 Atl. 233, a complainant in an action against the executors of her deceased half-brother, in relation to the will of their father, was held not to be competent to testify to statements made by the

Rittgers to take this property, and see that the children got it." Each of the witnesses stated on cross-examination that her remarks were to all present, but on redirect examination that they were addressed to defendant, and Mr. Rittgers testified that what he meant was that the talk was in the presence of all. The record has satisfied us that in this portion of the conversation the witnesses did not participate, and therefore that the evidence should not be excluded under the statute quoted. See *Walkley v. Clarke*, supra; *Foreman v. Archer*, 130 Iowa, 49, 106 N. W. 372; *Malloy v. Walker*, 115 Iowa, 238, 91 Am. St. Rep. 158, 88 N. W. 452. But even were this not so, neither of the witnesses appear to have had any present interest in the

controversy. Any interest Mr. Rittgers once had appears to have been removed by the payment of his share of the alleged bounty of deceased, and the outcome of the present litigation could not affect any right he may have. As said in *German American Sav. Bank v. Hanna*, 124 Iowa, 374, 100 N. W. 57: "The disqualifying interest must be in the event of the case itself, and not in the question to be decided. The liability to a like action, or his standing in the same predicament with the party, if the verdict cannot be given in evidence for or against him, is an interest in the question only, and does not exclude the witness." Neither of these witnesses will gain or lose by direct legal effect of the judgment, and the record would

two decedents in a conversation between them.

And in *Stringfellow v. Montgomery*, 57 Tex. 349, under a statute making the disqualification apply to testimony offered by, as well as against, the personal representative of a deceased person, it was held that it would be in direct contravention of such disqualification to permit an administrator, the plaintiff in the action, to establish the contract upon which he relied by testifying to a conversation had between his intestate and the defendants, in which the terms of the contract relied upon had been stated by the latter.

And in *Parks v. Caudle*, 58 Tex. 216, it was held that a party to a suit against heirs claiming the property in controversy through their deceased ancestor was precluded from testifying to transactions between the deceased and third persons, although occurring at a time when the witness had no interest in such statements or transactions.

And the same conclusion was reached in *Hopkins v. Faeber*, 86 Ky. 223, 5 S. W. 749; *Lowe v. Lowe*, 83 Minn. 206, 80 N. W. 11; *Gillaspie v. Murray*, 27 Tex. Civ. App. 580, 66 S. W. 252; *Barrett v. Eastham Bros.* (Tex. Civ. App.) 86 S. W. 1057.

On the other hand, in *Ray v. Camp*, 110 Ga. 818, 36 S. E. 243, it was held, under a statute in which the disqualification was "as to transactions or communications" with deceased persons, that a witness who was a party defendant, and interested in the result of an action instituted by the administrator of a deceased person, was not for that reason incompetent to testify to a conversation had in his presence between the deceased and another.

Nor will this difference in phraseology explain the decision reached in *Robinson v. James*, 29 W. Va. 224, 11 S. E. 920, in which it was held, under a statute precluding testimony by a party to an action or a person interested in the event thereof, in regard to "any personal transaction or communication" between such person and a deceased person, that a party or interested person was not competent to testify to a

conversation between the deceased and a third person, overheard by him, and in which he did not participate; the court declaring that a broad and liberal construction should be given to the words "personal transactions," if the spirit of the law was to be carried out, citing *Seabright v. Seabright*, 28 W. Va. 412, in which Judge Green, in delivering the opinion of the court, said that this question had not yet been decided in that state, but declared that he himself was of the impression that whenever it should be presented an interested witness would be decided incompetent to testify to a conversation held with the deceased in his presence, though the conversation was not with him.

And in *Harrell v. Hagan*, 150 N. C. 242, 63 S. E. 952, under a statute limiting the disqualification to "personal" transactions, it was held, in an action to ingraft a trust upon lands alleged to have been bought by the person through whom the plaintiffs claimed, for the use of the one through whom the defendants claimed, both of whom were dead, that the testimony of coparties to the action was incompetent to establish the trust by proof of a conversation between the alleged trustee and the *cestui que trust*. See, however, other North Carolina cases cited herein, and especially *Johnson v. Cameron*, 136 N. C. 243, 48 S. E. 640.

New York cases.

The decisions of the New York courts present such conflicting views that it is thought best to treat them separately.

The earliest case in which this question arose in this jurisdiction is *Simmons v. Sisson*, 26 N. Y. 264, in which it was held that the statutory provision which excluded a party to an action in which the legal representatives of a deceased person were adverse parties, from testifying to a transaction "had personally" between him and the deceased, did not prevent such a party from testifying to a conversation between the deceased and a third person which was overheard by him, and in which he did not participate. The court said that the hear-

not be legal evidence against either. *Worinley v. Hamburg*, 40 Iowa, 22; *Clinton Sav. Bank v. Underhill*, 115 Iowa, 292, 88 N. W. 357.

But appellant insists that, even though the witnesses were competent to testify, their evidence should be excluded for that, as is said, it tends to vary the terms of a power of attorney executed by deceased to the defendant in December, 1884. This power of attorney concededly "applies and refers to the property turned over to defendant," and authorizes him "to collect any notes, accounts, or property due me, to foreclose mortgages, to satisfy judgments and mortgages, to loan any money that I may have, to sign my name to any deeds of conveyance of land, and to direct

any suits that may be necessary to collect mortgages and any other property belonging to me, and to sign my name to any of the above purposes mentioned herein, giving and granting unto my attorney full power and authority to do and perform all and every act and thing whatsoever required and necessary to be done in and about the premises, as fully as I might or could do if personally present, reserving the right to revoke this power at pleasure." If a gift of the notes and mortgages had been consummated in 1880, it needs no argument to demonstrate that deceased could not affect the title thereto by executing a power of attorney in relation to the same four years later. Moreover, the instrument in its terms does not purport to modify or

ing of such conversation was not "a transaction had personally between the deceased and the party," within the meaning of the statute, the language of which had reference only to business done and negotiations carried on in person between the deceased and such party.

And in *Lobdell v. Lobdell*, 36 N. Y. 327, reversing 32 How. Pr. 1, the court, after arriving at the same conclusion as the case last cited, went on to say: "When the legislature explicitly limited the exclusion of a party to cases in which he should offer to testify in respect to a transaction or communication had personally by him with the deceased person, it is impossible to construe that exclusion as meaning to cover transactions or communications had by some third person,—whoever he may be, and however connected with the party offering to testify,—with the deceased person. Such construction would ignore the terms 'had personally by him,' which serve to show the precise extent of the exclusion."

And in *Cary v. White*, 59 N. Y. 336, it was held that a party was not precluded by the statutory prohibition under discussion from testifying to statements made by a deceased person to a third party, even if the witness participated in the conversation, so long as his testimony was limited to what was not personal between him and the deceased. The court said that such a case did not fall within the letter of the statute, and that the fact that another person was competent to speak went far to take it out of the substantial reason thereof.

And the case last cited was relied upon in *Hildebrand v. Crawford*, 65 N. Y. 107, affirming 6 Lans. 502, in which a party to the action was held competent to testify to a conversation heard by him between a principal and agent, both deceased, as against a successor in interest of the principal.

And in *Petrie v. Petrie*, 2 Silv. Sup. Ct. 438, 6 N. Y. Supp. 831, affirmed without opinion in 126 N. Y. 683, 27 N. E. 958, in which a will was attacked upon the ground of incompetency and undue influence, a party was, upon the authority of the cases heretofore cited, permitted to testify as to a

conversation between the deceased and the opposite party. It was said by the supreme court that as long as the witness took no part in the matter, and was not referred to as being present, the fact that her name might have been mentioned did not make her a party to the transaction.

It will be noticed that in all the cases heretofore cited, except the last one, no question as to the validity of any will or other instrument in writing was involved. Several years before *Petrie v. Petrie*, however, other cases had been presented to the court of appeals involving the validity of written instruments; and in the first one, *Holcomb v. Holcomb*, 95 N. Y. 316, reversing 20 Hun, 156, which was an action to set aside an assignment of a bond and mortgage upon the ground of the mental incapacity of the assignor, since deceased, the court found it necessary, in view of the peculiar circumstances, to limit to some extent the application of the broad rule laid down in the earlier cases. The reversal was due to the admission of testimony by the sons of the assignor as to the latter's mental condition, the nature of which may be best shown by giving a specific instance thereof. In reply to a question as to what he had ever heard his father say, when the remarks were not addressed to him, one of the sons stated that he had often heard his father talking as if speaking to his wife, who was dead, or as though talking to someone, though there was no one present. In holding such testimony inadmissible, the court said that in this instance the witness prepared himself to hear what his father might say, and the words when spoken became a communication which he received; and that his testimony was not made admissible because his father did not solicit the interview, and was even ignorant of his presence. The court, in referring to the rule of the earlier cases cited in this note, that the statutory disqualification did not preclude a party from testifying to statements of deceased made to a third person in the hearing of a witness, though the latter was a party to, or was otherwise interested in the action, went on to say: "It is obvious that

restate the conditions on which the papers were then delivered, nor was any evidence introduced tending to prove that it constituted or was executed for the purpose of embodying the original agreement. Who filed it for record does not appear. Had it been executed at about the time the papers were delivered, or thereafter, as embodying the understanding of the parties, there would be much force in appellant's contention that the oral evidence should be excluded because tending to vary the terms of a written instrument. See *Bowman v. Tagg*, 5 Sadler (Pa.) 74, 19 W. N. C. 147, 8 Atl. 384; *Best v. Sinz*, 73 Wis. 243, 41 N. W. 169. But as the transaction was consummated, if at all, between deceased and defendant long prior to the execution

of the power of attorney, and there was nothing to indicate that the purpose was to evidence it in writing, the above doctrine cannot be invoked to exclude the oral proof, nor is defendant estopped from relying thereon. See *Fawcner v. Lew Smith* Wall Paper Co. 88 Iowa, 169, 45 Am. St. Rep. 230, 55 N. W. 200. It follows that the testimony of the two witnesses was rightly received.

3. Appellant contends, however, that, even though this evidence be considered, it, in connection with the other proof, establishes no more than an agency on the part of defendant, which was revoked by the death of the intestate. The power of attorney apparently was executed by deceased on this theory, and tends strongly

a proper regard to the rights of suitors in the administration of justice requires the conditions upon which this conclusion depends to be strictly observed. The policy of the statute excludes the evidence of an interested witness concerning: 1st. Any transaction between himself and a deceased person, or in which the witness in any manner participated; 2d. All communications between the person deceased and the witness, including communications in the presence or hearing of the witness, if he in any way was a party thereto, or communications to either one of two or more persons, if all were interested. Each of these species of testimony is as much opposed to the spirit and intent of the statute as the other. If the proposed witness has asked a question of the decedent, and it is answered, it is a conversation; if while the decedent is conversing with a third person, the witness by word or sign participates in it or is referred to, his evidence of what occurred cannot be received."

So, in *Lane v. Lane*, 95 N. Y. 495, which was a contest of a will upon the ground of lack of testamentary capacity, it appeared that the testator, at the time of its execution, was unable to utter words, but made sounds intelligible to those familiar with him, and signs which to some extent anyone could interpret, and that his wife was familiar with such sounds and signs, and that she conversed with him at the time of the execution of the will. It was held that "her testimony so far as it embodied words said to him by herself, or her report of what he said to herself or others," was incompetent. The court, after declaring that such testimony was contrary to the spirit, if not the letter, of the Code, went on to say: "Something may have occurred by word or act in the presence of the testator, and between him and others, to which she was not a party, and of which she could testify," citing *Cary v. White*, *infra*, and *Kraushaar v. Meyer*, 72 N. Y. 602.

And the conclusion reached in *Holcomb v. Holcomb*, *supra*, was approved in *Re Eysaman*, 113 N. Y. 62, 3 L.R.A. 599, 20 N. E. 613, also a contest of a will on the ground of

undue influence, in which it was held that a legatee who supported the testator upon the bed in his arms at the latter's request, while another guided his hand in subscribing his name to the will, was incompetent to testify to a conversation between the testator and the subscribing witnesses attending the attestation and publication of the will, the whole matter of the execution of the will constituting but a single transaction making such legatee incompetent to testify to any part of it.

And in *Re Dunham*, 121 N. Y. 575, 24 N. E. 932, which was a contest against the probate of a codicil to a will on the ground of undue influence, restraint, and mental incapacity, it was held, upon the authority of *Holcomb v. Holcomb* and *Re Eysaman*, *supra*, that a specific and residuary legatee under the will was incompetent to prove conversations and transactions of the testator with others in the presence of the witness, upon the ground that communications in the presence of the witness were deemed to be made to him.

And in *Re Bernsee*, 141 N. Y. 389, 36 N. E. 314, it was held that a beneficiary under a will, the probate of which was contested upon the ground that there was no due publication, was incompetent to testify to any conversation or transaction in his presence at the time of its execution and publication, though the witness took no actual part in the conversation, and it was wholly between the testator and the attesting witness. The court said: "If active participation in the conversation was necessary to exclude an interested witness, and he should as an observer be permitted to testify to transactions in form between the deceased and third persons, although such transactions were in his interest, it would furnish an easy and convenient method in every case of evading the statute. The decisions have enforced the spirit of the statute by excluding such evidence, and have treated transactions between the deceased and third persons in the presence of interested parties as if the witness actually participated therein."

And in *Burdick v. Burdick*, 180 N. Y.

to indicate that such was the understanding of deceased; but there was no evidence that defendant ever acted thereunder, or that he placed it on record. Indeed, its purpose might well have been merely to enable defendant to satisfy existing mortgages of record. It also appears that defendant listed the property with the assessor in 1902 and 1904 in his name as agent of deceased, but he explained that in so doing he merely acquiesced in the suggestion of the assessor. He did not deny the latter's testimony, however, that he then informed the assessor that he was handling the money for his mother. This may have referred to her use, as he appears to have been turning over the interest to her. The husband of the deceased paid the taxes on

the property in defendant's hands at least from 1896 to 1904, inclusive; but, as the interest was paid to his wife, this amounted to no more than allowing her who enjoyed the use to bear the burden. The testimony that defendant, in an examination before the court, stated that he had given deceased the property or interest thereon from time to time during her lifetime, was undisputed. The objection that this was not the best evidence is untenable, even though his examination was taken down in shorthand. A gift may be so made that the grantor shall retain the use during life. *Tucker v. Tucker*, 138 Iowa, 344, 116 N. W. 119. Though there was no evidence that such a condition was incorporated in the agreement in this case, the children might well

261, 73 N. E. 23, which was an action to set aside a deed executed by the decedent, upon the ground of lack of consideration and undue influence, and in which the plaintiff showed that, after the grantor conveyed the property to the grantee, he executed and delivered in the latter's presence a lease of the property to a third person, it was held that the grantee was precluded from giving any testimony as to the conversation between her grantor and the tenant, for the purpose of explaining the lease.

And in *Re Bartholick*, 35 N. Y. S. R. 730, 12 N. Y. Supp. 640, which was a contest of a will upon the ground of lack of testamentary capacity and undue influence, a legatee who was the housekeeper and personal attendant of the testator was, upon the authority of *Re Eysaman* and *Re Dunham*, supra, held to be incompetent to testify to transactions and communications in immediate connection with the execution of the will seen and heard by her.

It will be noticed that the language of some of the cases taken alone would go far to support the proposition that an interested witness cannot in any event testify to transactions with the deceased in his presence, even though he took no part therein himself. But when the circumstances of the cases in which the language is used are considered, its sweeping character must be deemed greatly tempered thereby. Perhaps the clearest statement of the correct rule as established by the line of authorities under review is to be found in *Eighmie v. Taylor*, 68 Hun, 573, 23 N. Y. Supp. 248, in which it was held that where a will or other instrument or act was contested on the ground of undue influence, restraint, mental incapacity, or fraud, a person interested in the event of the action or proceeding was disqualified to testify to any transaction or communication which occurred in his presence or hearing, although it was not with or addressed to such person, or one in which he participated; and that "upon other issues" an interested witness might be permitted to testify to a conversation or transaction between the decedent and a third person, in the presence of the witness, pro-
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vided he was not referred to by the parties to such conversation, and did not participate in it by word, sign, or act, but a slight reference or participation would render the witness incompetent.

And it was apparently in accordance with this principle, that it was held in *Re Palma-ter*, 78 Hun, 43, 28 N. Y. Supp. 1002, citing *Re Eysaman*, supra, that the daughter of one whose will was contested upon the ground of undue influence, being interested in the event of the contest, was incompetent to testify to a conversation bearing upon the questions in issue had between the testator and his wife in the daughter's presence.

And it was with this distinction in mind that Chief Justice Parker, in delivering the opinion of the court in *Hutton v. Smith*, 175 N. Y. 375, 67 N. E. 635, affirming 74 App. Div. 284, 77 N. Y. Supp. 523, deemed it clear, after an exhaustive review of the New York decisions, that the principle laid down in the earlier cases, such as *Simmons v. Sisson*, 26 N. Y. 264; *Lobdell v. Lobdell*, 36 N. Y. 327, reversing 32 How. Pr. 1; *Cary v. White*, 59 N. Y. 336, was too broadly stated, and declared the true rule to be that all conversations or transactions between a person since deceased and a third person, in the presence or hearing of a party to the action or a person otherwise interested therein, could not be testified to by the latter, if he, by word or sign, participated in the transaction or conversation, or was referred to in the course of it, or was in any way a party to it.

And the following cases make it apparent that, under the rule as now prevailing in New York, the phrase "personal transactions," as used in the statute, is to be liberally construed, when one claiming to be only a bystander offers to testify to such transactions.

Thus, in *Adams v. Morrison*, 113 N. Y. 152, 20 N. E. 829, wherein the plaintiff sought to establish a copartnership between himself and the defendant's intestate, the former was held to be incompetent to testify that, about the time he claimed the copartnership was formed, the deceased made an entry in his presence, in a docket or

have accorded this consideration for the welfare of their mother.

No time was fixed for division among the children, save when the paper should be collected, and the fact that defendant has held this property twenty-five years before undertaking to divide among the children is cited as a circumstance inconsistent with the theory of a gift. Possibly, the other children might complain of this, but no one else, and the fact that the income was reserved on motion of the children for the mother sufficiently explains the circumstance. Nothing done with the property since the alleged delivery is necessarily inconsistent with the theory that the deceased gave the property as testified by the two witnesses. Their testimony plainly indicates not only the motive in parting with the notes and mortgages, but that she did in fact deliver them to defendant for himself and brother and sisters. The most that can be said is that in response to parental duty he delayed distribution, when this might have been effected immediately. It will be noticed that no word was uttered by the deceased indicating that she intended to retain any interest in the property or dominion over the papers. On the contrary, the intention is apparent that

the ownership was to pass to the children at once, and that defendant was but their trustee to hold these securities for division in the future as directed by the deceased. She exercised no dominion after parting with the possession. Where one "clearly and intelligently manifests an intention to make a present gift of personal property to another, and in consummation of his intention makes such a delivery to a third person for the use of the intended donees as he is then capable of making, considering the character and situation of the property, the person to whom delivery is thus made will be presumed, in the absence of countervailing circumstances, to take the property as trustee of the intended donees, and not merely as agent of the donor." In this case the person to whom delivery was made was one of the beneficiaries, and received the deposit as trustee coupled with an interest, and the conclusion is inevitable that his possession was as trustee for the donees. See, as bearing thereon: *Ibid.*; *Martin v. McCullough*, 136 Ind. 331, 34 N. E. 819; *Green v. Tulane*, 52 N. J. Eq. 169, 28 Atl. 9; *Hackett v. Moxley*, 65 Vt. 71, 25 Atl. 898.

Affirmed.

register, of the name of himself and the plaintiff as a firm.

And in *Devlin v. Greenwich Sav. Bank*, 125 N. Y. 756, 26 N. E. 744, which was an action to establish a gift *causa mortis*, in which testimony on the part of the plaintiff as to a conversation at which she was present, between the deceased and a third person, was excluded upon other grounds, the writer of the opinion went on to say that it was doubtful if the witness could be permitted to testify to a conversation in her presence between a deceased and a third person relative to the gift she claimed.

And in *Dolan v. Leary*, 69 App. Div. 459, 74 N. Y. Supp. 981, affirmed without opinion in 174 N. Y. 540, 66 N. E. 1107, which was an action to adjudicate the plaintiff the owner of certain property formerly owned by his deceased wife, and in which it was claimed that the property was deeded to an intermediary who deeded it to the plaintiff and the plaintiff's wife as joint tenants, and that the deeds, which were never recorded, had been lost, it was held that the plaintiff was incompetent to testify to their execution in his presence, though the deed to him and his wife as joint tenants was executed by the intermediary, and not by the deceased wife.

And in *Head v. Teeter*, 10 Hun, 548, it was held that the rule permitting a party to an action to testify to a conversation between the deceased and third person did not apply where the third person was an agent for, and acting in the interest of, the witness.

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So, in *Waver v. Waver*, 15 Hun, 277, in which it was alleged that certain promissory notes had been given by a deceased to one of the defendants to be equally divided between both defendants, a question asked one of the defendants: "Were you present when the notes were handed over to [the other defendant]?"—was held to be inadmissible, as calling for testimony of a personal transaction with the deceased.

And in *Erwin v. Erwin*, 54 Hun, 166, 7 N. Y. Supp. 365, which was an action to enforce the specific performance of a parcel promise to convey land as a homestead for the plaintiff, made by a deceased person, it was held that the wife of the plaintiff was incompetent to testify to a conversation between the deceased and the plaintiff in the course of which the alleged promise was made by the deceased, though she took no part therein, upon the ground that this was a personal transaction between the wife and the deceased, within the spirit and meaning of the statute. The court said that although it must appear that the conversation or transaction sought to be excluded under the statute was a personal one, it need not have been private or confined to the witness and the deceased, nor need the witness have been pecuniarily interested in the transaction at the time.

And in *Ditmars v. Sackett*, 92 Hun, 387, 36 N. Y. Supp. 690, it was held to be well settled that a personal transaction or communication between a decedent and a witness having an interest in the result of an action against the estate, to which the stat-

utory inhibition applied, included a transaction or communication of the decedent with another in the presence of the witness, on the subject to which his interest related, though he took no actual part in it.

And in *Stillwell v. Boyer*, 21 App. Div. 231, 47 N. Y. Supp. 666, it was held that in an action of ejectment the plaintiff could not testify to a conversation had between the person through whom he derived his title and the person through whom the defendants claimed title, both of whom were deceased at the time of the trial, though he took no active part in the conversation, and had no interest in the premises in question at the time the conversation took place.

And in *Leary v. Corvin*, 63 App. Div. 151, 71 N. Y. Supp. 335, which was an action to ingraft a trust upon certain land conveyed by the father and mother of the plaintiff to a church, it was held that the plaintiff was incompetent to testify that, just before the deed to the church was executed, she was called into a room in which were her mother and the pastor of the church, who was also treasurer and trustee of the church corporation, and that then her mother said to the pastor: "This is my only child; this is the one that I want the property held in trust for by the church."

And in *Shook v. Fox*, 126 App. Div. 565, 110 N. Y. Supp. 951, which was an action of ejectment, it was held that the defendant should not be allowed to give evidence as to a contract between the plaintiff's deceased ancestor and a third person, made for the plaintiff's benefit.

In *Burnham v. Burnham*, 46 App. Div. 513, 62 N. Y. Supp. 120, affirmed without opinion in 165 N. Y. 659, 59 N. E. 1119, which was an action against the devisees under a will to charge them with a debt of their testator, evidence of the plaintiff as to conversation which took place in his presence between the testator and another was held to be properly excluded, but the character of the conversations is not shown, no other reference being made to them in the opinion.

In *Campbell v. Maginn*, 21 Jones & S. 514, in which the question was whether or not the defendant employed the plaintiff's intestate to do repairs on certain premises, the court, upon the authority of *Holcomb v. Holcomb*, supra, excluded the testimony on the part of the defendant as to a conversation which took place between the owner of the premises, the lessor of the defendant, and the plaintiff's intestate, at which the defendant was present, but in which he did not join.

In *Brague v. Lord*, 67 N. Y. 495, a party was held incompetent to testify to a remark made by the deceased, though addressed to a third person, where the speaker turned his head toward the witness at the same time, so as to include him in the audience.

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In the following cases, in none of which was the validity of any instrument attacked, parties to the actions or persons otherwise interested were permitted to testify to conversations between the deceased and third persons, where the witness took no part whatever therein, the courts relying upon the authority of the earlier decisions: *Badger v. Badger*, 88 N. Y. 546, 42 Am. Rep. 263; *Simmons v. Havens*, 101 N. Y. 427, 5 N. E. 73; *O'Brien v. Weiler*, 140 N. Y. 281, 35 N. E. 587; *Sanford v. Sanford*, 61 Barb. 293, 5 Lans. 485; *Nicholls v. Van Valkenburgh*, 15 Hun, 230; *Crawford v. Haines*, 44 Hun, 597; *Burns v. Mullin*, 42 App. Div. 116, 58 N. Y. Supp. 933; *Farrar v. Farmers' Loan & T. Co.* 85 App. Div. 367, 83 N. Y. Supp. 172; *Re Andrews*, 97 App. Div. 429, 89 N. Y. Supp. 965; *Re Hartman*, 13 Misc. 486, 35 N. Y. Supp. 495; *Marsh v. Gilbert*, 2 Redf. 465; *Connelly v. O'Connor*, 17 N. Y. S. R. 261, 1 N. Y. Supp. 489; *Brown v. Klock*, 1 Silv. Sup. Ct. 273, 5 N. Y. Supp. 245; *Re Brown*, 38 N. Y. S. R. 130, 14 N. Y. Supp. 122 (in which the court declared that while it might be true that the testimony of the witnesses was prearranged so as to escape the statute, and render their testimony admissible, that aspect of the question bore only upon their credibility); *Benedict v. Phelps*, 2 N. Y. Week. Dig. 150.

And in *Kraushaar v. Meyer*, 72 N. Y. 602, and *Smith v. Ulman*, 26 Hun, 386, the courts, in declaring parties incompetent to testify to a conversation between the deceased and a third person, because the witness participated therein, assented to a rule that a witness might testify when the conversation was between the deceased and a third person, in which he in no manner participated.

In *Stern v. Eisner*, 51 Hun, 224, 4 N. Y. Supp. 406, and in *Patterson v. Copeland*, 52 How. Pr. 460, the same conclusion was reached as in *Cary v. White*, 59 N. Y. 336, and it was held that a party could testify to a remark made by the deceased to a third person, though it was part of the general conversation, in which he participated.

On the other hand, in *Price v. Price*, 33 Hun, 69, it was held that participating in some of the conversation between a deceased person and another, had in the presence of the witness, was sufficient to exclude her testimony as to any part of it.

And in *Gambie v. Gambie*, 24 App. Div. 446, 48 N. Y. Supp. 501, it was declared to be well settled that an interested witness was disqualified from giving evidence of an interview between a deceased party and a third person, where the witness took any part in the conversation, even though the portion of the interview in which he participated constituted no part of, or was wholly eliminated from, his testimony. To the same effect is *Ross v. Harden*, 10 Jones & S. 427.

J. A. C.

IOWA SUPREME COURT.

STEWART LUMBER COMPANY, Appt..

v.

FRED DOWNS et al.

(142 Iowa, 420, 120 N. W. 1067.)

Judgment — attack — stranger.

One taking a mortgage from a judgment debtor to secure a claim accruing before entry of the judgment cannot challenge the amount of the judgment because payments which the debtor had made were not credited upon the indebtedness prior to the entry of the judgment, and because the judgment was entered by default without knowledge on the part of the debtor of that fact, where no fraud and collusion between the parties are shown, although the failure to make such credits injuriously affects the rights of the mortgagee.

(Sherwin, J., dissents.)

(May 8, 1909.)

APPEAL by plaintiff from a judgment of the District Court for Crawford County dismissing so much of the petition

Note. — Right of creditor to attack a judgment against debtor in favor of another creditor on the ground of accident or mistake.

The only cases found upon this question are those in which, as in *STEWART LUMBER Co. v. DOWNS*, the judgment was for more than was due, and the majority agree with that case in holding that such a condition does not furnish ground for attack upon the judgment by another creditor.

Thus in *Safe Deposit & T. Co. v. Wright*, 44 C. C. A. 421, 105 Fed. 155, it was held that want of consideration for a judgment was not available collaterally to a junior lien holder, in the absence of fraud as against him, even though fraud against the judgment debtor was shown.

In *Adam v. Arnold*, 86 Ill. 185, it was held that judgment on confession for the amount due could not be set aside at the instance of a stranger to the suit, though he was a subsequent judgment creditor.

In *Rae v. Lawser*, 18 How. Pr. 23, 9 Abb. Pr. 380, note, where an assignee of a judgment paid full value therefor on being assured by the plaintiff and defendant that nothing had been paid thereon, it was held that it could not be set aside at the instance of a subsequent judgment creditor on the ground that it had in fact been partly paid.

In *Dougherty's Estate*, 9 Watts & S. 180, 42 Am. Dec. 320, it was held that creditors could not vacate a prior judgment, merely on the ground that the debtor had been overreached; that they could not try over again a defense which their debtor could have made, there being no collusion.

See also *Thompson's Appeal*, 57 Pa. 175. 29 L.R.A. (N.S.)

in an action brought to foreclose a note and mortgage as prayed for the correction of a fraudulent judgment obtained against defendant Reed in a suit to which plaintiff was not a party. Affirmed.

The facts are stated in the opinion. Messrs. Conner & Lally for appellant. Mr. W. C. Saul for appellees.

Sherwin, J., delivered the opinion of the court:

The petition alleged that on the 24th of October, 1904, the defendants Fred Downs and Sophia Downs made and delivered to the plaintiff their promissory note for \$1,008, and secured the same by a mortgage on real estate. Judgment for the amount thereof and for a foreclosure of the mortgage was asked against said defendants. In an amendment to the petition it was alleged: That in 1903 the defendant M. Reed obtained a judgment against her codefendant, Fred Downs, for the sum of \$770.45, and costs. That prior to the rendition of said judgment Downs had made payments to M. Reed on her claim against him, aggregating about \$450, which she

And in *Lewis v. Rogers*, 16 Pa. 18, where a judgment creditor attacked a prior judgment collaterally on the ground of failure of consideration, Gibson, Ch. J., in denying relief to plaintiff, said: "Creditor can attack a judgment collaterally only for collusion, not for matter of defense original or subsequent. A debtor or his representative may have a judgment against him opened on ground laid, and when let into a defense on the merits reduce or discharge it. Nor will I say that if he were to refuse to move for the benefit of his creditors they would not be permitted to move in his name. An insolvent man is not suffered to give away his property by means of a judgment which, though proper at first, has become a security, for less than the amount of it, but while it stands as a debt of record unabated, in whole or in part, neither the sheriff nor an antagonist creditor can resist the enforcement of it as a lien."

But in *Hinchman v. Town*, 10 Mich. 508, where an attachment creditor included items not yet due, by mistake, it was held that other attachment creditors could attack the judgment, as to the part improperly included, by a bill in equity.

And in *Shaw v. Dwight*, 27 N. Y. 244, 84 Am. Dec. 275, a junior judgment creditor was permitted to maintain an action to cancel prior judgments against the debtor on the ground that they had been paid, without allegation or proof of fraud or collusion between the debtor and the first judgment creditor for the purpose of hindering creditors.

R. L. S.

failed and refused to credit and indorse thereon, although the same should have been so indorsed. That the judgment against Downs was rendered on his default, and without any knowledge on his part that he had not been given credit for the payments so made. The petition further alleged that the action of the said M. Reed in so failing and refusing to credit Downs was in fraud of the plaintiff's rights. The plaintiff prayed that the sums so paid by Downs be credited on the Reed judgment. The defendant Reed demurred to the amended petition, and the demurrer was sustained. The plaintiff thereupon electing to stand on its pleading, judgment was entered dismissing its petition as to M. Reed, and this appeal followed.

For the purpose of this case, it must be conceded that the Reed judgment against Downs was, so far as the amount thereof is concerned, the result of fraud or mistake. The demurrer admitted that it was too large by the aggregate amount of the payments alleged to have been theretofore made by Downs, and that Downs suffered a default judgment to be taken against him, believing that he had been properly credited with the amount so paid. If the payments were in fact made as alleged, one of two things must be true: The defendant Reed took the judgment for the amount she did, either through fraud or mistake. At the time such judgment was taken, the plaintiff was a creditor of Downs, and its security was seriously impaired, if not wholly destroyed, by such erroneous or fraudulent judgment.

The question for determination, then, is whether the plaintiff may have the judgment corrected as to its amount in this direct equitable proceeding. That this suit is a direct attack on the judgment in the respect indicated cannot, we think, be seriously questioned. A direct attack on a judgment is an attempt to amend, correct, reform, vacate, or enjoin the execution of the same in a proceeding instituted for that purpose; and it is a general rule that, when the elements of fraud or mistake are involved in the issue, the attack is direct. *Earle v. Earle*, 91 Ind. 27; *Thompson v. McCorkle*, 136 Ind. 484, 43 Am. St. Rep. 334, 34 N. E. 813, 36 N. E. 211; *Morrill v. Morrill*, 20 Or. 96, 11 L.R.A. 155, 23 Am. St. Rep. 95, 25 Pac. 362. The plaintiff was not a party to the suit between Reed and Downs, nor could it have been made a party, because at that time its claim against Downs was not secured by the mortgage which it now seeks to foreclose. Nor would it have been a necessary party had it been otherwise, for the suit of the defendant Reed was based on notes

which were unsecured. Not being a party nor a privy to the action or judgment against Downs, the plaintiff could not have the judgment reviewed by appeal or writ, and hence its only remedy lies in an appeal to a court of equity to have the same corrected. That a stranger to a judgment which is the result of fraud or collusion, whose rights are affected thereby, may so proceed we think is well settled by the authorities, and sustained by equitable principles which can hardly be denied. The principles of natural justice and sound morals will not permit a man to gain an advantage by fraudulent acts; and when one has gained an unfair advantage in proceedings at law, by fraud or misconduct, whereby the court is made an instrument of injustice, equity will interfere to prevent him from reaping the benefit of such unfair advantage. It would be grossly inequitable to allow a fraudulent judgment to defeat a just claim against the judgment debtor, and the authorities are practically unanimous in holding that a judgment procured by the fraud and collusion of the judgment creditor and debtor may be attacked by a creditor who will be injured if it be allowed to stand. The petition, in substance, alleged that Mrs. Reed took a judgment against Downs for \$500 more than was due her, and that by so doing she perpetrated a fraud on the plaintiff and on Downs. If such was the fact, and the demurrer admitted as much, she should not, in my judgment, be permitted to profit thereby to the detriment of the plaintiff.

On the proposition that a stranger to a judgment may impeach it for fraud or mistake, see the following cases: *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332, 3 L. ed. 362; *Beeler v. Bullitt*, 3 A. K. Marsh. 280, 13 Am. Dec. 161; *Downs v. Fuller*, 2 Met. 135, 35 Am. Dec. 393; *Nason v. Blaisdell*, 12 Vt. 165, 36 Am. Dec. 331; *Vose v. Morton*, 4 Cush. 27, 50 Am. Dec. 750; *Scofield v. Brock*, 79 Vt. 449, 118 Am. St. Rep. 975, 65 Atl. 577; *Delaney v. Brown*, 72 Vt. 344, 47 Atl. 1067; *Inman v. Mead*, 97 Mass. 310; *Sargent v. Salmond*, 27 Me. 539; *Edson v. Cumings*, 52 Mich. 52, 17 N. W. 693; *Bergman v. Hutcheson*, 60 Miss. 872; *Mechanics' Nat. Bank v. Burnet Mfg. Co.* 33 N. J. Eq. 486; *Freeman*, Judgm. §§ 336, 337, 512; *Freeman*, Executions, 3d ed. § 136; *Bixby v. Adams County*, 49 Iowa, 507. That fraud or mistake in the amount of a judgment may be corrected by a court of equity is settled by our own decisions. *Bernard v. Douglas*, 10 Iowa, 370; *Partridge v. Harrow*, 27 Iowa, 97, 99 Am. Dec. 643; *Barthell v. Roderick*, 34 Iowa, 517; *Snyder v. Ives*, 42 Iowa, 157; *Bixby v. Adams County*, supra; *Milliman v. Eddie*,

115 Iowa, 530, 88 N. W. 964. In *Bernard v. Douglas* the plaintiffs brought an action in equity to set aside a judgment by confession. They were junior creditors and strangers to the judgment; but it was held that they might maintain the action. The transaction under consideration is analogous to fraudulent conveyances or to collusive and fraudulent legal proceedings, which are everywhere held to be subject to attack by existing creditors. A judgment obtained by fraudulent and collusive legal proceedings is no more sacred than any other form of fraudulent conveyance, and may be attacked by creditors, no matter how legal it may be in form. 20 Cyc. Law & Proc. p. 397, and cases cited.

The appellee urges that, under § 3440 of the Code, the judgment against Downs cannot be modified. The section was evidently intended to apply only to parties or privies to the judgment, and not to those in the plaintiff's situation. Otherwise there could be no attack on a fraudulent judgment by any stranger thereto, no matter whether a creditor or not.

The sufficiency of the petition is challenged, and it must be admitted that it is not clear and definite in its allegations of either fraud or mistake. But it was not properly attacked in the trial court, and, for the purposes of this appeal, I am of the opinion that it should be held to fairly present the issue discussed. A majority of the court disagree with me as to the right of the plaintiff to have the judgment corrected as to its amount, and hold that a judgment rendered for a larger amount than is due the judgment creditor cannot be challenged or corrected at the suit of a stranger thereto, unless it be shown that it was procured by the fraud and collusion of the judgment debtor and creditor. This conclusion is based on the general rule that, where no fraud or collusion has been shown in the recovery of the judgment, it is conclusive of the fact and the amount of the indebtedness of the judgment debtor, and cannot be collaterally impeached by third persons in a subsequent suit where such indebtedness is called in question. 23 Cyc. Law & Proc. pp. 1286, 1287, and cases cited; *Freeman*, Judgm. §§ 335, 336; *Black*, Judgm. §§ 293, 294, 317. It is true that the petition does not allege fraud and collusion on the part of Mrs. Reed and Downs. It goes no farther than to allege that a judgment by default was taken against Downs for a much larger amount than was due Mrs. Reed from him, and that such act on the part of Mrs. Reed was in fraud of the plaintiff's rights.

A majority of the court think the judgment should be affirmed, and it is so ordered.

ment should be affirmed, and it is so ordered.

Deeemer, J.: I concur in the result.

Evans, Ch. J., specially concurring:

It is clear to me that the trial court properly sustained the demurrer to the petition, and that its order to that effect should be affirmed. I concur, therefore, in the result announced. I am not willing, however, to place the affirmance upon the grounds stated in the opinion of my brother Sherwin, J., nor am I wholly satisfied with the statement of the record as therein set forth.

Whether a judgment may be attacked by a creditor of the judgment debtor upon any other ground than fraud and collusion, or whether it may also be attacked by such creditor on the ground of accident or mistake, we have no occasion in this case to determine. For the purpose of this case, it may be conceded that an existing creditor may attack the judgment of a third party against an insolvent debtor for fraud, collusion, accident, or mistake upon a proper showing that such judgment operates as a legal fraud upon him. I am not now prepared to say that this is not the correct rule. But the rule in this form will not save the plaintiff's case as made by its petition. Defendant Reed's judgment against Downs was entered in November, 1903. Plaintiff's action was brought to foreclose a note and mortgage for \$1,008, dated in October, 1904. On the face of the papers, therefore, plaintiff was not an existing creditor at the time Reed's judgment was entered. This statement, however, is to be qualified later in this opinion.

The issue as to the validity of Reed's judgment is tendered by plaintiff in its amendment to petition, and in the first eleven paragraphs thereof, which are as follows:

Amendment to Petition.

Paragraph 1. That heretofore and during the year ending March 1, 1897, the defendants Fred Downs and wife were occupying under a lease from their codefendant, M. Reed, at the cash rent of \$600, the real estate described in said plaintiff's petition, for the rent of which for the year named he executed and delivered to said M. Reed two promissory notes, of date October 8, 1895.—one for \$200, maturing in 1896, and one for \$400, maturing on the 1st day of January, 1897.

Paragraph 2. That the first-named note was paid by the said Fred Downs to his codefendant on or about the — day of

_____, 1896, and of the \$400 note named \$300 was paid on the 28th day of June, 1897. That for the year ending March 1, 1900, the said Fred Downs and wife occupied said real estate aforesaid under the lease from their codefendant, M. Reed, for a crop rent, excepting 40 acres of pasture, for which the sum of \$100 was agreed to be paid as rent therefor for said year, as evidenced by a certain promissory note of date September 5, 1898.

Paragraph 3. That during the year 1900, under an agreement by and between the defendant Downs and his codefendant, Reed, certain buildings on said real estate were moved by the said Downs, in consideration of which the said defendant Reed agreed to credit the said \$100 rent for the pasture referred to in paragraph 2 the sum of \$50.

Paragraph 4. That on or about the _____ day of _____, 1898, the defendant Downs paid to his codefendant the sum of \$100 to apply on the notes and rent hereinbefore referred to.

Paragraph 5. That afterwards, and on or about the _____ day of September, 1903, the defendant M. Reed commenced in the district court of Iowa in and for Crawford county a certain action against her codefendant, Fred Downs, on the \$200 note, and the \$400 note referred to in paragraph 1 hereof, and in said action on the 24th day of November, 1903, recovered judgment for \$770.45, with interest at 8 per cent, \$40.40 attorneys' fees, with interest at 6 per cent, and \$7.40 costs as shown by page 108 of appearance docket Y of the records of this court, to which reference is hereby made, and which is made a part thereof.

Paragraph 6. That no defense was made to said action by the defendant Downs, as plaintiff is informed, believes, and so avers the fact to be, he, the said Downs, fully believing that the indorsements were made on said notes, and that judgment for the actual amount owing, to wit, \$50, and no more, would be rendered in the case.

Paragraph 7. That in truth and in fact the plaintiff in said cause (M. Reed, one of the defendants herein) failed and refused, and still fails and refuses, to indorse upon said notes or credit upon said judgment the said items mentioned, and, in fraud of this plaintiff's right, allowed said judgment to stand of record for the full amount thereof, as hereinbefore stated, against the said defendant Downs, and against the premises covered by plaintiff's mortgage, the foreclosure of which is sought herein.

Paragraph 8. That the defendant Fred Downs is insolvent, and has no means of paying his debts, present or prospective, other than his equity in the real estate described herein. That equity and good con-

science demand that the defendant M. Reed credit upon said judgment as of the several dates of payment the following items, to wit: \$300, June 28, 1897; \$100, October 15, 1898; \$50, February 20, 1900.

Paragraph 10. That plaintiff avers that there is in this case, as between M. Reed and the plaintiff, the question of conflicting liens, and that, while the judgment in favor of M. Reed appears to be for the sum of \$770.45, in truth and in fact said judgment should be for the sum of \$50 only, with interest thereon from the 1st day of January, 1897.

Paragraph 11. That, while said judgment in point of time antedates the date of plaintiff's mortgage herein, yet, by reason of the premises, there should be credited upon said judgment the sum of \$450, and for the balance only of \$50 should judgment be allowed to stand against the premises covered by plaintiff's mortgage.

This amendment to petition was duly verified.

Although the petition alleges that Downs was insolvent at the time the petition was filed, in November, 1904, it wholly fails to allege that he was insolvent at the time Reed's judgment was entered. As an attack upon Reed's judgment, it alleges that it was entered upon certain promissory notes held by Reed against Downs; that Downs had a partial defense thereto, in that he had made partial payments thereon which Reed had "refused" to indorse or credit thereon. It also alleges that Downs made no defense, "believing the indorsements were made on said notes," and that judgment would not be rendered for more than was due. It must be presumed in support of the jurisdiction of the court that the original notice served upon Downs advised him of the amount for which Reed would take judgment. There is no allegation in the petition that Downs was prevented from setting up the alleged defense by any act of Reed, or by any accident or surprise or mistake of his own; nor is there any allegation of collusion between Reed and Downs, nor of fraud on the part of either of them. The petition charges no more than that Downs had a partial defense which was wholly ignored in the judgment. This of itself furnishes to plaintiff no legal ground of attack. The validity of such defense was necessarily covered by the adjudication.

A question is raised in the opinion as to whether the petition was properly attacked. The demurrer was a general equitable demurrer, and conformed to the requirements of the statute in all respects. It called in question the sufficiency of the allegations of the petition to entitle plaintiff to the relief demanded. I am unable to see how

it may be regarded as having cured in any sense the lack of allegations essential to plaintiff as grounds of attack upon the judgment. I have said that upon the face of the papers the plaintiff was a subsequent, and not an existing, creditor of Downs, at the time Reed's judgment was entered. It appears from the petition as amended, however, that the plaintiff's note and mortgage include an indebtedness for certain lumber and material furnished for the improvement of the real estate involved in this controversy, and that this was an existing account at the time the judgment was rendered, and that the plaintiff had, then, a right to a mechanics' lien therefore which he in due time perfected in accordance with the provisions of the statute. This account for lumber and material antedated Reed's judgment. In so far, therefore, as he was an existing creditor, he had a valid mechanics' lien which was superior to Reed's judgment lien, and he was in no manner prejudiced by Reed's judgment. He was in no position at that time, therefore, to attack Reed's judgment, for he had no interest to subserve by such attack. He afterwards chose to waive his mechanics' lien and blend his account with subsequent indebtedness, and to include the whole in the note and mortgage in suit bearing 8 per cent interest and attorney fees. If this were done through mistake or misunderstanding, or in ignorance of Reed's judgment, such fact could be brought to the consideration of the court by proper allegations; but no such claim is made. The petition and the amendment pray for the foreclosure of the mortgage. The amendment prays that the lien of the mortgage to the amount of the mechanics' lien be declared superior to the judgment, but no reinstatement or foreclosure of the mechanics' lien is prayed.

There is a manifest reason for this failure, in that § 3429 of the Code prohibits the joining of any other cause of action with an action to enforce a mechanics' lien. Under this section the plaintiff could not join a foreclosure of his mechanics' lien and a foreclosure of his mortgage for other indebtedness in the same action. Plaintiff has therefore chosen to stand upon its mortgage, rather than upon its mechanics' lien. The amendment to the petition also prays that plaintiff's mortgage take priority over Reed's judgment as to the barn, which was built with the lumber and material furnished, and that the plaintiff be permitted to remove the same from the premises. What I have already said is decisive of this contention. There is a further reason why such relief cannot be granted. The record before us discloses the cause came on for trial in the court below on April 15, 1905, 29 L.R.A. (N.S.)

and that the case was then "tried as to all of the defendants other than the defendant Reed, as to whom the case was continued." As a result of such trial, judgment was "rendered for the amount of plaintiff's claim as to all the defendants other than M. Reed, as to whom it was continued." The trial as to defendant Reed was had in March, 1906. The demurrer, which was sustained, was filed by defendant Reed alone.

Plaintiff's appeal is from the order and judgment sustaining Reed's demurrer and dismissing the petition as to him. The other defendants are not in this court. They did not appear in the lower court by any pleading filed.

Plaintiff makes no complaint of the judgment rendered in its favor against the defendant Downs, nor has it appealed therefrom. It will be noted that the judgment against defendant Downs contains no provision permitting the plaintiff to remove the barn from the premises. This is a question of vital interest to him as fee owner of the land. Plaintiff could not establish its mechanics' lien upon the barn, with right of removal, as against Reed, without first establishing such right as against the principal defendant, Downs. The owner of the property is always a necessary party to an action to foreclose a mechanics' lien. Even if Downs could be regarded as still in court in March, 1906, at the time of the trial on Reed's demurrer, and even though the court had power at that time to enlarge the judgment in plaintiff's favor as against Downs, and to permit the removal of the barn as prayed, the fact remains that Downs is not in this court. No notice of appeal appears to have been served upon him.

In view, therefore, of the state of the record as herein explained, I dissent from the statement of the main opinion that plaintiff's security "was seriously impaired if not wholly destroyed" by the taking of Reed's judgment.

On the grounds above stated I concur in the affirmance.

NEW JERSEY COURT OF ERRORS AND APPEALS.

STATE OF NEW JERSEY EX REL. ROBERT H. McCARTER, Attorney General. Appt.,

v.

FIREMEN'S INSURANCE COMPANY et al., Respts.

(74 N. J. Eq. 372, 73 Atl. 80.)

Corporation — contracts — public interest.

1. If a corporation engaged in a business

Headnotes by GARRISON, J.

that is affected with a public interest contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract is *ultra vires* such corporation, and may be restrained in equity at the suit of the attorney general, without regard to whether or not actual injury has resulted to the public.

Insurance — contract — public interest.

2. The business of fire insurance, as it is carried on in this state by corporations created, licensed, and regulated by the state, is a business affected with a public interest within the meaning of this rule.

Quasi public corporation — definition.

3. Quasi public corporations—i. e., those "affected with a public interest"—defined.

Injunction — insurance company — contract in restraint of trade — suit by attorney general.

4. A contract in restraint of trade, entered into by fire insurance companies, the necessary effect and the actual result of

which are to control such business within a certain area, and within such area to fix and regulate prices, and to limit or eliminate competition to the injury of the public, is contrary to public policy, and *ultra vires* such corporations, and may be restrained in equity at the suit of the attorney general.

Equity — contracts in restraint of trade — parties — remedies.

5. The rule in equity, that contracts in restraint of trade are merely unenforceable, does not require that the parties so contracting be deemed to be immune from ordinary equitable remedies, when their violation of public policy is directed at, and actually works, a public injury.

(Swayze, J., dissents.)

(June 14, 1909.)

A PPEAL by relator from a decree of the Court of Chancery dismissing a bill filed to cancel an agreement between defendant insurance companies which was alleged

Note. — Fire insurance as a business affected by a public interest.

In most cases in which the question of what particular kinds of business are affected with a public interest has been raised, the business involved was of such a character that the concerns in question were bound, as public or quasi public companies, to serve all members of the public. In this respect the business of fire insurance differs.

In determining whether a business is one affected with a public interest, numerous conditions are to be considered. The monopolistic character of the business affording an opportunity for oppressing the public, the nature and extent of the business, the fact that it closely touches and concerns many persons, are all important facts to be considered.

The general holding out of fire insurance companies to the public at the present day under conditions so monopolistic as to render it possible for them to oppress the public through high prices, unjust discriminations, and corrupt practices, would seem to warrant the conclusion that this business is one affected with a public interest.

And the holding that such companies are affected with a public interest is not without support.

Thus in *Northern American Ins. Co. v. Yates*, 214 Ill. 272, 73 N. E. 423, where a bill was brought by the superintendent of insurance to enjoin companies and individuals from transacting fire insurance business without first complying with the state law, the court said: "The business of insurance is the outgrowth of time and the demands and necessities of the public. It extends into and covers almost every branch of business and all the relations of life, and is applied to all the hazards of business in 29 L.R.A.(N.S.);

life where a basis of risk and compensation can be estimated. In all the stages of life, from the cradle to the grave, it asserts an interest and offers succor and aid. In the business enterprises, whether by land or sea; in the possessions of men, from a pane of glass to the mansion or the factory; in his undertakings involving every chance, misfortune, moral turpitude, or the act of God, it demands admission and promises indemnity, reward, or gain. It poses as the faithful and zealous trustee of his earnings and savings, and promises to the widow and orphan a guaranty against misery and want. It intercedes between principal and agent, master and servant, contractor and owner, and insures against loss from almost any and every cause. It is a public necessity that deals in its own credit for a cash consideration from the assured, and is stamped with public interest, and must yield obedience to necessary and proper regulations by the state in the exercise of its police power."

And in *People v. Loew*, 19 Misc. 248, 44 N. Y. Supp. 42, where an action was brought by the attorney general, under a statute authorizing him to maintain an action in the name of the people against persons exercising "any corporate rights, privileges, or franchises" not granted by law, against individuals alleged to be doing business in violation of the law regulating the carrying on of the insurance business, the court, in denying a motion to dismiss, said: "As the business of insuring lives, property, credits, and fidelity of conduct has become of such large public concern, in connection with the business enterprises and activities of the people of the state generally, such business has essentially become one of a public character; and it has been found necessary by the legislature to guard and protect the people of the state in their dealings with the persons and cor-

to be *ultra vires* and against public policy, and to enjoin further compliance therewith. Reversed.

The opinion here published is the final one in the case, and renders all former ones immaterial.

Statement by Garrison, J.:

The decree of the court of chancery dismissed an information filed by the attorney general against 8 domestic fire insurance companies and 113 foreign fire insurance companies, praying for a decree adjudging a certain agreement in writing, entered into by the defendants, to be void as an *ultra vires* act injurious to the public, and that the said companies be enjoined from continuing to act under such agreement.

The contract in question, which was annexed to the bill, and occupies twenty-two closely printed pages, constitutes the subscribing companies members of "The Newark Fire Insurance Exchange," and covers apparently every detail necessary to vest in such Exchange the fixing of the premium rates to be charged for insurance by the constituent companies, and to render it, as far as possible, impracticable to obtain fire insurance within the area covered by the Exchange, otherwise than from its constituent companies, and upon the rates fixed by it. The area thus covered includes the city of Newark, and certain outlying and adjacent districts in Essex and Hudson

counties. The salient features of this contract pertinent to this appeal are: (1) That the premium rates to be charged by the constituent companies shall be fixed by a central association, through an executive committee of five of its members, such central association being composed of a single representative of each constituent company, and such executive committee including uniformly one member representing all of the domestic companies; (2) that no member of the Exchange shall write policies at any other rate than that fixed by the Exchange; (3) that the only brokers to whom members of the Exchange shall pay brokerage for business obtained through them shall be those holding a broker's certificate from the Exchange, in order to obtain which such broker must pledge himself not to place any insurance with any insurance company that is not a member of the Exchange, unless, after giving preference to the members of the Exchange, sufficient insurance cannot be obtained. Upon receipt of a broker's certificate, the broker must agree in writing to observe the rules of the Exchange that forbid rebating, and "to act only as the agent of the assured in placing contracts for insurance."

The information charged that this contract rendered it practically impossible to obtain fire insurance within the covered territory save from the companies that had subscribed to such contract, and at the

porations assuming to act as insurance companies, in the same manner that it has been found essential to deal with the business of banking. The state has now for many years had a governmental department devoted to that purpose, and has placed upon the superintendent or head of that department responsible duties in regard to the supervision of domestic and foreign companies doing business within the state. It has thus been held repeatedly that the state has the right to regard the business of insurance as one dependent upon the exercise of a franchise which the state has the right to give and to withhold. This franchise right has grown up from a small beginning from necessity, but is not a departure from the general rule characterizing the meaning of the term 'franchise.' It is simply a modern application of the principle governing such privileges, applied to new emergencies. Whatever is of large public concern, so that a want of regulation and control will injuriously affect the public in its general interests, may be the subject of a franchise."

And in *Com. v. Vrooman*, 164 Pa. 306, 25 L.R.A. 251, 44 Am. St. Rep. 603, 30 Atl. 217, where fire insurance business was held a proper subject for the exercise of the police power of the state, and an act confining such business to corporations was upheld, the court, after considering the 29 L.R.A. (N.S.)

magnitude of the business in Pennsylvania, said: "Let us consider next the nature of the business. It is not like the sale of commodities for a present equivalent in value, but it is the purchase of indemnity against the risk of loss by fire that may happen at any time, and may not happen at all. The conditions necessary to the business of insurance are: (a) The existence of a known danger to which all property owners are exposed, and against which they cannot effectually protect themselves; (b) the strong probability that loss from this danger will fall upon but few of those who are exposed to it; (c) the certainty that when the loss happens it will fall so heavily on those to whom it comes as to make pecuniary indemnity a matter of great importance; (d) some knowledge of the relative value of the property annually destroyed by fire to serve as a basis for calculating the risk assumed by the insurer, and the amount of premium required to enable the insurer to meet losses and expenses and secure a fair return for the capital employed. In view of the magnitude and the nature of the insurance business, it is apparent that the public is largely interested in all that relates to it. The security of policy holders requires, first, permanency in the custodian of the funds gathered from them, and on which their indemnity in case of loss depends; second,

premium rates fixed in accordance with its terms, and that the rates so fixed are 60 per cent higher than the rates that prevailed in the same territory prior to the making of this contract, and that now prevail in the immediately adjacent territory not covered by the contract. The relief prayed by the information was that the defendants be enjoined from continuing or doing any act under said contract that tended to fix the rates to be charged for fire insurance, or to prescribe the persons through whom insurance may be placed, or the mode of payment therefor.

A mass of testimony substantiating on the one hand the averments of the information, and justifying on the other hand the propriety of the rates fixed and the methods employed by the exchange, was taken, and the case thus made brought to final hearing before the vice chancellor, who advised that the information be dismissed, not because its charges and averments had not been proven, but because, assuming that they had been proved, the contract in question, while one that a court of equity would not aid a party to such contract in enforcing against another party to it, was not one that a court of equity, at the instance of the state, would restrain the defendants from entering into or continuing to the public injury. Precisely what was decided is thus abstracted in the headnotes to the vice chancellor's opinion: (1) "The common

law does not treat agreements in restraint of trade as being illegal in the ordinary sense of the word, but merely as being unenforceable. (2) In the absence of statute authorizing it, the attorney general may not maintain a suit to enjoin insurers against carrying out an agreement regulating rates, though against public policy, as in restraint of trade, and the fact that the insurers are corporations makes no difference." [70 N. J. Eq. 291, 61 Atl. 705.]

Upon the ground thus stated the information of the attorney general was dismissed, and from the decree to that effect this appeal was taken, and argued, after which a reargument was ordered and had covering certain further matters upon which the court desired to hear the views of counsel.

Messrs. Robert H. McCarter, Attorney General, and Malcolm MacLear for appellant.

Messrs. Bennet Van Syckel and Richard V. Lindabury for respondents.

Garrison, J., delivered the opinion of the court:

The learned vice chancellor, who advised that the information filed by the attorney general be dismissed on the ground that the court of chancery could not give relief in such a suit, said at the conclusion of his opinion: "If these corporations were public or quasi public bodies, and if the

an honest and competent administration of these funds; third, restraint against the division of the profits of the business whenever such division would injuriously affect the security of policy holders. How are these safeguards to be obtained? There is but one way in which they can be obtained, and that is by means of general laws regulating the insurance business."

In *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397, however, in holding a combination of insurance companies to establish uniform rates and agents' commissions not an illegal combination at common law, the court said: "Insurance is a mere contract of indemnity against a contingent loss. Though it is an important aid to commerce, it is not a business of commerce, or one in which the public have any direct right. No franchise is necessary for its prosecution, and no one has a right to demand of an underwriter that his property shall be insured at any rate. Any individual may execute a policy, and so any company incorporated for the purpose of insuring property may refuse to execute one, unless it be so bound by its charter. Forced insurance, for obvious reasons, is detrimental to the public interest, and it is therefore not probable that such restriction will be found in any charter. Labor is necessary to production 29 L.R.A. (N.S.)

and transportation, and therefore it is not merely an aid, but a necessity, of commerce. It is advantageous to the public, and in that sense they have an interest in it. The services of professional men are likewise indispensable in most civilized communities, and are presumably likewise advantageous to the public. The public have an interest in them in the same sense in which they have an interest in the business of insurance. It follows, therefore, that if insurance companies are to be brought within the rule that makes agreements to increase the price of merchandise illegal, upon the ground that the public have an interest in their business, agreements among laborers and among professional men not to render their services below a stipulated rate should be held contrary to public policy and void upon the same ground." The court then proceeded to review authorities as to the right of laborers and professional men to combine for the purpose of maintaining or increasing their wages.

For a note on kinds of business affected with a public interest subjecting them to legislative control in respect to rates or prices, see *Ratcliff v. Wichita Union Stockyards Co.* 6 L.R.A. (N.S.) 834.

J. T. W.

attorney general were here asked to enjoin them from doing *ultra vires* acts to the public injury, as in *Stockton v. Central R. Co.* 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964, the case would be different."

We agree with the learned vice chancellor as to the class of corporations and of corporate acts to which the rule of *Stockton v. Central R. Co.* applies, but we do not agree with him that the defendants are not within such class. The pertinent language of Chancellor McGill in *Stockton v. Central R. Co.* is: "Where a corporate excess of power tends to the public injury, or to defeat public policy, it may be restrained in equity at . . . [the suit of the attorney general]." The case of *Stockton v. Central R. Co.* which did not itself come to this court, has, since its decision by Chancellor McGill in 1892, been followed in the court of chancery, and has been approved and acted upon by this court notably in the recent case of *McCarter v. Vineland Light & P. Co.* 73 N. J. Eq. 703, 70 Atl. 177, where the decree that was affirmed had been advised by Vice Chancellor Leaming (72 N. J. Eq. 767, 75 Atl. 1041), as to this point, upon the express authority of *Stockton v. Central R. Co.*

In the case of *Stockton v. American Tobacco Co.* 55 N. J. Eq. 352, 36 Atl. 971, Vice Chancellor Reed said: "It may be conceded that if this corporation had entered into an agreement with other manufacturers of these goods, whether those manufacturers were individuals or corporations, by which agreement prices were to be fixed and competition paralyzed, such an agreement would be a subject of equitable cognizance. Such was the case of *Stockton v. Central R. Co.* supra." This opinion was adopted by this court.

In *Atty. Gen. v. Delaware & B. R. Co.* 27 N. J. Eq. 631, Mr. Justice Dixon, speaking for this court, said: "In equity as in the law court the attorney general has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit by what may be called civil information for their protection."

Professor Pomeroy (Eq. Jur. § 1093) states the rule thus: "When the managing body are doing, or about to do, an *ultra vires* act of such a nature as to produce public mischief, the attorney general, as the representative of the people and of the government, may maintain an equitable suit for preventive relief."

In England the same rule prevails. *Atty. Gen. v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Atty. Gen. v. Shrewsbury (Kingsland) Bridge Co.* L. R. 21 Ch. Div. 752; 29 L.R.A. (N.S.)

Atty. Gen. v. London & N. W. R. Co. [1900] 1 Q. B. 78.

The rule of the American courts to the same effect as that laid down by Chancellor McGill is epitomized in 20 Am. & Eng. Enc. Law, 2d ed. p. 850, under the title "Monopolies and Trusts," where numerous cases are cited in the notes. A complete collection of such cases will also be found in the two volumes of Lewson's *Monopoly & Trade Restraint Cases*, which work is, in effect, a collection of the syllabi of the opinions delivered by American courts upon this topic.

The rule illustrated by all of these cases, and the one that we should adopt, if we have not already done so, is that if a corporation, engaged in a business that is affected with a public interest, contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, such contract is *ultra vires* such corporation, and may be restrained in equity at the suit of the attorney general, without regard to whether or not actual injury has resulted to the public. The expression "corporation affected with a public interest" is to be referred to the term "quasi public corporation" as tending, in some measure at least, to characterize the class of corporations indicated, whereas the term "quasi public" is characterized only by its unmeaning vagueness. In the discussion, and still more in the application, of this rule it will of course be necessary to amplify the expression "affected with a public interest" to the extent of stating just what is meant by that term, and also to discriminate between acts that are *ultra vires* a corporation and those that are merely illegal, and also to make clear what "tends" to public injury; for it is upon the concurrence of these three factors that the applicability of the rule in question depends.

Upon this branch of the present inquiry, therefore, the pertinent questions are:

(1) Are the defendants engaged in a business affected with a public interest?

(2) Is the contract into which they have entered one that is *ultra vires* such corporations? and

(3) Does such contract tend to affect such public interest injuriously?

The first question, and that upon the answer to which this branch of the case virtually turns, is whether or not the business of fire insurance as carried on in this state is a business affected with a public interest within the meaning of the rule enunciated in *Stockton v. Central R. Co.* The answer to this question does not depend, as counsel for the respondents argue, upon whether the defendants were expressly created as public agents, or whether the state has

expressly charged them with the performance of a public duty, or has to that end clothed them with monopolistic privileges, or granted to them its right of eminent domain, or required that they insure the property of all citizens alike. These are *indicia* by which the existence of "a public interest" may be readily discerned, but, so far from "the public interest" arising out of these incidents, the fundamental fact is that they arise out of such public interest. In natural course the public interest first arose, and afterwards, and because of such interest, all of these incidents were added unto it. In their inception all public callings were private ones, whose history has consisted in the evolution of a public character and of the incidents that they now possess. "First the blade, then the ear, after that the full corn in the ear."

Such at the common law was the course by which common carriers, and all of the callings now recognized as affected with a public interest, ceased to be *juris privati* only, and became matters of public concern. More than two centuries ago Lord Chief Justice Hale, in his treatise *De Portibus Maris*, said that when private property is "affected with a public interest, it ceases to be *juris privati* only" (1 Hargrave's Law Tracts, 78), illustrating this by the case of a man who sets up on his land a crane that in due course ceases to be *juris privati*, and becomes subject to public regulation. This statement of Lord Hale was cited with approval, and applied by Lord Kenyon a century later in *Bolt v. Stennett*, 8 T. R. 606, "and has," said Chief Justice Waite, speaking for the Supreme Court of the United States still a hundred years later, "been accepted without objection as the law of property ever since." *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77.

"Property," Chief Justice Waite continues, "does become clothed with a public interest, when used in a manner to make it of public consequence and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good to the extent of the interest he has thus created."

One significance of this statement of the law of property is that it speaks in the present tense, viz., "property does become clothed with a public interest," not did become so clothed once upon a time. Another is its recognition of the fundamental law that public interest arises essentially from the uses to which a man puts his property, and not from a force *ab extra*; and yet another is that, knowing this to be the law, 29 L.R.A. (N.S.)

men engage in certain callings, knowing that the business they so embark in will, if success attend it, become affected with a public interest. "They entered upon their business and provided the means to carry it on subject to this condition," he says; and, speaking to the point that it was of no moment that a direct precedent could not be found, Chief Justice Waite says, "It is conceded that the business is one of recent origin, that its growth has been rapid, and that it is already of great importance;" and, reaching the conclusion that the public interest was affected, he adds, "It presents, therefore, a case for the application of a long-known and well-established principle in social science. . . . There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner."

The force and significance of these statements of the highest court in our land is enhanced by the fact that the property owners with respect to which they were made were private individuals, and the business concerned that of storing grain in private warehouses. The fact that the question in *Munn v. Illinois* was the right of the public through its legislature to deal with a use of private property as affected with a public interest, rather than with the right of the public so to deal with it in the courts, is of no significance upon the point for which the language of the decision is now cited. Upon the underlying proposition that a business, private at its inception, may become affected with a public interest, it is immaterial that the question of its public character arose in a case where its restraint had been legislatively, rather than judicially, determined. Upon this point *Munn v. Illinois*, as was said by Chief Justice Waite, introduced no novel doctrine. What it did was to call attention to the fundamental relation that exists between the use of private property and the creation of a public interest in such use, and its chief value as a contribution to jurisprudence was that it pointed out clearly that in the determination of such a relation the underlying question was not what the state had done to impress a public interest upon a business, but what the owners and operators of such business had done to draw to, and thus clothe themselves with, a public interest; for in *Munn v. Illinois* the state had done absolutely nothing. The vast importance of the maintenance of this point of view by the courts of this country must be conceded when we consider that to an unprecedented extent business enterprises are launched, the success of which depends upon the extent to which the public can be

attached to them and constrained to lean upon them. Public support of this character is essential to the success of these enterprises, and hence is from their inception the desideratum of their promoters. When, therefore, success along these lines has been attained, it brings with it duties to the public, whose interests are involved, of precisely the same nature as if such duties had been imposed by public law upon such enterprises at their inception. This is the principle that was recognized and applied in *Munn v. Illinois*, and if it be sound as applied to individuals, it must *a fortiori* be sound as regards corporations. To the eye of the law and in the interest of the public it is one and the same thing, whether a corporation be created to subserve a public interest, or whether such corporation achieve success of such a nature that the duty of regarding the interests of the public is thrust upon it. Aptly the words of the great dramatist may be paraphrased, *viz.*, that some corporations are born to serve the public, some achieve that end, and some have it thrust upon them; and (as in the state of man) the last two conditions are so correlated that, when the interest of the public has been woven into a business as a *sine qua non* of its success, the success thus achieved thrusts upon such business a co-ordinate duty that clothes it, to that extent, with a public interest. It is in accordance with this principle that the entire class of callings we are considering has come into existence. Railways, ferries, inns, warehouses, or what not have in their day had this same origin and history. When the first waterman held out to his neighbors a means of ferriage other than in their separate boats, and when the first teamster undertook to carry families and their produce to the market town, the foundation of the modern law of common carriage was laid, and, as success attended these undertakings by their successful appeal to the public, a public interest in them arose which in time was recognized and acted upon by legislatures and by courts alike, the power of eminent domain and other privileges being granted in order that such public interest might be the better served; the duty of serving all alike, and of refraining from excessive charges by combination or otherwise, being imposed that such public interest might be the better safeguarded. To confuse, therefore, these incidents and *indicia* with the fundamental relation out of which they arose, or to say that such fundamental relation between the use of private property and the public interest therein is a thing of the past, and that such relation is not just as sound and fruitful now as then, is to take a totally illogical

position, the acceptance of which would disarm the courts of to-day of defensive weapons of which the public stands in more need now than it did then. It is therefore a shallow argument to say that a court cannot restrain corporations from *ultra vires* acts injurious to the public, because such corporations have not been given the right of eminent domain, or because they have not been compelled to insure all of the property of all of the people. When the public interest will be furthered by such power or by such duty, they will come into existence, but not otherwise. What, for instance, would a fire insurance company do with the power of eminent domain, or how would law-abiding insurers be benefited by requiring these companies to insure the property of incendiaries? The same law, both as to the attainment of a public interest and as to the incidents that shall attach to it, is operative now as in the past, and the same history still repeats itself whenever a business or calling that was either unknown to the common law, or of no public import then, insinuates itself into modern business methods, so that it becomes a matter in which the public is vitally concerned. Of this there can be no more apt an example than the business of fire insurance as carried on by these defendants under modern conditions and under the laws of this state. If such businesses were still in the hands of individual underwriters, unaffected by state regulation, and confined to the writing of policies on the dwellings of prudent householders and on the stores of careful merchants, a great deal might be said in favor of the view that no public interest had attached to the making of these private contracts. We cannot, however, close our eyes to the fact that, by the enormous extension of this business, by its concentration in the hands of immense corporations, by state regulations that amount to privileges, and by its practically universal employment as a collateral security for debts, the business has become one in which the interest of the public is directly involved, certainly as much so as it is in the warehousing of grain. The collateral security of mortgage debts would alone suffice to attach a public interest to the business in question, since it vitally concerns credit as a factor in modern business.

Whatever concerns business credit *ex necessitate* touches a matter in which the public is directly interested. The impairment or embarrassment of business credit affects immediately not only the demand for money and the volume of business transacted, but also the inauguration of new enterprises, the employment of people, and

the payment of the wages they would otherwise receive and spend, and thus ramifies in its effects from the greatest banking houses, through the homes of the unemployed, or the badly paid, to the smallest retail shops. By the introduction and perfection of title insurance, a practically new commercial utility has been imparted to real property, which, under such new conditions, performs a recognized service in the immediate obtaining of credit for commercial needs or in business emergencies. The collateral indemnification of credit thus obtained has become one of the chief, if not the chief, business of modern fire insurance, and I doubt whether within twenty years past a mortgage on improved property has been given that did not covenant for such insurance and for its maintenance under the penalty of immediate foreclosure. The public, greatly to the benefit of the insurance business, has become educated to this system, and to lean upon it and to shape their business ventures in reliance upon it. Such education and such reliance, which were of course beneficial, and properly so, to the insurance companies, have so entered into the woof and warp of general public business that nothing that can be conceived of would produce greater disturbance or profounder catastrophe than the cancellation of such policies or the withholding of such insurance. It seems to me that it is impossible to say that by its very growth and success the business of fire insurance has not become affected with a public interest, within the principle of *Munn v. Illinois*. That it is deemed for legislative purposes to be so affected is evident from the voluminous Code enacted in this state for its regulation in the interest of the public. P. L. 1902, pp. 407-447. It is pertinent, at this point, to ask why the state should enact a regulative Code for the protection of a public interest that does not exist. Moreover, some of the provisions of this Code, while in form regulations imposed upon insurance companies, amount practically to privileges accorded to them. Indeed it is by reason of the privileges thus enjoyed by foreign companies that the present combination is rendered feasible. In such case—i. e., where foreign corporations that have been accorded the privilege of transacting their legitimate business in this state use such privilege to engage with our domestic companies in a compact inimical to the interests of the people—it would be a salutary, and I am inclined to think a sound, rule of law that would estop such foreign corporations to deny that they were enjoying such a privilege from the state as made them amenable in the premises to its court of equity. A state that had grant-

ed such a privilege should, it seems to me, be entitled, with a reasonable expectation of being heard, to apply to its own courts for preventive relief based upon the abuse of the privilege it had granted. Be this as it may, we think that it is impossible for the unbiased mind to reach the conclusion that the business of fire insurance as now conducted in this state by corporations created, licensed, and regulated by the state, is not a business affected with a public interest, but that the storage of grain by private individuals is so affected. Yet such is the conclusion we reach, unless, so far as in us lies, we overturn the decision of the Supreme Federal Court in *Munn v. Illinois*, a decision that has been followed in cases so numerous that their citation from state reports would be superfluous, and of which Mr. Justice Harlan, speaking at a later period, said, "The doctrines of *Munn v. Illinois* have never been modified by this court," i. e., the Supreme Court of the United States. Civil Rights Cases, 109 U. S. 62, 27 L. ed. 856, 3 Sup. Ct. Rep. 18.

The conclusion we reach from these considerations is that the business of the defendants is in point of fact one that directly affects the interests of the public, and that such public interest has been recognized as a subsisting one by the legislature of this state, and that in point of law the business of the defendants is affected with a public interest.

2. We have next, therefore, to consider whether or not the contract by which the defendants have agreed that their several corporations shall be bound is *ultra vires* such corporations. In this regard the eight domestic companies stand in one respect in a position different from the hundred and odd foreign defendants. These domestic companies received their charters from this state in order that they might transact legitimately a business in which, as we have seen, the public is interested. To this end all general provisions essential to the lawful government of corporations are deemed to be written into their respective charters. Among these general provisions is that "the business of every corporation shall be managed by its directors," either by force of the express mandate of § 12 of the general corporation act of April 21, 1896 (P. L. p. 281), or because such is an imperative implication of the law of corporations. We cannot agree with the views of the respondents' counsel as expressed in their brief, viz., that "the provision that the company shall be managed by a board of directors is simply intended to show where the powers which may be exercised by the company shall, as between the shareholders,

and those who deal with the company, reside," or that "the provision in § 12 of the act of 1896 was not intended for the protection of the general public, and failure on the part of the directors to perform their duty in the management of the affairs of the company concerns only the shareholders and the policy holders."

The statute says all that counsel say it means, but it also says more, and we take it that a statute means all that it says. We do not concede or believe that the sole object of § 12 was to inform stockholders of what they already knew, *viz.*, that the business of their corporation was to be managed by the officers selected by them for that purpose, rather than by somebody else. Neither do we believe that a corporation affected with a public interest could insert in its certificate of incorporation a frank avowal that its business was not to be managed by its own directors, and then successfully set up as against the state the argument now advanced in justification of the respondents' construction of the statute. Counsel confuses, as it seems to us, the force to be given to the statute, with the occasions upon which such force is to be given to it. Where the question cannot be raised, the meaning of the statute is immaterial. It is, for instance, immaterial to the public, and to the state representing the public, whether the business of a company organized to manufacture bicycles or to make wall paper is managed by its directors or by its office boys. That is not the case here. These domestic companies were chartered to insure the property of citizens of this state under legitimate conditions. One of the most important and responsible duties that devolved upon the managers of these companies was therefore the fixing of the rates to be charged the citizens therefor. A contract by which the directors of such corporations in conclusive form abdicate their duty of management in this respect, and turn it over to an alien body, is in direct violation of the words and meaning of the statute, and is as typical an instance of an *ultra vires* act as can well be imagined. To do so in a given instance would be an illegal act, but the act of binding the corporation by contract to a settled policy of illegal acts is beyond the power of the corporation, *i. e.*, is *ultra vires*. That this is no academic criticism appears clearly from the fact that the Central Association, erected by the contract by which, through a subcommittee of five, rates are fixed, consists of but one representative of each constituent company. Hence in a body of 121 the New Jersey companies have but eight votes, and in the subcommittee they have but one vote to four

cast by foreign corporations. It is inevitable, therefore, that the influences affecting such foreign corporations, the losses they may have sustained, the expenses they have incurred, the salaries they design to pay, the dividends they desire to declare, will all be reflected and asserted in the fixing of the rates to be charged for insurance to the citizens of this state. These rates, and these only, the New Jersey companies by the contract in question bind themselves to charge, although such rates may be greatly in excess of anything required or justified by local conditions, or by the business of such domestic companies if managed by their own directors. *Pro tanto* this amounts to a merger of corporate management accomplished by means other than those sanctioned by law. It also places it out of the power of the domestic companies to manage an important feature of their business with respect to the public interest with which it is affected. While these considerations apply directly to the New Jersey companies only, they apply indirectly to the foreign companies also, which have used their privilege to do business in this state to render feasible a contract scheme that is *ultra vires* the New Jersey companies. Foreign corporations are permitted to do business in states other than that of their incorporation by comity, not of right. It is fundamental that such corporations have no other or greater powers than do corporations organized under the laws of such state. It would be, therefore, a total subversion of law and reason to hold that a foreign corporation had in this state the power to make, with corporations of this state, a contract affecting a matter of public interest that such corporations of this state had not themselves the power to make. Comity does not extend to a permission to combine with domestic corporations in a way that tends to public injury. A court of equity would be short-sighted indeed that did not see this, and short-armed if it could not reach out to prevent it. We have, therefore, no hesitation in concluding that the *ultra vires* quality of the corporate contract by which the Newark Fire Insurance Exchange was brought into existence is attributable to all of the corporations that subscribed to such contract,—the foreign as well as the domestic.

It is said that a court of equity will not take notice of the *ultra vires* nature of the contract into which these defendants have entered, for the reason that such contract, being in restraint of trade, is one that they cannot be forced to observe, and this had conclusive weight with the court below. For present purposes the plenary answer

is that the test of *ultra vires* is the power of a corporation to make a contract, not its power to break it.

3. Upon the question whether the contract that resulted from these *ultra vires* acts tends to affect the public interest injuriously, little remains to be said, and that little can be better said under the second branch of this appeal, which we shall now proceed to consider. Upon the first branch our conclusion is that, because the business of the defendants is affected with a public interest, a court of equity should restrain their *ultra vires* acts at the instance of the attorney general, if such acts tend to public injury, without regard to whether public injury had in fact resulted, and that the contract in question does so tend.

(2) Under the second branch of the case, we shall assume that the business of the defendants is not, in the general sense, affected with a public interest, and that the attorney general must show that actual public injury has resulted from an unlawful combination in restraint of trade, and is therefore *ultra vires* the contracting companies.

As this was the point of view from which the learned vice chancellor regarded the case in advising that the information be dismissed, it is necessary at this stage to determine whether the reasoning that led the court below to apply to the attorney general, seeking to avoid a contract repugnant to public policy, the same rule that obtains in that court when a party to such contract is seeking to enforce it, is sound.

Upon this point the court below laid down two propositions: First, that the attorney general could not maintain a suit to enjoin parties to an agreement regulating rates, though against public policy as in restraint of trade; and, second, that the fact that the parties to such agreement were corporations made no difference.

As to the first of these propositions it is perhaps only necessary that we should withhold our assent; but, as to the second, we must record our express dissent.

Before leaving the first of these propositions, however, we should say that the fault we find with the vice chancellor's conclusion is not in the soundness of the rule of mere unenforceability as applied to the class of cases in which it properly obtains, but in the extension of such rule to a subject not properly, or at all, within its purview, viz., the right of the state to preventive relief in aid of public policy. There is something startling, not to say appalling, in the proposition that the state is to be met in its courts with a denial of its right to relief, upon the ground that the rule of nonintervention that is applied to

the violators of such public policy must also be applied to the public that is injured by such violation.

The rule in question is itself an application of the maxim *in pari delicto*, etc., and hence is in strict analogy with the judicial policy, by force of which courts decline to aid in the distribution of plundered property, but it is quite illogical to say to the man who has been despoiled, "Because we refused our aid to those who despoiled you, therefore we must decline to aid you." Yet this, or something very like it, is what we are asked to say.

The case of *Mogul S. S. Co. v. McGregor*, L. R. 23 Q. B. Div. 598, cited by the vice chancellor, and relied upon by counsel for respondents, is not in point. There a court of law decided that a contract in restraint of trade, made by one set of shipowners, did not give another set of shipowners a legal cause of action against them for damages. The case has no bearing whatsoever upon the attitude of a court of equity when a suit is brought on behalf of the state in the interest of the public.

That the reasoning of *Mogul S. S. Co. v. McGregor*, even within the lines of its decision, is not likely to commend itself to jurisprudence generally, is pointed out in an instructive article on "The Case of the Monopolies" by Sidney T. Miller, Esq., in 6 Mich. Law Rev. 1 November, 1907. Upon the point we are considering the case has no bearing whatsoever.

This digression should not, however, be further extended, as the same ground is necessarily covered in expressing our dissent from the second proposition, on which the court below based its dismissal of the attorney general's information, viz., that the fact that the defendants were corporations made no difference as to the right of the attorney general to maintain such suit.

Laying aside, therefore, the rule applicable to individuals who have entered into an agreement contrary to public policy, in that it is in restraint of trade, and taking up a question that could by no possibility be involved in or decided in such a case, viz., the corporate power to enter into or continue under such an agreement, we perceive at once that such question lies entirely outside of the rule that was deemed in the court below conclusively to foreclose it. That such contracts are contrary to public policy is admitted upon all sides, in fact it is precisely because of their contravention of public policy that the courts refuse to countenance them. In the creation of its corporations no state, I suppose, confers upon them in express terms the power to make contracts that violate its

public policy. Where such a power is not expressly given, it will certainly not be deemed by a court of equity to exist by implication. A contract that a corporation has neither the express, nor the implied, power to make, is one that is beyond its power to make, i. e., *ultra vires*.

The circumstance that a corporation makes such a contract relying upon the nonintervention of the courts does not clothe the corporation with the needed power that it lacked to make such contract; it merely shows the inducement to make it, and how such violator of public policy will under such rule be protected from public redress by the very agreement by which the public is injured. The rule of mere unenforceability thus relied upon makes, however, an exception, even as to the parties *in pari delicto*, which is thus stated by Judge Story: "In cases where the agreements or other transactions are repudiated on account of their being against public policy, the circumstance that the relief is asked by a party who is *particeps criminis* is not in equity material. The reason is that the public interest requires that relief should be given; and it is given to the public through the party." 1 Story, Eq. Jur. § 298; Cone v. Russell, 48 N. J. Eq. 208, 217, 21 Atl. 847.

It would seem, therefore, that the rule enforced by the learned vice chancellor applies to actions based on the repudiated contract, but not to those in which its repudiation may be assumed by the court, whether as fact or as fiction.

The fiction of acting for the public by which relief is granted to a party *in pari delicto*, must *a fortiori* apply to the public itself when actually acting in its own interests. The fundamental principle recognized by this line of cases is that one who has entered into a contract that contravenes public policy owes to the public the continuous duty of withdrawing from such contract. A duty thus owing to the public is, upon familiar principles, presumed by courts to be performed; and such presumption should be indulged in by the courts whenever necessary to give to the public, acting through its official representative, the same standing that the actual performance of such duty gives to one *in pari delicto*, to act for the public.

It would be inconceivably absurd that the defendants, in rebuttal of this presumption, should be heard to say that, because to their original violation of public policy they had superadded a violation of another public duty, they were immune from ordinary judicial control. Yet such is the state of our jurisprudence under the rule enunciated in the court below, unless such

presumption or legal fiction is invoked in aid of violated public policy.

Speaking for myself, the extension of the rule of nonenforceability, based as it upon the maxim *in pari delicto*, to the case of the state seeking to prevent public injury, seems to be without the slightest foundation in sound logic, or justification in right reasoning. Be this as it may, the fact is that, if upon neither of these grounds preventive relief may be had by the state, no combination can be so hostile to the public interests, or so flagrant in its defiance of public policy, but that it may effectively shield itself from such interference on behalf of the public, by the simple device of casting its proposed violation of public policy in the form of a contract for a self-imposed restraint of trade. I cannot believe that this is the actual state of our jurisprudence on this vitally important subject.

Concluding, as we do, that the line of reasoning that limits the court of chancery, in all cases involving contracts in restraint of trade, to the single policy of their non-enforcement, is fundamentally at fault, and that the defendants have not by their violation of public policy effectually entrenched themselves outside the pale of preventive law, it remains to be considered whether certain facts that were merely assumed in the court below, viz., that the contract in question is one that fixes rates and stifles competition, and is detrimental to the public, are sustained by the testimony. If they are, and if injury has thereby resulted to the public, the duty of a court of equity to enjoin the defendants from continuing to act under such *ultra vires* contract is clear. The contract, without question, fixes and maintains rates, and so controls the placing of insurance, and the channels through which that business flows, that it inevitably reduces competition to the minimum, if it does not absolutely eliminate it. This much appears from the contract itself and in the testimony. The remaining question, viz., that of injury to the public, is not so much one of disputed fact as of the sufficiency of a proffered justification of an established fact. The marked increase of cost to the insured, coincident with the going into effect of the contract, is a salient and palpable fact that in the case of any other commodity of equal necessity would carry its own irrefutable conclusion as to whether or not it was a public injury. The debatable questions are whether such increased price of insurance is not justified and rendered non-injurious to the public (1) as being merely incidental to the adoption of means and methods necessary to the proper conduct

of the business of insurance; and (2) whether such increase of premium rates, while immediately burdensome, is not ultimately beneficial to the insured by adding to the solvency of the insurers, and swelling the fund out of which indemnity must come in case of loss. The first of these suggestions does not appeal to us, for the reason that it is perfectly obvious that everything that is attained by this contract in the way of equipment for the proper conduct of the business of the defendants could be attained by them severally or acting in unison without involving their combination to regulate rates and stifle competition. The masterful way in which these reprobated features of the contract are effectuated forbids us to treat them as mere incidents of a system for the gathering of statistics and the dissemination of data. The other suggestion by which the increase of price to the insured is justified as being ultimately beneficial to him is more persuasive, and would probably be entirely so if any substantial warrant for such suggested benefit could be found in the contract. It cannot, however, be found there.

In order that the insuring public be ultimately or at all benefited by the increased cost of insurance it is required to pay, it is essential that such increase, over and above the cost of the operation of a company, should go not in dividends to its stockholders, or in salaries to its officers, but to a fund, by whatever name called, by which greater solvency would be given to the company, and its increased ability to respond to losses assured. For this, however, there is no provision in the contract. In such case—i. e., where an increase of earnings results from a contract made by the officers of a company acting for its stockholders—we must, in the absence of any suggestion to the contrary, deem that such contract was made for the benefit of such stockholders. If, contrary to this normal presumption, the intention in making such contract was that such increased earnings were to go to some fund in which the insured would have an interest, it is so highly probable that a provision of such importance would be mentioned in such contract, that the failure so to do forbids us to assume that such an intention existed. It is certain that this contract contains no such provision that the insured can lay hold of, or by which the subscribing companies could be bound. We cannot avoid, therefore, the following conclusions: (1) That the increase of price wrought by this combination of insurers has not been justified; (2) That such increase works actual injury to the public; (3) that the contract by which such combination was affected is in re-

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straint of trade, and repugnant to public policy on that account; and (4) that it is unreasonable, in that it transcends the legitimate purposes for which the defendants were created or licensed, and that such combination itself is characterized by all the evils that the common law, by its rule against them, placed under its condemnation. That the corporate acts by which such contract was entered into, and such combination effected and its continuance perpetuated, are *ultra vires* the defendants need no further argument. That the defendants should be enjoined from such continuance follows from what has already been said.

The notion that this conclusion runs counter to anything that was decided by this court in *Raritan River R. Co. v. Middlesex & S. Traction Co.* 70 N. J. L. 743, 58 Atl. 332, can rest only upon a misunderstanding of that decision, or arise from a failure to read the opinion delivered in that case. The contract there under consideration was one between a railroad company and a traction company, by which the former agreed "not to lower its present rate of fare unless required by law." In his opinion Mr. Justice Pitney (now chancellor) makes it perfectly clear that what was decided was that § 15 of the general railroad act of 1873 (Gen. Stat. p. 2643) in terms absolved a railroad company affected by it from the exercise of that judicial discretion, respecting rates of fare, that otherwise would be addressed to it as an impartial arbiter between its stockholders and the public, and vested in such railroad company an uncontrolled discretion, within the limits fixed by the legislature itself, to establish such rates as its own interests, without regard to the public, might require. Upon this point the opinion concludes with this language: "Any construction of § 15 of the act that places the railroad company in the attitude of an impartial arbiter as between it and the public being thus found inadmissible, because it runs counter to fundamental principles, we have before us a statutory scheme which in terms confers upon the company an uncontrolled discretion to subserve its own interests in making and, from time to time, changing the rates of fare and of freight, subject only to the maximum rates prescribed, and to further legislative action from time to time thereafter." It is clear, therefore, that what was decided was the construction of a statute and its effect in absolving railroad companies from an attitude toward the public that otherwise would exist. The decision, therefore, instead of militating against our present conclusion, is, impliedly at least, in its

favor. The judges who dissented in the case cited did so because their construction of the statute differed from that of the majority of the court.

The result reached upon either branch of the present appeal is that the decree brought up by it should be reversed, and the case remitted to the Court of Chancery to the end that an injunction may issue in accordance with the specific prayers of the information and the views herein expressed.

Pitney, Ch. J., and Garrison, Trenchard, Bogert, Vredenburgh, Vroom, and Dill, JJ., concur.

Swayze, J., dissenting:

In ordinary cases little good is done by an expression of the reasons for dissent, but when the principle involved is fundamental, it is a public duty to protest in the hope that the logical consequences may not lead us too far before we are aware of the direction in which we are traveling. This decision is novel. Combinations of insurance companies like the Newark Fire Insurance Exchange are not new. Many such cases are collected in Lewson's Monopoly & Trade Restraint Cases, referred to in the opinion. It is significant that not one of these cases is cited. I shall review them at length hereafter. Our sister states, administering the same system of law that we administer, have been singularly blind, for they have for years been industriously legislating on this subject, and, if the present decision is right, such legislation has been unnecessary, since we have accomplished by judicial decision what in every other state has been thought to require legislative action by the elected representatives of the people. I deprecate judicial legislation, regardless of its merits. It confuses the functions of the separate branches of the government, and when it results, as in this case, in applying new law to the past conduct of individuals, it has all those evils of *ex post facto* legislation which led to our constitutional prohibition. I deprecate also the ground upon which the decision is put, for it goes much farther and reaches much deeper than the opinion itself indicates. The court relies on *Munn v. Illinois*, 94 U. S. 113, 24 L. ed. 77. *Munn v. Illinois* was decided under provisions of the Illinois statute which attempted to regulate the charges of individuals owning grain elevators. The importance of the case was in its assertion of this right to regulate charges by private individuals, not corporations. By relying upon that case alone as authority, the court must mean that it is competent for the legislature to

fix rates of insurance by private individual insurers,—a very wide departure from established principles. It may be conceded that where a virtual monopoly exists, as in the *Munn Case*, the state, by its legislature, has the right to regulate charges. Such is the view suggested by Professor Wyman in a thoughtful article on "The Law of Public Callings," 17 *Harvard Law Review*, 156, at page 217; and it has much to commend it. But the right to regulate charges when it rests upon the existence of a virtual monopoly must cease as soon as the court has destroyed the monopoly by its injunction. Under this view, to put an end to the monopoly is to cut off the branch on which the right of public regulation hangs, and this the court attempts to do by its present decree. The opinion rests for its fundamental proposition, not upon the basis of virtual monopoly, but upon the idea that when the public interest is served by the conduct of any business, and that business has become large and successful, the public may at once intervene. The quotation in the opinion, "First the blade, then the ear, after that the full corn in the ear," and the paraphrase of Shakespeare, suggests that one rule applies to a small business and a different rule to a large business. I have never before heard it suggested that the size or success or want of success of a business was a test of its public character. I think a ferryman operating a flatboat with only one passenger a day is engaged in a public calling as truly as the owners of the ferries over the North river, with their thousands of passengers daily; that a private expressman just beginning business and carrying his first parcel is engaged in a public calling as truly as the great express companies; and that the railroads were engaged in a public calling in their feeble beginnings as well as in their present development. If size or success is, as the opinion holds, the test by which the existence or nonexistence of a public calling is to be determined, I do not know where to draw the line or when, in the course of its growth a business which before was private becomes public. The test of size and success is a very different test from that of a virtual monopoly. The opinion holds that the business of insurance is affected with a public interest, not because of the combination which is to be dissolved, but because it is an important business necessary in modern life. The reasoning applies as well to a single company as to a combination of many companies. In fact, the decision goes upon the ground that the court has the right to regulate the business of each separate company because it is affected with a public interest, and to pre-

vent each separate company from making the contract in question. If this is correct, the Munn Case is authority for the extension of the same regulation to individual insurers. It is therefore important to determine whether the right to regulate insurance companies, which has long been exercised, rests upon the ground that they are affected with a public interest. The expression "affected with a public interest" is an unfortunate one. Judge Cooley, years ago, in discussing *Munn v. Illinois*, was careful to warn us against the danger of giving too broad a meaning to these words. Cooley, *Const. Lim.* 736. He says: "The mere fact that the public have an interest in the existence of the business, and are accommodated by it, cannot be sufficient, for that would subject the stock of the merchant and his charges, to public regulation. The public have an interest in every business in which an individual offers his wares, his merchandise, his services, or his accommodations to the public; but his offer does not place him at the mercy of the public in respect to charges and prices." He then proceeds to explain *Munn v. Illinois* as resting upon the virtual monopoly, the very condition which the present decree undertakes to destroy, and he classifies businesses which are affected with the public interest as follows: "(1) Where the business is one the following of which is not of right, but is permitted by the state as a privilege or franchise. Under this head would be comprised the business of setting up lotteries, of giving shows, etc., of keeping billiard tables for hire, and of selling intoxicating drinks when the sale by unlicensed parties is forbidden; also the cases of toll bridges, etc. (2) Where the state, on public grounds, renders to the business special assistance by taxation or otherwise. (3) Where, for the accommodation of the business, some special use is allowed to be made of public property or of a public easement. (4) Where exclusive privileges are granted in consideration of some special return to be made to the public." The business of insurance against fire is said to come within these classes, because it is regulated by the state, and companies which cannot satisfy a certain standard of solvency and comply with certain conditions are not allowed to do business in the state. It sounds rather strange to find that the burdens and requirements imposed by forty-six different states, from which insurance companies have made vain attempts to escape since the decision of *Paul v. Virginia*, 8 Wall. 168, 19 L. ed. 357, are really in the nature of privileges and franchises, because they exclude from competition all companies which cannot at-

tain to the legislative standard or comply with the legislative conditions. These regulations might indeed amount to privileges and franchises if the state bound itself not to relax them or not to admit other companies on less onerous terms; but there can be no privilege or franchise where the state grants nothing, and the restriction of competition by means of these salutary regulations does not amount to an agreement on the part of the state to continue them. The legislature may to-day adopt regulations which would require a company to have a capital of a million dollars, and after the companies that could do so had complied, perhaps with great difficulty, with the legislative requirements, those requirements might be reduced and the companies with large capital would have no redress. Indeed, the legislature, far from making these regulations amount to the grant of a special privilege, has taken pains to provide for insurance on the mutual plan and for the formation of associations known as "Lloyds" (act March 26, 1896; P. L. 156), under which any twenty men of sufficient substance may insure as individuals. The state has been careful not to grant special privileges to what are called the "old-line" insurance companies, such as are concerned in the present case, but has only imposed regulations and restrictions necessary to insure solvency. It is true that the companies having a New Jersey charter have a privilege and franchise, and that the companies of other states that are admitted to do business in this state may also properly be deemed to acquire a privilege by that permission, and I do not deny the state's power of regulation arising from these facts; but that power rests upon the reserved power of the state to control its own corporations, and upon its absolute power to admit or refuse to admit foreign corporations to do business in the state. It does not rest upon the view that these particular corporations known as insurance companies are peculiarly constituted and peculiarly affected with a public interest. Under this power the legislature has the right to amend the charters of corporations, at least those which have received their charters since the enactment of the act of February 14, 1846 (P. L. p. 16), which now appears as § 4 of the corporation act (Laws 1896, p. 278),—a class which probably includes all of the defendants in this case (although their charters have not been put in evidence); and it has the right to impose additional conditions upon foreign insurance companies. But the right to regulate the business of corporations is very different from the right to regulate the business of individuals. Corporations come within

the first of Judge Cooley's classes, but individual insurers, who under the form known as "Lloyds," have become important in England and may become important here, do not exercise their business as one of privilege but as one of constitutional right, by which they may acquire property, and, if they are to be regulated at all, are to be regulated by virtue of the police power, just as the practice of medicine and law may be regulated since the decision of *Dent v. West Virginia*, 129 U. S. 114, 32 L. ed. 623, 9 Sup. Ct. Rep. 231. The distinction is important, for the police power and the power to regulate corporations must be exercised by the legislature, and our legislature has significantly failed to act.

The remedy for the evils supposed to be due to the compact now condemned by the court has been in the hands of the legislature ever since the Newark Fire Insurance Exchange was formed in 1902. It was simple, and required no litigation to establish its efficacy, but the legislature has failed to prescribe any additional requirements, and, as far as the foreign companies are concerned, has allowed the superintendent of insurance to renew their licenses in each successive year. It is not for the court to add to the legislative requirements. Such has been the holding of this court with reference to the statutory signals required to be given by railroads; and I think our decision in that respect is applicable to the present situation. The reason why the legislature has failed to act is probably the same reason which led the legislature of Missouri, in passing a statute against combinations of this character, to exempt from the operation of the act, cities of more than 100,000 inhabitants. *State ex rel. Crow v. Firemen's Fund Ins. Co.* 152 Mo. 1, 45 L.R.A. 363, 52 S. W. 595. It has a solid basis in the greater fire hazard in the larger and more compactly built cities, many of which are built of frame structures and consist of extraordinary hazardous risks, where regulations such as those of the Newark Fire Insurance Exchange are peculiarly desirable for the public safety. The failure to exercise the legislative power to forbid the present arrangement is conclusive evidence that, in the view of the legislature, it was not inimical to the public interest. There is no reason why the legislature should not have exercised this summary and extreme power which is not applicable to the exercise of the same power by this court. For us to decide that this business has been continued illegally for all these years is to suggest that the legislature has failed in its duty. I cannot believe that that accusation is just.

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The distinction between the power of the legislature to control corporations, and the control by the courts upon the ground that the business is affected with a public interest, is an important one in its effect, aside from its application to individuals. One of the most important characteristics of a business affected with a public interest is that those engaged in its conduct must serve all who come, just as the innkeeper or a ferryman or a common carrier must, and it would be quite impossible to hold that this prominent and essential characteristic of a business affected with a public interest applies to an insurance company. The court in its opinion shrinks from so holding. An insurance company is certainly at liberty to reject, absolutely, and without assigning a reason, risks which are too hazardous to be insured at all, or in which experience has failed to establish a basis for rates of premium, or in which the moral hazard is bad. In such cases the insurance company must decline to insure if it is to hold itself ready to pay natural losses to honest insurers. The fact that the insurance companies cannot, if the business is to be successfully conducted, insure all who offer, is itself enough to show the error into which the court has fallen in holding that the business is one affected with a public interest.

The definition given by the court to the expression "affected with a public interest" loses sight entirely of the distinction upon which the cases rest. All of them go back to what Lord Hale says in the passage quoted in *Munn v. Illinois*. The right to regulate ferries was put upon the ground that they were really a part of a public highway. As to a wharf or crane, Lord Hale says that a man may set up one and take what rates he and his customers can agree upon, "for he doth no more than is lawful for any man to do, viz., makes the most of his own;" but he adds: When the wharf is one to which all must go, because it is the only wharf licensed by the Queen, or because it is the only wharf at the port (as it may fall out where a port is newly erected), then arbitrary and exclusive charges cannot be taken. This is the view that Professor Wyman advocates in the article referred to, and puts the right to regulation upon the more tenable ground of a virtual monopoly, not upon the size or success of the business. It is the necessity of public regulation in such cases that justifies what would otherwise be an unwarrantable interference with a private business. Whether there can be a virtual monopoly of mere contracts of pecuniary indemnity or not, it is reasoning in a circle to say that, because a combination becomes

affected with a public interest by reason of its being a virtual monopoly, we can destroy the monopoly and still retain the quality of being affected with a public interest. It is hard to see how the business of insurance can become a virtual monopoly, since, under the decision in *Allgeyer v. Louisiana*, it is open to all the world, regardless of state regulations, so long as the contracts are not made in the state, and even such monopoly as exists by virtue of the legislative restrictions upon the business is created by the legislature itself, which has found it wise to restrict the business to certain companies and individuals in the public interest.

Munn v. Illinois has been frequently reviewed, but the diligence of counsel and of this court and my own researches have failed to reveal any case before this in which it has been held that the fact that a business was successful, and that it was a useful or necessary adjunct of modern society, was sufficient to bring it within the purview of that case. *Budd v. New York*, 143 U. S. 517, 36 L. ed. 247, 4 Inters. Com. Rep. 45, 12 Sup. Ct. Rep. 468, certainly explained the earlier case on the view I suggest, and I do not know what other test is to be adopted unless we include all useful employments in the class. It must not be overlooked that what *Munn v. Illinois* decided was that the charges of individuals might be regulated where their business was affected with a public interest. I think the upright lawyer or even the skilful advocate are essential to the conduct of a civilized society, and no one would deny the absolute necessity for the proper care of human life by the skilful physician and surgeon. Logically the court must hold that as soon as the lawyer or advocate, the physician or surgeon, becomes so skilful that his services are of the utmost value, then the practice of his profession becomes affected with a public interest, and his fees for a skill which may be quite unique become the matter of public regulation. I cannot conceive the court carrying the reasoning of the opinion to the logical end, but where it is to stop I do not know. I think, therefore, that the court fails in its first proposition that the business of insurance is affected with a public interest within the meaning of the cases. The cases in which a similar result has been reached have been under statutes of the different states. *State ex rel. Crow v. Firemen's Fund Ins. Co. supra*; *Hartford F. Ins. Co. v. State*, 76 Ark. 303, 89 S. W. 42; *State v. Phipps*, 50 Kan. 609, 18 L.R.A. 657, 4 Inters. Com. Rep. 299, 34 Am. St. Rep. 152, 31 Pac. 1097. *People v. Sheldon*, 139 N. Y. 251, 23 L.R.A. 221, 36 Am. St. 29 L.R.A. (N.S.)

Rep. 690, 34 N. E. 785, was not an insurance case, but that also arose under a statute. In states which, like New Jersey, have no statute, a different result has been reached. Thus in *Ætna Ins. Co. v. Com.* 106 Ky. 864, 45 L.R.A. 355, 51 S. W. 624, the Kentucky court held that contracts regulating insurance were not within a statute prohibiting combinations to regulate, control, or fix the price of any merchandise, manufactured articles, or property of any kind, and that a combination for the purpose of maintaining rates of insurance, although it might be a void contract, was not an indictable offense at common law. The indictment in that case was for conspiracy to stifle free competition among fire insurance companies and their agents. And in *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L.R.A. 483, 24 S. W. 397, the Texas court held that the Texas statute did not apply to insurance, and that a combination of fire insurance companies to fix uniform rates and agents' commissions, though possibly unenforceable as an unreasonable restraint of trade at common law, was not enjoined by the public, nor a ground for forfeiting franchises, "since the business is not one in which the public has an interest, as in that of a common carrier or other corporation having the power of eminent domain, or of a dealer in a staple which is a prime necessary of life; nor is it a professional service to which the public is entitled." In *Continental Ins. Co. v. Fire Underwriters (C. C.)* 67 Fed. 310, Mr. Justice McKenna held that a board of fire underwriters formed under an agreement providing for the regulation of premium rates, the prevention of rebates, the compensation of agents, and nonintercourse with companies not members, was not an illegal conspiracy, and the accomplishment of its purpose by lawful means would not be enjoined at the instance of a company not a member of the association. In *Liverpool & L. & G. Ins. Co. v. Clunie (C. C.)* 88 Fed. 160, Circuit Judge Morrow held that the fact that a number of foreign insurance companies doing business in the state were members of an illegal combination to suppress competition would not prevent them from maintaining a suit to enjoin the state insurance commissioner from illegally revoking their certificates to do business; and he quoted the *Continental Ins. Co. Case*, above cited, as deciding that the association was lawful and its purpose legal. It will thus be seen that in the cases in which a similar question has arisen, where there was no statute, the courts have uniformly reached a result different from that now entertained by this court. No one would deny the high standing of Mr. Justice Har-

lan, the senior judge in service of the United States Supreme Court. In his concurring opinion in *Carroll v. Greenwich Ins. Co.* 199 U. S. 401, 414, 50 L. ed. 246, 251, 26 Sup. Ct. Rep. 66, 69, he touched upon this subject, and his language shows that he was fully sensible of the very consideration now expressed in the opinion of this court, but, instead of suggesting that the matter could be controlled upon common-law principles in the manner that we now adopt, his language shows that he evidently thought that the way to reach it was by legislation. He says: "The business of fire insurance is of such a peculiar character, so intimately connected with the prosperity of the whole community, and so vital to the security of property owners, that it is competent for the state to forbid combinations and agreements among fire insurance companies doing business within its limits in reference to rates, agents' commissions, and the manner of transacting their business. If in the judgment of the state the people who desire insurance upon their property are put at a disadvantage when confronted by a combination or agreement among insurance companies, I do not perceive any sound reason why, preserving the individual right of contracting, it may not forbid such combinations and agreements, and thereby enable the insured and insurer to meet on terms of equality. Surely the state could enact such a regulation with reference to companies organized under its own laws. If that be so, it cannot be that such a regulation may not be made applicable to foreign insurance companies doing business in the state only by its consent." The control of corporations by state enactment, as Justice Harlan suggests, is a very different thing from action by the court where the state, through its authorized agents, has persistently for years failed to act.

There are cases where agreements in restraint of trade of this kind have been denounced, but in every case the only remedy has been supposed to be for the court to refuse to enforce the agreement. The reason is not far to seek. If the parties to an agreement are all satisfied with it, and find it to their interest to conduct their business in harmony and without competition, no power can prevent them from doing so, short of the absolute prohibition of the business. The courts cannot make men compete who are determined not to compete. If, however, they are not satisfied with the agreement, and do not desire to conduct their affairs in harmony, but prefer to compete, the agreement will not stand in their way as long as the courts refuse to enforce it. An injunction is either

brutum fulmen or is unnecessary. A similar question arose in *Meredith v. New Jersey Zinc & I. Co.* 55 N. J. Eq. 211, 221, 37 Atl. 539, 543, where Vice Chancellor Pitney held that the buying up by one corporation of the property of another, and consolidating the whole into one business to the extent and in the manner provided for in the agreement there in question, was not contrary to public policy, nor did it tend to create a monopoly; and he added:

"By the law of the land these owners have the right to exercise their own judgment as to when, if ever, and how, they will spend their money in preparing their property for market and rendering it fit for use by mankind. Now I am unable to find any foundation, either in law or in morals, for the notion that the public have the right to have these private owners of this sort of property continue to do business in competition with each other. No doubt the public has reasonable ground to entertain the hope and expectation that its individual members will generally, in their several struggles to acquire the means of comfortable existence, compete with each other. But such expectation is based entirely upon the exercise of the free will and choice of the individual, and not upon any legal or moral duty to compete, and can never, from the nature of things, become a matter of right on the part of the public against the individual. In fact, the essential quality of that series of acts or course of conduct which we call competition is that it shall be the result of the free choice of the individual, and not of any legal or moral obligation or duty."

The control of the supply of zinc ore, necessarily limited to the already existing natural deposits, is undoubtedly as important for the public as a partial control of the moneyed capital of the world, which is limited only by the wealth of the world, and is constantly increasing in amount. The *Meredith Case* was affirmed by this court on the opinion of Vice Chancellor Pitney, 56 N. J. Eq. 454, 41 Atl. 1116.

Twenty years ago we had occasion to consider a question similar to that which arose in *Munn v. Illinois*. The Delaware, Lackawanna, & Western Railroad Company filed a bill to compel the Central Stock Yard & Transit Company to receive cars containing livestock, and Vice Chancellor Van Fleet recognized that the case was similar to *Munn v. Illinois*; in fact, the stock yard in that case was the only place in Jersey City to which the railroad could deliver live stock. *Delaware, L. & W. R. Co. v. Central Stock Yard & Transit Co.* 45 N. J. Eq. 50, 61, 6 L.R.A. 855, 17 Atl. 146, 151, Vice Chancellor Van Fleet said:

"The part of the opinion of the majority of the court which is most pertinent to the question now under consideration is that in which it is said . . . : 'It matters not in this case that these warehousemen had built their warehouses and established their business before the regulations complained of were adopted. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authority for the public good.' From this statement of the law, it would seem to be undeniable that, until the proper public authority intervenes and establishes such regulations as it may deem necessary for the public good, the owners of property devoted to a public use of this character retain complete and absolute dominion over it, and may exclude any part of the public from its use that they see fit. Until the body politic puts in exercise its power to control the use of such property, its owner may use it as he pleases."

He adds that the duty to receive the live stock did not rest upon the stock yard by force of any general rule of law, and "the court, to sustain the complainants' claim, must be able to find evidence of an intention . . . on the face of the statute, so clear and strong that it may, without fear of usurping legislative power, declare that such intention is part of the legislative will."

This opinion was approved in this court, where the decree was affirmed without further reasoning. 46 N. J. Eq. 280, 6 L.R.A. 863, 19 Atl. 185. Justices Dixon and Magie dissented, but upon the ground that the character of the stock yards required the business to be located upon public navigable waters near the terminus of great trunk lines of railroad, and gave them power to build railroads, to lay tracks across public streets, and invested the company with authority to make police regulations the violations of which would subject the offender to arrest without warrant, and to fine and imprisonment, and expressly declared that the business of the company should be that of a general stock yard. They laid stress upon the use of the word "general." The dissenting justices recognized that it followed as a necessary consequence that the company was bound to deal with all members of the community impartially and on reasonable terms. This is, indeed, a necessary consequence of a public employment; and the very fact that it is inapplicable to insurance companies is conclusive that they are not a public employment within the definition. The reasoning of the present case goes contrary, therefore, to two express decisions of this court, and is 29 L.R.A. (N.S.);

unwarranted, as far as I know, by any case in any other jurisdiction. No such case is cited. If, therefore, it is necessary, as the opinion says, in order to sustain the conclusion of the court, to hold that the business of insurance is a public employment, the basis upon which the result is reached fails.

The contract is said, however, to be *ultra vires* because it amounts to a delegation by the board of directors of the right and duty to manage the affairs of the corporation. I think it is unnecessary to discuss the general question as to the extent to which the board of directors may delegate to others the execution of acts for the corporation. Obviously, a very large portion of the acts of a corporation must necessarily be done by subordinate agents, and I understand that the rule is that the duty of the directors is only to exercise a general supervision and direction of the affairs of the corporation. Morawetz, Priv. Corp. § 536. This case does not amount to a delegation of authority at all. It is merely an agreement by the constituent companies that they will not issue insurance in Newark at less than the rates established by the Exchange. I know of no provision of law, nor is any pointed out in the opinion, which requires any one of these insurance companies to issue any insurance whatever in the city of Newark. As far as appears, all of them are at liberty to decline risks in the territory covered by the Exchange. Certainly the foreign companies are under no legal obligation to issue insurance in that locality. If they are free to refuse to issue insurance at all, they must *a fortiori* be free to refuse to issue except at certain rates. By the agreement the constituent companies do not bind themselves to issue insurance policies at the rates fixed by the Exchange, but merely not to issue them at any lower rates. The power of the directors to manage the affairs of the company, no doubt, includes the determination of the question whether or not the company will issue any particular policy or assume any particular risks, or will do business in any particular place, and it is no abdication of power to decline the business except upon certain terms. It is rather an exercise of the power of general supervision and direction. It is no more an abdication or delegation of power to refuse to issue policies in Newark except at certain rates, than it would be to refuse to issue policies at all in San Francisco. Since the companies are free to decline all risks, I do not see any logical reason why they may not agree in advance upon the rates at which they will accept the risks. In substance, what the insurance companies say is this: The Exchange will establish

rates; if we choose to do business in Newark at all, we will do business at those rates, but it is still open to the companies to accept or decline any particular policy. But for the respect which I entertain for my brethren, I should think it absurd to say that an agreement not to do, except upon certain conditions, what they are at liberty not to do at all, amounts to a merger of the companies. In fact, as the insurance business is conducted, the question of premium rates must necessarily be left to skilled underwriters familiar with the conditions in the particular locality. All of these companies probably do business in many different localities, in many different states, under widely varying conditions of hazard. It is quite impossible for any board of directors actually to determine the rates in any particular place, and that is not their function, but the function of professional underwriters. Again, the value of property has become so great that perhaps a majority in amount of the insurance issued is upon risks which cannot be assumed by one company alone, without exposing its assets to undue hazard and putting too many eggs in one basket; consequently the practice has grown up of insurance companies uniting and each writing a part of the amount on the same risk. It must be that companies have the right to agree upon the rate on such risks; and, if they have the right to agree, they certainly have the right to agree to insure at a rate to be fixed by a skilled underwriter for a whole city. This is no delegation of the actual function of the directors, which is to make contracts, and not to determine rates. The agreement does not give to any one company any control over the assets and management of another. It merely establishes a convenient way by which uniform rates may be determined, leaving each company free to accept or decline the risk as it chooses, and to manage its own affairs.

The case of *Stockton v. Central R. Co.* is an illustration of an *ultra vires* act restrained at the suit of the attorney general. But Chancellor McGill expressly put the case upon the ground that the lease there in question was made, not only without legal sanction, but in defiance of an express prohibitory statute. 50 N. J. Eq. 489, 25 Atl. 942. This case would be analogous to that if the legislature had enacted a statute forbidding contracts like the present. The failure of the legislature to do so is, as I have already suggested, in effect a legislative permission.

It is said that the contract is illegal because it is in restraint of trade, and the argument is that the state must have power 29 L.R.A. (N.S.)

to restrain corporations from entering into any illegal contract. It has been decided in this state, after most mature consideration, that contracts in restraint of trade are not necessarily illegal. *Trenton Potteries Co. v. Oliphant*, 58 N. J. Eq. 507, 46 L.R.A. 255, 78 Am. St. Rep. 612, 43 Atl. 723. We have recently reaffirmed this view in *Fleckenstein Bros. Co. v. Fleckenstein*, 76 N. J. L. 613, 24 Am. St. Rep. 913, 71 Atl. 265. Even under the Federal anti-trust act of July 2, 1890, chap. 647, 26 Stat. at L. 209, U. S. Comp. Stat. 1901, p. 3200, Mr. Justice Brewer, who had concurred with the majority of the court in the early case of *United States v. Trans-Missouri Freight Asso.* 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, said, in his concurring opinion in *Northern Securities Co. v. United States*, 193 U. S. 360, 48 L. ed. 709, 24 Sup. Ct. Rep. 436, that the ruling in that case, instead of holding that the anti-trust act included all contracts, reasonable or unreasonable, in restraint of interstate trade, should have been that the contracts there presented were an unreasonable restraint of interstate trade, and as such within the scope of the act. From the very earliest times contracts in restraint of trade, when limited to a particular locality or to a particular time, have been treated as valid. Such is the contract in the present case. It is limited to the city of Newark and the immediately adjacent towns coming within the same fire risk; and it is limited in time, because any of the companies may withdraw from the agreement upon 'thirty days' notice. I doubt if a case can be found where a contract thus limited in time and place has been held to be an illegal restraint of trade. If I am wrong in that, an examination of the contract itself indicates its real object. That object was twofold: First, to prevent rebating by agents of the insurance companies; and, second, to adopt concerted measures to decrease the fire risk. It is probable that there would be little difficulty in the companies themselves agreeing upon the rates of insurance. The difficulty is shown to have arisen from the fact that the agents of the companies were allowed a commission on the premiums, and were enabled, by means of surrendering a portion of their commission by way of rebate to the assured, to compete not only with each other, but to compete even with the companies they represented, and to write insurance at lower rates than the company itself offered over its counter. We have been at pains in this state to pass an act making it criminal to allow rebates from the premium in the case of life insurance; and the Federal government during the last few years has made sternuous ef-

forts, by means of legislation and litigation, to prevent what has been considered the evils of rebating in interstate commerce. The evil, of course, is that one man is enabled, by his greater skill or influence, to secure service at a lower rate than his neighbor. It seems to have been considered by our legislature in the case of life insurance, by the Federal government in the case of contracts of carriers, that uniformity of rates was even more desirable than low rates. I cannot think that it is illegal for fire insurance companies to attempt to prevent, by common agreement, what the legislature in the case of life insurance companies has made criminal by statute. It even seems meritorious. It was practically conceded at the argument that this was the real complaint of the attorney general; and that it was not that the rates fixed by the companies were extortionate, but that the agreement was so drawn as to prevent any discount from those rates to favored insurers. Another prime object of the agreement was to secure improvement in the fire hazard by allowing deductions from the premium in case various precautions were taken by the assured. The natural tendency of this effort by the concerted action of the companies to decrease the fire loss is not detrimental to the public, but, on the contrary, beneficial; and there is no reason to doubt the evidence, which was uncontradicted, that the rates of insurance in the United States are less in states where compacts of this kind exist than in states where such compacts do not exist. It was proved that this laudable effort to decrease fire loss could not be accomplished except by the concerted action of the companies and an agreement upon rates. It may be true that such an agreement also has a tendency to maintain rates; but every agreement by which two men unite and conduct their business together, instead of competing one with the other, has the same tendency; and while an agreement, the only object of which was to stifle competition, might well be declared illegal, it is going much farther to hold that an agreement, the main object of which is for proper purposes beneficial to the public, becomes illegal because, as an incidental result, it may by possibility tend to prevent competition. The proof in the case shows that the rates in Newark are lower than in most places, and there is a total failure to show that the rates are more than enough to make good the losses insured against, pay the expenses of conducting the business, and a reasonable return upon the capital invested. The evidence shows that in some localities near by, where rates are lower, the business has been conducted

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at a loss. Indeed, the complaint at the original argument was not that the companies were making unreasonable profits on their whole business, but that they were using profits made in Newark to recoup losses in San Francisco. This argument overlooked the whole theory of insurance, which is to distribute the hazard. It is for the public benefit that the business should not be conducted at a loss, for insolvency sooner or later is the necessary consequence; and it is to the public interest that men who invest their money in the business of insurance against loss by fire should be compensated by a proper return, for otherwise there would be no inducement to engage in this highly useful employment, which serves the admirable purpose of distributing through society at large the shock of the loss by fire which might prove ruinous to any single man or association. It is said that there is no provision in the contract which requires the company to set aside any portion of the premium in order to increase the security of the assured, but the desire of the companies for the continued successful conduct of their business is sufficient motive to accomplish this end. We must assume that the companies are honestly managed with a view to a continuance in business (as is the ordinary case), and that they will be careful not only to comply with the law, but to lay aside, as most of them do except in cases of unexpectedly great conflagrations, a sufficient surplus to meet the unusual hazards of the business.

The question, however, seems to be entirely set at rest by the decision in this court, in the case of *Raritan River R. Co. v. Middlesex & S. Traction Co.* 70 N. J. L. 732, 743, 58 Atl. 332. There a railroad company agreed with a traction company which paralleled it line that during a limited period the railroad company would not reduce its present rates of fare unless required by law. It was held that this agreement was valid, and not contrary to public policy as established in this state. I fail to see how an agreement between common carriers, everywhere conceded to be engaged in a public calling, which is intended purely for the purpose of preventing competition, is valid where the right of the company is limited to a maximum rate fixed by law, and an agreement which has merely a tendency to prevent competition as a mere incident of lawful purposes becomes invalid when the company is not limited by any maximum, but is free to charge any, rate that it pleases. The case seems stronger to me in favor of the validity of an agreement in the latter case, where the company is unhampered by restrictions

of statute. The legislative permission in the railroad act is not to charge 3 cents per mile absolutely, but such rate as the company shall think reasonable and proper, provided it is not more than 3 cents per mile. So, in this case, the companies are entitled to charge such rates as are reasonable and proper without any limitation, except by the court, which, upon the theory of the opinion, would be entitled to determine what are reasonable and proper rates. What difference in principle can there be between an agreement to prevent competition where there is a fixed statutory limit which cannot be exceeded, and a similar agreement where the limit is what the court determines to be reasonable and proper? The fact that the railroad act authorizes the company to charge what it thinks reasonable and proper does not alter the case, for insurance companies also may charge such rates as they think are reasonable and proper. In the case cited, competition between two common carriers was absolutely stopped by the agreement which we said was valid. In neither case is the question of the reasonableness and the propriety of the charges within the control and discretion of the company; that is, in case the insurance companies are subject to judicial regulation in this respect, as is the necessary result of this decision. If the case is to be distinguished, it can only be upon proof that the rates charged in the present case were unreasonable and improper; and there is an entire failure of such proof. The opinion of the court does not venture to suggest that the rates are higher than are required to pay losses, the expenses of conducting the business, and a reasonable profit; that is, higher than suffices to induce men to enter the business of insurance and to maintain solvency.

Even if the contracts were invalid, I agree with the learned vice chancellor that the only effect is that it is unenforceable. It is sufficient to justify that view to quote from the famous opinion of Judge Taft, upon which the learned vice chancellor relied (*United States v. Addyston Pipe & Steel Co.* 46 L.R.A. 122, 29 C. C. A. 141, 54 U. S. App. 723, 85 Fed. 271), where the court said that contracts that were in unreasonable restraint of trade at common law were not unlawful in the sense of being criminal, or giving rise to a civil action for damages in favor of one prejudicially affected thereby, but were simply void, and were not enforced by the courts; and that the effect of the act of 1890 (the act of Congress to protect trade and commerce against unlawful restraints and monopolies) is to render such contracts unlawful in an 29 L.R.A. (N.S.)

affirmative or positive sense and punishable as a misdemeanor, and to create the right of civil action in damages in favor of those injured thereby, and a civil remedy by injunction in favor of both private persons and the public against the execution of such contracts and the maintenance of such trade restraints. Judge Taft, in this passage, distinctly calls attention to the fact that the civil remedy by injunction was introduced into the Federal jurisprudence by the act of 1890, and that it did not exist at common law. If this decision is good law—and no one questions it—there is no remedy by injunction in this state, for the reason that we have no such statute. Courts of equity do not issue injunctions unless for the purpose of preventing irreparable injury. Such a result cannot be had by this injunction. If the companies choose to continue the present rates, the injunction cannot prevent them. If they do not choose to do so, the compact is no obstacle. The only probable effect of this decision is to make it difficult for the companies to prevent rebating by their agents. The question of the public policy of rebating is outside my province; it is for the legislature, and not for the court. I am unwilling to assent to judicial legislation; I prefer to stand by the more stable landmarks of established law.

Gummere, Ch. J., and Reed and Bergen, JJ., concur.

Petition for rehearing denied.

ALABAMA SUPREME COURT.

ATLANTIC COAST LINE RAILROAD
COMPANY, Appt.,

v.
JULIEN M. RICE.

(— Ala. —, 52 So. 918.)

Carrier — crated animal — escape — liability.

A carrier which accepts for transportation a crated animal cannot avoid liability for the escape of the animal, on the theory that the shipper was negligent with respect to the crating.

(April 21, 1910.)

Note. — Liability of carrier in respect of property which it accepts improperly packed or crated.

That injury to goods received by a carrier for transportation was due to some fault of the shipper is recognized by the courts as one of the conditions which will

APPEAL by defendant from a judgment of the City Court of Montgomery in plaintiff's favor in an action brought to recover damages for loss of a dog while in defendant's possession for transportation. Affirmed.

Plea 3, referred to in the opinion, is as follows: "For further answer defendant says that the plaintiff presented for transportation two dogs in a box which was locked, and to which plaintiff had and retained the key, and that defendant accepted said box containing said dogs in the condition it was at the time of its delivery by plaintiff, to wit, for carriage; and that while the said box was in the same condition as when presented to and accepted by defendant, the dog for a failure to deliver

which this action was brought escaped from said box and from the car of this defendant, in which it was being transported, without fault on the part of this defendant, its agents or servants. This defendant therefore pleads that the escape and loss of the dog was wholly due to the fault of the plaintiff, and not to any fault of this defendant, its agents or servants."

Further facts appear in the opinion.

Messrs. A. H. Arrington and John R. Tyson for appellant.

Messrs. Fred S. Ball and Frank Stoltenwerck, Jr., for appellee:

The risk of loss or damage lies with the railroad company.

Western R. Co. v. Harwell, 91 Ala. 340, 8 So. 649.

relieve a common carrier from its almost absolute liability for goods it undertakes to carry; and such a fault is the improper packing of the goods. *Culbreth v. Philadelphia, W. & B. R. Co.* 3 *Houst. (Del.)* 392; *Carpenter v. Baltimore & O. R. Co.* 6 *Penn. (Del.)* 15, 64 *Atl.* 252; *Goodman v. Oregon R. & Nav. Co.* 22 *Or.* 14, 28 *Pac.* 894.

Thus, it has been held that a carrier was not liable for injuries to goods where, because of defective covers furnished by a shipper, a deck cargo was damaged. *The M. C. Currie*, 132 *Fed.* 125; *Graham v. Planters' Compress Co.* 129 *Fed.* 253.

— where the loss of live fowls was due to their being packed too many in a crate. *Cohn v. Platt*, 48 *Misc.* 378, 95 *N. Y. Supp.* 535.

— where a demijohn of whisky was packed in a champagne case intended to carry separate bottles, there being nothing to indicate the unusual character of the contents. *Morris v. Wier*, 20 *Misc.* 586, 46 *N. Y. Supp.* 413.

— where perishable goods were not packed to stand shipment for the time required to transport them after receipt by defendant, a connecting carrier. *Farmers' Nursery Co. v. Cowan*, 21 *Pa. Super. Ct.* 192.

— where a shipper refused to pack furniture, and it was received by the carrier in that condition, and was damaged in transit. *Barbour v. South Eastern R. Co.* 34 *L. T. N. S.* 67.

— where a dog was shipped secured by a leather collar and strap placed on it by the owner, and it slipped its collar and escaped while being transferred. *Richardson v. North Eastern R. Co.* *L. R.* 7 *C. P.* 75, 5 *Eng. Rul. Cas.* 329.

The latter case, however, distinguishes *Stuart v. Crawley*, 2 *Starkie*, 323, where a dog was accepted by a carrier, secured only by a string, which was obviously insecure, and it was held that the carrier was liable for its escape by its slipping out of the noose.

While the cases frequently speak of improper packing as contributory negligence on the part of the shipper, it is pointed out 29 *L.R.A. (N.S.)*

in *McCarthy v. Louisville & N. R. Co.* 102 *Ala.* 193, 49 *Am. St. Rep.* 29, 14 *So.* 370, that there can properly be no such defense as contributory negligence to an action on a common-law contract of affreightment; that while the fault of the shipper is a defense, along with the act of God, or a public enemy, yet, to constitute a defense, the injury must be due solely to the fault of the shipper; and if the carrier's negligence contributes to the injury, it is liable absolutely.

While a carrier may properly refuse to receive goods which are improperly packed (*Truax v. Philadelphia, W. & B. R. Co.* 3 *Houst. (Del.)* 233), yet, if it does receive them, it is bound to handle them with reference to their condition, and is liable for failure to do so. *The David & Caroline*, 5 *Blatchf.* 266, *Fed. Cas. No.* 3,593.

Although the shipper is negligent in packing goods, a carrier will be liable for injury thereto if it is also negligent. Thus, in *Union Exp. Co. v. Graham*, 26 *Ohio St.* 595, the court said: "The carrier may well refuse to receive the property unless it is properly packed, but if he receives it, the duty attaches of exercising due care for its safe carriage. If, notwithstanding such care, the property should be damaged through the defective packing of the owner, the carrier would be relieved from liability; but where, as in this case, the carrier takes charge of the property for the purpose of carriage, the duty rests on him to show that the injury is attributable to the defective packing, and not to any fault or neglect on his part."

In *Thompson v. Chicago & N. W. R. Co.* 27 *Iowa*, 561, it was held that though a barrel in which oil was shipped was old and defective, the company was liable if the leakage was due to their loading it in an improper and unusual manner, rather than to the defective condition of the barrel.

In *Shriver v. Sioux City & St. P. R. Co.* 24 *Minn.* 506, 31 *Am. Rep.* 353, where there was a contract which apparently had the effect of making the railroad liable only for ordinary care, and it was contended that the marble was insecurely packed, the court

The company is liable for the loss of the dog by the carrier when no notice of the rule restricting liability is given.

Kansas City, M. & B. R. Co. v. Higdon, 94 Ala. 286, 14 L.R.A. 515, 33 Am. St. Rep. 119, 10 So. 282; *Cantling v. Hannibal & St. J. R. Co.* 54 Mo. 385, 14 Am. Rep. 476.

If a carrier accepts as baggage articles or merchandise not properly having that character, with knowledge that they are

offered for transportation as baggage, he thereby waives any objection on that ground, and is liable therefor the same as in reference to baggage in general.

6 Cyc. Law & Proc. p. 668.

McClellan, J., delivered the opinion of the court:

The action is for breach of a contract between appellee (plaintiff) and the appel-

said that while plaintiff could not recover for an injury to which her negligence contributed, no negligence of hers, unconnected with the cause of the injury, could defeat a recovery.

In *Calender-Vanderhoof Co. v. Chicago, B. & Q. R. Co.* 99 Minn. 295, 101 N. W. 402, the court held that packing apples in bulk in an ordinary box car instead of in barrels or in a refrigerator car, for shipment over a route where they were liable to encounter frost, does not in itself constitute negligence, so as to preclude recovery for such damage by freezing as may have been caused by the carrier's negligence.

In *Klauber v. American Exp. Co.* 21 Wis. 21, 91 Am. Dec. 452, it was held that the fact that a shipper failed to pack goods susceptible to injury by rain in a box or other waterproof covering would not relieve a carrier from liability for their damage while being transferred during a storm, though they were so packed as not to indicate their nature.

And in *Atlanta & W. P. R. Co. v. Jacobs' Pharmacy Co.* (Ga.) 68 S. E. 1039, it was held that while a carrier would not be liable if the loss was caused by the fault of the shipper, such as improper packing, without the negligence of the carrier, nevertheless, if, after an accident resulting from improper packing, the goods could have been preserved by extraordinary care on the part of the carrier, it would not be relieved from liability by the original fault of the shipper.

While negligence of a shipper in packing goods is not a bar to his recovery if the carrier was also negligent, it was held in *Higginbotham v. Great Northern R. Co.* 2 Fost. & F. 796, and *Baldwin v. London, C. & D. R. Co.* L. R. 9 Q. B. Div. 582, that his negligence may be considered in mitigation of damages, and in the latter case, where damp rags were packed and shipped without notice of their condition, and because of delay in transportation they heated and spoiled, it was held that the shipper was entitled to nominal damages only.

In *Menner v. Delaware & H. Canal Co.* 7 Pa. Super. Ct. 135, where evidence conflicted as to whether loss of molasses was due to the breaking of the barrel by negligent handling in transshipping, or to defective cooerage, the question of liability was properly left to the jury.

In *Zerega v. Poppe*, Abb. Adm. 397, Fed. Cas. No. 18,213, and *Nelson v. Stephenson*, 5 Duer, 538, where an attempt was made to preclude a carrier from showing that the goods were improperly packed because bills of lading were issued, acknowledging the re- 29 L.R.A. (N.S.)

ceipt of same in good condition, it was held that while an unconditional bill of lading places the presumption of negligence against the carrier, it is not thereby precluded from showing that the goods were defectively packed.

As to the right of a carrier to contract against liability for goods improperly packed, it was held in *Simons v. Great Western R. Co.* 18 C. B. 805, that such a stipulation is unjust and unreasonable.

While this note is not intended to cover cases involving the improper loading of cars (as to which, see note to *Duncan v. Great Northern R. Co.* 19 L.R.A. (N.S.) 952) as distinguished from packing or crating of goods, the following cases, which possibly should be classed as loading cases, are included because of their close analogy to the other cases included in the note.

In *Texas & P. R. Co. v. Kelly* (Tex. Civ. App.) 74 S. W. 343, where a final carrier received a car sealed, evidence showing that the damage was due to improper packing in the car, either by the shipper or initial carrier, was held sufficient to relieve the final carrier from liability, it being shown that it handled the car properly.

In *Miltimore v. Chicago & N. W. R. Co.* 37 Wis. 190, where a shipper assumed the entire charge of loading a wagon on a flat car, and failed to secure it properly, so that it was blown from the car in transit by a strong wind that had commenced before the loading, judgment against the carrier was reversed.

In *Ross v. Troy & B. R. Co.* 49 Vt. 364, 24 Am. Rep. 144, where a shipper placed machinery on a car without proper blocking, because of which it was damaged, though the car was properly handled, it was held that the carrier was not liable merely because an employee noticed the defective blocking before it had given way.

But in *Elgin, J. & E. R. Co. v. Bates Mach. Co.* 98 Ill. App. 311, affirmed in 200 Ill. 636, 93 Am. St. Rep. 218, 66 N. E. 326, in holding a railway company liable for injury to a fly wheel shipped by plaintiff, notwithstanding a defense that the injury was due to the negligent manner in which it was loaded and fastened upon the car by plaintiff, the court said that if it was not properly prepared for shipment, the defect was apparent, and the railroad company should have refused to accept it, or have prepared it properly itself.

Upon the somewhat analogous question as to the liability of carrier of live stock for losses due to the natural propensity of the live stock, see note in 18 L.R.A. (N.S.) 91.

R. L. S.

lant, a common carrier, to transport and deliver a dog from a point in the state of Florida to appellee at Montgomery, Alabama.

Plea 3, which will be set out in the report of the appeal, avers, in substance, that the dog escaped, in transit, from the locked crate, appellee having the key, in which it was when delivered to the carrier by appellee, and from the appellant's car, without fault of the carrier; and that the crate or box was delivered to appellee at Montgomery in the same condition as when received by the carrier at the initial point in Florida; and concludes that the loss of the dog was wholly due to the fault of the appellee. It is necessarily inferable from the averments of the plea that the escape of the dog from the crate or box was affected through an opening therein.

Whatever may have been, or may now be, the opinion elsewhere prevailing, it is settled with us that a carrier, undertaking to transport and deliver live animals, is subject to the same responsibilities, with respect thereto as in ordinary cases of goods received for transportation by a common carrier, except it is not accountable for, and does not assume the risk of, loss or damage to live animals "arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care." *Central R. & Bkg. Co. v. Smitha*, 85 Ala. 47, 4 So. 708; *South & North Ala. R. Co. v. Henlein*, 52 Ala. 606, 23 Am. Rep. 578; *Western R. Co. v. Harwell*, 91 Ala. 340, 8 So. 649. The exceptions, aside from those legally possible of creation by special contract, to the exacting common-law liability of a common carrier in the carriage of goods, are the acts of God and of the public enemy, where no negligence of omission or commission concurred therewith to produce the damnifying result. Authorities supra; *Steele v. Townsend*, 37 Ala. 247, 79 Am. Dec. 49; *McCarthy v. Louisville & N. R. Co.* 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370; *Green v. Louisville & N. R. Co.* 163 Ala. 138, 50 So. 937. In short, in the absence of contract limiting liability, the rule here is that a common carrier, in case of loss or damage to live animals received for shipment, is an insurer against such loss or damages as do not arise from the act of God, the public enemy, and those arising from the nature and propensities of the live animals so received for transportation, and against which due care could not provide. And to avail in exoneration of legally unmodified liability of the common carrier for the loss or damage of a consignment received by it, the burden is on the carrier to trace the loss or damage to negligence of the shipper, or to one or more of the exceptions, with

which its negligence did not concur. Authorities supra.

Consul for both litigants construe plea 3 as asserting, when reduced to legal formula, that where the shipper of a live animal crates or boxes it, the shipper, and not the common carrier, assumes the risk of escape of the animal therefrom, if such escape results from the nature and propensities of the animal. To state the matter otherwise: That where such live animal is crated or boxed by the shipper, and escapes therefrom, after reception by the carrier, as the result of natural propensity, the shipper, and not the carrier, is negligent.

It is not contended that the carrier was ignorant of the character of the shipment. The carrier affirms, by its plea as construed by counsel, and the shipper (here) denies, by his demurrer thereto, the correctness of the proposition. The gist of the argument in negation of the soundness of the proposition is that the carrier, by receiving the animal so crated or boxed, assumes the risk of the sufficiency of the inclosure, else it should refuse to receive the subject of the shipment if ordinary observation would disclose its insufficiency. On the other hand, the gist of the argument in affirmation of the proposition is that, by offering a self-contrived inclosure for the live animal, the shipper relieves the carrier of any duty to overlook the inclosure with a view to restraining the natural propensity of the animal to leave confinement in the crate or box. Without considering or treating the plea as asserting, well or ill, any other matter of defense than that which counsel for both parties ascribe to it, we will decide only the question raised below and argued here.

Subject to the exception, among others not now necessary to enumerate, that it may properly refuse to accept for transportation goods "tendered in an unfit condition" therefor, a common carrier is duty bound to transport all goods that are properly offered for that purpose. 4 *Elliott, Railroads*, § 1466, 1 *Hutchinson, Carr.* § 143, 145. While the carrier may refuse to accept goods improperly packed, yet, if it accepts them in that condition,—a condition open to ordinary observation,—"the duty attaches of exercising due care for its safe carriage." *Union Exp. Co. v. Graham*, 26 Ohio St. 595; *Elgin, J. & E. R. Co. v. Bates Mach. Co.* 98 Ill. App. 311, 315; *Hannibal & St. J. R. Co. v. Swift*, 12 Wall. 262, 272, 20 L. ed. 423, 428; 4 *Elliott, Railroads*, § 1466, p. 154; *Munster v. South Eastern R. Co.* 4 C. B. N. S. 676. Mr. Elliott, at the citation last made from his work, says: "If goods which it may properly reject are actually, not merely constructively,

accepted for carriage, the common carrier's liability attaches."

In the case of *Hannibal & St. J. R. Co. v. Swift*, supra, the Supreme Court dealt with this state of fact: An army surgeon was *en route* under orders, with a part of the command to which he was attached, from South Dakota to Cincinnati. At St. Joseph, Missouri, it was necessary to use appellant's line of road across to Hannibal, in that state. Along this line of road the country was represented by appellant's servants as being in a state of insurrection dangerous to persons and property on its trains, and, on this ground, refused to engage at St. Joseph, for the transportation of the troops, their equipment, and the personal effects of the appellee, Swift, to Hannibal. On demand of the commanding officer the appellant furnished the required transportation for troops, baggage, etc., including the chattels of the appellee, and the effects of the plaintiff were loaded in a car by the troops. The appellant's agents took charge of the car after it was loaded and locked up by the commanding officer, and placed it in the train. These agents had nothing to do with the selection, loading, or packing of the car. *En route* the car was burned, and with it appellee's effects. The court, through Justice Field, said: "The liability of the company attached when it thus took possession of the property. No objection was made at the time to the selection of a separate car for the baggage and other property of the troops and the plaintiff, or to the kind of property offered for transportation, or to the manner in which the property was packed. . . . If objection existed on any of these grounds, or on any other ground not concealed, but open to the observation of the company, it should have been stated before the property was received. The company might then have insisted, as a condition of its undertaking the transportation, upon the selection of a different car, or upon superintending its loading. . . . Not having thus insisted, but having received the property and undertaken its transportation in the car in which it was placed, the company assumed, with respect to it, the ordinary liabilities of a common carrier. . . . The common carrier is regarded as an insurer (subject to exceptions, we interpolate) of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure its safety. The consequences of his neglect in these particulars cannot be transferred to the owner of the property." For the value attached to the decision as authority, see 7 Rose's Notes (U. S.) pp. 542, 544.

We think it can be safely ruled, in accord with *Hannibal & St. J. R. Co. v. 29 L.R.A. (N.S.)*

Swift and the other texts and decisions cited, that, first, the carrier has the right to inspect proffered shipments, and to refuse their acceptance when not in fit condition for transportation; second, that if unfit for shipment, and ordinary observation would discover that fact, it is the duty of the carrier to refuse the shipment, in order that the shipper may, if he can, conform the shipment to a fit condition for transportation; and, third, that the acceptance of a shipment for transportation, without qualification or dissent in respect of the fitness of its condition for that purpose, subjects the carrier to all the liabilities ordinarily attaching to an accepted shipment of the character to which that shipment belongs.

In this instance,—that shown by the complaint and by plea 3,—the character of the shipment, viz., live animals in a box or crate, and their natural propensity to escape confinement, were known to appellant's servants. The tender for transportation was of these animals, and not, primarily, of the box or crate, which was but a means to conserve convenience of custody and handling and the safety of the animals within it. If the dog had been leashed with cords attached to a heavy block, there would have been, in principle, no difference. If that had been the means employed, the carrier could not, after acceptance of the shipment, have answered, when impleaded for the loss or injury of the animal, that the cord was too sleazy to serve the purpose, and hence that the shipper was negligent in that regard. With the result that he could not recover for the loss or injury. That this is true is demonstrated, we think, when the announcement of duty in *Central R. & Bkg. Co. v. Smith*, by way of approving quotation from *Penn v. Buffalo & E. R. Co.* 49 N. Y. 204. 10 Am. Rep. 355, is considered; viz.: "They are not insurers of animals against injury [to animals] arising from their nature and propensities, and which could not be prevented by foresight, vigilance, and care." (Italics supplied.)

It will be observed that this court did not conclude, in the quotation, to place the common carrier's exoneration solely upon the ground that the injury arose from the nature and propensity of the animal. That, alone, will not suffice to exonerate the carrier in case of loss to a live animal after acceptance for transportation. The natural propensity of the animal that may lead to injury or loss must be anticipated "by foresight, vigilance, and care," if the transportation thereof is undertaken. The very statement of the rule of duty—to exonerate—precludes any right of the carrier to transfer the consequences of its neglect in

this regard to the shipper. *Hannibal & St. J. R. Co. v. Swift*, supra. Being bound in duty, as *Central R. & Bkg. Co. v. Smitha*, defines it, it would be obviously illogical—an immediate qualification of the duty declared—to close the responsibility of the carrier for restraint thereof against natural propensity to escape when the shipper tenders and the carrier accepts a live animal, boxed or crated, for transportation. The carrier may, in a proper case, refuse a shipment where in unfit condition for transportation. If so, it must be a necessary consequence that, having accepted the shipment as tendered, its duty is unmodified by the character, sufficiency or insufficiency, open to observation, of the packing of the shipment so received for transportation. It follows, of course, that the insufficiency of the crate or box from which the dog escaped, for the purpose here disclosed, was not negligence exonerating this carrier. There is no such thing as contributory negligence in cases of this character (*McCarthy v. Louisville & N. R. Co.* 102 Ala. 193, 48 Am. St. Rep. 29, 14 So. 370) for the satisfactory reason that, if negligent at all in the loss of or damage to goods committed to a common carrier for its service, the carrier is liable, 29 L.R.A. (N.S.),

the plea of contributory negligence being one of confession and avoidance.

The demurrer to plea 3, on the theory respectively asserted and denied by counsel, was properly sustained. On like considerations to those inducing our conclusion as respects plea 3, the demurrer to replication 2 was well overruled.

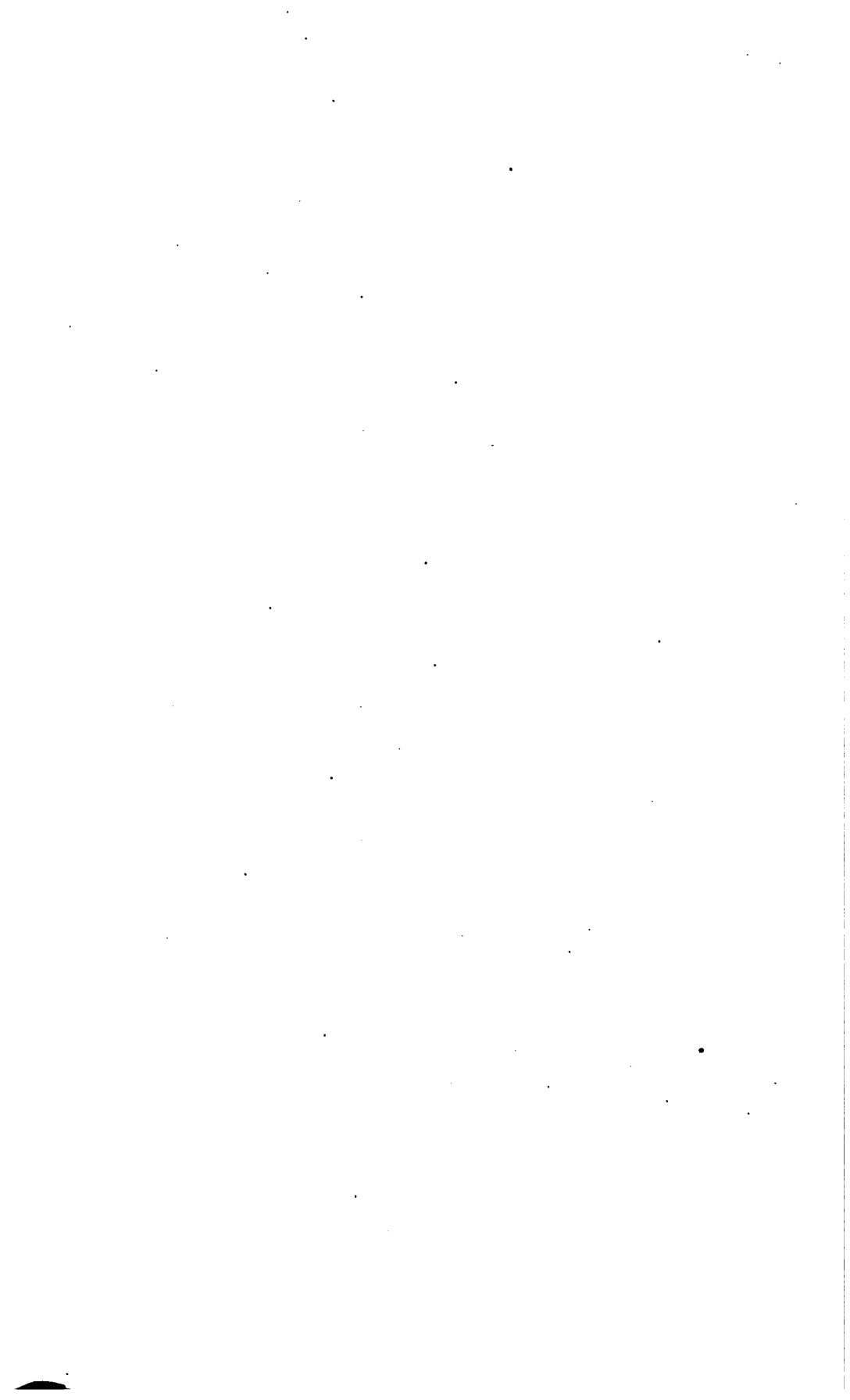
A careful review of the evidence, especially with reference to the material averments of plea 2, which counsel for appellant insist were proven without dispute, does not convince this court that the court below (the trial was without jury) reached an erroneous conclusion as upon the facts and circumstances in evidence.

The allegation in the complaint of the sum paid was under *videlicet*, and hence the insistence, for appellant, of variance in respect of the sum alleged and that proven, cannot prevail.

The judgment is affirmed.

Dowdell, Ch. J., and Simpson and Mayfield, JJ., concur.

Petition for rehearing denied June 30, 1910.



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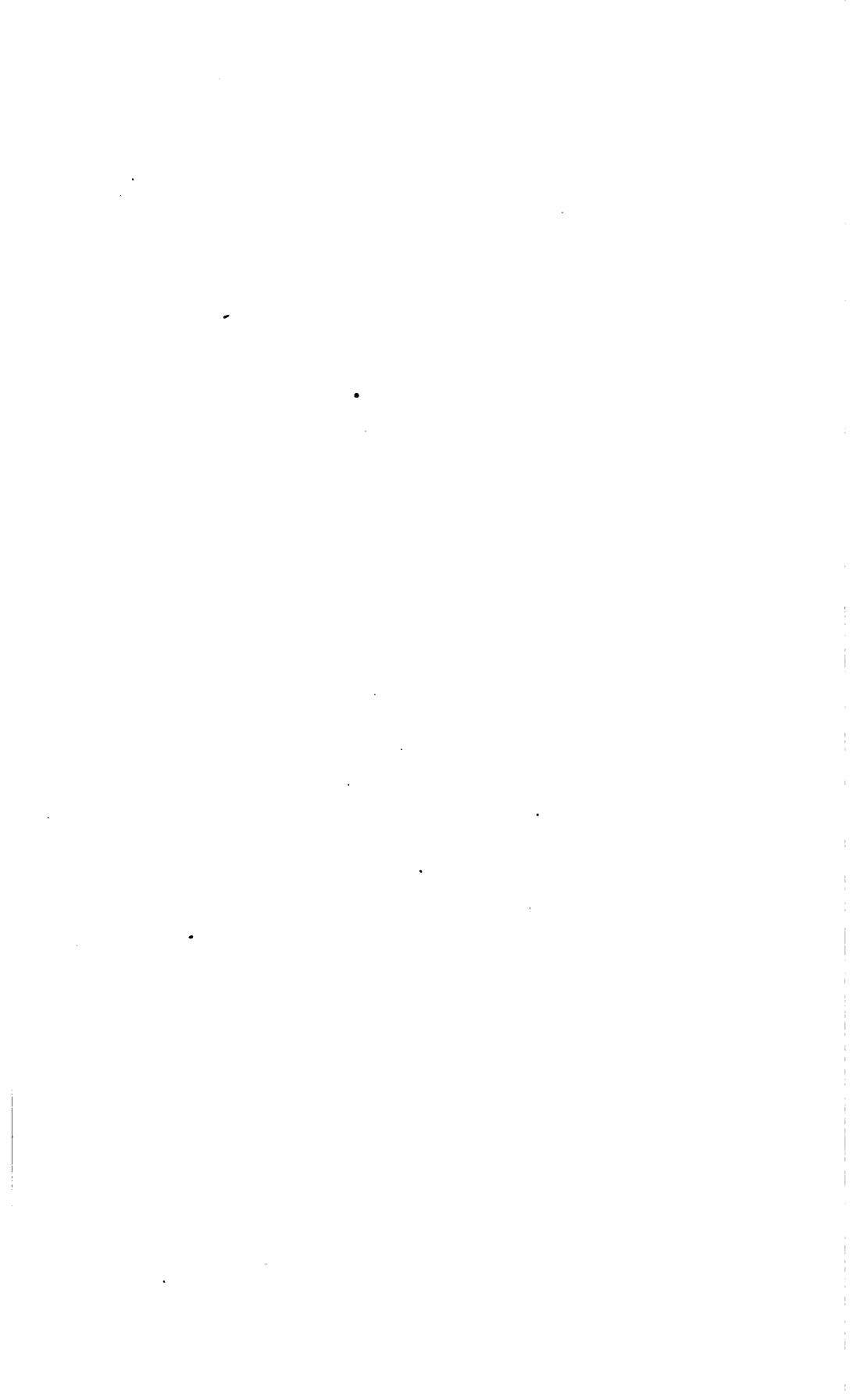
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A foreign railroad company having a traffic contract with a local company cannot defeat an attachment of its cars within the state, because of the rights of the local company under the contract, where the latter is not made a party to the proceeding. *De Rochemont v. New York C. & H. R. R. Co.* 29: 529, 71 Atl. 868, 75 N. H. 158.

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An annuity provided by a father for the widow of his son to be paid quarterly, which is not expressly stated to be for support and maintenance, is not apportionable, and therefore her administrators cannot require payment to them of the accrued amount in case she dies between two quarterly periods. *Brown v. Keach*, 29: 775, 76 Atl. 846, 112 Md. 398. (Annotated)

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APPEAL AND ERROR.

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Jurisdiction of United States Supreme Court.

1. The ruling of a state court that the power to penalize a railway company for failure to furnish cars on demand arose from a state statute instead of from a rule adopted by the railroad commission, which was challenged as repugnant to the Federal Constitution, does not eliminate the Federal questions from the case, so as to require the dismissal of a writ of error from the Federal Supreme Court, where the constitutional defenses asserted by the pleadings and embraced in the instructions asked and refused were not confined to the mere order as such, but plainly challenged the power of the state to inflict the penalty for the failure to furnish the cars under the circumstances disclosed by the pleadings. *St. Louis S. W. R. Co. v. State*, 29: 802, 30 Sup. Ct. Rep. 476, 217 U. S. 136, 54 L. ed. 698.

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Transfer of cause; effect; time.

2. That a licensee, upon conviction of a violation of a statute making it unlawful for a licensed saloon keeper to traffic in intoxicating liquors after and before certain hours, is subjected to a fine and forfeiture of his license whether he appealed from the conviction or not, does not invalidate the statute as denying the right of appeal. *Dinuzzo v. State*, 29: 417, 123 N. W. 309, 85 Neb. 351. (Annotated)

3. The duties of a guardian *ad litem*, duly appointed by a court to defend the interests of an insane ward, do not necessarily terminate with the decision of the case in which he was appointed, but he has authority, in a proper case, to appeal the cause to the court of last resort. *Buchanan v. Hunter*, 29: 147, 127 N. W. 166, — Neb. —.

4. A party who accepts the benefit of a decree waives his right to appeal from that decree, unless he is so absolutely entitled to the benefit received that a refusal will not affect his right to it. *McKain v. Mullen*, 29: 1, 64 S. E. 829, 65 W. Va. 554.

5. The defendant in a suit by which his tax deed is set aside cannot unreservedly accept the taxes, interest, and charges tendered by the bill and ordered by the decree to be paid him, and then appeal from the decree, since his acceptance is a positively implied waiver of his right of appeal, nor will an offer to return the money, made long after its acceptance, avail to prevent dismissal of an appeal in such case. *McKain v. Mullen*, 29: 1, 64 S. E. 829, 65 W. Va. 558.

6. One cannot avail himself of that part of a decree which is favorable to him, accept its benefit, and then prosecute an appeal to reverse such portion of the same decree as militates against him, when the acceptance of the benefit from the one part is totally inconsistent with the appeal from the other. *McKain v. Mullen*, 29: 1, 64 S. E. 829, 65 W. Va. 558. (Annotated)

7. The pendency of an appeal does not deprive the trial court of power to award alimony in a divorce suit, where the statute empowers the judge, either in term time or vacation, to award maintenance to the wife during the pendency of the suit, until a final decree shall have been made in the cause. *Ex parte Lohmuller*, 29: 303, 129 S. W. 834. — Tex. —.

8. An appeal to the Federal Supreme Court from a decree of a circuit court of appeals on a bill in equity brought by a trustee in bankruptcy to set aside a transfer made by the bankrupt in fraud of creditors need not be taken within the thirty days prescribed by general orders in bankruptcy No. 36, for appeals under the bankrupt act, but the appellate jurisdiction being under, or the same as that under, the circuit courts of appeals act of March 3, 1891 (26 Stat. at L. 828, chap. 517, U. S. Comp. Stat. 1901, p. 549), § 6, the appeal is in time if taken within a year. *Thomas*

v. Sugarman, 29: 250, 30 Sup. Ct. Rep. 650, 218 U. S. 129, 54 L. ed. 967.

Record on appeal.

9. A record constituting a purported case-made, although filed in the appellate court in two parts, and marked respectively "Part 1" and "Part 2," will be considered as one record, where each part bears the title of the case, and both were filed on the same day, under the same number, and Part 1, to which is attached the petition in error, and the certificate of the trial judge signing it, unmistakably refers to Part 2. *Board v. Dill*, 29:1170, 110 Pac. 1107, — Okla. —.

Objections and exceptions; raising questions in lower court.

10. An objection that one convicted of crime was prosecuted under the wrong name is too late when raised for the first time on motion for new trial. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

11. An objection that an indictment which is signed by the district attorney, and properly identified as the work of the grand jury by the indorsement, "A true bill," followed by the official signature of the foreman of the grand jury, and is shown to have been returned into court by the grand jury, was not read "in open court, in the presence of the jury," comes too late, when raised for the first time on a motion in arrest of judgment. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

12. The filing of a motion for a new trial in the nisi prius court is not essential to the jurisdiction of the appellate court to review an order made upon the hearing of a contested question of fact which arose not upon the pleadings, but upon motion. *Powell v. Nichols*, 29: 886, 110 Pac. 762, — Okla. —.

Presumptions.

13. A verdict cannot be disturbed by a reviewing court on the theory that the jury must have been impressed with the truth of the opinions of a witness upon which hypothetical questions to experts were founded, by the reiteration of such questions containing assumptions founded upon such opinions. *Kearner v. Charles S. Tanner Co.* 29: 537, 76 Atl. 833, — R. I. —
What revealable generally.

14. A reviewing court will not examine and analyze the testimony in a case, to determine whether or not hypothetical questions to an expert witness were based on opinions of other witnesses, but to make such question objectionable in form because of that fact it must be determinable upon the mere inspection of the question. *Kearner v. Charles S. Tanner Co.* 29: 537, 76 Atl. 833, — R. I. —.

Discretionary matters.

15. Denial of a new trial for excessive allowance of damages will not be reversed on appeal, if one new trial was awarded on such ground, and the same judge, after careful consideration, refused to interfere 29 L.R.A. (N.S.)

with the second verdict. *Southern P. Co. v. Hogan*, 29: 813, 108 Pac. 240, — Ariz. —.

Questions not raised below.

16. The admission of evidence cannot be declared to be error on appeal, for a reason different from that claimed at the trial. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1.

17. Alleged errors in the court's charge to the jury in a criminal prosecution will not be considered on appeal, where they were not called to the attention of the trial court by motion for a new trial. *Territory v. Harwood*, 29: 504, 110 Pac. 556, — N. M. —.

Errors waived or cured below.

18. Objection to evidence of transactions with a person since deceased is waived by eliciting on cross-examination new matter as to such transactions, not pertaining to anything elicited on direct examination. *Mollison v. Rittgers*, 29:1179, 118 N. W. 512, 140 Iowa, 365.

Review of facts.

19. The appellate court will not set aside a verdict because it differs from the jury as to the relative weight or effect of conflicting evidence. *Southern P. Co. v. Hogan*, 29: 813, 108 Pac. 240, — Ariz. —.

20. The allowance of \$500 as exemplary damages and \$300 as counsel fees for the suing out of an attachment to compel payment of \$600 which had matured on notes aggregating \$2,400 without any reason to believe that the debtor intended to defraud the creditor, will not be interfered with on appeal, although the actual damages are only \$40. *International Harvester Co. v. Iowa Hardware Co.* 29: 272, 122 N. W. 951, — Iowa, —.

21. A verdict for the full value of merchandise lost while in the carrier's possession for transportation will not be disturbed where the defense was that the loss was caused by an unprecedented flood, and the carrier discharges the burden of proving that the flood caused the loss, and that the goods were totally destroyed thereby, only to the extent of showing that the goods were not identified after the flood, and that all of the freight except the perishable goods that could not be delivered had supposedly or probably been sent to the claim department, and there is no showing made from that department with reference thereto. *Chicago, R. I. & P. R. Co. v. Logan, Snow, & Co.* 29: 663, 105 Pac. 343, 23 Okla. 707.

22. In a case tried to the court, where, on request, findings of fact are made, and it is contended on appeal that a certain material finding is not sustained by the evidence, and that in fact all the evidence negated such finding, the appellate court will, on proper assignment, examine the record for the purpose of ascertaining that fact, and where the contention is sustained, set the finding aside. *Board v. Dill*, 29:1170, 110 Pac. 1107, — Okla. —.

Grounds for reversal.

23. A retrial must be granted where a demurrer to a bad paragraph of complaint is overruled, and the paragraph left in the complaint, and it is not shown that the judgment for plaintiff rested wholly upon the paragraph which was good. *W. B. Conkey Co. v. Larsen*, 29: 116, 91 N. E. 163, — Ind. —.

24. The refusal of the trial court to require the plaintiff's petition to be made more definite and certain will not be disturbed on appeal, where it affirmatively appears from the record that the defendant was not prejudiced thereby. *Chicago, R. I. & P. R. Co. v. Logan, Snow, & Co.* 29: 663, 105 Pac. 343, 23 Okla. 707.

25. The admission of inadmissible, corroborative evidence which is merely cumulative, is not reversible error. *State v. Rozeboom*, 29: 37, 124 N. W. 783, — Iowa, —.

26. Refusal to permit a witness to answer a question is not reversible error if an answer as full as could have been obtained in response to the question excluded was obtained from him in response to another question. *International Harvester Co. v. Iowa Hardware Co.* 29: 272, 122 N. W. 951, — Iowa, —.

27. The erroneous admission of evidence as to the measure of damages constitutes harmless error as to the plaintiff, where there is no liability whatever found by the jury. *Puls v. Hornbeck*, 29: 202, 103 Pac. 665, — Okla. —.

28. Error in receiving evidence of the intention of the parties with respect to a written contract does not require a reversal, if the construction given by the court to the contract was in exact harmony with the legal construction of the instrument. *Brown v. Vermont Mut. F. Ins. Co.* 29: 698, 74 Atl. 1061, 83 Vt. 161.

29. Rejection of testimony of an expert as to what is shown by certain account books is not reversible error if the books themselves were before the court and failed to show facts sufficient to establish the issue which they are offered to establish. *Shaw v. Lobe*, 29: 333, 108 Pac. 450, — Wash. —.

30. Rejection of competent evidence is not reversible error if with it in the record the evidence would not be sufficient to establish the issue which it was offered to support. *Shaw v. Lobe*, 29: 333, 108 Pac. 450, — Wash. —.

31. The erroneous exclusion, in an action on a fraternal benefit certificate, of the proofs of death furnished by the beneficiary, when offered in evidence by the insurer, is not prejudicial, where the physician who made out such proofs, when on the witness stand, gave substantially the same answers as those contained in the proofs of loss. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

32. A judgment cannot be reversed because of refusal to permit a witness to answer a question, if he afterwards testi-

fies fully with respect to the matter. *State v. Dyer*, 29: 459, 124 N. W. 629, — Iowa, —.

33. A judgment will not be reversed on account of general statements in an instruction which might under some circumstances have been prejudicially erroneous, if the issue was submitted to the jury in such a manner that they could not have misunderstood the law applicable thereto. *Searles v. Northwestern Mut. L. Ins. Co.* 29: 405, 126 N. W. 801, — Iowa, —.

34. An instruction that a partner may be guilty of embezzling the funds of a partnership constitutes harmless error in a prosecution for embezzlement, wherein it is not shown that the property alleged to have been embezzled belonged to a partnership of which the accused was a member. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

35. It is not reversible error to instruct in the language designated by the statute, that a witness false in one part of his testimony is to be distrusted in others, where no request is made to limit the rule to testimony wilfully false. *Simpson v. Miller*, 29: 680, 110 Pac. 485, — Or. —.

(Annotate.)

36. A conviction will not be reversed because the jury were instructed that the testimony of an accomplice must tend to show guilt, where the testimony absolutely shows the guilt if the jury believes it. *Thorp v. State*, 29: 421, 129 S. W. 607, — Tex. Crim. Rep. —.

37. Refusal to give an instruction to correct one which is subject to criticism is not reversible error where it is no more persuasive for that purpose than some which were actually given by the court. *International Harvester Co. v. Iowa Hardware Co.* 29: 272, 122 N. W. 951, — Iowa, —.

38. The failure of the trial court to submit the question of exemplary damages is harmless error as to the plaintiff, even though he was entitled to such submission, which there is no liability whatever found by the jury. *Puls v. Hornbeck*, 29: 202, 103 Pac. 665, — Okla. —.

Judgment.

39. An allowance of \$1,500 may be raised by the appellate court to \$3,000 as damages to be awarded parents for the negligent killing of their eleven-year-old boy. *Servant v. Wolfe*, 29: 677, 52 So. 1025, 126 La. 787.

APPLIANCES.

Master's duty as to, see *Master and Servant*, 7.

APPORTIONMENT.

Of annuities, see *Annuities*.

APPROPRIATION.

Of public money, see *Public Money*.
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ARREST.

Liability on marshal's bond for shooting by-stander in making arrest, see Bonds.

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What is sufficient asportation to constitute larceny, see Larceny.

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Of tax, see Taxes, 3-6.

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Of corporate stock, see Corporations, 5, 6.

Of insurance policy, see Evidence, 29; Insurance, 7.

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Building and loan associations, see Building and Loan Associations.

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Recovery back of payments on bill or note, see Bills and Notes, 11.

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ATTACHMENT.

Who may set up defense as against attachment of foreign railway cars, see Action or Suit.

Review on appeal of damages for wrongful attachment, see Appeal and Error, 20.

Attachment of foreign railroad cars as interference with interstate commerce, see Commerce, 2.

Validity of unregistered pledge of stock as against subsequent attachment, see Corporations, 6.

Exemplary damages for wrongfully suing out, see Damages, 1, 6.

Rights as between attaching creditor of reputed grantee and holder of prior unrecorded deed, see Vendor and Purchaser, 2.

1. Jurisdiction over a debtor upon whom the service of summons and complaint is by publication may be secured by levying an attachment upon his equity in corporate stock which he has pledged as security for a debt, so far as is necessary to uphold a sale of such stock under execution. *State Banking & T. Co. v. Taylor*, 29: 523, 127 N. W. 590, — S. D. —.

2. A state statute permitting the attachment of idle cars of foreign railroad companies is not invalid as tending to promote the evils at which the interstate commerce act of Congress is aimed, nor as directly or indirectly tending to defeat any of the purposes which Congress had in view when that statute was enacted. *De 29 L.R.A. (N.S.)*

Rochemont v. New York C. & H. R. R. Co. 29: 529, 71 Atl. 868, 75 N. H. 158.

3. Attaching idle freight cars of a foreign railroad company is not invalid under the Federal statute giving railroad companies authority to carry property on its way to other states, and to contract with roads of other states, so as to form continuous lines of transportation. *De Rochemont v. New York C. & H. R. R. Co.* 29: 529, 71 Atl. 868, 75 N. H. 158.

ATTORNEYS.

Necessity of written authority to enable attorney to sign demand for dower, see Contracts, 4.

Counsel fees as element of damages, see Damages, 6.

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ATTORNEYS' FEES.

As element of damages, see Damages, 6.

ATTRACTIVE NUISANCE.

See Negligence, 1, 2.

AUTOMOBILES.

Liability of master for servant's negligence in operating, see Master and Servant, 14.

Negligence of driver at railroad crossing, see Railroads, 3-5.

1. The driver of an automobile is liable for running down a boy standing in or moving diagonally across the street ahead of him, and unaware of his peril, if the driver failed to see him and avoid a collision because he permitted his attention to be diverted in another direction. *Burvant v. Wolfe*, 29: 677, 52 So. 1025, 126 La. 787.

2. An eleven-year-old boy is not negligent in standing in or moving diagonally across a street toward the scene of a commotion to which many people are going, without looking out for automobiles which may come up behind him, but to do so must be on the wrong side of the street. *Burvant v. Wolfe*, 29: 677, 52 So. 1025, 126 La. 787.

BAGGAGE.

In general, see Carriers, 11-13.

BAIL AND RECOGNIZANCE.

Evidence of forfeiture of, by accused, see Evidence, 42.

BAILMENT.

Liability of carrier for loss of parcel left in check room, see Carriers, 11-13.

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See Elections.

BANKRUPTCY.

Time for appeal from decree on bill in equity by trustee to set aside transfer, see Appeal and Error, 8.

Election of remedies by trustee, see Election of Remedies.

Interest on claims allowed in bankruptcy, see Interest.

Right of trustee in bankruptcy to maintain suit for partition of real estate, see Partition.

A bankruptcy court which attempts to sell encumbered property of the bankrupt free from liens may charge the expense of the sale against the general estate of the bankrupt if one exists, and permit the lien holder to take the entire proceeds of the sale if they do not exceed the amount of his claim. *Re Harralson* 29: 737, 179 Fed. 490, — C. C. A. — (Annotated)

BANKS.

As to embezzlement by officer of bank who is also officer of private corporation, see Corporations, 4.

Gift by deposit in bank, see Gifts, 1. Notice to, see Notice, 2, 5.

Right of bank to testify to transactions from knowledge of course of business, see Witnesses, 2.

Authority of cashier.

1. Where the cashier of a bank, who has misappropriated its funds in order to cancel his defalcation, transfers thereto funds of an elevator company of which he is treasurer, and, in order to account for the transfer, draws checks upon the elevator company payable to the bank, and charges the amount thereof against the elevator company upon the books of the bank, the bank, having accepted such payment through its cashier, cannot retain the benefits of his act without accepting the consequences of his knowledge, and where it does so retain such funds, it ratifies the fraudulent act of its agent, the cashier, and becomes *particeps criminis* with him, and liable to the elevator company for the amount so fraudulently transferred. *Emerado Farmers' Elevator Co. v. Farmers' Bank*, 29: 567, 127 N. W. 522, — N. D. —

Application of deposit.

2. A bank, upon paying trust funds to a person known by it to stand in a trust relation to the depositor, with notice that such person intends to misappropriate them, renders itself liable to the depositor to the amount of the funds so paid. *Emerado Farmers' Elevator Co. v. Farmers' Bank*, 29: 567, 127 N. W. 522, — N. D. —

Payment of checks.

3. Where presentation of a check makes the bank liable therefor to the holder, one who, after giving a check, signs an order directing the bank to pay to the holder the amount of such check if it is still unpaid, takes the risk of the subsequent presentation of such check, and the bank may be required to pay both checks if the deposit account has funds. *Southern Seating & Cabinet Co. v. First Nat. Bank*, 29: 623, 88 S. E. 962, — S. C. — (Annotated)

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Certificates of deposit.

When statute of limitations begins to run upon certificate of deposit, see Limitation of Actions, 2, 5.

4. A bank which cashes a certificate of deposit made payable "to the order of T., guardian," upon the order of T., who had not in fact been appointed guardian, is not thereby discharged from liability to the minor wards, where such certificate was issued to T. upon surrender by him of the original certificate, which had been made payable to such minors "or guardian," as the original certificate determined the obligation of the bank, since the true owners, being minors, could not be estopped by the unauthorized issuing of the second certificate. *McMahon v. German-American Nat. Bank*, 29: 67, 127 N. W. 7, — Minn. —

5. The cashing by a bank of certificates of deposit issued to the order of certain minors "or guardian," on the order of one who made the deposits and purported to act as guardian in the transaction, does not discharge the bank from liability to such minors, where the one to whom the payment was made was not in fact the guardian, since the bank, by payment to one not actually named in the certificates, acted at its peril that such person was a legally appointed guardian. *McMahon v. German-American Nat. Bank*, 29: 67, 127 N. W. 7, — Minn. — (Annotated)

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Of judgment, see Judgment, 2.

Of limitation, see Limitation of Actions.

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See Disorderly Houses.

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Waiver by local lodge of right of society to insist on forfeiture of certificate, see Insurance, 8.

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BILLS AND NOTES.

As to certificates of deposit, see Banks, 4, 5.

Consideration of pledge of stock as security for note, see Contracts, 3.

Effect of putting paper or securities indorsed or assigned in blank into another's possession to estop owner as against purchaser in good faith, see Estoppel, 1.

Evidence in action on, see Evidence, 43.

Variance between pleading and proof in action on, see Evidence, 58.

Rights of holder in mortgage security, see Mortgage, 2.

Right of assignee to sue on note, see Parties, 2.

Right of indorsee to sue thereon in his own name, see Parties, 2.

Payment to original mortgagee after transfer of note secured by mortgage, see Payment.

Sufficiency of evidence to go to jury, see Trial, 3, 4.

Direction of verdict, see Trial, 18.

Competency of witnesses in action on, see Witnesses, 3.

Negotiability.

1. The provision of the negotiable instruments law that a qualified indorsement, which is defined as an indorsement without recourse, or words of similar import, does not impair the negotiable character of the instrument, does not apply to an indorsement by which one assigns his interest in the note. *Gale v. Mayhew*, 29: 648, 125 N. W. 781, 161 Mich. 96.

Indorsement and transfer.

2. One who in good faith has purchased from the payee, who indorsed generally, a draft to which the drawer's name has been forged, does not, by indorsement to the drawee, warrant the genuineness of the drawer's signature. *State Bank v. First Nat. Bank*, 29: 100, 127 N. W. 244, — Neb. —.

Rights and liabilities of transferees.

Evidence as to bona fide nature of purchase, see Evidence, 30.

Evidence on question of bona fides, see Evidence, 43.

Burden of showing good faith, see Evidence, 12, 13.

Assignment of note secured by mortgage, see Mortgage, 2.

Sufficiency of evidence to take question of bad faith to jury, see Trial, 4.

3. That a note was purchased without notice of a defense does not, of itself, as matter of law, entitle the holder to enforce it, where it was transferred in violation of an agreement to return it if the property for which it was given did not give satisfaction. *Pierson v. Huntington*, 29: 695, 74 Atl. 88, 82 Vt. 482.

4. The maker from whom a note executed to cover the purchase price of a horse is fraudulently obtained is not, in order to defeat a recovery thereon by an indorsee, required to show that the sale was rescinded or the animal returned, where it 29 L.R.A. (N.S.)

does not appear that it was ever delivered or accepted, or that he had received any benefit from it. *Mee v. Carlson*, 29: 351, 117 N. W. 1033, 22 S. D. 365.

5. One who purchases negotiable paper without inquiry, when the circumstances are such as would excite the suspicion of a prudent and careful man, does not stand in the position of a bona fide holder. *Pierson v. Huntington*, 29: 695, 74 Atl. 88, 82 Vt. 482.

6. The purchaser of a note from an indorser who indorses "without recourse" may be found not to have fulfilled his duty in merely inquiring as to its validity from his indorser, so as to entitle him to hold the maker thereon, where the instrument was obtained from the maker by fraud, and he obtained it at a tempting discount. *Mee v. Carlson*, 29: 351, 117 N. W. 1033, 22 S. D. 365.

7. A purchaser of a note with actual notice of suspicious circumstances sufficient to put a prudent person on inquiry as to its validity is charged with notice of all facts which such inquiries would have elicited. *Mee v. Carlson*, 29: 351, 117 N. W. 1033, 22 S. D. 365.

8. The offer for sale by a comparative stranger residing out of the state, to an individual, of a note indorsed by him "without recourse," which had been procured from the maker by fraud, at a place other than that of the residence of the maker, in whose vicinity are several banks, is a circumstance calculated to arouse suspicion in the mind of a prudent person, so that his purchase without inquiry may destroy his bona fides, and prevent his enforcing the note against the maker. *Mee v. Carlson*, 29: 351, 117 N. W. 1033, 22 S. D. 365.

(Annotated)

Defenses.

When statute of limitations begins to run, see Limitation of Actions, 2.

Sufficiency of evidence to take defense of fraud to jury, see Trial, 3.

9. The maker of a note obtained by fraud and transferred to a bank is not relieved from his liability to it by the fact that the payee had made an assignment for the benefit of creditors, including such bank. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1.

10. The execution of renewal notes before discovery that the execution of the original notes was induced by the fraud of the payee does not constitute a waiver of that fraud. *Gilpin v. Netograph Machine Co.* 29: 477, 108 Pac. 382, — Okla. —

Recovery back of payment made.

11. The drawee of a draft purporting to have been drawn by a South Dakota bank upon an Illinois bank, but to which the drawer's name had been forged, which pays the draft to a Nebraska banker to whom the payee, a personal acquaintance of the Nebraska banker, had indorsed generally and sold the instrument for its face value, cannot recover back the amount

so paid unless it pleads and proves that the latter was negligent in purchasing the instrument or in indorsing it, or withheld from the drawee at the time the draft was paid some information or ground for suspicion within his knowledge concerning the genuineness of the instrument; and if the one cashing the draft acted in good faith in the transaction, he is not required, in order to acquit himself of a charge of negligence in purchasing the bill, to prove that before such purchase he inquired of the drawer whether the instrument was genuine, or communicated with the drawee to learn whether the bill would be accepted. *State Bank v. First Nat. Bank*, 29: 100, 127 N. W. 244, — Neb. — (Annotated)

BLASTING.

Recovery for death resulting from fright caused by, see *Death*, 2.

Liability of employer for negligence of independent contractor in performance of contract requiring, see *Master and Servant*, 16.

BOARDS.

Of county commissioners, see *Counties*.

BONA FIDE PURCHASERS.

Of note, see *Bills and Notes*.
of personality, see *Sale*, 8-10.

BONDS.

Sufficiency of bond of guardian to whom license for sale of property of incompetent is given, see *Incompetent Persons*, 1.

Replevin bond, see *Replevin*.

Reservation of more than legal interest for loan of bonds, see *Usury*.

The sureties on a marshal's bond are liable for his act in shooting a bystander whom he believes intends to interfere in an arrest which he is attempting to make. *Martin v. Smith*, 29: 463, 125 S. W. 249, 136 Ky. 804. (Annotated)

BOOKS.

Compelling production of, see *Discovery and Inspection*, 1.

BRIDGES.

Injury on trolley bridge within limits of highway, see *Highways*, 10.

Liability for injury to municipal employee on, see *Municipal Corporations*, 6.

BROKERS.

Effect of putting into broker's possession certificate of corporate indebtedness indorsed in blank to estop owner as against purchaser in good faith, see *Estoppel*, 1.

Right of broker to secure loan to pay mortgage to become purchaser at foreclosure, see *Principal and Agent*, 4, 5.

A broker with whom land is listed for sale, who is to be paid "when the property is sold," is not entitled to commissions 29 L.R.A. (N.S.)

although he has procured one who said he was willing to purchase at the price asked, and who has paid to the broker a sum to be applied on the purchase price, which sum has been turned over to the owners, where no written contract of purchase was made, and possession was not taken by the purchaser, who afterwards, through no fault of the owners, refused to complete the purchase by making an enforceable contract, since the condition as to when commissions were payable was not complied with. *Pfanz v. Humburg*, 29: 533, 91 N. E. 863, 81 Ohio St. 1. (Annotated)

BUILDING AND LOAN ASSOCIATIONS.

Gift of certificate of shares in, see *Gifts*, 3.

A certificate of shares in a building and loan association, assigned by indorser in blank upon the back thereof by the person to whom it was issued, will prima facie, as between the parties themselves, constitute the vendee and holder thereof the owner of such certificate. *Dewey v. Barnhouse*, 29: 166, 109 Pac. 1081, — Kan. —.

BUILDINGS.

Lien on, see *Mechanics' Liens*.

BURDEN OF PROOF.

See *Evidence*, 2.

BURGLARY.

Evidence in prosecution for, see *Evidence*, 39.

CANDIDATES.

Libel of, see *Libel and Slander*.

CAPACITY.

Burden of proving, see *Evidence*, 6-9.
Question for jury as to, see *Trial*, 7, 13.

CARRIERS.

Attachment of cars of foreign railroad company, see *Attachment*, 2, 3;
Commerce, 2.

Regulation of interstate business of, see *Commerce*, 3-5.

Regulating hours of labor of railroad employees, see *Constitutional Law*, 10; *Evidence*, 2.

Rules and regulations.

1. A railroad company is not forbidden to make possession of a ticket a condition precedent to entering its train, by a statute requiring nonticket holders to be transported at the regular fare charged for tickets. *St. Louis & S. F. R. Co. v. Blythe*, 29: 299, 126 S. W. 386, — Ark. — (Annotated)

2. The carrier waives its notice and rule that "passengers are not allowed to stand on the platform" when its conductor receives and carries passengers thereon after the train is so crowded that the cars cannot reasonably be entered. *Norvell v.*

Kanawha & M. R. Co. 29: 325, 68 S. E. 288, — W. Va. —.

Measure of care required; negligence generally.

Presumption and burden of proof as to negligence, see Evidence, 15, 16.

Complaint in action for injury to passenger, see Pleading, 6.

Negligence of carrier as question for jury, see Trial, 11.

3. The carrier owes to a passenger involuntarily, necessarily, and rightfully riding on the platform the high degree of care commensurate with the circumstances and its act in undertaking to carry him there. *Norvell v. Kanawha & M. R. Co.* 29: 325, 68 S. E. 288, — W. Va. —.

4. A carrier is not liable to one injured by falling from the platform of its car upon which he was excusably riding, where it used reasonable diligence to provide cars for his safe carriage, and with fair excuse for failing to provide them, exercised the increased care demanded by the passenger's enforced position on the platform. *Norvell v. Kanawha & M. R. Co.* 29: 325, 68 S. E. 288, — W. Va. —.

5. A carrier which negligently and unreasonably fails to provide sufficient cars, so that passengers are compelled to ride on the platform, and then accepts passengers for carriage in such hazardous place, is, in the absence of contributory negligence, liable in damages for injuries to one who, while so riding, fell therefrom. *Norvell v. Kanawha & M. R. Co.* 29: 325, 68 S. E. 288, — W. Va. —.

Contributory negligence of passenger.

6. One voluntarily and unnecessarily riding on the platform of a rapidly moving railroad car is guilty of contributory negligence barring recovery for injury caused by falling therefrom while so riding. *Norvell v. Kanawha & M. R. Co.* 29: 325, 68 S. E. 288, — W. Va. —.

7. It is not negligence to ride on a railroad car platform when the train is so crowded that one cannot reasonably enter the car, and the carrier acquiesces in the use of such accommodation by collecting fare or some other indicative act. *Norvell v. Kanawha & M. R. Co.* 29: 325, 68 S. E. 288, — W. Va. —. (Annotated)

8. An intelligent, smart boy, nearly fifteen years old, is negligent in jumping from a train moving at the rate of 30 miles an hour, which will prevent holding the railroad company liable for the resulting injury. *Baker v. Seaboard A. L. R. Co.* 29: 846, 64 S. E. 506, 150 N. C. 562.

(Annotated)

Stations.

9. Notice to a railroad station agent that a woman is in no condition to face a storm is sufficient to place on the company the risk of injury in forcing her to do so, although the nature of her indisposition is not stated. *Texas M. R. Co. v. Geraldton*, 29: 799, 128 S. W. 611, — Tex. —.

10. A railroad company is liable for injury to a woman who has gone to its depot to take passage on a train, by the act of its agent in turning her out into a storm, with notice that she is in no condition to encounter it, although the reasonable time fixed by the company for closing the building has arrived. *Texas M. R. Co. v. Geraldton*, 29: 799, 128 S. W. 611, — Tex. —.

(Annotated)

Baggage.

Question for jury as to negligence where parcel disappears from carrier's check room, see Trial, 10.

11. That a railroad company charges only a nominal fee for checking parcels of intending passengers for safe-keeping until called for does not render it a mere gratuitous bailee, but it is bound to exercise ordinary care, and is liable for ordinary negligence. *Fraam v. Grand Rapids & I. R. Co.* 29: 834, 126 N. W. 851, 161 Mich. 556.

(Annotated)

12. One checking a parcel at a carrier's check room is not negligent in failing to make inquiry for it for about four hours, and then making the inquiry at another station and asking to have the parcel forwarded to him. *Fraam v. Grand Rapids & I. R. Co.* 29: 834, 126 N. W. 851, 161 Mich. 556.

13. Notice to a carrier when a parcel is left at its check room, to be very careful of it, as it contains lots of goods, is sufficient to warn the bailee that the articles are of considerable value. *Fraam v. Grand Rapids & I. R. Co.* 29: 834, 126 N. W. 851, 161 Mich. 556.

Carriers of freight.

Writ of error from United States Supreme Court in action to penalize carrier for failure to furnish cars on demand, see Appeal and Error, 1.

Review of damages on appeal, see Appeal and Error, 21.

Validity of statute as to supplying cars to shippers on demand, see Commerce, 5.

Burden of establishing defense, see Evidence, 3.

Presumption and burden of proof as to negligence, see Evidence, 17, 18.

Sufficiency of evidence to show negligence, see Evidence, 48.

14. A carrier may withdraw from a shipper the privilege of a custom which he has enjoyed for only about fifteen months, of having his goods reshipped on the original waybills, all charges to be paid at final destination, where the privilege is only extended to shippers on the credit list of the carrier, from which the shipper's name has been stricken because of disputes over freight charges. *Brown & Brown (Coal Co. v. Grand Trunk R. System)*, 29: 840, 124 N. W. 523, 159 Mich. 565.

15. It is the duty of a carrier with respect to goods caught in a flood, but not destroyed thereby, to show the extent of damage, and to account for any of such goods which have unaccountably disap-

peared, and a failure so to do renders the carrier liable for their full value. *Chicago, R. I. & P. R. Co. v. Logan, Snow, & Co.* 29: 663, 105 Pac. 343, 23 Okla. 707.

16. The carrier is not liable for damage to a shipment of goods caused by a flood amounting to an act of God, where it appears that the carrier tendered the car containing the shipment, which was handled in due course of business, to the connecting carrier upon the day following its receipt, that it was not accepted by such carrier because of its inability to handle it, and that, after learning that the car could not be moved from the danger zone, took it to the safest place available for detention, at which place the damage occurred. *Armstrong v. Illinois C. R. Co.* 29: 671, 109 Pac. 216, — Okla. —. (Annotated)

17. A carrier which accepts for transportation a crated animal cannot avoid liability for the escape of the animal, on the theory that the shipper was negligent with respect to the crating. *Atlantic Coast Line R. Co. v. Rice*, 29: 1214, 52 So. 918, — Ala. —.

Governmental control; discrimination.

Validity of statute as to supplying cars to shippers on demand, see Commerce, 5.

18. Refusal by a carrier to permit a merchant to reshipe cars of freight consigned to him to purchasers on the original waybill, all charges to be collected at destination, when such privilege is accorded to other shippers, is not within a statute making it unlawful for any carrier to make or give undue preferences or advantages to any particular shipper, or subject him to any undue or unreasonable disadvantage or prejudice. *Brown & Brown Coal Co. v. Grand Trunk R. System*, 29: 840, 124 N. W. 528, 159 Mich. 565.

19. An order of a state railroad commission requiring a railroad company to stop another interstate train at a specified local town on its line where proper and adequate passenger facilities are otherwise afforded is unreasonable. *Missouri, K. & T. R. Co. v. State*, 29: 159, 107 Pac. 172, — Okla. —.

(Annotated)

CARRYING ON BUSINESS.

What constitutes, see Corporations, 7.
Power of executor to carry on, see Executors and Administrators, 1-4.

CARS.

Attachment of foreign railroad cars, see Action or Suit; Attachment, 2, 3; Commerce, 2.

CASE.

Enticing servant, see Master and Servant, 1; Parties, 4; Pleading, 8.

CASE MADE.

On appeal, see Appeal and Error, 9.
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CASHIER.

Responsibility of bank for acts of, see Banks, 1.

CAUSE.

Hypothetical questions as to cause of Explosion, see Evidence, 23.

CAVEAT EMPTOR.

See Sale, 6.

CERTIFICATE.

Of deposit, see Banks, 4, 5; Limitation of Actions, 2.

CHARTER.

Of corporation, see Corporations, 2.

CHattel MORTGAGE.

Effect of, on insurance, see Insurance, 2, 3.

CHECK ROOM.

Loss of property in carrier's check room, see Carriers, 11-13.

CHECKS.

Procuring certification of check as acceptance, see Accord and Satisfaction.

Risk of giving second check upon alleged loss of first, see Banks, 3.

Tender of check as redemption from mortgage, see Mortgage, 11, 12.

Effect of taking worthless check in payment of goods sold, see Sale, 8.

CHOICE.

Of remedy, see Election of Remedies.

CLASS LEGISLATION.

See Constitutional Law, 3-5.

CLOUD ON TITLE.

Validity of default decree quieting title as against partnership described by firm name only, see Judgment, 4.

Application of statute of limitations to action to remove, see Limitation of Actions, 1.

Jurisdiction of suit to remove, upon constructive service of process against nonresident, see Writ and Process, 2.

Independently of any statute conferring jurisdiction, equity may remove cloud from title to land within its jurisdiction at the suit of the owner thereof in possession under good legal title by a decree binding only *in rem*. *Tennant v. Fretts*, 29: 625, 68 S. E. 387, — W. Va. —.

CLUBS.

Liability for serving liquors to members, see Intoxicating Liquors, 2; Statutes, 2.

C. O. D.

Sale C. O. D., see Sale, 1.

COLLATERAL ATTACK.

On judgment, see Judgment, 3, 4.

COMMERCE.

1. The sale by a foreign corporation, within a state, of unissued shares of its capital stock, is not a transaction of interstate commerce. *Southwestern Slate Co. v. Stephens*, 29: 92, 120 N. W. 408, 139 Wis. 616.

2. Attaching a car of a foreign railroad company when found idle within the state, under a state statute permitting it to enable local creditors to collect their debts, is not an unlawful interference with interstate commerce. *De Rochemont v. New York C. & H. R. R. Co.* 29: 529, 71 Atl. 868, 75 N. H. 158.

Regulating carriers and transportation.

3. A state statute may be effective to control the hours of labor of a tower man on an interstate railway after the passage of a Federal statute upon the subject and before it takes effect. *People v. Erie R. Co.* 29: 240, 91 N. E. 849, 198 N. Y. 369.

(Annotated)

4. The mere fact that Congress has forbidden interstate railroads to keep signal tower operators on duty more than nine hours in each twenty-four does not preclude the state from prescribing a lesser number of hours for such service, where the road is handling both interstate and intrastate traffic. *People v. Erie R. Co.* 29: 240, 91 N. E. 849, 198 N. Y. 369.

5. Interstate commerce is unconstitutionally regulated by Kirby's Ark. Dig. §§ 6803, 6804, making it the carrier's duty to supply cars to shippers on demand, under which a carrier will either be compelled to desist from the interchange of cars with connecting lines for the purpose of moving interstate commerce, because of a refusal of the state courts to permit it to avail itself, as causing and excusing its default, of the rules and regulations adopted for the interchange of cars by the American Railway Association, which govern 90 per cent of the railways in the United States, or will be obliged to conduct such business with the certainty of being subjected to the heavy penalties provided by the statute. *St. Louis S. W. R. Co. v. State*, 29: 802, 30 Sup. Ct. Rep. 476, 217 U. S. 136, 54 L. ed. 698.

Regulating and licensing sales, etc.

6. A state statute regulating the taking of orders in one state for intoxicating liquors which are in another state is not repugnant to the interstate commerce clause. *State ex rel. Jackson v. Wm. J. Lemp Brew. Co.* 29: 44, 102 Pac. 504, 79 Kan. 705.

7. Intoxicating liquor consigned to prohibition territory from another state is subject to seizure in the hands of the carrier where one holding the bill of lading has receipted for the entire consignment and taken away a portion, leaving that 29 L.R.A. (N.S.)

seized in the carrier's freight house for six days thereafter. *State v. Intoxicating Liquors*, 29: 745, 76 Atl. 265, — Me. —.

(Annotated)

8. The sale of the frames does not constitute interstate commerce where, after the taking of orders upon a foreign concern for pictures which the contract stipulates may be delivered in frames which the one giving the order may purchase or not at his pleasure, the pictures in the frames are shipped to the vendor's agent, who delivers the pictures, collects the price, and sells the frames whenever he can. *State v. Looney*, 29: 412, 97 S. W. 934, 214 Mo. 218.

COMMISSIONS.

Of brokers, see Brokers.

Order requiring stopping of trains at specified station, see Carriers, 19.

COMMON CARRIERS.

See Carriers.

COMMUNITY PROPERTY.

See Husband and Wife.

COMPENSATION.

For taking of property by eminent domain, see Eminent Domain, 2-4.

COMPLAINT.

Of plaintiff, see Pleading, 4-9.

COMPROMISE AND SETTLEMENT.

See Accord and Satisfaction.

COMPULSORY SERVICE.

Compelling corporation constructing sewer to permit connection therewith, see Drains and Sewers, 1.

CONCEALMENT.

By insured, see Insurance, 2.

CONCLUSIVENESS.

Of judgment, see Judgment, 2-5.

CONCURRENT REMEDIES.

See Election of Remedies.

CONDEMNATION.

See Eminent Domain.

CONDITION.

Of right to appeal to courts for reduction of tax, see Taxes, 3.

In telegram, see Telegraphs, 6, 7.

Of right to rescind land contract, see Vendor and Purchaser, 1.

CONFLICT OF LAWS.

As to contracts generally.

As to statute of frauds, see *infra*, 5.

1. The acceptance, by subscribers, of an offer by a foreign corporation to sell its stock in the state of their residence, completes the contract there. *Southwestern Slate Co. v. Stephens*, 29: 92, 120 N. W. 408, 139 Wis. 616.

As to telegrams.

2. The liability of a telegraph company in tort for error in the transmission of a message is governed by the law of the state where the message originated. *M. M. Stone & Co. v. Postal-Telegraph Co.* 29: 795, 76 Atl. 762, — R. I. —. (Annotated)

Rights in property generally.

3. The inheritance tax law of a state applies to property acquired there by one who died there, although he was married in a foreign country by whose law his wife was entitled to a community interest in it. *Re Majot*, 29: 780, 92 N. E. 402, 199 N. Y. 29. (Annotated)

Descent and distribution.

Burden of proving that domicile has been acquired in foreign country, see Evidence, 4.

4. A domicile of testacy or intestacy may be established by a citizen of one of the United States in that portion of China in which, by treaty, he is permitted to enjoy the laws of the United States, so that in case of his death his estate is subject to the jurisdiction of the consular court there located, and not to the courts of the state of his former domicile. *Mather v. Cunningham*, 29: 761, 74 Atl. 809, 105 Me. 326.

5. An antenuptial agreement to hold acquired property in common will not be presumed from the fact that a marriage took place in a country where the community law prevails, so as to be enforced in a state where no such agreement is valid unless in writing. *Re Majot*, 29: 780, 92 N. E. 402, 199 N. Y. 29.

CONSIDERATION.

Of contracts generally, see Contracts, 3.

CONSPIRACY.

Parties to action for conspiring to entice servant, see Parties, 4.

CONSTITUTIONAL LAW.

Cruel and unusual punishment, see Criminal Law, 4.

Ex post facto laws.

1. A curative act purporting to validate all proceedings prosecuted to judgment under a statute permitting a county court to vest the fee to a homestead in the surviving spouse upon payment by her to the heirs of the proportionate share descending to them, before such statute was held unconstitutional and void, contravenes the constitutional provision that no person shall be deprived of his property without due process of law, where a statute enacted prior to the act attempting to confer power upon the county court, and which was not repealed or amended thereby, provided that the surviving spouse should have but a life estate in the homestead, with remainder to the heirs. *Draper v. Clayton*, 29: 153, 127 N. W. 369, — Neb. —.

Delegation of power.

2. A statute making the right to es-

tablish a private industrial school in a county depend upon a vote of the electors of the county violates a constitutional provision that no law, except such as relate to intoxicating liquors, bridges, public roads and buildings, fences, stock, common schools, paupers, and the regulation of local affairs of municipalities, shall be enacted to take effect upon the approval of any other authority than the general assembly. *Columbia Trust Co. v. Lincoln Institute*, 29: 53, 129 S. W. 113, 138 Ky. 804.

Equal protection and privileges.

3. The constitutional guaranty of equal rights is not infringed by a police regulation forbidding the permitting of any person under twenty-one years of age to be or remain in a dance hall, on the ground that it discriminates between women who have arrived at the age of majority under the age of twenty-one, and those over the age of twenty-one. *State v. Rosenfield*, 29: 331, 126 N. W. 1068, — Minn. —.

4. A statute exempting the wages of railroad employees from garnishment is not one for the benefit of the railroad companies, so as to render it unconstitutional in granting them special favors. *White v. Missouri, K. & T. R. Co.* 29: 874, 130 S. W. 325, — Mo. —.

5. A statute forbidding garnishment of the wages of railroad employees under \$200 in value, until a judgment has been recovered against the debtor, is not unconstitutional class legislation, although the same prohibition does not apply to other classes of employees, nor when the wages due are over the prescribed amount. *White v. Missouri, K. & T. R. Co.* 29: 874, 130 S. W. 325, — Mo. —.

Due process; right to life, liberty, and property.

6. A municipal ordinance authorizing the summary destruction of milk brought into the city for sale, which has been drawn from cows which have not been subjected to the tuberculin test, as required by law, neither violates the constitutional rights of the citizens, nor amounts to a taking of property without due process of law, although milk which may be subject to destruction thereunder may in fact be fit for food purposes. *Nelson v. Minneapolis*, 29: 260, 127 N. W. 445, — Minn. —. (Annotated)

Police power.

7. The legislature cannot, under its police power, prohibit, or authorize the voters of the county to prohibit, the establishment within the county limits, by a private charitable corporation, of an industrial school for colored children. *Columbia Trust Co. v. Lincoln Institute*, 29: 53, 129 S. W. 113, 138 Ky. 804. (Annotated)

8. The legislature may, under its police power, forbid the owner, keeper, or manager of a "dance house" to permit persons under twenty-one years of age to be or remain therein. *State v. Rosenfield*, 29: 331, 126 N. W. 1068, — Minn. —.

9. A municipal corporation may, in the exercise of its police power, prescribe as a test of the purity and wholesomeness of milk brought into the city for sale that it be drawn from cows previously subjected to the tuberculin test and found free from disease. *Nelson v. Minneapolis*, 29: 260, 127 N. W. 445, — Minn. —.

10. The legislature may, under its police power, forbid a railroad company to keep employees who despatch or space trains by telephone or telegraph, on duty more than eight hours in each twenty-four. *People v. Erie R. Co.* 29: 240, 91 N. E. 849, 198 N. Y. 369.

Freedom of worship.

See also Schools.

11. Requiring school children to listen to the reading of passages of the King James' version of the Bible, and join in repeating the Lord's Prayer, and in singing hymns, violates their constitutional right to the free exercise and enjoyment of religious profession and worship. *People ex rel. Ring v. Board of Education*, 29: 442, 92 N. E. 251, 245 Ill. 334.

CONSTRUCTION.

Statute as to construction of pleading, see Pleading, 1.

Of statutes, see Statutes, 5, 6.

CONSULAR COURTS.

Jurisdiction of, over settlement of estate, see Conflict of Laws, 4.

CONTEMPT.

Statement by courts as to jailing accused for, see Trial, 2.

That a person is on trial for crime and already in actual custody does not render him incapable of committing contempt of court or of being punished therefor. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

CONTRACTS.

Contract of accord and satisfaction, see Accord and Satisfaction.

Conflict of laws as to, see Conflict of Laws.

By county, see Counties.

Damages for breach of, see Damages, 2, 3, 10.

Evidence on question of, see Evidence, 41.

As to mortgages, see Mortgage.

Ratification by principal of agent's attempt to modify contract, see Notice, 4.

Who may sue for breach of, see Parties.

Specific performance of, see Specific Performance.

Between vendor and purchaser, see Vendor and Purchaser, 1.

Implied agreements.

Presumption that services of foster child were gratuitous, see Evidence, 22.

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Sufficiency of evidence to show implied contract, see Evidence, 52.

1. One who has been received in infancy into a family not of kin must show, in order to recover for services rendered the family after majority while still remaining in the household, either an express contract, or circumstances from which a contract to compensate her for such services may be implied. *Howard v. Randolph*, 29: 294, 68 S. E. 586, 134 Ga. 691.

2. The estate of one who takes an orphan not of kin, when but three years of age, into his family, assuming the relation of a parent, and educating and supporting the child, is not liable, in the absence of express agreement, to pay wages to the child, after the death of the person *in loco parentis*, for services rendered by the child while a minor to such parent, although the value thereof may exceed the expenses of education and support. *Howard v. Randolph*, 29: 294, 68 S. E. 586, 134 Ga. 691.

Consideration.

Effect of failure of consideration on transferee of bill or note, see Bills and Notes, 3, 4.

Sufficiency of consideration for conveyance as against creditors, see Fraudulent Conveyances, 2.

For bid of purchaser at administrator's sale, see Judicial Sale, 3.

3. A pledge of stock as security for an existing overdue note is supported by a sufficient consideration. *State Banking & T. Co. v. Taylor*, 29: 523, 127 N. W. 590, — S. D. —.

Statute of frauds.

Conflict of laws as to, see Conflict of Laws, 5.

4. Written authority is not necessary to enable an attorney to sign a demand for dower. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —.

5. A contract for sale of unissued stock in a corporation and an interest in an automobile is taken out of the statute of frauds by entering into possession of the business with the other owners, carrying it on as contemplated by the contract, and taking and using the automobile as one of the owners. *Ford v. Howgate*, 29: 734, 76 Atl. 939, — Me. —.

Validity; public policy.

Contracts of unauthorized foreign corporation, see Corporations, 8.

Remedy in equity on illegal contract, see Equity, 1.

Injunction against illegal contract, see Injunction, 1, 2.

As to lotteries, see Lottery.

Specific performance of, see Specific Performance.

6. A contract between city authorities and the owner of property not exempted from taxation by the Constitution, providing that no taxes on such property above a specified amount, which is less than the amount of taxes due, shall be collected by

the city, in consideration of specified benefits and privileges conferred upon the city by the property owner, is void under a constitutional provision that all laws exempting property from taxation other than property exempted in the Constitution shall be void, although the city, under the contract, may receive from the taxed debtor benefits which, in value, exceed the amount of the taxes due. *Tarver v. Dalton*, 29: 183, 67 S. E. 929, 134 Ga. 462. (Annotated)

7. A contract for the services of a morgue keeper, executed by a county board just before the expiration of the term of office of a part of the members thereof, and the taking of office by their successors, which is reasonable, is not against public policy, and cannot legally be rescinded without cause after such new members have qualified as such. *Manley v. Scott*, 29: 652, 121 N. W. 628, 108 Minn. 142.

8. A contract in restraint of trade, entered into by fire insurance companies, the necessary effect and the actual result of which is to control such business within a certain area, and therein to fix and regulate prices so as to limit or eliminate competition, to the injury of the public, is contrary to public policy, and *ultra vires* such corporations, and may be restrained in equity, at the suit of the attorney general. *State ex rel. McCarter v. Firemen's Ins. Co.* (N. J. Err. & App.) 29: 1194, 73 Atl. 80, 74 N. J. Eq. 372.

Defenses.

9. The fact that the parties to an express contract for services to be rendered by a woman for a man as housekeeper and servant maintained illicit relations with each other during the time the services were being rendered does not render the contract unenforceable, where it was not made in contemplation of such illicit relationship, and the claim for compensation is not based thereon. *Emmerson v. Botkin*, 29: 786, 109 Pac. 531, — Okla. —. (Annotated)

CONTRIBUTION.

Between life tenant and remainderman, see Life Tenants.

CORPORATIONS.

Transfer of funds of, by officer who is also cashier of bank to conceal misappropriations from bank, see Banks, 1.

Sale of stock by foreign corporation as interstate commerce, see Commerce, 1.

Place of contract on sale of corporate stock, see Conflict of Laws, 1.

Contract for sale of unissued stock as within statute of frauds, see Contracts, 5.

Compelling production of books of, see Discovery and Inspection, 1.

Wrongful use by broker of certificate of indebtedness of corporation placed in his hands by principal, see Estoppel, 1.

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Conveyance of assets of insolvent partnership to corporation organized to carry on business, see Fraudulent Conveyances, 1, 2.

Notice to bank of misappropriation of funds of other corporation by cashier, see Notice, 2.

Right of bank to testify to transactions from knowledge of course of business, see Witnesses, 2.

1. A quasi public corporation is one affected with a public interest. *State ex rel. McCarter v. Firemen's Ins. Co.* (N. J. Err. & App.) 29: 1194, 73 Atl. 80, 74 N. J. Eq. 372.

2. A statute invalidly prohibiting a corporation from establishing a school for colored children within a certain county cannot be upheld as an amendment of the charter of the corporation, so as to take away its power to locate the school there. *Columbia Trust Co. v. Lincoln Institute*, 29: 53, 129 S. W. 113, 138 Ky. 804.

Liabilities.

Liability of corporation organized to continue business of insolvent partnership to creditors of partnership for partnership funds transferred to it, see Fraudulent Conveyances, 2.

Sufficiency of pleading in suit to hold corporation liable for debts of partnership to the business of which it succeeds, see Pleading, 9.

3. A corporation which continues the business of an insolvent partnership is not, in the absence of fraud, liable for its debts, where it is organized by the former partners, who pay for their stock by insurance money collected for the destruction of the partnership assets by fire, and a stranger who, with knowledge of the facts, contributed cash equal to that of each partner, each contributor taking a *pro rata* share of stock for his contribution. *Byrne Hammer Dry Goods Co. v. Willis-Dunn Co.* 29: 589, 121 N. W. 620, 23 S. D. 221. (Annotated)

Officers.

Authority of cashier of bank, see Notice, 6.

4. Checks drawn by the treasurer of an elevator company, who, as such, has power to draw checks in its name to pay its obligations, against its deposit in a bank of which he is also cashier, in the bank's favor, temporarily to cover up a shortage in its funds caused by a misappropriation thereof by him, which checks he charges against the elevator company on the bank books without intention to transfer funds from one corporation to the other, create no liability in favor of the bank against the elevator company. *Emerado Farmers' Elevator Co. v. Farmers' Bank*, 29: 567, 127 N. W. 522, — N. D. —.

Transfer of stock.

Attachment of corporate stock pledged to securities, see Attachment, 1.

Transfer of certificate of shares in building and loan association, see Building and Loan Associations.

Consideration for pledge of stock, see Contracts, 3.

Validity of transfer as against creditors of transferor, see Fraudulent Conveyances, 3.

Gift of stock certificate, see Gifts, 3.

5. One who sells his stock in a corporation the certificate of which has never been issued is under no duty of securing a certificate of issuance, and delivering it to the purchaser. *Ford v. Howgate*, 29: 734, 76 Atl. 939, — Me. —.

6. Statutes requiring corporations to keep stock transfer books which shall be open to the inspection of any stockholder, member, or creditor, and providing that transfers shall not be valid, except between the parties thereto, until entered on the corporate books, are not intended for the protection of the public, and therefore an unregistered pledge of stock is valid against a subsequent attachment, against the stockholder, by a creditor without notice. *State Banking & T. Co. v. Taylor*, 29: 523, 127 N. W. 590, — S. D. —.

Foreign corporations.

Attachment against, see Attachment.

Sale of stock by foreign corporation as interstate commerce, see Commerce, 1.

Place of contract on sale of stock by foreign corporation, see Conflict of Laws, 1.

Sufficiency of evidence to support finding that corporation was unlawfully engaged in business within state, see Evidence, 53.

Injunction against *ultra vires* contract of public corporation, see Injunction, 1, 2.

7. A foreign corporation whose traveling salesmen solicit and receive orders in another state for intoxicating liquors, which orders, when accepted by the corporation, are filled by shipping the liquors f. o. b. to the purchasers, is engaged in business in such other state, and is subject to the statutory provisions thereof relating to foreign corporations doing business within the state. *State ex rel. Jackson v. Wm. J. Lemp Brew. Co.* 29: 44, 102 Pac. 504, 79 Kan. 705.

8. The obligation of a corporation to persons who subscribe to its stock affects its personal liability, within the meaning of a statute invalidating contracts affecting such liability made by any foreign corporation which has not complied with the local laws so as to be entitled to do business within the state, and a foreign corporation which has not complied with the laws cannot therefore enforce, in the courts of the state where the statute was enacted, contracts of subscription to its capital stock made within such state. *Southwestern Slate Co. v. Stephens*, 29: 92, 120 N. W. 408, 139 Wis. 616. (Annotated)

COSTS.

What fund chargeable with costs of sale when encumbered property is 29 L.R.A. (N.S.)

sold in bankruptcy free of liens, see Bankruptcy.

COTENANCY.

When action to recover rents and profits from cotenant is barred, see Limitation of Actions, 6.

As to partition of interests, see Partition.

1. A tenancy in common, entitling one of the cotenants to maintain an action for partition, and for rents and profits, the other cotenants being in adverse possession under claim of title, exists where it appears that several brothers, by joint contribution of labor and money, purchased certain lands, taking the title in the names of all the brothers, with the understanding that such lands were to be so held by them. *Schuster v. Schuster*, 29: 224, 120 N. W. 948, 84 Neb. 98.

2. A tenant in common who rightfully occupies and uses the common property cannot be compelled to pay rent to his cotenants who are nonoccupants, where there is no showing of exclusive possession on the part of the actual occupant, or that the other cotenants might not occupy the property at the same time. *Thurstin v. Brown*, 29: 238, 109 Pac. 784, — Kan. —.

(Annotated)

3. A tenant in common who is in sole, exclusive, and adverse possession under claim of title, is liable to his cotenant for an accounting for rents and profits. *Schuster v. Schuster*, 29: 224, 120 N. W. 948, 84 Neb. 98.

(Annotated)

COUNTIES.

Public policy as to contract by county officers extending beyond term of office, see Contracts, 7.

1. A county board may, just before the expiration of the term of office of a part of the members thereof, and the taking of office by their successors, employ a morgue keeper for a period of one year, as such a board is a continuing body, the existence of which is not affected by a partial change in the personnel thereof. *Manley v. Scott*, 29: 652, 121 N. W. 628, 108 Minn. 142.

(Annotated)

2. A county board may, under a statute authorizing a county to provide and equip a public morgue which shall be under the control of the board of county commissioners, appoint a morgue keeper, and enter into a contract with him to perform the services required for a period of one year, during which time he may only be discharged for causes which will justify the county in refusing to carry out the contract. *Manley v. Scott*, 29: 652, 121 N. W. 628, 108 Minn. 142.

COURTS.

Appeal to courts from tax assessment, see Taxes, 3.

Process of, see Writ and Process.

1. The method to be adopted by the

health authorities to insure a supply of pure milk, and the standard by which the same shall be determined, is a legislative question, and the adoption of a particular method cannot be reviewed by the courts, unless so arbitrary as to be violative of the constitutional rights of the citizens affected. *Nelson v. Minneapolis*, 29: 260, 127 N. W. 445, — Minn. —.

2. A decree of the county court confirming in a widow the absolute title to a homestead asserted and selected from the lands of her deceased husband is void in the absence of constitutional or statutory grant to such court of power so to act other than an act purporting to confer such power, which act, subsequent to the assertion, has been held unconstitutional and void. *Draper v. Clayton*, 29: 153, 127 N. W. 309, — Neb. —.

COVENANTS AND CONDITIONS.

Covenant to stand seised to uses, see Trusts, 1.

CREDIBILITY.

Of witness, see Witnesses, 6, 7.

CRIMINAL LAW.

Time for objection that accused was prosecuted under wrong name, see Appeal and Error, 10.

First objecting to instructions on appeal, see Appeal and Error, 17.

Prejudicial error as to instructions, see Appeal and Error, 34, 36.

Contempt by person on trial for crime, see Contempt.

Presumption and burden of proof, see Evidence, 11.

Admissibility of evidence, see Evidence, 24, 34, 39, 40, 42.

Weight and sufficiency of evidence, see Evidence, 54-56.

Sufficiency of evidence to take indictment to jury, see Trial, 5.

Remarks by court during prosecution, see Trial, 2.

As to instructions, see Trial, 24, 25.

Conviction as bar to subsequent prosecution for same offense, see Judgment, 2.

See also Disorderly Houses; Embezzlement; Homicide; Intoxicating Liquors; Larceny; Lottery.

Intent.

Presumption as to intent, see Evidence, 11.

1. Knowledge of the age of the person named in the complaint is not essential to the violation of a statute forbidding the owner, keeper, or manager, of a dance house to permit any person under twenty-one years of age to be or remain therein, when not so provided by the statute. *State v. Rosenfield*, 29: 331, 126 N. W. 1068, — Minn. —.

2. Under a statute making it a penal offense to unite "in wedlock any of the persons whose marriage is declared invalid" by a statute which is directed against marriage

riages between persons within the prohibited degrees of consanguinity, and males under eighteen and females under fifteen, knowledge by the officiating officer that a female whom he has united in marriage was under fifteen years of age is not an essential element of the offense. *Territory v. Harwood*, 29: 504, 110 Pac. 556, — N. M. —. (Annotated)

Pleadings; motions.

Raising for first time on motion in arrest of judgment objection to indictment, see Appeal and Error, 11.

3. Matters that are covered by the verdict in a prosecution for crime will not be inquired into on a motion in arrest of judgment. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

Cruel and unusual punishment.

4. That a licensee, upon conviction of a violation of a statute making it unlawful for a licensed saloon keeper to traffic in intoxicating liquor after and before certain hours, is subjected thereby to a fine and forfeiture of the license, does not invalidate the statute, as inflicting cruel and unusual punishment. *Dinuzzo v. State*, 29: 417, 123 N. W. 309, 85 Neb. 351.

CRUEL AND UNUSUAL PUNISHMENT.

See Criminal Law, 4.

CURATIVE ACT.

See Constitutional Law, 1.

CUSTOM.

To permit shippers to reship goods on original waybills without payment of freight, see Carriers, 14.

Right of one purchasing goods to rely on, see Sale, 5.

DAMAGES.

Review of, on appeal, see Appeal and Error, 20, 21.

Exemplary or punitive.

Failure to instruct as to exemplary damages, see Appeal and Error, 38.

Review of verdict for exemplary damages, see Appeal and Error, 20.

1. Exemplary damages may be recovered for suing out an attachment merely because the debtor does not pay money when demanded without any belief that he has any purpose of defrauding his creditor. *International Harvester Co. v. Iowa Hardware Co.* 29: 272, 122 N. W. 951, — Iowa. —. (Annotated)

On contracts generally.

See also *infra*, 10.

2. For breach, after the disappointed party has entered upon the work of tearing out the old dam, of a contract to lend money to replace a milldam and furnish logs to be sawed in the mill, the value of the service to be applied in satisfaction of the loan, damages may be recovered which will make him whole, without the necessity

of his showing that he could not have obtained the money from any other source. *Bixby-Theison Lumber Co. v. Evans*, 29: 194, 52 So. 843, — Ala. —. (Annotated)

3. The damages to be awarded for breach of a contract to lend money to replace a milldam cannot include the amount advanced by the disappointed party to carry on the work, where the contract provided for use of his money only in the event that the money to be advanced under the contract proved insufficient to complete the work. *Bixby-Theison Lumber Co. v. Evans*, 29: 194, 52 So. 843, — Ala. —.

For telegrams.

4. Nine hundred and fifty-five dollars and fifty cents is not excessive to award a widow for the negligent failure of a telegraph company to deliver a message in time to permit her to reach the bedside of her dying husband before he sank into final unconsciousness. *Western U. Teleg. Co. v. Price*, 29: 836, 126 S. W. 1100, 137 Ky. 758.

Torts generally.

5. The damages for failure to allot dower out of a gravel pit are the amount which the doweress could have secured by the reasonable use of her share of the property during the period had she been in possession of it. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —.

Abuse of process.

6. Counsel fees in case of the malicious suing out of an attachment are not limited to those reasonable with reference to the actual damages sustained, by a statute providing that, for wrongfully suing out an attachment, recovery may be had for the actual damages sustained and reasonable attorneys' fees to be fixed by the court; and if it be shown that the attachment was sued out maliciously, exemplary damages may be recovered. *International Harvester Co. v. Iowa Hardware Co.* 29: 272, 122 N. W. 951, — Iowa, —.

Personal injuries; death.

Increasing allowance on appeal, see Appeal and Error, 39.

7. Nine hundred dollars is not excessive to award as damages to a boy whose leg is broken above the knee by another's negligence, in consequence of which he is compelled to stay in bed for four months, and go on crutches for three more, and is finally left with the injured leg shorter than the other. *Palmer Transfer Co. v. F. Smith*, 29: 321, 125 S. W. 725, 137 Ky. 319.

Injury to real property; trees.

Admissibility of evidence as to, see Evidence, 37.

Setting aside verdict for error in admission of evidence as to, see New Trial.

8. Temporary damages only may be recovered for injuries to real property caused by the occasional and intermittent submergence thereof by the casting thereon of surface water caused by the grading and sewerage of city streets. *McHenry v. Parkersburg*, 29: 860, 66 S. E. 750, 66 W. Va. 533. (Annotated)

9. The measure of temporary damages for injuries to a lot and dwelling house caused by the flooding thereof by the occasional and intermittent casting thereon of surface water from city improvements is the cost of repairing the injury to the property, reimbursements for expenses directly occasioned by the flooding thereof, and compensation for loss of use of the property and rentals, and destruction of, and damage to, personal property thereon. *McHenry v. Parkersburg*, 29: 860, 66 S. E. 750, 66 W. Va. 533.

Loss of profits.

10. The damages to be awarded for breach of a contract to lend money to replace a milldam cannot include the profits which were anticipated from the operation of the mill in its improved state. *Bixby-Theison Lumber Co. v. Evans*, 29: 194, 52 So. 843, — Ala. —.

DAMS.

Damages for breach of contract to lend money to build, see Damages, 2, 3, 10.

DANCE HALLS.

Forbidding presence of infants in, see Constitutional Law, 3, 8; Criminal Law, 1; Evidence, 54; Information and Complaint, 1; Statutes, 5.

DEATH.

Admissibility of acts or declarations of person killed, see Evidence, 33.

Effect of, to start running of limitations, see Limitation of Actions, 5.

1. One who negligently causes the death of a married woman cannot escape liability to her estate because her earnings belong to her husband. *Hunter v. Southern R. Co.* 29: 851, 68 S. E. 237, 152 N. C. 682.

2. That the terror caused by blasting operations would cause the death of one ill with fever was not foreseen by the one carrying on such operations will not relieve him from liability therefor, if they were performed in such manner that some injury was likely to result from them. *Hunter v. Southern R. Co.* 29: 851, 68 S. E. 237, 152 N. C. 682.

3. The authority of one in whose hands securities are placed to make distribution of them among the owner's children to whom they are given by the owner, and for whom delivery is made to such person, is not revoked by the latter's death. *Mollison v. Rittgers*, 29: 1179, 118 N. W. 512, 140 Iowa, 365.

DE BONIS NON.

Administrator *de bonis non*, see Executors and Administrators, 2, 3.

DEBTOR AND CREDITOR.

Accord and satisfaction between, see Accord and Satisfaction.

Insolvency of debtor, see Bankruptcy.

Conveyances fraudulent as to creditors, see Fraudulent Conveyances.

Right of one taking mortgage from judgment debtor to challenge amount of judgment, see Judgment, see Judgment, 3.

DECEIT.

See Fraud and Deceit.

DECLARATION OR COMPLAINT.

See Pleading.

DECLARATIONS.

Evidence of, see Evidence, 32-34.

DEEDS.

When limitations begin to run in case of conveyance in fee by life tenant as against contingent remainderman, see Limitation of Actions, 4.

Necessary party in proceeding to correct sheriff's deed, see Parties, 3.

Reforming deed running to partnership in firm name, see Reformation of Instruments.

Tax deeds, see Taxes, 5, 6.

1. A deed to a woman, habendum to her in fee providing that if she die without heirs, then to her husband, should he be living; and in case he is dead, then a share to vest in the next legal heirs of the grantee, the remainder to vest in the next legal heirs of the husband, creates a conditional fee in the first taker, with an absolute fee to her husband, should she die without heirs; and their deed will therefore convey the whole estate, since the words to "the next legal heirs" are used as words of inheritance, and not of purchase. *Hamilton v. Sidwell*, 29: 961, 115 S. W. 204, 131 Ky. 428. (Annotated)

2. A deed to one for life, and at his death to his surviving heirs, vests a fee in the first taker, the word "surviving" not being sufficient to prevent an application of the rule in *Shelley's Case*, at least, where the warranty runs to him and to his assigns forever. *Price v. Griffin*, 29: 935, 64 S. E. 372, 150 N. C. 523. (Annotated)

3. A conveyance to a man and his wife during their natural lives, and after their death to his heirs, vests the fee in him, under the rule in *Shelley's Case*, subject to her life estate. *Bails v. Davis*, 29: 937, 89 N. E. 706, 241 Ill. 536. (Annotated)

4. A conveyance in trust, to stand seised to the use and benefit of a certain person for life, and at his death to transfer the property to such persons as he shall direct, or, in default of direction, to his heirs in fee, does not vest a fee in the first taker, under the rule in *Shelley's Case*, since it is an executory trust. *Steele v. Smith*, 29: 939, 66 S. E. 200, 84 S. C. 464. (Annotated)

5. Although in case of a conveyance in trust for the life of a designated person, and at his death to convey the property to his appointees, or to his heirs in case the

appointment is not made, the statute would execute the fee in the heirs immediately upon the death of the life tenant without appointment, such estate could not coalesce with that of the first taker, so as to vest the fee in him. *Steele v. Smith*, 29: 939, 66 S. E. 200, 84 S. C. 464.

DEFAULT JUDGMENT.

Conclusiveness of, see Judgment, 4.

DEFENDANTS.

Parties defendant, see Parties, 3-5.

DEFENSE.

In action on negotiable paper, see Bills and Notes, 9, 10.

To liability on contracts generally, see Contracts, 9.

To action for causing death, see Death, 1, 2.

In prosecution for embezzlement, see Embezzlement, 3.

Burden of proving, see Evidence, 3.

In action on insurance policy, see Insurance, 12.

To enforcement of bid at judicial sale, see Judicial Sale.

Sufficiency of pleading to permit, see Pleading, 9.

To collection of tax, see Taxes, 4.

DEFINITIONS.

Dance house, see Statutes, 5.

DELAY.

Of telegram, see Telegraphs; Trial, 16.

DELEGATION OF POWER.

Constitutionality of, see Constitutional Law, 2.

DELIVERY.

Of gift, see Gifts, 2, 3.

Of personalty sold, see Sale, 1.

Of telegrams, see Telegraphs.

DEMAND.

For dower, see Contracts, 4; Dower, 2-4.

DEMONSTRATIVE EVIDENCE.

See Evidence, 26.

DEMURRER.

See Pleading, 11, 12.

DESCENT AND DISTRIBUTION.

Jurisdiction of consular court to distribute estate, see Conflict of Laws, 4.

DESERTION.

As ground for divorce, see Divorce and Separation.

Right of deserted wife to claim community rights, see Husband and Wife, 1.

DIRECTION OF VERDICT.

See Trial, 18-21.

DIRECTORY PROVISIONS.

Of statute, see Statutes, 6.

DISCOVERY AND INSPECTION.

Exhibition of person to jury, see Evidence, 26.

1. The officers of a corporation cannot refuse to produce its books in court for inspection, in response to a subpoena in a cause in which the matter contained in them is material, on the theory that the privacy with which its business is carried on is a trade secret, which it is entitled to protect from the inspection of strangers. *Re Bolster*, 29: 716, 110 Pac. 547, — Wash. (Annotated)

2. A court is empowered to compel a witness to produce papers before a commissioner authorized to take depositions, by statutes providing that a witness may be required to attend and give evidence before the court and bring with him required papers, and that he may be required to appear and give his deposition before any officer authorized to take depositions, in like manner as he may be compelled to attend as a witness before any court, and authorizing the court to compel attendance before the commissioner, and providing that, in case of failure to attend before the commissioner, the latter shall ask an order to compel him to attend and testify. *Re Bolster*, 29: 716, 110 Pac. 547, — Wash. —

DISCRETION.

Review of, on appeal, see Appeal and Error, 15.

DISCRIMINATION.

By carrier between shippers, see Carriers, 18.

DISORDERLY HOUSES.

Conviction of keeping, as bar to subsequent prosecution for same offense, see Judgment, 2.

Members of a city council who pass an ordinance providing for the licensing of bawdyhouses do not become participants in the keeping of houses kept under the resolution, so as to render themselves liable to punishment as such keepers. *State v. Lismore*, 29: 721, 126 S. W. 855, — Ark. — (Annotated)

DITCH.

See Drains and Sewers.

DIVORCE AND SEPARATION.

Effect of pendency of appeal on power of trial court to award alimony, see Appeal and Error, 7.

Judicial notice in second proceeding of facts proved at first hearing, see Evidence, 1.

Multifariousness of bill for, see Pleading, 3.

Repeal of statute granting dower to divorced wife, see Statutes, 9.

1. A husband who leaves his home,

after being twice ordered therefrom, because of the wife's long-continued abuse, attempts to take his life, and refusal to continue the marital relation, under circumstances showing that further effort to induce her to live with him would have been unavailing, and perhaps would have caused her to take his life, is entitled to a divorce on the ground of wilful and obstinate desertion. *Hudson v. Hudson*, 29: 614, 51 So. 857, — Fla. — (Annotated)

2. The final adjournment of the term of court at which a divorce was granted does not, if an appeal has been taken, deprive the court of power to award alimony in case conditions have arisen since the decree which require it, under a statute empowering the judge, either in term-time or vacation, to allow the wife a sufficient income for her maintenance during the pendency of the suit, "until a final decree shall have been made in the cause." *Ex parte Lohmuller*, 29: 303, 129 S. W. 834, — Tex. —

DOCUMENTARY EVIDENCE.

See Evidence, 24, 25.

DOCUMENTS.

Production of, see Discovery and Inspection.

DOMESTIC RELATIONS.

See Divorce and Separation; Husband and Wife.

DOMICIL.

Acquirement of, in foreign country, see Conflict of Laws, 4.

Presumption and burden of proof as to, see Evidence, 4.

Sufficiency of evidence to show change of, see Evidence, 48.

DOWER.

Necessity of written authority to enable attorney to sign demand for, see Contracts, 4.

Damages for failure to allow dower, see Damages, 5.

Attempt to defeat action for, on theory of nontenure after plea in bar, see Pleading, 10.

Repeal of statute granting dower to divorced wife, see Statutes, 9.

1. A railroad does not take land purchased for a gravel pit free from the right of the grantor's wife to dower, although it so far devotes the land to public use as to secure therefrom materials for its roadbed. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. — (Annotated)

2. A demand for dower in premises described by reference to a recorded deed is sufficient, although the deed includes two parcels, and dower is claimed in one only of them. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —

3. A demand for dower need not state the portion of the income which is claimed, as affected by the question whether issue

was living at the time it became consummate or not. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —.

4. A demand for dower by an attorney with authority to make demand with respect to one parcel of land is not vitiated by the fact that his demand includes another parcel also. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —.

DRAINS AND SEWERS.

A corporation which constructs a sewer under legislative authority empowering it to rent or sell the right to use it may be compelled to permit anyone to connect with it who wishes to do so upon payment of a fee which the court approves as reasonable. *Pulaski Heights Sewerage Co. v. Loughborough*, 29: 319, 129 S. W. 536, — Ark. —.

DREDGE.

Situs of sea-going stream dredge for purpose of taxation, see Taxes, 2.

DRUGS AND DRUGGISTS.

Sufficiency of evidence to show negligence of, see Evidence, 47.

The ordinary care which a druggist is bound to exercise in the filling of prescriptions is the highest possible degree of prudence, thoughtfulness, and diligence, and the employment of the most exact and reliable safeguards consistent with the reasonable conduct of the business, in order that human life may not be exposed to the danger following from the substitution of deadly poisons for harmless medicines. *Tremblay v. Kimball*, 29: 900, 77 Atl. 405, — Me. —. (Annotated)

DRUMMERS.

Interstate business by, see Commerce, 8.

DUE PROCESS OF LAW.

See Constitutional Law, 1, 6.

DWELLING.

Homicide in defense of, see Homicide, 1.

DYING DECLARATIONS.

Admissibility of, see Evidence, 34.

EIGHT-HOUR LAW.

Validity of, see Commerce, 3, 4; Constitutional Law, 10; Evidence, 2.

EJECTION.

Of passenger from station, see Carriers, 9, 10.

ELECTION OF REMEDIES.

The trustee in bankruptcy does not, by obtaining a judgment against the bankrupt for the proceeds of a transfer in fraud of creditors, make an election which prevents him from suing in equity to set aside such transfer. *Thomas v. Sugarman*, 29: 250, 30 Sup. Ct. Rep. 650, 218 U. S. 129, 54 L. ed. 967.
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ELECTION.

Construction of statute as to assistance to illiterate voter, see Statutes, 6.

A ballot which has been prepared by the elector with the voluntarily permitted assistance of any other than the authorized or acting poll clerks is exposed, within the meaning of a statute providing for the exclusion of an intentionally exposed ballot, except when prepared by the poll clerks as provided by a statute declaring that any elector who declares that, because of physical disability or inability to read the English language, he is unable to mark his ballot, may declare his choice of candidates to the poll clerks, who, in the presence of the elector, shall prepare the ballot. *Board v. Dill*, 29: 1170, 110 Pac. 1107, — Okla. —.

ELEVATORS.

Master's duty to instruct boy as to dangers of, see Master and Servant, 5.

Contributory negligence of employee, see Master and Servant, 13.

EMBEZZLEMENT.

Error in instructions, see Appeal and Error, 34.

From two corporations by officer common to both, see Corporations, 4.

By trustee, liability of estate for, see Trusts, 6-12.

1. Partnership funds cannot be embezzled by a member of the partnership, unless expressly so provided by statute. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

2. A husband may embezzle the separate funds of his wife, under a statute providing that any servant, clerk, agent, mandatory, depository, bailee, etc., who shall wrongfully use, dispose of, or conceal any property which he shall receive for another, or which shall have been intrusted to his care or possession by another, shall be guilty of embezzlement. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

(Annotated)

3. In a jurisdiction where one cannot be both the husband and a partner in business of the same woman, one accused of embezzlement cannot defend on the ground that he is both the partner in business and the husband of the prosecutrix, since such defenses are conflicting. *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

EMINENT DOMAIN.

What may be taken.

1. The necessary authority to condemn a right of way for a telephone line along a railroad right of way is conferred by a statute permitting such construction upon or along a railroad. *Canadian P. R. Co. v. Moosehead Teleph. Co.* 29: 703, 76 Atl. 885, — Me. —.

Compensation.

2. A levee district is not liable even

under a Constitution which provides that private property shall not be damaged for public use without compensation, for running a levee across sloughs, swales, and other low places which help to absorb the flood waters of a river, and leaving certain riparian lands between the levee and the river, the effect of which is to raise the height of the flood water over such land to its injury. *McCoy v. Board of Directors*, 29: 396, 129 S. W. 1007, — Ark. —.

3. The constitutionality of a statute permitting the railroad commission to authorize the construction of a telephone line along a railroad right of way, which makes no provision for compensation, is not saved by a section permitting the telephone company to condemn a right of way, where it invokes the assistance of the commission and makes no attempt to condemn the right. *Canadian P. R. Co. v. Moosehead Teleph. Co.* 29: 703, 76 Atl. 885, — Me. —.

4. The legislature cannot authorize a telephone company to construct its line along a railroad right of way, unless it makes provision for just compensation to the railroad company. *Canadian P. R. Co. v. Moosehead Teleph. Co.* 29: 703, 76 Atl. 885, — Me. —. (Annotated)

ENCUMBRANCES.

What fund chargeable with costs of sale when encumbered property is sold in bankruptcy free of liens, see Bankruptcy.

On insured property, see Insurance, 2, 3.

Right of life tenant who satisfies encumbrance upon estate, see Life Tenants.

ENTICING.

Of servant, see Master and Servant, 1; Parties, 4; Pleading, 8.

ENTRY.

On mining claim which is excessive through mistake, see Mines.

EQUALITY.

Of immunities, privileges, and protection, see Constitutional Law, 3-5.

EQUAL PROTECTION AND PRIVILEGES.

See Constitutional Law.

EQUITY.

See also Cloud on Title; Reformation of Instruments.

1. The rule in equity that contracts in restraint of trade are merely unenforceable does not require that the parties so contracting be deemed to be immune from ordinary equitable remedies, when their violation of public policy is directed at, and actually works, a public injury. *State ex rel. McCarter v. Firemen's Ins. Co.* (N. J. Err. & App.) 29: 1194, 73 Atl. 80, 74 N. J. Eq. 372.

2. Equity has jurisdiction of a suit to 29 L.R.A. (N.S.)

reach the proceeds of property which a thief has turned into cash, since he holds them in trust for the true owner. *Lightfoot v. Davis*, 29: 119, 91 N. E. 582, 198 N. Y. 261.

ESTOPPEL.

To appeal from decree, see Appeal and Error, 4-6.

Of infant by act of guardian, see Guardian and Ward.

By judgment as against one not party, see Judgment, 5.

Of obligors on replevin bond, see Replevin, 2.

1. The owner of a certificate of indebtedness of a corporation, which was issued by its receivers and is transferable on the books of the company, having a blank for assignment on its back, who indorses it in blank and delivers it to his brokers for sale, is bound by their act in transferring it to a bona fide purchaser for value, although the major portion of the purchase price is represented by cancellation of their indebtedness to him. *McCarthy v. Crawford*, 29: 252, 86 N. E. 750, 238 Ill. 38.

(Annotated)

2. Heirs of a life tenant who are given a remainder in the property are not estopped from recovering the property from grantees of the life tenant, by permitting them to take possession and make valuable improvements on the property, and by failing to bring an action to assert their rights until the death of the life tenant, where they had no interest in the property which would entitle them to bring such action until the death of the life tenant. *Westcott v. Meeker*, 29: 947, 122 N. W. 964, — Iowa, —.

3. A tenant may, after termination of the lease, defend against an action by the landlord to recover possession and establish title, by showing a superior title in himself, without surrendering possession, where the success of the landlord would destroy the title of the tenant. *Stevenson v. Rogers*, 29: 85, 125 S. W. 1, — Tex. —.

(Annotated)

EVIDENCE.

Prejudicial error as to, see Appeal and Error.

Right of bank to testify to transactions from knowledge of course of business, see Witnesses, 2.

Judicial notice.

1. A court cannot, in a second proceeding before it for divorce, base its denial of relief upon facts proved at the first hearing, if the record of such hearing is not offered in evidence in the second cause. *Matthews v. Matthews*, 29: 905, 77 Atl. 249, 112 Md. 582.

(Annotated)

2. In support of a statute forbidding corporations which operate a certain class of railroads to keep their employees on duty more than a certain number of hours in each twenty-four, as against the charge

of discrimination in favor of individuals, the court may take judicial notice that all roads to which the act could apply must necessarily be operated by corporations. *People v. Erie R. Co.* 29: 240, 91 N. E. 849, 198 N. Y. 369.

Presumptions and burden of proof.

Presumptions on appeal, see Appeal and Error, 13.

Review of, on appeal, see Appeal and Error, 14.

Sufficiency of evidence to overcome presumption, see Trial, 7, 11.

3. The burden of proof is upon the carrier to exempt itself from liability for loss of goods consigned to it for transportation, where the defense is that the loss was caused by an act of God or some irresistible superhuman cause. *Chicago, R. I. & P. R. Co. v. Logan, Snow, & Co.* 29: 663, 105 Pac. 343, 23 Okla. 707. (Annotated)

4. One seeking to distribute the estate of a former resident of a particular state, according to the laws of a foreign country in which he resides, must establish that he had acquired a domicile there in fact and in law. *Mather v. Cunningham*, 29: 761, 74 Atl. 809, 105 Me. 326.

5. A wife seeking to establish her community rights against one who purchased from her husband's grantee, who was a purchaser for value of a clear record title, has the burden of showing that defendants had notice of her equity. *Daly v. Rizzutto*, 29: 467, 109 Pac. 276, — Wash. —.

6. When an infant employee under fourteen years of age relies, in an action to recover damages for personal injuries sustained in the course of his employment, upon insufficient mental capacity to comprehend the dangers thereof, the burden of proving his capacity is upon the defendant. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

7. An infant employee fourteen years of age or over is presumed to possess sufficient mental capacity to comprehend and avoid the dangers of his employment. *Ewing v. Lanark Fuel Co.* 25: 487, 65 S. E. 200, 65 W. Va. 726. (Annotated)

8. An infant employee under fourteen years of age is not presumed to possess sufficient mental capacity to comprehend and avoid the dangers of his employment. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

9. An infant employee fourteen years of age or over, who, in an action to recover damages for personal injuries sustained in the course of his employment, relies upon insufficient mental capacity to comprehend and avoid the dangers thereof, has the burden of proof as to such issue. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726. (Annotated)

10. Failure of one sued for libel in charging a candidate for office and unfitness therefor because of facts stated, to establish a plea of truth as a defense, cannot be taken into consideration by the jury in estimating damages, as tending to show malice. *Schull v. Hopkins*, 29: 691, 127 N. W. 550, — S. D. —.

11. An intent to sell the liquor unlawfully is presumed when 120 quart bottles of whisky are consigned to one address in prohibition territory. *State v. Intoxicating Liquors*, 29: 745, 76 Atl. 265, — Me. —.

12. The purchaser of a note secured from the maker by fraud has the burden of showing his good faith in the transaction. *Arnd v. Aylesworth*, 29: 638, 123 N. W. 1000, — Iowa, —.

13. The transfer of a note in violation of an agreement that it will be returned if the property for which it was given did not give satisfaction is a fraud, which casts upon the transferee the burden of showing that he took the note in good faith, which includes proof that he paid full value for it. *Pierson v. Huntington*, 29: 695, 74 Atl. 88, 82 Vt. 482.

14. In the absence of proof to the contrary, it will be presumed that the cause of an explosion in a portion of a building originated where the explosion occurred, and one contending that it originated elsewhere has the burden of establishing that fact. *Kearner v. Charles S. Tanner Co.* 29: 537, 76 Atl. 833, — R. I. —.

15. Negligence on the part of a railroad company is presumed from the fact that a passenger coach was derailed, overturned, and dragged on its side, to the injury of a passenger. *Southern P. Co. v. Hogan*, 29: 813, 108 Pac. 240, — Ariz. —.

(Annotated)

16. The burden of showing negligence in an action to recover damages for the alleged negligent killing of a passenger upon a vestibule train, who was found in a mangled condition beside the track some 200 or 300 feet east of the station of his destination immediately after the departure of the train therefrom to the westward, is upon the plaintiff, since no presumption of negligence upon the part of the railroad employees arises from the bare fact that a passenger is found dead beside the track after having disappeared from a vestibule passenger train. *Brown v. Union P. R. Co.* 29: 808, 106 Pac. 1001, 81 Kan. 701.

(Annotated)

17. Proof of delivery of a shipment of goods to a carrier in good condition, and of delivery by it to the consignee in a damaged state, establishes the prima facie liability of the carrier for the damage to the shipment. *Armstrong v. Illinois C. R. Co.* 29: 671, 109 Pac. 216, — Okla. —.

18. Proof by a carrier which has received a shipment of goods in good condition, and delivered them to the consignee in a damaged state, that the damage was due entirely to a flood which amounted to an act of God, overcomes the prima facie case against it arising from the acceptance of the goods in good condition, and their delivery in a damaged condition, and shifts

the burden of proof to the shipper to show, in order to recover, that negligence on the part of the carrier co-operated with the act of God in bringing about the damage to the shipment. *Armstrong v. Illinois C. R. Co.* 29: 671, 109 Pac. 216, — Okla. —.

19. The doctrine of *res ipsa loquitur* obtains in case of an explosion in a starch factory, throwing the walls outward upon a person passing upon the adjoining highway, placing upon the owner of the factory the burden of explaining the cause of the explosion and showing that it was not caused by his negligence. *Kearner v. Charles S. Tanner Co.* 29: 537, 76 Atl. 833, — R. I. —.

20. The lessee under a written lease for one year who, by holding over, becomes a tenant for another year, must, when sued for the rent, in order to avail himself of the alleged right to terminate his tenancy at any time, under conditions expressed in the lease, allege and prove the existence of the conditions. *Kuhlman v. Wm. J. Lemp Brew. Co.* 29: 174, 126 N. W. 1083, — Neb. —.

21. A telegraph company which has maintained poles on a public highway for more than sixty years is presumed to have acquired the right to do so from the abutting owner. *Western U. Teleg. Co. v. Polhemus*, 29: 465, 178 Fed. 904, — C. C. A. —.

22. A foster child cannot recover compensation from the estate of her deceased foster father for services rendered him during his last illness, in the absence of an express promise to pay therefor, or the presence of such circumstances as will be equivalent to such a promise, since there is a presumption that such services were gratuitous. *Re Daste*, 29: 297, 51 So. 677, 125 La. 657.

Best and secondary.

23. Testimony as to evidence given in an examination before court cannot be excluded on the theory that it is not the best evidence of what was so given, although the evidence was taken down in shorthand. *Mollison v. Rittgers*, 29: 1179, 118 N. W. 512, 140 Iowa, 365.

Documentary evidence.

24. Upon the question of larceny by a shipper of freight of material loaded in the car, a shipping receipt is not admissible upon which a notation was made of facts tending to show a larceny after the shipper had been charged therewith. *State v. Rozeboom*, 29: 37, 124 N. W. 783, — Iowa, —.

25. In an action on a fraternal benefit certificate, proofs of death furnished by the beneficiary are admissible in evidence when offered by the insurer. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

Demonstrative evidence.

26. In an action to recover damages for injuries to the plaintiff's leg, necessitating its amputation, exhibition of the naked remnant is permissible. *Ewing v. Lanark* 29 L.R.A. (N.S.)

Fuel Co. 29:487, 65 S. E. 200, 65 W. Va. 726.

Parol.

Prejudicial error as to, see Appeal and Error, 27.

27. The execution of a power of attorney by one who has placed securities in another's hands, several years after it was done, which does not purport to embody the original agreement as to their disposition, will not exclude oral evidence of what the original agreement was, on the theory that it tends to vary the terms of a written instrument. *Mollison v. Rittgers*, 29: 1179, 118 N. W. 512, 140 Iowa, 365.

Opinions and conclusions.

Presumption that jury was impressed with truth of opinion of witness upon which hypothetical questions were founded, see Appeal and Error, 13.

28. Hypothetical questions to expert witnesses cannot be predicated upon the opinion of witnesses as to the possible cause of an explosion in a starch factory. *Kearner v. Charles S. Tanner Co.* 29: 537, 76 Atl. 833, — R. I. —. (Annotated)

29. Witnesses may express their opinions as to whether or not one making an assignment of an insurance policy was capable of transacting business at and prior to the time when the assignment was made. *Searles v. Northwestern Mut. L. Ins. Co.* 29:405, 126 N. W. 801, — Iowa, —.

30. One suing on a note which had been procured from the maker by fraud cannot be permitted to testify that he purchased the note in good faith and for value, since that is the question which the jury must decide. *Arnd v. Aylesworth*, 29: 638, 123 N. W. 1000, — Iowa, —.

Admissions.

31. The original petition in an action upon a promissory note, which sets out the chain of title from the maker to plaintiff, is admissible in evidence after an amendment inserting a link in the chain immediately before plaintiff, where the admission contained in it is inconsistent with testimony at the trial as to the facts of plaintiff's purchase. *Arnd v. Aylesworth*, 29: 638, 123 N. W. 1000, — Iowa, —.

Hearsay; declarations; *res gestæ*.

Waiver of objection as to, see Appeal, and Error, 18.

Who are interested persons not competent to testify, see Witnesses, 4.

32. An exclamation by a bystander, not in the hearing of those in charge of an electric car, as to an impending collision between the car and a child on the track, is not admissible as *res gestæ* in an action for injury to the child. *Shadowski v. Pittsburgh R. Co.* 29: 302, 75 Atl. 730, 226 Pa. 537.

33. Testimony of children of a property owner present when securities were placed in the hands of one of them to be distributed among the children, who did not participate in the conversation, is not within

the operation of a statute forbidding evidence of transactions with persons since deceased. *Mollison v. Rittgers*, 29: 1179, 118 N. W. 512, 140 Iowa, 365.

34. Declarations by one in *articulo mortis* who believes that he is mortally wounded are admissible in evidence. *State v. Dyer*, 29: 459, 124 N. W. 629, — Iowa, —. **Relevancy and materiality.**

First objecting to, on appeal, see Appeal and Error, 16.

Waiver of objection as to, see Appeal and Error, 18.

Prejudicial error in admitting or excluding, see Appeal and Error, 25-32.

35. Evidence that a father told the mine boss, who was also the employing agent of a coal mine operator, to keep his son, who was employed about the mine, out of it, is admissible in an action by such son to recover damages for personal injuries sustained while working in the mine at the direction of the boss, for the purpose of showing that the defendant was put on inquiry as to the boy's capacity to perform the work inside the mine, since such evidence tends to show that the father thought such work dangerous for one of his son's capacity. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

36. In an action by a bank on a note purchased by it from one who is alleged to have obtained it by fraud for property which he was to deliver, but did not, evidence is not admissible as to his lack of possession of the property, where the bank is shown to be a bona fide holder. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1.

37. Evidence of the difference between the value of real property both before and after the flooding thereof by surface water, caused by a street improvement, is inadmissible in an action against a city to recover temporary damages therefor. *McHenry v. Parkersburg*, 29: 860, 66 S. E. 760, 66 W. Va. 533.

38. In an action by a minor son to recover damages for permanent personal injuries sustained while working in a coal mine, because of the alleged negligence of defendant in employing him without proper warning and instruction, to perform a duty the dangers of which he was incapable of comprehending, evidence that work on the outside of the mine on which the father was willing that his son should be employed was more hazardous than that which the son was performing at the time of his injury is not admissible as tending to prove either the capacity of the plaintiff to perform the inside work or the extent of the dangers of such work, at least where it does not appear that the father knew that the outside work was more dangerous. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

39. In a prosecution of one found committing theft in a house into which he had broken, evidence is not admissible of other 29 L.R.A. (N.S.)

burglaries committed in the neighborhood the same night. *Clark v. State*, 29: 323, 128 S. W. 131, — Tex. Crim. Rep. —.

40. Where by statute each act of sexual intercourse between a father and a daughter is a separate offense, evidence of prior or subsequent acts is not admissible in support of an indictment charging one specific act. *Pridmore v. State*, 29: 858, 129 S. W. 1112, — Tex. Crim. Rep. —.

41. In an action to recover for services rendered after obtaining majority, but while remaining in the household of a family not of kin, into which plaintiff had been received during infancy, evidence relating to the character and extent of the services, the declarations and conduct of the recipient, the value of the services, and corresponding benefits to the recipient, is admissible upon the question whether the services were rendered gratuitously or under an implied promise of compensation. *Howard v. Randolph*, 29: 294, 68 S. E. 586, 134 Ga. 691.

42. Forfeiting the bond and fleeing from the county after arrest for seduction may be considered, in corroboration of the testimony of the victim, to support a conviction. *Thorp v. State*, 29: 421, 129 S. W. 607, — Tex. Crim. Rep. —.

43. One resisting payment of a note on the ground of fraud may be asked if, when he suspected fraud, he took any steps to recover possession of the note, as bearing upon the consistency of his conduct with his statement that he suspected fraud. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1.

Weight and sufficiency.

Review of facts on appeal, see Appeal and Error, 19-22.

Sufficiency to go to jury, see Trial, 3-5.

Weight of evidence to overcome presumption as question for jury, see Trial, 7, 11.

Credibility of witness, see Witnesses, 6, 7.

44. A finding that property of a corporation organized to brew and sell beer was conveyed to the secretary of the corporation to evade responsibility for previous infractions of the laws of the state where the property was located is supported by proof that the secretary advised the sale to avoid "trouble and complications," that the property was used for the sale of the corporation's beer after the conveyance precisely as it had been used before, that the corporation furnished bar fixtures for such property, both before and after the conveyance, upon which it paid taxes, and that the property was looked after and the rents collected by the same agent, the only difference being that he accounted therefor to the secretary instead of to the corporation. *State ex rel. Jackson v. Wm. J. Lemp Brew. Co.* 29: 44, 102 Pac. 504, 79 Kan. 705.

45. Probable cause for charging a candidate for re-election to the office of state's attorney with unfitness for office because of unwillingness to prosecute gamblers exists

where he was seen about gambling places, did not act upon complaints against gamblers, and locked his doors against a committee seeking to interview him upon the subject. *Schull v. Hopkins*, 29: 691, 127 S. W. 550, — S. D. —.

46. The mere expression in a communication to voters of a desire to defeat a certain candidate for office is not sufficient to show a malicious motive for the publication, so as to render the publisher answerable for libel in case there are false statements in the publication, tending to injure the candidate, where there was probable cause for the statements. *Schull v. Hopkins*, 29: 691, 127 N. W. 550, — S. D. —.

47. A druggist may be found to have been wanting in the exercise of due care in filling a prescription from an opened bottle of tablets bearing the manufacturer's label, where two similar bottles containing tablets stand side by side, but the tablets in the two are strikingly different in appearance, and those from which he fills the prescription have an extraordinary, if not unprecedented, color for that kind of tablets. *Tremblay v. Kimball*, 29: 900, 77 Atl. 405, — Me. —.

48. Negligence upon the part of a carrier contributing to the injury to goods damaged by a flood amounting to an act of God, sufficient to render the carrier liable for such damage, is not shown by proof that it received the car containing the goods, which were in good condition, on a certain day, in the regular course of business, and that the car was tendered to the connecting carrier upon the following day, when it was not accepted because of the inability of such carrier to handle it. *Armstrong v. Illinois C. R. Co.* 29: 671, 109 Pac. 216, — Okla. —.

49. A change of domicile as matter of fact may be established by evidence that one left the state of his birth at an early age and returned only once to visit his parents, and finding that they had left the state again departed, leaving neither property nor relatives there, while for nearly forty years his residence and place of business were at a certain place in a foreign country. *Mather v. Cunningham*, 29: 761, 74 Atl. 809, 105 Me. 326.

50. A finding of employment by a principal in an action against him to recover on an alleged contract of employment is unwarranted, where the evidence shows that plaintiff was hired by an unauthorized agent, that the defendant at all times protested against the performing of the work, and repeatedly notified plaintiff of that fact, and inquired as to who employed him, and at no time recognized the acts of the alleged agent in employing plaintiff. *Findlay v. Hildenbrand*, 29: 400, 105 Pac. 790, 17 Idaho, 403.

51. That a man, in negotiating for a loan, is acting for his wife as undisclosed principal, is not shown by evidence that she was carrying on a farm in her own name 20 L.R.A. (N.S.)

and that all the marketing, buying, and selling was done by him for her. *Shields v. Coyne*, 29: 472, 127 N. W. 63, — Iowa, —.

52. Parol proof of a promise by a foster father to compensate his foster daughter for services rendered him during his last illness, or circumstances from which such a promise can be implied, without at least some corroboration, is insufficient to bind the estate of the deceased parent. *Re Daste*, 29: 297, 51 So. 677, 125 La. 657.

53. In a quo warranto proceeding to oust a foreign corporation authorized by its charter to brew and sell beer from exercising its corporate franchise in a state, on the ground that it has not complied with the statutory requirements concerning foreign corporations, and is engaged in the unlawful sale of intoxicating liquor, evidence that it has not received permission from the state charter board to do business therein, that it conveyed its real estate to its secretary to avoid "trouble and complications," which, both before and after such transaction, was used to promote the unlawful sale of the corporation's beer, that it furnished bar fixtures necessary for such unlawful use, upon which it paid taxes, and that it employed salesmen to solicit and receive orders within the state, which were filled by shipping the liquor f. o. b. to the various purchasers, the liquor, however, being received by a drayman employed and paid by the corporation, who stored it in a warehouse rented by the corporation, and in which it had an internal revenue stamp posted, from which place the beer was taken by the purchasers, or delivered by the drayman, sufficiently supports a finding of fact that the corporation was unlawfully engaged in the liquor business within the state, warranting a judgment of ouster. *State ex rel. Jackson v. Wm. J. Lemp Brew. Co.* 29: 44, 102 Pac. 504, 79 Kan. 705.

54. To sustain a conviction under a statute forbidding the owner, keeper, or manager, whether in whole or in part, of a dance house, to permit any person under twenty-one years of age to be or remain therein, it is not necessary that a part owner who personally assisted in conducting a public dance hall should have been present at the dance on the night alleged in a complaint for permitting a minor to remain therein in violation of the statute, where it appears that such part proprietor had frequently been in charge when the minor named in the complaint had been present. *State v. Rosenfield*, 29: 331, 126 N. W. 1068, — Minn. —.

55. The court cannot permit a jury to convict on the testimony of an accomplice which merely tends to show the guilt of accused. *Thorp v. State*, 29: 421, 129 S. W. 607, — Tex. Crim. Rep. —.

56. A conviction of unlawfully performing a marriage ceremony where the female was under the age of fifteen years cannot be sustained where the only evidence as to the age of the female was a statement read

by a witness from a written memorandum, the use of which was not lawfully permissible because the correctness thereof when made had not been first established. *Territory v. Harwood*, 29: 504, 110 Pac. 556, — N. M. —.

Admissibility under particular pleadings.

57. Evidence of the promise of the master to remedy a defect in an instrumentality is admissible in evidence for the servant, under a declaration averring that the master set the servant to work with an instrumentality that he had negligently permitted to become defective and to so remain, without proper repair and inspection, although no averment of such promise is contained in the declaration, as the action is based upon the negligence of the defendant, and not upon the nonperformance of the promise. *Comer v. Meyer* (N. J. Err. & App.) 29: 597, 74 Atl. 497, — N. J. —.

Variance.

58. That a note sued on is alleged to have been delivered to the holder by the first indorser, while the evidence shows that the indorsement was in blank, and the note was actually delivered to plaintiff by one who received it after the indorsement, does not constitute a fatal variance. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1.

EXAMINATION.

Of witness, see Witnesses, 5.

EXECUTION.

Sale under, see Judicial Sale.

Reformation of sheriff's deed, see Reformation of Instruments.

EXECUTORS AND ADMINISTRATORS.

Right of administrator to recover accrued amount of annuities in case of death between two quarterly periods, see Annuities.

Liability of estate to pay for services by adopted child of deceased, see Contracts, 2.

Presumption in suit against estate by foster child for services, see Evidence, 22.

Grant of letters of administration upon estate as starting statute of limitations, see Limitation of Actions, 5.

Enforcement of purchaser's bid at administrator's sale, see Judicial Sale, 3.

Rescission of purchase at administrator's sale, see Vendor and Purchaser, 1.

1. An executor who is empowered by the will to do anything concerning testator's estate which he himself would do if living, leaving it to his judgment how he shall manage "my business," has power, where testator's business is the management of a corporation of which he is practically the

sole stockholder, to borrow money, if necessary, to carry on the business, and bind the entire estate for its repayment. *Schlickman v. Citizens' Nat. Bank*, 29: 264, 129 S. W. 823, — Ky. —.

2. Authority conferred upon an executor to carry on testator's business without bond will not, upon his resignation, pass to an administrator *de bonis non* with the will annexed. *Schlickman v. Citizens' Nat. Bank*, 29: 264, 129 S. W. 823, — Ky. —.

3. The power conferred upon an executor to carry on testator's business does not pass to an administrator *de bonis non* because of a clause to the effect that the devise to testator's children is subject to the power conferred on the executor, and shall in no case be construed as a limitation upon his power to carry on the business. *Schlickman v. Citizens' Nat. Bank*, 29: 264, 129 S. W. 823, — Ky. —.

4. A statute providing that an administrator with the will annexed shall exercise all the powers and authority, and possess the same rights and interest, as the executors named therein, does not confer upon such administrator a power conferred by the will upon the executor, to carry on testator's business without bond. *Schlickman v. Citizens' Nat. Bank*, 29: 264, 129 S. W. 823, — Ky. —. (Annotated.)

5. Failure of the trustee to pay an assessment for benefits to the trust property by a public improvement, as required by statute, will render his estate liable therefor, although the trust ends at his death, so that there is no trust estate from which his estate can be reimbursed for the amount paid. *Bangor v. Peirce*, 29: 770, 76 Atl. 945, — Me. —.

EXECUTORY TRUST.

See Trusts, 1.

EXEMPLARY DAMAGES.

See Damages, 1, 6.

EXHIBITION.

Of person to jury, see Evidence, 28.

EXPENDITURES.

See Estoppel, 2.

EXPERT TESTIMONY.

In general, see Evidence, 28.

EXPLOSIONS AND EXPLOSIVES.

Presumption as to cause of explosion, see Evidence, 14.

Presumption and burden of proof as to negligence, see Evidence, 19.

Hypothetical questions as to cause of, see Evidence, 28.

EX POST FACTO LAW.

See Constitutional Law, 1.

FACTS.

Review of, on appeal, see Appeal and Error, 19-22.

FEDERAL QUESTION.

As basis of jurisdiction on appeal, see Appeal and Error, 1.

FENCES.

Reasonableness of ordinances as to railroad fence, see Municipal Corporations, 3.

Injury to animals by failure of railroad to fence, see Railroads, 1.

FIDUCIARY RELATIONS.

Of agent, see Principal and Agent, 4, 5.

FINDINGS.

Review of, on appeal, see Appeal and Error, 22.

FINES.

For violation of liquor law, see Appeal and Error, 2.

FITNESS.

Warranty of, see Sale, 3.

FLAGMAN.

Reliance on, at railroad crossing, see Railroads, 3.

FLIGHT.

Evidence of flight of accused, see Evidence, 42.

FLOOD.

Duty of carrier with respect to goods caught in, see Carriers, 15.

FOLLOWING TRUST PROPERTY.

See Trusts, 10-12.

FOOD.

Constitutionality of ordinance authorizing summary destruction of milk, see Constitutional Law, 6, 9.

Review by courts of ordinance as to, see Courts, 1.

FORCIBLE ENTRY AND DETAINER.

Direction of verdict, see Trial, 21.

FORECLOSURE.

Of mortgage, generally, see Mortgage, 3-7.

Of vendors' lien, see Vendor and Purchaser, 1.

FOREIGN CORPORATIONS.

See Corporations, 7, 8.

FORFEITURE.

Of license for sale of liquors, see Appeal and Error, 2.

Waiver of forfeiture of insurance policy, see Insurance, 8, 9.

Of timber by nonremoval within time limited, see Timber, 2.

FORGERY.

Effect of indorsement as warranting drawer's signature, see Bills and Notes, 2.

Recovery by drawee of forged draft, see Bills and Notes, 11.

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FRANCHISE.

Sufficiency of ordinance granting light-franchise to convey right to use streets, see Municipal Corporations, 2.

Right of owner of franchise for public benefit which is not exclusive to injunction against its invasion without right, see Nuisance, 2.

FRAUD AND DECEIT.

As defense to note in hands of transferee, see Bills and Notes, 4-8.

Presumption and burden of proof where note is purchased by fraud, see Evidence, 12, 13.

Admissibility of evidence on question of, see Evidence, 36, 43.

Effect of, on running of limitations, see Limitation of Actions, 3.

Effect of agent's fraud on rule as to imputing his knowledge to principal, see Notice, 5, 6.

In obtaining release, see Release.

In sale of animals, see Sale, 6.

Sufficiency of evidence to take question to jury, see Trial, 3.

As question for jury, see Trial, 8.

Liability of trust estate for fraud of trustee, see Trusts, 6-12.

Transfers in fraud of creditors, see Fraudulent Conveyances.

One who lends money to an insane person with which to purchase real estate cannot, where both he and the vendor act independently and without knowledge of the insanity, compel the vendor to return the money to him on the ground of fraud. *Murphree v. Clisby*, 29: 933, 52 So. 907, — Ala. —.

FRAUDULENT CONVEYANCES.

1. The fact that members of an insolvent partnership contribute the insurance money received for a destruction of its assets by fire, to the organization of a corporation, to continue its business, taking stock in such corporation in return, does not necessarily imply a fraudulent intent on their part to hinder and delay the creditors of the partnership. *Byrne Hammer Dry Goods Co. v. Willis-Dunn Co.* 29: 589, 121 N. W. 620, 23 S. D. 221.

2. The issuance, by a corporation organized to continue the business of an insolvent partnership, of its stock to the members of the partnership, who contributed cash received from insurance on the partnership property, is a sufficient consideration for the money so contributed, so that it is not liable to account for such money to the creditors of the partnership. *Byrne Hammer Dry Goods Co. v. Willis-Dunn Co.* 29: 589, 121 N. W. 620, 23 S. D. 221.

3. A statute making transfers of personal property without immediate change of possession void as against creditors has no application to a transfer of corporate stock not entered on the books of the corporation, but the certificates of which were

delivered to the transferee. *State Banking & T. Co. v. Taylor*, 29: 523, 127 N. W. 590, — S. D. —.

FREEDOM OF WORSHIP.

See Constitutional Law, 11.

FREIGHT CARRIERS.

See Carriers.

FRIGHT.

Recovery for death from fright caused by blasting, see Death, 2.

Effect of fright of animal on right to recover for injuries thereto from obstruction in highway, see Highways, 6, 8.

GAMING.

As to lottery, see Lottery.

GARNISHMENT.

Exempting wages of railroad employees from garnishment, see Constitutional Law, 4, 5.

Attachment of foreign railroad cars, see Action or Suit; Attachment, 2, 3; Commerce, 2.

GIFT.

Of public money, see Public Moneys.

1. A gift is established by the depositing in bank, through another, of money in the names of the minor children of the donor, the taking of certificates of deposit in their names, and the retention of such certificates by the one actually making the deposit as guardian for the donees, where the bank knew that the children were infants, and accepted the money as belonging to them. *McMahon v. German-American Nat. Bank*, 29: 67, 127 N. W. 7, — Minn. —.

2. To make a complete gift of personal property *inter vivos*, there must be a delivery of the property from the donor to the donee, or to some person for him. *Dewey v. Barnhouse*, 29: 166, 109 Pac. 1081, — Kan. —.

3. Where a donor decides to give to another a certificate of shares in a building and loan association, and to make the payments thereon for the donee until maturity, and then causes such certificate to be issued in the name of the donee, retaining possession thereof himself, and makes the subsequent payments thereon in the name of the donee, but at all times regards the certificate as the property of the donee, and his possession as holding in trust for such donee, the delivery to himself as trustee of the donee will be held sufficient to complete the gift. *Dewey v. Barnhouse*, 29: 166, 109 Pac. 1081, — Kan. —.

(Annotated)

GOOD FAITH.

Burden of establishing, see Evidence, 12, 13.

Evidence to show, see Evidence, 30.

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GRAVEL PIT.

Right to dower in, see Damages, 5, Dower, 1.

GUARDIAN AND WARD.

Right of guardian *ad litem* to appeal case to court of last resort, see Appeal and Error, 3.

Liability of bank for cashing certificate of deposit payable to guardian to one not in fact guardian see Banks, 4, 5.

Guardian of incompetent person, see Incompetent Persons.

An infant's guardian, by giving a receipt for money not received by him, but purporting to have been received in satisfaction of the ward's interest in his ancestor's homestead, in proceedings prosecuted under an unconstitutional statute providing that the surviving spouse may elect to retain a homestead worth more than \$1,000 after deducting encumbrances, by payment to the heirs of the proportionate share descending to them, will not estop the ward from subsequently asserting his estate in the homestead. *Draper v. Clayton*, 29: 153, 127 N. W. 369, — Neb. —.

HARMLESS ERROR.

See Appeal and Error, 23-32.

HAWKERS.

See Peddlers.

HEALTH.

Review by courts of health ordinance, see Courts, 1.

Of insured, warranties or representations as to, see Insurance, 4-6.

HEARSAY.

Evidence of, see Evidence, 32-34.

HIGHWAYS.

Negligence in use of automobile on, see Automobiles, 1.

Sufficiency of ordinance to carry grant of right to use for electric light poles and wires, see Municipal Corporations, 2.

Liability of city for injury to employee working on, see Municipal Corporations, 6.

Uses; what allowed in, generally.

Who may enjoin use of streets by electric light and power company, see Nuisance, 2.

Presumption of consent of abutting owner to use of highway by telegraph company, see Evidence, 21.

Presumption of rights in highway from lapse of time, see Evidence, 21.

1. A telegraph company which has a right, as against the abutting owner, to maintain a line of poles along the highway in front of his property, has included therein the right to set additional poles where necessary to strengthen the line because of the weight of additional wires. *Western*

U. Teleg. Co. v. Polhemus, 29: 465, 178 Fed. 904. — C. C. A. —.

Obstruction.

2. The entire width of a highway as laid out is subject to the public easement of passage, and, if a less width is graded and worked for travel, or if a bridge or culvert does not extend to the entire width, the public rights of passage are not thereby limited in favor of one who places an unauthorized or improper structure within the highway limits. *Opdycke v. Public Service R. Co.* (N. J. Err. & App.) 29: 71, 76 Atl. 1032, — N. J. —.

3. One who places an unauthorized obstruction within the limits of the highway as laid out is liable to an action at the suit of any person who is specially damnified thereby, and this although the obstruction is outside the traveled way. *Opdycke v. Public Service R. Co.* (N. J. Err. & App.) 29: 71, 76 Atl. 1032, — N. J. —.

Improvements; repairs.

Measure of damages for injuries caused by grading and sewerage of streets, see Damages, 8.

Evidence on question of damages by street improvement, see Evidence, 37.

Liability of municipality for obstructing surface waters in grading street, see Municipal Corporations, 7.

Setting aside verdict against city for injury caused by, see New Trial.

4. A municipal corporation is not required to exercise as high a degree of care in grading and constructing a rural way within its limits as where improving a street in the populous portions of the city, but ordinarily more care must be used upon such a way than would be required on an ordinary country road. *Neidhardt v. Minneapolis*, 29: 822, 127 N. W. 484, — Minn. —. (Annotated)

5. A municipal corporation in improving and maintaining a rural way within its limits is not required to grade or improve to the entire width of the highway. *Neidhardt v. Minneapolis*, 29: 822, 127 N. W. 484, — Minn. —.

Liability for injuries on.

Injuries by improving or repairing highway, see *supra*, 4, 5.

Proximate cause of injury, see Proximate Cause.

Negligence as question for jury, see Trial, 12.

6. A municipal corporation is not liable for the death of a horse through collision, while running away from a cause for which the municipality is not responsible, with an obstruction left standing near the curb in the highway, if ample space remained in the highway for safe travel, so that the street, with the obstruction in it, was reasonably safe for the uses of ordinary public travel. *Harrodsburg v. Abraham*, 29: 199, 127 S. W. 758, 138 Ky. 157. (Annotated)

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7. A municipal corporation is not liable for injury to a pedestrian who, in attempting to cross a street, stumbles and falls because of a piece of stone projecting 2 inches above the level of the cross walk, where the walk is constructed of two level strips of paving stone, with the intervening space filled with loose stones, and covered with dirt. *Richmond v. Schonberger*, 29: 180, 68 S. E. 284, — Va. —.

(Annotated)

8. That a horse is running beyond control when he is injured because of an unlawful and improper structure in the highway does not prevent recovery against the party maintaining the obstruction, for the injury to the horse, where the runaway was not attributable to the plaintiff's negligence. *Opdycke v. Public Service R. Co.* (N. J. Err. & App.) 29: 71, 76 Atl. 1032, — N. J. —.

9. An owner of property is not liable for injuries to a pedestrian caused by stepping on a tomato hidden by straw upon the sidewalk adjoining his premises, under an ordinance of the city in which the accident occurred, which makes it unlawful for any person to throw or leave upon the sidewalk any straw, rubbish, or other refuse, where there is no proof that such owner had violated the ordinance, or was in any way responsible for the presence of the tomato upon the sidewalk. *Riseman v. Hayden Brothers*, 29: 707, 126 N. W. 288, 86 Neb. 610. (Annotated)

10. Consent granted pursuant to statute for the construction, maintenance, and operation of a street railway along a highway does not warrant the construction and maintenance within the limits of the highway as laid out, but outside of the traveled way, of an open trestle trolley bridge that, in design and construction, is dangerous to ordinary travel, and calculated to entrap and kill horses and other animals which may reasonably be expected to attempt to pass over it. *Opdycke v. Public Service R. Co.* (N. J. Err. & App.) 29: 71, 76 Atl. 1032, — N. J. —.

Contributory negligence.

Of person injured by automobile, see Automobiles, 2.

At railway crossing, see Railroads, 2-5.

11. It is not, as between a pedestrian and a municipality which has negligently left the catch-basin at the end of a culvert unguarded, negligence *per se* to walk upon the left side of the street, nor, for the purpose of avoiding a rapidly approaching vehicle, to turn to the left, so as to preclude recovery for the injuries sustained while so doing by falling into such opening. *Neidhardt v. Minneapolis*, 29: 822, 127 N. W. 484, — Minn. —.

HOLDING OVER.

By tenant, see Landlord and Tenant.

HOMESTEAD.

Curative act as to, see Constitutional Law, 1.

Jurisdiction of county court to determine title to, see Courts, 2.

Estoppel of infant to claim rights in, by act of guardian, see Guardian and Ward.

Conclusiveness of *ex parte* order setting apart to widow homestead interest as against children, see Judgment, 5.

When action to recover interest in, is barred, see Limitation of Actions, 7.

Succession tax on, see Taxes, 7.

HOMICIDE.

Admissibility of evidence, see Evidence, 34.

Indictment for, see Indictment, Information and Complaint, 2.

Instructions in prosecution for, see Trial, 25.

Question for jury as to self-defense, see Trial, 17.

1. A roomer in a house cannot when attacked by its owner, in the building, out of his own room, take life, without retreating, on the theory that he is in his own habitation. *State v. Dyer*, 29: 459, 124 N. W. 629, — Iowa, —.

2. One cannot excuse the taking of life, on the ground of self-defense, unless it was, or reasonably appeared to be, the only means of saving his own life, or preventing great bodily injury. *State v. Dyer*, 29: 459, 124 N. W. 629, — Iowa, —.

HOSPITAL.

Cancer hospital as nuisance, see Nuisances, 1.

HOURS OF LABOR.

Statute regulating, see Commerce, 3, 4; Constitutional Law, 10; Evidence, 2.

HUSBAND AND WIFE.

Conflict of laws as to community property, see Conflict of Laws, 3, 5.

Notice to purchaser of property from one representing himself to be a single man, of wife's interest therein, see Notice, 1.

Burden of proving that purchaser from husband had notice of wife's equity, see Evidence, 5.

Presumption of antenuptial agreement, see Conflict of Laws, 5.

Defense to action for causing death of married woman, see Death, 1.

As to divorce or separation, see Divorce and Separation.

Embezzlement by husband of wife's funds, see Embezzlement, 2, 3.

Sufficiency of evidence to show that husband was acting for wife as undisclosed principal, see Evidence, 51.

Insurance on life of married woman, see Insurance, 4-6.

1. A deserted wife cannot claim com-
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munity rights in property bought and sold by her husband in another state, under the solemn assurance that he was a single man, where there is nothing on the records or in the circumstances to charge the grantees with notice of any community rights in the property. *Daly v. Rizzutto*, 29: 467, 109 Pac. 276, — Wash. —. (Annotated)

2. Under a statute permitting a married woman to maintain actions for all torts committed against her or her separate property, in the same manner as if sole, she may maintain an action for the alienation from her of the affections of her husband. *Sims v. Sims* (N. J. Err. & App.) 29: 842, 76 Atl. 1063, — N. J. —. (Annotated)

HYPOTHETICAL QUESTIONS.

Review of, on appeal, see Appeal and Error, 13, 14.

In general, see Evidence, 28.

ILLEGAL CONTRACTS.

Specific performance of, see Specific Performance.

ILLICIT RELATIONS.

Between parties to contract for services as defense to action to recover for services, see Contracts, 9.

ILLITERACY.

Assistance to illiterate voter, see Statutes, 6.

Competency of illiterate person as witness, see Witnesses, 1.

IMPLIED AGREEMENTS.

See Contracts, 1, 2.

IMPLIED WARRANTY.

On sale, see Sale, 3-5.

IMPROVEMENTS.

Estoppel by permitting, see Estoppel, 2.

Of highway, see Highways, 4, 5.

IMPUTED NOTICE.

See Notice, 3-6.

INCEST.

Evidence in prosecution for, see Evidence, 40.

INCOMPETENT PERSONS.

Right of guardian *ad litem* to appeal case to court of last resort, see Appeal and Error, 3.

Opinion evidence as to sanity, see Evidence, 29.

Mental capacity of insured assigning policy, see Insurance, 7.

Right of one lending money to, as against vendor of real estate in which money is invested, see Fraud and Deceit.

Subrogation of one lending money to insane person which is invested in real estate, see Subrogation.

1. That the bond of a guardian to whom

a license for the sale of the real estate of his insane ward has been legally issued was approved by the court clerk to whom the district judge to whom it was made had, upon presentation to him, while occupied with other matters, and without noting its nature, directed it to be taken, and not formally by such judge himself, will not render a sale made pursuant to such license void upon collateral attack under a statute providing that every guardian licensed to sell real estate shall give bond to the judge of the district court, with sufficient surety or sureties, "to be approved by such judge," at least, where the sale, which was for full value, has been confirmed and the proceeds duly accounted for by the guardian, and it appears that the utmost good faith characterized the whole transaction. *Buchanan v. Hunter*, 29: 147, 127 N. W. 166, — Neb. —.

2. Notice to an insane ward of an application by his guardian for a license to sell the ward's real estate for the purpose of paying his debts is not necessary, in the absence of statute, in order to render the sale valid, as such a sale is a proceeding *in rem*, and not adverse to the interests of the ward. *Buchanan v. Hunter*, 29: 147, 127 N. W. 166, — Neb. —.

(Annotated)

3. Notice to an insane ward of an application by his guardian for a license to sell the ward's real estate for the purpose of paying his debts is not required by Neb. Comp. Stat. 1909, chap. 23, § 49, providing that a copy of the order "shall be personally served on the next of kin of such ward and on all persons interested in the estate." *Buchanan v. Hunter*, 29: 147, 127 N. W. 166, — Neb. —.

INDEFINITENESS.

Of tax deed, see *Taxes*, 5.

INDEPENDENT CONTRACTORS.

Master's liability for acts of, see *Master and Servant*, 16.

INDICTMENT, INFORMATION, AND COMPLAINT.

1. Under a statute making it a misdemeanor to permit "any person under the age of twenty-one years to be or remain in any dance house, concert saloon, place where intoxicating liquors are sold or given away, or in any place injurious to the morals," a complaint for permitting a person under twenty-one years of age to remain in a "dance hall" need not describe the character of such hall, nor allege that it was a place injurious to the morals. *State v. Rosenfield*, 29: 331, 126 N. W. 1068, — Minn. —.

2. Murder in the first degree is charged by an indictment alleging that accused did, with intent to kill and murder, wrongfully, deliberately, and premeditatedly, and with malice aforethought, shoot a bullet from a revolver into the body of accused, and that

death resulted therefrom. *State v. Dyer*, 29: 459, 124 N. W. 629, — Iowa, —.

INDORSEMENT.

Of bill or note, see *Bills and Notes*, 1, 2.

INFANTS.

Increasing on appeal allowance for negligent killing of, see *Appeal and Error*, 39.

Liability of bank for cashing certificate of deposit payable to guardian to one not in fact guardian, see *Banks*, 4, 5.

Negligence of, in jumping from moving train, see *Carriers*, 8.

Forbidding presence of, in dance halls, see *Constitutional Law*, 3, 8; *Criminal Law*, 1; *Evidence*, 54; *Indictment, Information and Complaint*, 1; *Statutes*, 5.

Measure of damages for injury to, see *Damages*, 7.

Burden of proving capacity of, see *Evidence*, 6-9.

Admissibility of evidence to show capacity of, see *Evidence*, 38.

Evidence in action for injury to infant employee, see *Evidence*, 35.

Statute forbidding performance of marriage ceremony for, see *Evidence*, 56.

When action by, to recover interest in homestead is barred, see *Limitation of Actions*, 7.

Master's duty toward infant employee, generally, see *Master and Servant*, 2.

Master's duty to warn and instruct, see *Master and Servant*, 5, 6.

Assumption of risk by infant employee, see *Master and Servant*, 11, 12.

Contributory negligence of infant employee, see *Master and Servant*, 13.

Liability of owner of bus for injury to boy invited by driver to ride free of charge, see *Master and Servant*, 15.

Negligence towards, generally, see *Negligence*, 1, 2.

Contributory negligence of, see *Negligence*, 3.

Declarations in action for injury to infant employee, see *Pleading*, 7.

Question for jury as to capacity of, see *Trial*, 7, 13.

INFORMATION.

For criminal offense, see *Indictment, Information, and Complaint*.

INHERITANCE TAX.

See *Taxes*.

INJUNCTION.

Against contract in restraint of trade, see *Contracts*, 8.

Anticipated or threatened injury.

1. If a corporation engaged in a pub-

lic business contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy and *ultra vires*, performance thereof by the corporation may be restrained in equity at the suit of the attorney general, without regard to whether or not actual injury has resulted to the public. *State ex rel. McCarter v. Firemen's Ins. Co.* (N. J. Err. & App.) 29: 1194, 73 Atl. 80, 74 N. J. Eq. 372.

2. The business of fire insurance is affected with a public interest within the rule that, if a corporation engaged in a public business contracts to enter upon a line of conduct in respect to such business that tends to affect such public interest injuriously, and is contrary to public policy, and *ultra vires*, performance thereof by the corporation may be restrained in equity, at the suit of the attorney general, without regard to whether or not actual injury has resulted to the public. *State ex rel. McCarter v. Firemen's Ins. Co.* (N. J. Err. & App.) 29: 1194, 73 Atl. 80, 74 N. J. Eq. 372.

As to parks, highways, and railways.

3. Injunction lies to prevent a telephone company from attempting to construct and maintain its line upon a railroad right of way, where its acts in so doing are unlawful. *Canadian P. R. Co. v. Moosehead Teleph. Co.* 29: 703, 76 Atl. 885, — Me. —.

INSANITY.

See Incompetent Persons.

INSOLVENCY.

As to bankruptcy, see Bankruptcy.
Fraudulent conveyance by insolvent, see Fraudulent Conveyances.

INSPECTION.

Effect of, on warranty, see Sale, 4, 5.
See also Discovery and Inspection.

INSTRUCTIONS.

See Trial, 22-25.

INSURABLE INTEREST.

See Insurance, 1.

INSURANCE.

Abatement of action on assigned policy because of suit in other state, see Abatement and Revival.
Contract by fire insurance company in restraint of trade, see Contracts, 8.
Evidence as to capacity of one making assignment, see Evidence, 20.
Evidence in action on policy, see Evidence, 25.
Injunction against illegal contract between insurance companies, see Injunction, 2.

Insurable interest.

1. One may insure his own life for the benefit of another having no insurable in-

terest therein, where he makes the contract and pays the premiums himself. *Rupp v. Western Life Indemnity Co.* 29: 675, 127 S. W. 490, 138 Ky. 18.

Warranties and representations.

2. Concealment by the applicant for insurance on a stock of goods of the existence of an outstanding unfiled chattel mortgage thereon by answering in the negative the question whether the property was mortgaged or encumbered, constitutes concealment of a fact material to the risk, within the meaning of a policy providing that it shall be void if the insured has concealed or misrepresented any material fact or circumstance concerning the insurance or the subject thereof, and avoids the policy. *Madsen v. Farmers' & M. Ins. Co.* 29: 97, 126 N. W. 1086, — Neb. —.

3. An outstanding unfiled chattel mortgage on a stock of goods, given as security for a guaranty of a debt of the mortgagor, although containing a clause that it shall not be valid and binding until filed, constitutes an encumbrance within the meaning of a policy insuring such goods against fire, which provides that the policy shall be void if the subject of the insurance be or become encumbered by a chattel mortgage. *Madsen v. Farmers' & M. Ins. Co.* 29: 97, 126 N. W. 1086, — Neb. —.

4. An agreement or stipulation in a contract of fraternal insurance with a married woman, that the policy shall not take effect unless delivered to her "while in sound health," is not violated by reason of the applicant being pregnant at the time of the delivery of the policy. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

5. Confinement in childbirth is not a "personal ailment," within the meaning of a fraternal benefit certificate, so as to avoid it because of a negative answer, which was made a warranty, as to whether the applicant had, within seven years, consulted a physician in regard to personal ailment, where in fact the applicant had been attended once by a physician during confinement, some three years prior thereto. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

6. A negative answer to a question in an application for insurance, the answers in which are made warranties, as to whether the applicant was then pregnant, will not avoid the policy, where it appears that the applicant did not know of her pregnancy at the time, that her answer was in good faith and honestly made, and that her pregnancy at the time of the issuance of the policy in no way contributed to the ultimate cause of death, nor increased the risk. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

Assignment of policy.

7. An assignment of an insurance policy by one who, by a long-existing habit of using intoxicating liquor to excess, permanently impaired his mental faculties

to such an extent that he could not act rationally, is invalid, although, at the time of making the assignment, he is not intoxicated and does not manifest any aberration. *Searles v. Northwestern Mut. L. Ins. Co.* 29: 405, 126 N. W. 801, — Iowa, —.

Waiver; estoppel.

8. A subordinate camp of a fraternal benefit society, which has supervision and right of expulsion of members, which collects dues and premiums for nearly five years succeeding the confinement in childbirth of a member who, in good faith, warranted in her application that she was not then pregnant, when in fact she was, during which time she was in good health, waives the right of the society to insist on a breach of the contract for the falsity of the answer. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

9. A fraternal benefit society which issues a certificate to an applicant, and thereafter continuously collects dues from her for nearly five years, cannot, after her death, repudiate the contract on the ground that the certificate never went into effect, because the applicant had warranted that she was not pregnant at the time of her application, when in fact she was, although such fact was not known to her, and in no wise contributed to the cause of death, nor increased the risk, where such condition would not have avoided the policy or been a breach of the contract had it occurred after the contract became effective. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

10. The unwillingness or inability of the arbitrator chosen by insured from the list furnished by the insurer, to serve, from a cause arising after he is chosen, will constitute a waiver on the part of the insurer of its right to arbitrate the amount of loss, where the statute provides that if the company shall not, within ten days after request, name three men each of whom shall be willing to act as a referee, it shall be deemed to have waived its right to arbitration. *Mowry & Payson v. Hanover F. Ins. Co.* 29: 498, 76 Atl. 875, — Me. —.

Extent of recovery.

11. An injury which wholly incapacitates a manual laborer from performing any and every kind of business which he is able to do or capable of engaging in is within the terms of a policy providing an indemnity for an injury which shall wholly disable and prevent him from prosecution of any and every kind of business, although the injury would not prevent his doing mental work if he was fitted to do it. *Industrial Mut. Indemnity Co. v. Hawkins*, 29: 635, 127 S. W. 457, — Ark. —.

Defenses.

12. The owner of insured property destroyed through the negligence of a railroad company does not release the liability of the insurer by settling with the railroad for an amount representing the difference between the value of the property and the 29 L.R.A. (N.S.)

amount of insurance, and giving a receipt stating that the amount is above that for which the property is insured, which latter amount is to be paid by the insurance company. *Brown v. Vermont Mut. F. Ins. Co.* 29: 698, 74 Atl. 1061, 83 Vt. 161.

(Annotated.)

INTENT.

Presumption as to criminal intent, see Evidence, 11.

INTEREST.

As to illegal interest, see Usury.

As affecting competency of witnesses, see Witnesses, 4.

Allowed claims in bankruptcy are to be treated as judgments, and bear interest from maturity, although the contracts do not provide therefor; and this rule is not affected by the acceptance by the creditor from the trustee of the principal of the claim without stipulating for interest, but the trustee is entitled to retain possession of the assets until he has accumulated funds enough to satisfy such interest. *Re John Osborn's Sons & Co.* 29: 887, 177 Fed. 184, 100 C. C. A. 392.

(Annotated)

INTERSTATE COMMERCE.

See Commerce.

INTOXICATING LIQUOR.

Subjecting licensee convicted of violation of statute to fine and forfeiture of license as denying right of appeal, see Appeal and Error, 2. Regulation of, as interference with interstate commerce, see Commerce, 6, 7.

What is sufficient to terminate interstate transportation of, see Commerce, 7.

Carrying on business in, by foreign corporation, see Corporations, 7.

Subjecting licensee violating law to fine and forfeiture of license as cruel and unusual punishment, see Criminal Law, 4.

Presumption as to intent to sell liquor unlawfully, see Evidence, 11.

Sufficiency of evidence to sustain finding that property was transferred to evade responsibility for previous infractions of the law, see Evidence, 44.

Sufficiency of evidence to support finding that corporation was unlawfully engaged in business of, see Evidence, 53.

Indictment under statute forbidding presence of infants where liquor is sold, see Indictment, Information and Complaint, 1.

Title of statute as to keeping of liquors by social club, see Statutes, 2.

Title of amendment of liquor law, see Statutes, 3.

Amendment of liquor law, see Statutes, 7.

1. One cannot be convicted of illegally

selling intoxicating liquor if he merely acted as the purchaser's agent in procuring it, although the intent was to evade the local option law. *Lafrentz v. State*, 29:743, 125 S. W. 32, 57 Tex. Crim. Rep. 464.

2. A social club which furnishes its members lockers, permits them to keep intoxicating liquors therein, and upon demand serves such liquors to the owners thereof and their invited guests, furnishing the glasses, ice, and other things used in such service, maintains a place where intoxicating liquors are kept for use as a beverage, within the meaning of a statute prohibiting any person from directly or indirectly keeping or maintaining by himself or by association with others any clubroom or other place in which intoxicating liquor is received or kept for use or sale as a beverage or for distribution among the members of any club by any means whatever, although the liquors are the individual property of the members occupying lockers, and the club has no control thereover, and receives no profit therefrom. *State ex rel. Jackson v. Topeka Club*, 29:722, 109 Pac. 183, 82 Kan. 756.

INTOXICATION.

Assignment of insurance policy by one whose mental faculties are impaired through use of liquor, see Insurance, 7.

JOINDER.

Of parties defendant, see Parties, 4.

JUDGES.

Remarks by court during trial, see Trial, 2.

JUDGMENT.

Estoppel to appeal from, see Appeal and Error, 4-6.

On appeal, see Appeal and Error, 39.

Effect of levy of attachment to give jurisdiction over nonresident served by publication only, see Attachment, 1.

Judicial notice of judicial records and decisions, see Evidence, 1.

Relief under pleading, see Pleading, 2.

Form and substance.

Personal judgment for public improvement assessment, see Public Improvements.

1. That an action was brought and judgment rendered in the name of a partnership does not render it void where no objection was made thereto. *Spaulding Mfg. Co. v. Godbold*, 29:282, 121 S. W. 1063, 92 Ark. 63. (Annotated)

Effect and conclusiveness.

2. A conviction of keeping a bawdy-house, upon an instruction authorizing conviction if the jury find that accused had kept such house at the place alleged within twelve months before the filing of the information, bars another prosecution for the maintenance of such house at the place alleged within the twelve months, although 29 L.R.A. (N.S.)

on different days from those specified in the first information. *State v. Liamore*, 29:721, 126 S. W. 855, — Ark. —.

3. One taking a mortgage from a judgment debtor to secure a claim accruing before entry of the judgment cannot challenge the amount of the judgment because payments which the debtor had made were not credited upon the indebtedness prior to the entry of the judgment, and because the judgment was entered by default without knowledge on the part of the debtor of that fact, where no fraud and collusion between the parties are shown, although the failure to make such credits injuriously affects the rights of the mortgagee. *Stewart Lumber Co. v. Downs*, 29:1190, 142 Iowa, 420, 120 N. W. 1067.

4. A default decree obtained by a tax deed holder quieting title as to a mortgage executed to a partnership in the firm name only is not open to collateral attack by such mortgagees merely because they were described in the publication service and throughout the proceedings by their firm name alone, as the failure to name the mortgagees individually was an irregularity only. *Ord v. Neiswanger*, 29:287, 105 Pac. 17, 81 Kan. 63. (Annotated)

5. An *ex parte* order made upon a widow's application, setting apart to her a homestead interest in the lands of her deceased husband, will not estop his children, residing at that time in the county where the homestead is situated, and who have not subsequently ratified the order or otherwise waived their right, to object thereto. *Draper v. Clayton*, 29:153, 127 N. W. 369, — Neb. —.

Relief against.

Review of discretion as to, see Appeal and Error, 15.

Arrest of judgment in criminal case, see Criminal Law, 3.

6. Under a statutory provision that a judgment may be set aside at a subsequent term for "irregularity in obtaining," a judgment rendered on the pleadings may be vacated because of a misapprehension as to what allegations they in fact contained. *Cooper v. Rhea*, 29:930, 107 Pac. 799, 82 Kan. 109.

JUDICIAL NOTICE.

See Evidence, 1, 2.

JUDICIAL SALE.

Sale of incompetent's estate, see Incompetent Persons.

What may be levied on, see Levy and Seizure.

Foreclosure of mortgage, see Mortgage, 3-7.

Right of sheriff whose term has expired to maintain action against defaulting bidders, see Officers.

Sheriff making sale as necessary party in proceeding to correct deed, see Parties, 3.

1. A bidder at an execution sale cannot refuse to comply with his bid because the

title of the execution debtor proves to be defective. *Dickson v. McCartney*, 29:792, 75 Atl. 735, 226 Pa. 552.

2. The court may relieve a bidder at an execution sale who has been misled or deceived if direct application is made to it for relief. *Dickson v. McCartney*, 29:792, 75 Atl. 735, 226 Pa. 552.

3. The bid of a purchaser at an administrator's sale which was void for want of jurisdiction in the court to order the sale is without consideration, and cannot be enforced, although the court confirmed the sale. *Zufall v. Payton*, 29:740, 110 Pac. 773, — Okla. —.

JURISDICTION.

Of appellate court, see Appeal and Error.

Effect of levy of attachment to give jurisdiction over nonresident served by publication only, see Attachment, 1.

Right of purchaser at judicial sale void for want of jurisdiction, see Judicial Sale, 3.

JURY.

Question for, see Trial, 3-21.

KNOWLEDGE.

As element of crime generally, see Criminal Law, 1, 2.

Presumption and burden of proof as to, see Evidence, 5.

Admissibility of evidence to show, see Evidence, 35.

Of witness, see Witnesses, 2, 3.

LACHES.

Estoppel by, see Estoppel, 2.

LANDLORD AND TENANT.

Liability of cotenant for rent, see Co-tenancy.

Burden of proof as to existence of conditions giving tenant right to terminate tenancy, see Evidence, 20.

Estoppel to dispute landlord's title, see Estoppel, 3.

Levy on leasehold estate, see Levy and Seizure.

Right of one employed to sell land to assign rents to purchaser, see Principal and Agent, 1, 3.

Holding over under a written lease for one year, with the option of removal for the further period of three years upon the same terms, without exercising such option, renders the lessee a tenant for another year, at the option of the landlord, and liable for the payment of rent for that period at the rental fixed by the lease. *Kuhlman v. Wm. J. Lemp Brew. Co.* 29:174, 126 N. W. 1083, — Neb. —.

(Annotated)

LARCENY.

Right of one stealing property to acquire title by adverse possession, see Adverse Possession.

Jurisdiction of equity of suit to reach proceeds of property which thief has turned into cash, see Equity. Evidence in prosecution for, see Evidence, 24.

Effect of fraud on time for suit to recover proceeds of stolen property, see Limitation of Actions, 3.

Sufficiency of evidence to take indictment to jury, see Trial, 5.

1. Unfastening a dress which is on a display model, and pushing it to the bottom of the figure for the purpose of removing it, is not sufficient asportation to constitute larceny, where the dress can be removed from the figure only over the top, and the figure itself has not been removed from its accustomed place. *Clark v. State*, 29:323, 128 S. W. 131, — Tex. Crim. Rep. —.

2. The mere dragging or rolling by a shipper of butter of tubs of that material belonging to another shipper, from one portion of the car to another, with intent to appropriate them to his own use, is sufficient asportation to constitute larceny, although he does not lift them from the floor, — at least where he changes the addresses on them, so as to cause the carrier to transport them as his agent. *State v. Rozeboom*, 29:37, 124 N. W. 783, — Iowa, —.

(Annotated)

LEGISLATURE.

Power to authorize construction of telephone line along railroad right of way without compensation, see Eminent Domain, 4.

Power to confer upon particular consumer of water preferential right, see Waters, 3.

LEVEES.

Compensation for injury resulting from erection of, see Eminent Domain, 2.

LEVY AND SEIZURE.

1. A leasehold estate, the term of which, under the written lease, does not fall within a statute providing that no tenant for a term not exceeding two years shall assign or transfer his term or interest without the written assent of the landlord or person holding under him, is subject to sale under an execution against the lessee, notwithstanding a covenant in the lease against subletting or assigning without the consent of the lessor, where it does not affirmatively appear from the lease that such restriction was to apply other than to the voluntary acts of the lessee. *Powell v. Nichols*, 29:886, 110 Pac. 762, — Okla. —.

(Annotated)

2. A written lease for a term of more than two years is not within the protection of a statute providing that no tenant for a term not exceeding two years shall assign or transfer his term or interest without the consent of the lessor, so as to prevent levy of an execution on the leasehold. *Powell v. Nichols*, 29:886, 110 Pac. 762, — Okla. —.

LIBEL AND SLANDER.

Sufficiency of evidence to show probable cause for charges, see Evidence, 45.

Presumption and burden of proof as to malice, see Evidence, 10.

Sufficiency of evidence to show malice, see Evidence, 46.

Sufficiency of evidence to show probable cause, see Evidence, 45.

Privileged communications.

1. A publication charging a candidate for renomination for the office of state's attorney with unfitness for office because of his record in prosecuting gamblers only under threat of removal from office is not libelous *per se*. *Schull v. Hopkins*, 29: 691, 127 N. W. 550, — S. D. —.

2. One publishing to voters a false charge against a candidate for re-election to the office of state's attorney, to the effect that he was unfit for office because he prosecuted gamblers only under threat of removal from office, is not answerable for libel unless shown to have been actuated by actual malice. *Schull v. Hopkins*, 29: 691, 127 N. W. 550, — S. D. —.

LICENSE.

Invalid contract of unlicensed foreign corporation, see Corporations, 8.

Liability of officers licensing bawdy-house, see Disorderly Houses.

LIENS.

What fund chargeable with costs of sale when encumbered property is sold in bankruptcy free of liens, see Bankruptcy.

Right of life tenant who satisfies existing lien upon estate, see Life Tenants.

Of mechanic or materialman, see Mechanics' Liens.

Of vendor, see Vendor and Purchaser, 1.

LIFE ANNUITIES.

See Annuities.

LIFE ESTATE.

Creation of, by will, see Wills, 2, 3.

LIFE TENANTS.

Estoppel of remainderman, see Estoppel, 2.

A life tenant of real estate who satisfies an existing lien upon the entire estate is entitled to contribution from the remainderman, and should recover from him the difference between the principal debt and the present value of an annuity equal to the annual interest charge running during the years which constitute the life tenant's expectancy of life. *Draper v. Clayton*, 29: 153, 127 N. W. 369, — Neb. —. (Annotated)

LIGHTS.

Sufficiency of ordinance granting lighting franchise to convey right to use streets, see Municipal Corporations, 2.

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LIMITATION OF ACTIONS.

Estoppel by laches, see Estoppel, 2.

Presumption of right from lapse of time, see Evidence, 21.

Duty to instruct as to, in prosecution for seduction, see Trial, 24.

To what claims applicable.

1. The right to maintain an action to remove a cloud from a title is a continuing one, to which the statute of limitations is not applicable. *Cooper v. Rhea*, 29: 930, 107 Pac. 799, 82 Kan. 109. (Annotated)

When statute runs.

2. The statute of limitations does not begin to run upon a certificate of deposit issued by a bank, which is payable on its return six months after date, until it is presented for payment. *Re Gardner*, 29: 685, 77 Atl. 509, 228 Pa. 282. (Annotated)

3. A statute permitting a suit based on fraud to be commenced within six years after the discovery of the fraud applies to a suit to recover the proceeds of stolen property which the thief sold, were he concealed the transaction from the true owner. *Lightfoot v. Davis*, 29: 119, 91 N. E. 582, 198 N. Y. 261. (Annotated)

4. The statute of limitations does not commence to run in case of a conveyance in fee by a life tenant, as against the right to recover the property belonging to his heirs, to whom the fee is given at his death, under conditions which prevent it from vesting in him under the rule in *Shelley's Case*, until his death, although children were born to him who would presumably be his heirs, since, until his death, they acquire no vested interest which will entitle them to bring an action to quiet title. *Westcott v. Meeker*, 29: 947, 122 N. W. 964, — Iowa, —.

5. Upon the granting of letters of administration upon the estate of a member of a banking partnership the statute of limitations begins to run against any claim upon his estate for payment of a certificate of deposit issued by the partnership, and the fact that the depositor had no notice of the death is immaterial. *Re Gardner*, 29: 685, 77 Atl. 509, 228 Pa. 282.

When action is barred.

6. An action for the recovery of rents and profits from a cotenant who is in adverse possession under claim of title is not barred by the statute of limitations until four years have elapsed from the accruing of such action. *Schuster v. Schuster*, 29: 224, 120 N. W. 948, 84 Neb. 98.

7. The infant child of a decedent in whose lands the widow has, by virtue of a void county court order, asserted a title in fee to a homestead selected therefrom, who is entitled to a remainder in such homestead, may, at any time within ten years after attaining his majority, maintain an action under Neb. Comp. Stat. 1909, chap. 73, §§ 57-59, for the purpose of quieting his title to such remainder.

Draper v. Clayton, 29: 153, 127 N. W. 369, — Neb. —.

8. An action to recover possession of personal property is not barred by the statute of limitations if the title to the property has not been lost by lapse of time. **Lightfoot v. Davis**, 29: 119, 91 N. E. 582, 198 N. Y. 261.

LIMITATION OF LIABILITY.

By telegraph company, see **Telegraphs**, 6, 7.

LOAN.

Damages for breach of contract for, see **Damages**, 2, 3, 10.

Power of executor to borrow money, see **Executors and Administrators**, 1.

To insane person, see **Fraud and Deceit**; **Subrogation**.

Who may sue for breach of contract to lend money, see **Parties**, 1.

Right of one employed to secure loan to pay mortgage to purchase on foreclosure, see **Principal and Agent**, 4, 5.

Applicability of usury law to loans other than of money, see **Usury**.

LOAN ASSOCIATIONS.

See **Building and Loan Associations**.

LOCAL LAWS.

See **Statutes**, 4.

LOCATION.

Of mining claims, see **Mines**.

LOSS OF PROFITS.

As element of damage, see **Damages**, 10.

LOTTERY.

Specific performance of lottery contract, see **Specific Performance**.

The distribution by lot, upon an agreed opening day, of lots varying widely in value, into which a tract had been divided, among the purchasers, at a uniform price, of undesignated lots in the tract, under rules prescribed by the seller, the agreement being that the lot drawn by each purchaser should be conveyed to him by the seller, is within the statute against lotteries, notwithstanding it was provided in the contracts that the "opening and distribution of these lots and land will be conducted on a plan entirely in keeping with the law, and fair to all, and shall be agreed upon by a majority of the purchasers present" at the opening. **Glennville Investment Co. v. Grace**, 29: 758, 68 S. E. 301, 134 Ga. 572.

LUNATICS.

See **Incompetent Persons**.

MALICE.

Presumption and burden of proof as to, see **Evidence**, 10.

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Sufficiency of evidence to show, see **Evidence**, 46.

Maliciously enticing servant, see **Master and Servant**, 1.

MALPRACTICE.

See **Physicians and Surgeons**.

MANDAMUS.

Bringing in as party owner of property who takes part in attempting to compel municipality to collect tax, see **Parties**, 5.

Refusal to make a mandamus absolute upon the motion of the relator in proceedings to compel a municipality to collect taxes on property claimed by the municipality to be exempt because of a contract with the property owner, which was unconstitutional, is error where defendant's answers merely allege the contract and that the city authorities in past years collected no taxes except the amount specified in the contract, which was less than the amount of taxes due, and that the present city authorities, on account of such contract, are willing that no taxes other than specified in the contract should be collected during the year in which the application for mandamus was filed, and that no other taxes should be collected for previous years, as such averments show no legal settlement of the accrued taxes or any valid reason why they should not be collected. **Tarver v. Dalton**, 29: 183, 67 S. E. 929, 134 Ga. 462.

MANDATORY PROVISIONS.

Of statute, see **Statutes**, 6.

MANUFACTURERS.

Who are within rule that manufacturers warrant quality of goods, see **Sale**, 2.

MARRIAGE.

Knowledge as element of offense of uniting in wedlock persons under certain age, see **Criminal Law**, 2.

Sufficiency of evidence to sustain conviction for unlawfully uniting persons in marriage, see **Evidence**, 56.

Repeal of statute forbidding uniting in marriage of certain persons, see **Statutes**, 8.

As to divorce or separation, see **Divorce and Separation**.

MARSHAL.

Bond of, see **Bonds**.

MASTER AND SERVANT.

Limiting hours of labor of tower man on interstate railway, see **Commerce**, 3, 4.

Statute regulating hours of labor of railroad employees as exercise of police power, see **Constitutional Law**, 10.

Exempting wages of railroad employee from garnishment, see **Constitutional Law**, 4, 5.

Sufficiency of evidence to sustain finding of employment, see Evidence, 50.

Imputing servant's knowledge to employer, see Notice, 3.

Enticing servant.

Parties to action for enticing servant, see Parties, 4.

Complaint in action for enticing servant, see Pleading, 8.

1. One is liable in damages for maliciously enticing away another's servant for the sole purpose of harming the master. *Globe & Rutgers F. Ins. Co. v. Firemen's Fund Ins. Co.* 29: 869, 52 So. 454, — Miss. — (Annotated)

Master's duty generally.

Evidence in action for injury to servant, see Evidence, 35, 38, 57.

Liability of municipality for injury to employees, see Municipal Corporations, 6.

Declaration in action for injuries to employees, see Pleading, 7.

2. The liability of a master for injury sustained by a minor servant in the course of his employment depends upon the mental capacity of the infant to comprehend and avoid the dangers incidental thereto, and upon the question whether or not he was fully informed in relation to such dangers, so as to charge him with having voluntarily assumed the risk of injury. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

3. An employer who retains from the wages of his employees a certain amount with which to pay for the services of a surgeon if they are injured discharges his full legal obligation when he selects a competent surgeon to attend a particular injury, and cannot be held responsible for the surgeon's negligence. *Wells v. Ferry-Baker Lumber Co.* 29: 426, 107 Pac. 869, 57 Wash. 658.

Rules and regulations.

4. A master waives a rule established by him that reports of defects in instrumentalities furnished his servants should be made to a designated agent, by personally receiving such a complaint, investigating it, and promising to repair. *Comer v. Meyer* (N. J. Err. & App.) 29: 597, 74 Atl. 497, — N. J. —.

Duty to warn or instruct.

5. A master is not bound to instruct a fourteen-year-old boy of average intelligence of the danger of allowing a portion of his body to project beyond the sides of an elevator on which his duties require him to ride, where he already knows that if he does so he is likely to be caught between the elevator and passing floors and injured. *Cronin v. Columbian Mfg. Co.* 29: 111, 74 Atl. 180, 75 N. H. 319. (Annotated)

6. A master is not negligent in failing to caution a minor employee against the danger of the cutter of a machine under which he is required to hold work to be cut, 29 L.R.A. (N.S.)

swerving the work so as to throw his hand against the cutter, if he has no knowledge and there is nothing in the history construction, or proper operation of the machine, from which the law will impute knowledge that the danger exists. *W. B. Conkey Co. v. Larsen*, 29: 116, 91 N. E. 163, — Ind. —.

Duty as to place and appliances generally.

7. A master must furnish a skilled superintendent where he directs common laborers to construct a raft and moor it in the current above falls in a river as a platform upon which to perform labor, failure to do which will render him liable for the death of the laborers, in case the current tears the raft from its moorings and sweeps them over the falls. *Engelking v. Spokane*, 29: 481, 110 Pac. 25, — Wash. —. (Annotated)

Assumption of risk.

Burden of proving capacity of infant employee, see Evidence, 6-9.

As question for jury, see Trial, 13, 14.

8. A common laborer directed to construct a raft and float it in the current of a river above a fall for the purpose of performing some labor there does not assume, as matter of law, the risk of the effect of the current upon the raft and mooring line, so as to preclude holding his employer liable in case the raft is torn from its fastenings and he is swept over the falls. *Engelking v. Spokane*, 29: 481, 110 Pac. 25. — Wash. —.

9. An experienced miner has no right to rely upon the master's assurance of safety of an unpropped room and promise to furnish the props soon if he will continue work, where he knows that every moment of work increases the danger of the fall of the roof. *Republic Iron & Steel Co. v. Thomasino*, 29: 606, 176 Fed. 49, 99 C. C. A. 523.

10. A master is not liable under his promise to repair, if the danger of injury to the servant from the defective appliance is so great that a reasonably prudent person would not assume the risk. *Comer v. Meyer* (N. J. Err. & App.) 29: 597, 74 Atl. 497, — N. J. —. (Annotated)

11. The master will not be relieved from liability to an infant for an injury received in the course of his employment, on the ground that the injury was the result of mere accident, or of the negligence of a fellow servant, if the infant did not have sufficient capacity to comprehend and avoid the dangers incidental to his employment, where that fact is relied upon by the infant. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

12. A sixteen-year old employee required to hold work under a cutting tool on a machine assumes the risk of the tool causing the work to swerve so as to bring his hand in contact with the cutting edge, if, to his knowledge, the swerving occurs frequently or occasionally, and he continues to perform the service without notice to his mas-

ter and a promise to repair. *W. B. Conkey Co. v. Larsen*, 29: 116, 91 N. E. 163, — Ind.

Contributory negligence.

Burden of proving capacity of infant employee, see Evidence, 6-9.

As question for jury, see Trial, 13.

13. A minor injured by being caught between an elevator on which his duties require him to ride and a passing floor cannot hold his master liable for the injury, where his only explanation of the injury was that he did not think. *Cronin v. Columbian Mfg. Co.* 29: 111, 74 Atl. 180, 75 N. H. 319.

Master's liability for servant's acts.

14. The mere fact that a chauffeur in taking out his master's automobile in obedience to a command of the master's family, for the entertainment of friends and guests of the family, disobeys the master's command not to take out the car unless the master accompanies it, does not show that he is acting outside the scope of his employment, so as to relieve the master from liability for injury done by the negligent handling of the car. *Moon v. Matthews*, 29: 856, 76 Atl. 219, 227 Pa. 488.

15. The owner of a bus is liable for injury to a boy who, without knowledge of the owner, is invited to ride, free of charge, by the driver, and injured by the latter's negligence, although the owner had forbidden the boy to ride on the bus. *Palmer Transfer Co. v. Smith*, 29: 321, 125 S. W. 725, 137 Ky. 319.

16. A railroad company cannot avoid liability for injury to neighboring property owners by blasting done on its property, by employing an independent contractor to perform the work, when complaint is made to it that injury will result from the manner the work is carried on by it, if the contractor continues to perform the work in the same manner and produces like results as the railroad company and the work could be done in no other way. *Hunter v. Southern R. Co.* 29: 851, 68 S. E. 237, 152 N. C. 682. (Annotated)

MATERIALITY.

Of evidence, see Evidence, 35-43.

MAXIMS.

1. Caveat emptor. *Zufall v. Peyton*, 29: 740, 110 Pac. 773, — Okla.—; *Buchanan v. Hunter*, 29: 147, 127 N. W. 166, — Neb.—.

2. Damnum absque injuria. *Globe & Rutgers F. Ins. Co. v. Firemen's Fund Ins. Co.* 29: 869, 52 So. 454, — Miss.—.

3. Cujus est solum, ejus est usque ad cælum. *Hume v. Des Moines*, 29: 126, 125 N. W. 846, — Iowa.—.

4. Every man must have a domicile. *Mather v. Cunningham*, 29: 761, 74 Atl. 809, 105 Me. 326.

5. Falsus in uno, falsus in omnibus. *Simpson v. Miller*, 29: 680, 110 Pac. 485, — Or.—.

6. He who owns the soil owns it down 29 L.R.A. (N.S.)

to the center of the earth and up to the skies. *Hume v. Des Moines*, 29: 126, 125 N. W. 846 — Iowa, —.

7. In pari delicto, etc. *State ex rel. McCarter v. Firemen's Ins. Co.* (N. J. Err. & App.) 29: 1194, 73 Atl. 80, 74 N. J. Eq. 372.

8. Nemo est hæres viventis. *Price v. Griffin*, 29: 935, 64 S. E. 372, 150 N. C. 523.

9. One must so use his own property as not to injure the rights of another. *Hume v. Des Moines*, 29: 126, 125 N. W. 846 — Iowa —.

10. Qui hæret in litera, hæret in cortice. *White v. Missouri, K. & T. R. Co.* 29: 874, 130 S. W. 325, — Mo. —.

11. Res ipsa loquitur. *Brown v. Union P. R. Co.* 29: 808, 106 Pac. 1001, 81 Kan. 701.

12. Respondeat superior. *Opdycke v. Public Service R. Co.* (N. J. Err. & App.) 29: 71, 76 Atl. 1032, — N. J. —.

13. Sic utere tuo ut alienum non lædas. *Hume v. Des Moines*, 29: 126, 125 N. W. 846, — Iowa, —; *Stotler v. Rochelle*, 29: 49, 109 Pac. 788, — Kan. —.

14. There is no wrong without its remedy. *Globe & Rutgers F. Ins. Co. v. Firemen's Fund Ins. Co.* 29: 869, 52 So. 454, — Miss. —.

15. Volenti non fit injuria. *Comer v. Meyer* (N. J. Err. & App.) 29: 597, 74 Atl. 497, — N. J. —.

MECHANICS' LIENS.

An excess of 60 or 70 per cent in the amount of claim filed to secure a mechanics' lien will prevent the lien from attaching, where the statute requires a just and true statement of the demand due. *Griff v. Clark*, 29: 305, 119 N. W. 1076, 155 Mich. 611. (Annotated)

MENTAL ANGUISH.

Sufficiency of pleading to permit recovery for, see Pleading, 2.

MILK DEALERS.

Review by courts of ordinance as to, see Courts, 1.

Due process of law in regulation of, see Constitutional Law, 6, 9.

MILLS.

Damages for breach of contract to lend money to build milldam, see Damages, 2, 3, 10.

MINES.

Assumption of risk by servant in, see Master and Servant, 9.

No entry for purposes of location can be made upon an existing mining claim which is excessive through honest mistake, until notice of the excess has been given the locator and an opportunity afforded him to reduce his claim to legal size. *Jones v. Wild Goose Min. & T. Co.* 29: 392, 177 Fed. 95, 101 C. C. A. 349.

MISTAKE.

Who may challenge judgment because of, see Judgment, 3.

Parties to proceeding to correct sheriff's deed for, see Parties, 3.

Reformation of deed for, see Reformation of Instruments.

MONEY.

As to public money, see Public Moneys.

MORGUE.

Contract by county to employ morgue keeper, see Counties.

MORTGAGE.

Right of one taking mortgage from judgment debtor to challenge amount of judgment, see Judgment, 3.

What may be mortgaged.

1. Real estate is subject to mortgage by the holder of the legal title between the acts of sale on foreclosure under a power contained in a prior mortgage, and the expiration of the period allowed by statute for redemption. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

Assignment.

Payment by purchaser of mortgaged chattel to an original mortgagee after transfer of note secured by mortgage, see Payment.

2. Payment by a purchaser of mortgaged property to the original mortgagees of a part of the amount of a negotiable note secured by the mortgage, after assignment of the note, does not relieve the purchaser of liability to the assignee of the note where the sum paid does not reach him, although such purchaser has no notice of the assignment, since, as the assignment of the note carried the security mortgage with it, the assignee alone could thereafter discharge the mortgage lien, and payment to another was at the payor's risk. *Smith v. First Nat. Bank*, 29:576, 104 Pac. 1080, 23 Okla. 411. (Annotated)

Enforcement.

Right of one employed to secure loan to pay mortgage to purchase on foreclosure, see Principal and Agent, 4, 5.

Enforcement of vendor's lien, see Vendor and Purchaser, 1.

3. In an action brought to foreclose a mortgage, in order to establish a ground of recovery against a defendant who does not claim under its maker, the plaintiff must show that the mortgagor had title to the property, so that the mortgage created a lien. *Cooper v. Rhea*, 29:930, 107 Pac. 799, 82 Kan. 109.

4. A "foreclosure sale" under a power in a mortgage, which conveys the title of the mortgagor, is in a legal sense the complete foreclosure proceedings, beginning with the act of sale and terminating with the execution of the deed after expiration of the period allowed for redemption, and includes

all the proceedings for the foreclosure of the right of redemption by sale and deed. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

5. The sale in the exercise of a power contained in a mortgage, which conveys the title of the mortgagor, is the sale as completed by the execution of a deed at the expiration of the period allowed by statute for redemption. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

6. The title conveyed by a completed foreclosure sale under a power in a mortgage, which conveys the title of the mortgagor, is all the right, title, and interest in and to the mortgaged premises which the mortgagor possessed at the time the mortgage was executed, or which was subsequently acquired by him. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

7. The provision of North Dakota Rev. Codes, 1905, § 7464, that the certificate given on the execution of a power of sale in a mortgage shall have the same effect as the certificate of sale in like manner furnished on sale of real property under execution provided for by Rev. Codes 1905, § 7137, which transfers all the right, title, and claims of the judgment debtor in the property to the purchaser, and makes such certificate evidence of the facts therein, does not relate to the effect of the act of sale, but to the validity and effect of the certificate, so that a certificate of mortgage foreclosure does not by reason thereof, of itself, convey title, but is only evidence of what transpired for the purpose of record, notice to protect purchasers against intervening claims, and to show who may become entitled to a deed. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

Redemption.

Real estate as subject to mortgage by holder of legal title between act of sale on foreclosure and expiration of redemption period, see *supra*, 1.

8. The North Dakota mortgage redemption statute is remedial in its nature, and is intended not only for the benefit of creditors holding liens subsequent to a lien in process of foreclosure, but also to make the property of the debtor pay as many of his debts as it can be made to pay, and to prevent its sacrifice. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

9. The holder of a mortgage superior to one foreclosed, assuming to be a redemptioner, when not made so by statute, who tenders the amount necessary to redeem, becomes, by the issuance to him of a certificate of redemption and the acceptance and retention by the holder of the certificate of sale of the money tendered, as between himself and the party who parts with such certificate, a "redemptioner." *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

10. One who, although not made a redemptioner by statute, acquires the rights of one by a tender of the amount necessary to redeem, and the issuance to him of a certificate of redemption, and the acceptance and retention by the holder of the certificate of sale of the money tendered, assumes the obligations and liabilities of a redemptioner, and must permit a lawful redemptioner to redeem from him within the period given by statute to a subsequent lien holder by mortgage for such purpose. *North Dakota Horse & C. Co. v. Serumgard*, 29: 508, 117 N. W. 453, 17 N. D. 466.

11. The sheriff who conducts a sale on foreclosure is the agent of the purchaser or holder of the certificate, to receive redemption money, but is not such an agent as can bind his principal to accept a check instead of money from one qualified to redeem, or to retain the money received by such agent from one not a lawful redemptioner, if the principal makes seasonable objection to the form of payment, or refuses forthwith to recognize the party making the tender as entitled to redeem as a redemptioner, when he is not made such by statute. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

12. The tender, by a lawful redemptioner, of a bank check issued by a solvent and reputable bank for the sum necessary to be paid to effect a redemption, to a prior redemptioner or his agent for the purpose of receiving redemption money, effects a redemption, unless refused because it is a check instead of legal tender, and the subsequent lien holder given an opportunity to procure and tender the necessary currency to comply with the legal requirements of the holder of the certificate. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

13. The phrase "on the property sold," in a statute defining a redemptioner as one holding "a lien by judgment or mortgage on the property sold," applies to the land or premises, as those words are commonly used. *North Dakota Horse & C. Co. v. Serumgard*, 29:508, 117 N. W. 453, 17 N. D. 466.

14. The holder of a mortgage given after the act of sale under a prior mortgage, and before the expiration of the period allowed for redemption from such sale, is a redemptioner. *North Dakota Horse & C. Co. v. Serumgard*, 29: 508, 117 N. W. 453, 17 N. D. 466. (Annotated)

15. That a mortgage given after the act of sale occurred on a prior mortgage, and before the expiration of the period allowed for redemption, is not recorded until after the expiration of one year from the sale, but is recorded within the sixty days additional allowed where there has been a redemption, does not deprive the holder of the last mortgage of the right to redeem on complying with the other statutory requirements. *North Dakota Horse & C. Co.* 29 L.R.A. (N.S.)

v. Serumgard, 29: 508, 117 N. W. 453, 17 N. D. 466.

16. A "redemption" from the purchaser at a foreclosure sale by one not the mortgagor is a compulsory sale of the interest acquired by the purchaser at such sale, and can only be enforced by one given that right by statute, and then only by pursuing the method prescribed by the statute conferring the right. *North Dakota Horse & C. Co. v. Serumgard*, 29: 508, 117 N. W. 453, 17 N. D. 466.

MOTIONS AND ORDERS.

In arrest of judgment, see Criminal Law, 3.

Setting aside verdict on motion, see New Trial.

MUNICIPAL CORPORATIONS.

Ordinances.

Constitutionality of milk ordinance, see Constitutional Law, 6, 9.

Court's power to review ordinances, see Courts, 1.

Liability of city council passing ordinance licensing bawdyhouse, see Disorderly Houses.

1. The statutory requirement that the subject of any municipal ordinance shall be clearly expressed in the title is complied with where the title calls attention to the general subject of the legislation in the ordinance, and does not tend to mislead or deceive the people or council as to the purpose or effect of the legislation, or to conceal or obscure the same. *Bartlesville Electric L. & P. Co. v. Bartlesville Interurban R. Co.* 29: 77, 109 Pac. 228, — Okla. —.

2. The title of an ordinance reciting that its object was to grant to a certain person "the right to construct, maintain, and operate an electric light and power plant" is sufficient to carry a grant of the right to use the streets and alleys of the city for the construction of lines and poles thereon for the purpose of operating the plant, within the meaning of a statute requiring the subject of any municipal ordinance to be clearly expressed in its title. *Bartlesville Electric L. & P. Co. v. Bartlesville Interurban R. Co.* 29: 77, 109 Pac. 228, — Okla. —.

3. A municipal ordinance requiring a railroad company whose tracks adjoins a public street to erect and maintain gates between the tracks and the street is unreasonable where its effect would be to require the maintenance of gates at points where the street is almost uninhabited as well as along those portions which are built up and crossed by streets and vehicles engaged in the ordinary city traffic. *New Orleans v. Lenfant*, 29:642, 52 So. 575, 126 La. 455.

4. A municipal ordinance which requires that all railroad cars which pass through the city shall be provided with modern and efficient spark arresters and

smoke consumers is unreasonable, as failing to distinguish between an ordinary car and a locomotive, and, where it appears that some of the locomotives coming within the jurisdiction of the ordinance burn oil, for failure to distinguish between such locomotives and those which burn coal. *New Orleans v. Lenfant*, 29: 642, 52 So. 575, 126 La. 455.

5. The parking of railroad cars and the making up of trains on private property within city limits cannot be absolutely prohibited by municipal ordinance, as constituting a nuisance, irrespective of the manner in which it is done. *New Orleans v. Lenfant*, 29: 642, 52 So. 575, 126 La. 455.

(Annotated)

Liability for damages.

Measure of damages for injuries caused by surface water, see Damages, 8, 9.

Evidence of question of damages by surface water, see Evidence, 37.

Liability for defects or obstructions in streets, see Highways, 6, 7.

Setting aside verdict against city on motion for new trial, see New Trial.

Liability for trespass, see Trespass.

6. A municipal corporation, in constructing a bridge as a part of its highway system, acts in its ministerial capacity, and is therefore liable for negligent injury to employees engaged in the work. *Engelking v. Spokane*, 29: 481, 110 Pac. 25, — Wash. —.

7. A municipal corporation which, in bringing a street to grade, negligently obstructs the entrances to drains carrying surface water from abutting property, without notice to the owner, or giving him opportunity to bring his property to grade, so as to avoid injury by such water, will be liable in damages for the injuries done by backing the water up upon his property. *Hume v. Des Moines*, 29: 126, 125 N. W. 840, — Iowa —.

(Annotated)

MURDER.

See Homicide.

NAME.

Objection that one convicted of crime was prosecuted under wrong name, see Appeal and Error, 10.

Rendering judgment in name of partnership, see Judgment, 1, 4.

Service by publication upon partnership in its firm name, see Writ and Process, 1.

NATURALIZATION.

See Aliens.

NEGLIGENCE.

In use of automobile, see Automobiles, 1.

Of child injured by automobile, see Automobiles, 2.

Of carrier, see Carriers.

Of passenger, see Carriers, 6-8.

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Of infant in jumping from moving train, see Carriers, 8.

Measure of damages for negligence causing personal injury, see Damages, 7.

Of druggists, see Drugs and Druggists.

Presumption and burden of proof as to, see Evidence, 13-19.

Presumption and burden of proof as to capacity of infants, see Evidence, 6-9.

Sufficiency of evidence to show, see Evidence, 47, 48.

As to injuries from defects in highway, see Highways, 11.

Effect of discharge of person primarily liable for loss of insured property upon insured's right of action against insurer, see Insurance, 12.

Of master, see Master and Servant. Contributory negligence of servant, see Master and Servant, 13.

Of municipal corporations, see Municipal Corporations, 6, 7.

Proximate cause of injury, see Proximate Cause.

Of surgeon, see Physicians and Surgeons.

At railway crossing, see Railroads, 2-5.

Release from damages for injury by, see Release.

As to telegrams, see Telegraphs.

As question for jury, see Trial, 9-16.

Competency of witness in action for, see Witnesses, 1.

1. The owner of a mill who maintains a barrel to receive exhaust steam, which is kept full of steaming hot water, is not liable for the scalding of a child who goes to it for water, by the plug coming out of the bung-hole, if the plug was a substantial one, and the owner was not shown to have had notice that it had become loose. *Gordon v. Snoqualmie Lumber & Shingle Co.* 29: 88, 109 Pac. 1044, — Wash. —.

2. A barrel to receive the exhaust steam from a mill, which is covered, accessible only on one side, and filled with hot water, from which steam continually arises, is not, if it appeared to be safe, an attractive nuisance so as to render the owner liable for the scalding of a child going to it for water, although to his knowledge children had been in the habit of playing near it and taking water from it. *Gordon v. Snoqualmie Lumber & Shingle Co.* 29: 88, 109 Pac. 1044, — Wash. —.

3. Between seven and twenty-one years the age of an infant is only an evidential fact bearing on the question of his mental capacity to comprehend and avoid danger. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

NEGOTIABILITY.

Of bills or notes, see Bills and Notes, 1.

NEGROES.

Prohibiting establishment within county limits of private school for colored children, see Constitutional Law, 7; Corporations, 2.

NEW TRIAL.

Raising objections for first time on motion for, see Appeal and Error, 10.

Filing of motion for, as essential to jurisdiction of appellate court, see Appeal and Error, 12.

Review of discretion in denying, see Appeal and Error, 15.

A verdict for plaintiff in an action against a city to recover temporary damages for injuries to real property caused by the flooding thereof by surface water collected and cast thereon by a street improvement will, when based upon inadmissible evidence of the difference between the value of the property both before and after the flooding, be set aside on motion, although such evidence was admitted without objection. *McHenry v. Parkersburg*, 29: 86, 66 S. E. 750, 66 W. Va. 533.

NONRESIDENTS.

Effect of levy of attachment to give jurisdiction over nonresident served by publication only, see Attachment, 1.

NOTICE.

Of rights of third parties in note taken by assignment, see Bills and Notes, 5-8.

Sufficiency of notice to carrier that woman ejected from station is in no condition to face storm, see Carriers, 9.

To carrier of value of contents of parcel left at check room, see Carriers, 13.

Presumption and burden of proof as to, see Evidence, 5.

To insane ward of application for sale of real property, see Incompetent Persons, 2, 3.

To owner of premises of danger to children coming thereon, see Negligence, 1.

Of contents of telegram, see Telegraphs, 5.

Time for notice of claim for damages because of delay in telegram, see Telegraphs, 6.

1. The fact that diligent inquiry would have led to facts disclosing community rights in property sold by only representing himself to be a single man is not enough to charge the purchaser with notice of the rights of the wife, if there was no fact or circumstance which raised a duty to inquire. *Daly v. Rizutto*, 29: 467, 109 Pac. 276, — Wash. —.

2. Where the cashier of a bank to which he is personally indebted, as treasurer of another corporation, draws checks upon it payable to the bank, and uses them

to pay such indebtedness, the checks, by their form, of themselves, operate as notice to the bank of a misappropriation of the funds of the other corporation, so that the bank cannot predicate a liability thereon. *Emerado Farmers' Elevator Co. v. Farmers' Bank*, 29: 567, 127 N. W. 522, — N. D. —.

Imputed.

Imputing notice of cashier to bank, see Banks, 1.

3. A servant who is authorized by his master to employ and to discharge other servants, and to assign their duties, is, to the extent of such authority, the agent of the master; and whatever knowledge he may have of matters pertaining to the ability and capacity of a servant employed by him to perform a particular kind of work, and to comprehend and avoid the dangers incidental thereto, will be imputed to the master. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

4. Knowledge of an agent for the sale of machinery of his attempt to modify the contract of sale after a tender of delivery, in violation of a provision of the contract depriving him of the power to do so, is not notice to the principal of the change, so that his acting upon the contract will constitute a ratification thereof. *Reeves & Co. v. Lewis*, 29: 82, 125 N. W. 289, — S. D. —. (Annotated)

5. The knowledge of an officer of a bank, who is also a member of its discount committee, and who offers to the bank a note which he had secured by fraud, but who withdraws from the committee meeting while the question of the acceptance of the note is under consideration, is not imputable to the bank, so as to prevent its enforcing the note. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1. (Annotated)

6. Where the cashier of a bank, who has the entire management, control, and conduct of its affairs, draws checks of a company of which he is treasurer, payable to the bank, and presents them as treasurer to himself as cashier, and misappropriates the proceeds thereof, the bank cannot base thereon a liability in its favor against the company, since, as the bank exercised no oversight or control over its cashier, it placed itself under plenary responsibility for his acts, and must be held to knowledge of his fraudulent purpose at the time of the presenting of the checks. *Emerado Farmers' Elevator Co. v. Farmers' Bank*, 29: 567, 127 N. W. 522, — N. D. —.

NUISANCES.

City's power to declare what constitutes, see Municipal Corporations, 5.

1. The establishment of a cancer hospital in a residence neighborhood, in near proximity to dwellings, may be enjoined as a nuisance at the instance of one owning

and occupying adjacent property. *Statler v. Rochelle*, 29: 49, 109 Pac. 788, — Kan. —. (Annotated)

2. The corporate owner of a nonexclusive franchise granting authority to use the streets, alleys, and public grounds of a city for the purpose of constructing and operating an electric light and power plant to furnish light and power to such city and its inhabitants may enjoin another corporation which, without legislative authority, attempts to exercise rights similar to those granted to plaintiff, from so doing. *Bartlesville Electric L. & P. Co. v. Bartlesville Interurban R. Co.* 29: 77, 109 Pac. 228, — Okla. —. (Annotated)

OBJECTIONS.

To raise question on appeal, see Appeal and Error, 10-12.

OBSTRUCTION.

Of highways, see Highways, 2, 3.

OFFICERS.

Bonds of, see Bonds.

Public policy as to contract by county officers extending beyond term of office, see Contracts, 7.

Right of county board to make contract extending beyond term of office, see Counties, 1.

Of private corporation, see Corporations, 4.

Of county generally, see Counties.

Liability of officers licensing bawdy-house, see Disorderly Houses.

A sheriff whose term of office has expired may maintain an action against defaulting bidders at a sale made by him pending his term, and recover from them the difference between their bid and an amount realized at a subsequent sale of the property. *Dickson v. McCartney*, 29: 792, 75 Atl. 735, 226 Pa. 552. (Annotated)

OLD LADIES' HOME.

Appropriation of public moneys for, see Public Moneys.

OPINIONS.

Admissibility in evidence, see Evidence, 28-30.

ORDINANCES.

In general, see Municipal Corporations, 1-5.

OWNERSHIP.

Allegations as to, see Pleading, 5.

PARCEL STAND.

Loss of passenger's property from, see Carriers, 11-13.

PARKING CARS.

Ordinance as to, see Municipal Corporations, 5.

PAROL EVIDENCE.

See Evidence, 27.
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PARTIES.

Who are affected by judgment, see Judgment, 5.

Plaintiff.

Who may have remedy against nuisance, see Nuisance, 2.

Right of officer to maintain action against expiration of term, see Officers.

1. An undisclosed principal cannot sue for breach of a contract to lend money to the agent. *Shields v. Coyne*, 29: 472, 127 N. W. 63, — Iowa, —. (Annotated)

2. An indorsement by which one "assigns his interest" in a negotiable note does not permit the indorsee to sue thereon in his own name, where the statute permitting such suits by assignees of choses in action does not apply to such notes. *Gale v. Mayhew*, 29: 648, 125 N. W. 781, 161 Mich. 98.

Parties defendant.

3. The sheriff who made a sale under execution, or his successor in office, is a necessary party in a proceeding to correct a deed which names a partnership as grantee, rather than the members who compose it. *Spaulding Mfg. Co. v. Godbold*, 29: 282, 121 S. W. 1063, 92 Ark. 63.

4. All parties to a conspiracy to injure one by enticing his servant away from him may be joined in an action to recover the damages thereby caused. *Globe & Rutgers F. Ins. Co. v. Firemen's Fund Ins. Co.* 29: 869, 52 So. 454, — Miss. —.

Bringing in.

5. The owner of taxable property upon which a taxpayer is attempting by mandamus to compel the municipality in which the property is taxable to collect taxes, may, upon motion of the municipality, be made a party defendant, where the defense is that the property is not liable for taxes, by reason of a contract between the city and such owner, who has no objection to being made a party defendant in the proceedings. *Tarver v. Dalton*, 29: 183, 67 S. E. 929, 134 Ga. 462.

PARTITION.

What constitutes tenancy in common entitling cotenant to partition, see Cotenancy, 1.

A trustee of the estate of a bankrupt, selected or appointed under the provisions of the national bankruptcy act, is without legal capacity, under the statutes of Ohio, to maintain a suit for the partition of real estate in which such bankrupt is a tenant in common with others. *Lindsay v. Runkle*, 29: 659, 92 N. E. 489, 82 Ohio St. 325.

PARTNERSHIP.

Liability for debts of, of corporation organized to continue business of insolvent partnership, see Corporations, 3; Pleading, 9.

Embezzlement of funds by member of, see Embezzlement, 1, 3.

Conveyance of assets of insolvent partnership to corporation organized to carry on business, see Fraudulent Conveyances, 1, 2.

Validity of judgment for, rendered in firm name, see Judgment, 1.

Default decree against, in firm name only, see Judgment, 4.

Reforming deed to partnership in firm name, see Reformation of Instruments.

Service by publication upon partnership in its firm name, see Writ and Process, 1.

PAYMENT.

To original mortgagee after assignment of note secured thereby, see Mortgage, 2.

Subrogation for, see Subrogation.

A purchaser of mortgaged cattle is not authorized to pay the purchase price to the original commission merchant mortgagees, after the note secured by the mortgage has been assigned to another, so as to relieve the purchaser from liability to the assignee of the note in case the sum paid to the original mortgagees does not reach him, by a clause in the mortgage providing that, if the cattle be consigned to, or sold by, any person except the original mortgagees, such mortgagees shall be paid the proceeds of the sale and its commission on all the cattle so sold, as such construction would destroy the mortgage as a security. *Smith v. First Nat. Bank*, 29: 576, 104 Pac. 1080, 23 Okla. 411.

PEDDLERS.

One who, in delivering pictures from house to house, which had been ordered through another agent from a manufacturer in another state, receives them in frames which he attempts to sell to the persons who had ordered the pictures, is a peddler within the meaning of a statute defining a peddler as whoever shall deal in the selling of goods, wares or merchandise by going from place to place to sell the same. *State v. Looney*, 29: 412, 97 S. W. 934, 214 Mo. 216.

PERSONAL INJURIES.

Measure of damages for, see Damages, 7.

Evidence in action for, see Evidence, 26.

Release from liability for, see Release.

Question for jury as to whether release was obtained by fraud, see Trial, 8.

PERSONAL LIABILITY.

For local improvement assessments, see Public Improvements; Trusts, 3, 4.

PERSONAL PROPERTY.

Adverse possession of, see Adverse Possession.

PHYSICIANS AND SURGEONS.

Liability of master for negligence of surgeon engaged for servant, see Master and Servant, 3.

A surgeon is not negligent in failing

to take an X-ray photograph of an injured arm to ascertain whether or not there is a fracture where he diagnoses and treats the injury as a sprain, which proves to be erroneous, and results in permanent impairment of the usefulness of the arm. *Wells v. Ferry-Baker Lumber Co.* 29: 426, 107 Pac. 869, 57 Wash. 658.

PLAINTIFFS.

Parties plaintiff, see Parties, 1, 2.

PLATFORM.

Negligence of passenger in riding on, see Carriers, 6, 7.

PLEADING.

Prejudicial error as to, see Appeal and Error, 24.

Admissibility of original petition in evidence after amendment, see Evidence, 31.

Evidence admissible under, see Evidence, 57.

Variance between pleading and proof, see Evidence, 58.

In criminal prosecution, see Indictment, Information and Complaint.

Vacation of judgment rendered on the pleadings, see Judgment, 6.

Bringing action and rendering judgment in name of partnership, see Judgment, 1.

Right of plaintiff's counsel to comment on abandoned issues after amendment, see Trial, 1.

1. A statute providing that the allegations of a pleading shall be liberally construed with a view to substantial justice between the parties does not require that essential averments which are lacking shall be construed into the pleading, or that a necessary averment be supplied on inferences drawn from other facts alleged, unless such averments must logically and necessarily be so inferred therefrom. *Emmerson v. Botkin*, 29: 786, 109 Pac. 531, — Okla. —.

Relief under pleadings.

2. Damages for loss caused by the sale at a sound price of cattle infected with Texas fever ticks do not include damages for mental annoyance, where there is neither allegation nor proof of such damage. *Pula v. Hornbeck*, 29: 202, 103 Pac. 665, — Okla. —.

Misjoinder; multifariousness.

3. A bill for divorce is not rendered multifarious by joining therein a prayer for a conveyance by the husband to the wife of lands paid for with her funds the title to which was taken in his name. *Singer v. Singer*, 29: 819, 51 So. 755, — Ala. —.

(Annotated)

Declaration or complaint.

4. Essential facts necessary to be shown in order to entitle a party to the relief demanded, and to which he supposes himself entitled, should be stated in the pleadings by allegation or averment, and not by way of recital. *Emmerson v. Botkin*, 29: 786, 109 Pac. 531, — Okla. —.

5. An allegation in replevin that, at all times and dates mentioned, plaintiff was and now is the owner and entitled to the immediate possession of the property, is a sufficient allegation that he was so at the beginning of the action. *Johnson v. Iankovetz*, 29: 709, 110 Pac. 398, — Or. —.

6. A complaint in an action to hold a carrier liable for injuries to a passenger need not distinctly allege negligence, if it alleges that the coach in which plaintiff was riding was derailed, overturned, and dragged on its side, to plaintiff's injury. *Southern P. Co. v. Hogan*, 29: 813, 108 Pac. 240, — Ariz. —.

7. A declaration in an action for damages for injuries to an infant, which avers that defendant employed the infant, and negligently required him to perform a duty the dangers of which of which he was incapable of comprehending and avoiding, and failed to instruct him how to perform the work and to guard against the dangers incident thereto, states a good cause of action. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

8. The question whether or not a complaint for enticing away a servant states a cause of action cannot be affected by an affidavit of denial by the servant. *Globe & Rutgers F. Ins. Co. v. Firemen's Fund Ins. Co.* 29: 869, 52 So. 454, — Miss. —.

9. In a suit to hold a corporation liable for debts of a partnership to the business of which it succeeds, on the theory that its organization was fraudulent in fact, or that, under the facts surrounding the organization, it was liable for the debts of the partnership, what the stockholders did with their stock since the organization is immaterial as matter of pleading, although such matters might be material as evidence tending to support a charge of fraud. *Byrne Hammer Dry Goods Co. v. Willis-Dunn Co.* 29: 589, 121 N. W. 620, 23 S. D. 221.

Pleas and answers.

10. One cannot defeat an action for dower, on the theory that he is not possessed of the freehold, if he pleaded in bar denying plaintiff's right to dower. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —.

Demurrer.

Prejudicial error as to, see Appeal and Error, 23.

11. A general demurrer to a petition stating several causes of action should be overruled where one of such causes of action is good. *Emmerson v. Botkin*, 29: 786, 109 Pac. 531, — Okla. —.

12. Doubtful language in a pleading challenged by demurrer will be construed against the pleader, and where a demurrer is sustained on account of the insufficiency of a pleading, and no application for amendment is made, it will be presumed that the facts to justify it do not exist. *Emmerson v. Botkin*, 29: 786, 109 Pac. 531, — Okla. —.

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PLEDGE AND COLLATERAL SECURITY.

Attachment of corporate stock pledged to securities, see Attachment, 1.

Consideration for, see Contracts, 3.

Of corporate stock, see Corporations, 6.

POLES.

In highways, see Highways, 1.

POLICE POWER.

See Constitutional Law, 7-10.

PREFERENCES.

Right of appropriator of water for distribution to public to grant exclusive or preferential rights to individuals, see Waters, 4.

PREJUDICIAL ERROR.

See Appeal and Error, 23-38.

PRESUMPTIONS.

On appeal, see Appeal and Error, 13.

As to correctness of rulings on demurrer, see Pleading, 12.

Generally, see Evidence, 2.

PRINCIPAL AND AGENT.

Effect of death of principal on authority of agent, see Death, 3.

Right as against principal of purchaser in good faith from agent of paper indorsed in blank and delivered to agent by principal, see Estoppel, 1.

Sufficiency of evidence to show finding of employment, see Evidence, 50.

Sufficiency of evidence to show that one acted for another as undisclosed principal, see Evidence, 51.

Liability of one acting as purchaser's agent in procuring liquor, see Intoxicating Liquors, 1.

Power of agent to receive redemption money to accept check instead of cash, see Mortgage, 11.

Imputing agent's knowledge to principal, see Notice, 3-8.

Suit on contract by undisclosed principal, see Parties, 1.

1. An agent with authority to sell certain land of his principal has no implied authority to assign to one with whom he contracts for a sale the rent to accrue from tenants during the pendency of negotiations, or from the date of the contract to the completion of the transaction. *John Gund Brew. Co. v. Tourtellotte*, 29: 210, 121 N. W. 417, 108 Minn. 71.

Ratification of agent's acts.

Ratification by bank of acts of cashier, see Banks, 1.

Sufficiency of notice to master so as to make his acting on contract constitute a ratification thereof, see Notice, 4.

2. Payment after the cessation of work, by a principal, to one employed to perform labor by a person assuming to

act as an agent in making the contract, of an amount which the principal deemed the services worth, does not amount to a ratification of the contract of employment, where the person with whom the contract was made performed the work under protest from the principal, and under notice from him that such person was not in his employ, and that no one had authority to employ him. *Findlay v. Hildenbrand*, 29: 400, 105 Pac. 790, 17 Idaho, 403.

(Annotated)

3. The execution of a deed to certain land by a principal, in conformity with a contract entered into by his agent for the sale thereof, does not ratify a clause of the contract whereby the agent unauthorizedly attempted to assign the rent to accrue from tenants from a certain date to the completion of the transaction, in the absence of notice or knowledge on the part of the principal of such unauthorized terms. *John Gund Brew. Co. v. Tourtelotte*, 29: 210, 121 N. W. 417, 108 Minn. 71.

(Annotated)

Rights and liabilities of agent.

Compensation of real estate brokers, see *Brokers*.

4. The right of a broker employed to procure money to pay a mortgage on real estate, to purchase the property at the foreclosure sale, and hold it for his own benefit, in case he fails to secure the loan, is not affected by the fact that he secures a loan on his own account with which to pay the purchase money. *Clark v. Delano*, 29: 595, 91 N. E. 299, 205 Mass. 224.

5. That a broker is employed to secure a loan to pay a mortgage does not prevent his becoming purchaser at the foreclosure sale in case he fails to secure the loan. *Clark v. Delano*, 29: 595, 91 N. E. 299, 205 Mass. 224.

PRINCIPAL AND SURETY.

As to bonds generally, see *Bonds*.

PRIORITY.

As between two bona fide purchasers, see *Vendor and Purchaser*, 2.

PRIVACY.

Violation of, by compelling production of corporate books, see *Discovery and Inspection*, 1.

PRIVILEGED COMMUNICATIONS.

See *Libel and Slander*.

PROBABLE CAUSE.

Sufficiency of evidence to show, see *Evidence*, 45.

PROCESS.

See *Writ and Process*.

PRODUCTION OF DOCUMENTS.

See *Discovery and Inspection*.

PROFITS.

Duty of cotenant to account for, see *Cotenancy*, 1, 3.

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Loss of, as element of damages, see *Damages*, 10.

PROOFS OF DEATH.

Admissibility in evidence, see *Evidence*, 25.

PROSTITUTION.

See *Disorderly Houses*.

PROXIMATE CAUSE.

As question for jury, see *Trial*, 6.

The negligence of a municipal corporation in leaving an unguarded opening upon the side of a street is the proximate cause of injuries sustained by a pedestrian falling into such opening when forced off the traveled way by a rapidly approaching vehicle. *Neidhardt v. Minneapolis*, 29: 822, 127 N. W. 484, — Minn. —.

PUBLICATION.

Service by, see *Writ and Process*.

PUBLIC CORPORATIONS.

See *Corporations*, 1; *Counties*; *Municipal Corporations*.

PUBLIC IMPROVEMENTS.

Matters peculiar to drains and sewers, see *Drains and Sewers*.

Trespass in making, see *Trespass*.

Personal liability of trustee for, see *Trusts*, 3, 4.

Personal liability may be imposed upon a property owner to make compensation for the increase in the value of his property caused by adjacent public improvements made at the public expense. *Bangor v. Peirce*, 29: 770, 76 Atl. 945, — Me. —.

(Annotated)

PUBLIC MONEY.

Prohibition of use of, in aid of sectarian purposes, see *Schools*.

An annual appropriation of \$400 by the state for the benefit of an incorporated private home for aged women, to enter which an applicant must be homeless and without relatives legally liable for her support, must be not less than sixty-five years of age, and must, when able, pay an admission fee of \$300, which is the total amount required during the inmate's life, which home has been recognized by the state board of charities as a deserving charitable institution, is supplied and managed by women who act without compensation, and is not local, in that applicants are not restricted to any specified territory, is for a public purpose within the meaning of a constitutional provision that the state shall foster and support such benevolent institutions as the public good may require, and is the duty of the state auditor to issue a warrant therefor to such institution. *Ingleside Asso. v. Nation*, 29: 190, 109 Pac. 984, — Kan. —.

(Annotated)

PUBLIC POLICY.

As affecting contract, see Contracts, 6-8.

PUBLIC SERVICE CORPORATIONS.

Compelling corporation constructing sewer to permit connection therewith, see Drains and Sewers.

PUBLIC WATER SUPPLY.

See Waters.

PUNITIVE DAMAGES.

See Damages, 1, 6.

QUALITY.

Warranty of, on sale, see Sale, 2.

QUASI-PUBLIC CORPORATIONS.

See Corporations, 1.

QUESTION FOR JURY.

See Trial.

QUIETING TITLE.

See Cloud on Title.

QUO WARRANTO.

Sufficiency of evidence to warrant judgment of ouster against corporation, see Evidence, 53.

RAILROAD COMMISSION.

Order requiring stopping of train at specified station, see Carriers, 19.

Statute permitting commission to authorize construction of telephone line along railroad right of way, see Eminent Domain, 3.

RAILROADS.

Attachment of cars of foreign railroad company, see Attachment, 2, 3; Commerce, 2.

Regulation of interstate business of, see Commerce, 3-5.

Exempting wages of railroad employees from garnishment, see Constitutional Law, 4, 5.

Regulating hours of labor of railroad employees, see Constitutional Law, 10; Evidence, 3.

Right to dower in land purchased by railroad for gravel pit, see Dower, 1.

Right to condemn right of way for telephone line along railroad right of way, see Eminent Domain, 1, 3, 4.

Injunction to prevent construction of telephone line, see Injunction, 3.

Ordinance requiring railroad whose tracks adjoin public street to maintain gates, see Municipal Corporations, 3.

Ordinance requiring all cars passing through city to be provided with spark arresters and smoke consumers, see Municipal Corporations, 4.

Ordinance forbidding parking of railroad cars within city limits, see Municipal Corporations, 5.

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Injuries to animals by train.

1. A railroad company which by statute is made liable "for all damages sustained in person or property in any manner, by reason of the want or insufficiency" of fences sufficient to turn stock on each side of its road, is not liable for the loss of stock which, because of the insufficiency of its fences, wandered upon the tracks of another railway company, where it was killed, as under such statute the liability of a railroad company is limited to loss or injury occurring upon its own right of way. *Hocking Valley R. Co. v. Phillips*, 29: 573, 91 N. E. 118, 81 Ohio St. 453. (Annotated)

Contributory negligence.

2. One who drives an automobile over a railroad crossing at grade, without stopping his machine to look and listen at the only point where he could get a clear view of the track, is guilty of negligence which will prevent his holding the railroad company liable for injuries received through collision with a train, although such point was within 30 or 40 feet of the track. *Brommer v. Pennsylvania R. Co.* 29: 924, 179 Fed. 577, — C. C. A. —. (Annotated)

3. The presence at a railroad crossing of a flagman who makes no attempt to warn the driver of an approaching automobile that a train is also approaching does not relieve such driver of the duty to stop, look, and listen to ascertain for himself the safety of attempting to cross the tracks. *Brommer v. Pennsylvania R. Co.* 29: 924, 179 Fed. 577, — C. C. A. —.

4. The mere fact that an invited passenger on the rear seat of an automobile made no attempt to ascertain whether or not a railroad track could be crossed in safety does not render him guilty of negligence as matter of law, so as to prevent his holding the railroad company liable for injury due to a collision with a train at the crossing, if there is nothing to show the construction of the vehicle, or that he knew of the proximity of the crossing, or could have known of it by the exercise of reasonable care. *Brommer v. Pennsylvania R. Co.* 29: 924, 179 Fed. 577, — C. C. A. —.

5. An invited passenger in an automobile who fails to request the driver to stop for the purpose of looking and listening when approaching a railroad crossing is guilty of negligence which will prevent his holding the railroad company liable for injuries caused by collision with a train, due to the attempt to cross without stopping. *Brommer v. Pennsylvania R. Co.* 29: 924, 179 Fed. 577, — C. C. A. —.

RATIFICATION.

By bank of acts of cashier, see Banks, 1.

Of agent's acts by principal, see Notice, 4; Principal and Agent, 2, 3.

REAL-ESTATE BROKERS.

See Brokers.

REAL PROPERTY.

Jurisdiction of matters affecting title to, see Courts, 2.
 Measure of damages for injury to, see Damages, 8, 9.
 Deeds of, see Deeds.
 Distribution of lots by chance as lottery, see Lottery.
 Partition of, see Partition.
 As to timber on, see Timber.
 Sale of, see Vendor and Purchaser.

REASONABLENESS.

Of ordinance, see Municipal Corporations, 3, 4.

RECORD.

On appeal, see Appeal and Error, 9.
 Judicial notice of, see Evidence, 1.
 Rights as between two successive bona fide purchasers from common vendor holding under unrecorded deed where conveyance to earlier purchaser was also unrecorded, see Vendor and Purchaser, 2.

REDEMPTION.

From mortgage, see Mortgage.

REFORMATION OF INSTRUMENTS.

Necessary party in proceeding to correct sheriff's deed, see Parties, 3.

1. A deed running to a partnership the name of which does not include the name of one of the partners, while void at law, may be reformed in equity, where the property was in fact purchased by the members of the firm individually, and the deed was taken in the name of the firm by mistake of the draftsman. *Spaulding Mfg. Co. v. Godbold*, 29:282, 121 S. W. 1063, 92 Ark. 63.

2. The rule that equity will not aid the defective execution of statutory powers will not prevent its correcting a deed executed by the sheriff after an execution sale, in which a partnership rather than the individual members were named as grantee by mistake, where the execution and all proceedings under it were regular in all respects. *Spaulding Mfg. Co. v. Godbold*, 29:282, 121 S. W. 1063, 92 Ark. 63.

REFRESHING MEMORY.

Of witness, see Witnesses, 5.

RELEASE.

From liability on insurance policy, see Insurance, 12.

Question for jury as to whether obtained by fraud, see Trial, 8.

A written release or acquittance of a claim for personal injury will not sustain a plea of accord and satisfaction in the premises, if its execution was obtained by deception and fraud. *Norvell v. Kana-wha & M. R. Co.* 29:325, 68 S. E. 288, — W. Va. —.

RELEVANCY.

Of evidence, see Evidence, 35-43.
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RELIGIOUS FREEDOM.

See Constitutional Law, 11.

REMAINDERMEN.

Estoppel of, see Estoppel, 2.
 When limitations begin to run against, see Limitation of Actions, 4.

REMAINDERS.

In general, see Life Tenants.

REMEDIES.

Election of, see Election of Remedies.

REPEAL.

Of statute, see Statutes, 8, 9.

REPETITION.

Of instructions, see Trial, 22.

REPLEVIN.

Allegations as to ownership and possession in replevin, see Pleading, 5.

1. The fact that the undertaking in replevin, required by a statute providing that the order shall not be issued by the clerk until there has been executed in his office the undertaking required, was indorsed as filed at a date subsequent to the issuance of the writ, does not affect its validity, where it was in fact signed at a prior date, and the writ itself recites that before its issuance an undertaking was filed. *Leeper, Graves & Co. v. First Nat. Bank*, 29:747, 110 Pac. 655, — Okla. —.

2. The obligors on a replevin bond given by the plaintiff, who has by virtue thereof received and retained the property, are estopped from questioning its validity on the ground of formal or technical defects. *Leeper, Graves, & Co. v. First Nat. Bank*, 29:747, 110 Pac. 655, — Okla. —.

(Annotated)

3. It is the duty of a defendant in a replevin action in which a number of steel bridges were taken, which resulted in a judgment for their return or their value, to accept a tender of a substantial part of the bridges and recoup any damages suffered by suit on the replevin bond, when the tender is made in good faith and within a reasonable time after the rendition of the judgment, and it does not appear that the plaintiff wilfully withheld the parts not tendered, or that such parts could not readily be obtained in the open market. *Leeper, Graves, & Co. v. First Nat. Bank*, 29:747, 110 Pac. 655, — Okla. —.

REPRESENTATIONS.

By insured, see Insurance, 2-6.

RESCISSION.

Of land contract, see Vendor and Purchaser, 1.

RES GESTÆ.

See Evidence, 32-34.

RESTRAINT OF TRADE.

Contract by fire insurance company in restraint of trade, see Contracts, 8.
Equitable remedies as to contract in restraint of trade, see Equity, 1.

REVERSIBLE ERROR.

See Appeal and Error, 23-38.

REVIEW.

Of order or judgment, see Appeal and Error.

REVOCATION.

Of authority by death, see Death, 3.

RULES.

Of carrier, see Carriers, 1, 2.
Of employer, see Master and Servant, 4.
As to closing of telegraph office on Sunday, see Telegraphs, 2.

SALE.

Application of statute of frauds to contract of, see Contracts, 5.
Of corporate stock, see Corporations, 5, 6.
Sale as fraud on creditor, see Fraudulent Conveyances.
Foreclosure sale, see Mortgage, 3-7.
Ratification by principal of agent's attempt to modify contract, see Notice, 4.
Of timber, see Timber.

C. O. D.

1. In sales of specific chattels for cash on delivery, delivery and payment are concurrent acts, and delivery in the expectation of receiving immediate payment is not absolute, but conditional, and, when there is no waiver of payment, the property does not pass until the price is paid. *Baltimore & O. S. W. R. Co. v. Good*, 29: 713, 92 N. E. 435, 82 Ohio St. 278.

Warranty.

2. Jobbers who sell by sample garments which are made by others, but which they carry in stock or order after sales are made, are not themselves manufacturers, within the rule that a manufacturer warrants the quality of the goods manufactured by him. *Remy, Schmidt, & Pleissner v. Healy*, 29: 139, 126 N. W. 202, 161 Mich. 266.

3. There is no warranty by jobbers that ladies' garments which they sell by sample to a retailer for resale are fit for the purpose for which they are made.—*Remy, Schmidt, & Pleissner v. Healy*, 29: 139, 126 N. W. 202, — Mich. —.

4. That the embroidery on ladies' garments bought by sample from a jobber for resale was put on to run with the woof of the goods instead of the warp, which made them unsalable, could have been ascertained only by the most minute examination, does not raise a warranty that the garments were rightly made, and justify a purchaser in rejecting them when the fact was discovered; and it is immaterial 29 L.R.A. (N.S.)

that the garments were made to correspond to the sample upon the order of the buyer. *Remy, Schmidt, & Pleissner v. Healy*, 29: 139, 126 N. W. 202, 161 Mich. 266. (Annotated)

5. A merchant in ordering ladies' garments by sample cannot rely on a custom to have the warp run lengthwise of garment, to raise a warranty that it will do so, if it does not do so in the sample which he inspects. *Remy, Schmidt, & Pleissner v. Healy*, 29: 139, 126 N. W. 202, 161 Mich. 266.

Rights and remedies of parties.

6. A vendor who sells cattle at a sound price knowing that they have Texas fever ticks, which infection is not a matter of detection by those having had no experience with it, and which would affect their value for the known purpose for which they are bought, without disclosing such knowledge to the vendee, is liable to such vendee as for a fraudulent concealment of a latent defect, to which the rule of caveat emptor does not apply. *Puls v. Hornbeck*, 29: 202, 103 Pac. 665, — Okla. —.

7. A vendor who sells at a sound price cattle infected with Texas fever ticks is not liable to the purchaser for loss or damage occasioned thereby, when he had no knowledge of such infection before the sale was consummated. *Puls v. Hornbeck*, 29: 202, 103 Pac. 665, — Okla. —.

(Annotated)

Rights of bona fide purchasers.

8. Taking a check which proves to be worthless, in payment of goods sold for cash, is not a waiver of the right to an immediate cash payment, so as to pass title to the vendee, which he can transfer to a stranger. *Johnson v. Iankavetz*, 29: 709, 110 Pac. 398, — Or. —.

(Annotated)

9. On a sale for cash on delivery, where the goods are in the custody of a bailee, and the vendor, without requiring payment, gives the vendee a delivery order, directing the bailee to deliver the goods, intending to transfer both the property and the possession, and the bailee delivers the goods to a bona fide purchaser from the vendee, the title passes to the innocent purchaser, and is good against the seller, although the sale between the vendor and vendee was fraudulent. *Baltimore & O. S. W. R. Co. v. Good*, 29: 713, 92 N. E. 435, 82 Ohio St. 278.

10. The condition of cash on delivery in a sale of goods contract is waived by delivery without requiring compliance therewith, with intent to transfer both the property and the possession, so as to render the title of an innocent subvendee good as against the original vendor, although such delivery was obtained by fraud. *Baltimore & O. S. W. R. Co. v. Good*, 29: 713, 92 N. E. 435, 82 Ohio St. 278.

SAMPLE.

Warranty on sale of goods by, see Sale, 3-5.

CITY.

See Incompetent Persons.

DISFACTION.

See Accord and Satisfaction.

BUILDING ASSOCIATIONS.

See Building and Loan Associations.

SCHOOLS.

Statute making right to establish private school depend upon vote of electors of county, see Constitutional Law, 2.

Prohibiting establishment within county limits of private school for colored children, see Constitutional Law, 7; Corporations, 2.

See also Constitutional Law, 11.

The reading of the King James' version of the Bible, repeating the Lord's prayer, and singing hymns, as part of the exercises of a public school, violate a constitutional provision forbidding the appropriation of any public fund or the donation of money by the state in aid of sectarian purposes. *People ex rel. Ring v. Board of Education*, 29: 442, 92 N. E. 251, 245 Ill. 34.

SECONDARY EVIDENCE.

See Evidence, 23.

SEDUCTION.

Evidence of prosecution for, see Evidence, 42.

Instruction in prosecution for, see Trial, 24.

That the offer of marriage cannot be accepted because the woman has married another between the commission of the offense and the trial will deprive one accused of seduction of the benefit of a statute providing for the dismissal of the prosecution upon an offer, in good faith, to marry the person seduced. *Thorp v. State*, 29: 421, 129 S. W. 607, — Tex. Crim. Rep. (Annotated)

SEIZURE.

See Levy and Seizure.

SELF-DEFENSE.

See Homicide; Trial, 17.

SEWERS.

See Drains and Sewers.

SHELLEY'S CASE.

See Deeds; Wills, 4-9.

SHERIFF.

Sheriff who conducts foreclosure sale as agent of purchaser to receive redemption money, see Mortgage, 11.

As necessary party to proceeding to correct sheriff's deed, see Parties, 3.

SHOOTING.

Of by-stander by marshal in making arrest, see Bonds.

SIGNATURE.

Of testator, see Wills, 1.

SITUS.

For purpose of taxation, see Taxes, 2.

SLANDER.

See Libel and Slander.

SMOKE.

Reasonableness of ordinance requiring railroad cars to carry smoke consumers, see Municipal Corporations, 4.

SOCIAL CLUBS.

Liability for serving liquors to members, see Intoxicating Liquors, 2; Statutes, 2.

SOLICITORS.

Interstate business by, see Commerce, 8.

SPARK ARRESTERS.

Reasonableness of ordinance as to, see Municipal Corporations, 4.

SPECIAL INJURY.

Necessity of, to entitle one to remedy against nuisance, see Nuisance, 2.

SPECIAL LEGISLATION.

See Statutes, 4.

SPECIAL PRIVILEGE.

Right of carrier to withdraw special privilege from shipper, see Carriers, 14, 18.

SPECIFIC PERFORMANCE.

Specific performance of an illegal agreement whereby the purchasers, at a uniform price, of lots of unequal value into which a tract had been divided, were to choose their respective lots by chance, will not be decreed against the seller at the suit of a purchaser who drew certain lots. *Glennville Investment Co. v. Grace*, 29: 758, 88 S. E. 301, 134 Ga. 572.

STATE.

Public funds of, see Public Moneys.

STATED ACCOUNT.

See Accounts.

STATEMENT.

Of mechanics' lien, see Mechanics' Liens.

STATION.

Duty of carrier as to, see Carriers, 9, 10.

STATUTE OF FRAUDS.

Conflict of laws as to, see Conflict of Laws, 5.

In general, see Contracts, 4, 5.

STATUTE OF LIMITATIONS.

See Limitation of Actions.

STATUTES.**Entitling.**

Title of ordinance, see Municipal Corporations, 1, 2.

1. The title of a statute which is attacked as violative of a constitutional provision requiring the subject of the act to be expressed in the title will be liberally construed, for the purpose of upholding the law. *State ex rel. Jackson v. Topeka Club*, 29: 722, 109 Pac. 183, 82 Kan. 756.

2. A statute prohibiting the keeping and storing of intoxicating liquors by a social club for the use of its members is within the title "An Act to Prohibit the Manufacture and Sale of Intoxicating Liquors Except for Medicinal, Scientific, and Mechanical Purposes, and to Regulate the Manufacture and Sale Thereof for Such Purposes," and not violative of a constitutional provision requiring the subject of an act to be stated in its title. *State ex rel. Jackson v. Topeka Club*, 29: 722, 109 Pac. 183, 82 Kan. 756.

3. An act which declares in its title a purpose to amend a specific section of the general statute regulating traffic in intoxicating liquor, which section prohibited the sale thereof on days of election and on Sundays by fully restricting the sale thereof, by prohibiting sales between 8 o'clock P. M. and 7 o'clock A. M. on all week days, does not constitute legislation on a different subject, within the meaning of a constitutional provision that "no bill shall contain more than one subject, and the same shall be clearly expressed in its title." *Dinuzzo v. State*, 29: 417, 123 N. W. 309, 85 Neb. 351.

Local or special legislation.

Constitutional equality of protection and privileges, see Constitutional Law, 3-5.

4. A statute exempting from its provisions the first four classes of cities of the state is included under a constitutional provision that the legislature shall not enact any special law by exempting from the operation of a general act any city, town, district, or county. *Columbia Trust Co. v. Lincoln Institute*, 29: 53, 129 S. W. 113, 138 Ky. 804.

Construction.

5. A "dance house," as used in Minn. Rev. Laws 1905, § 4936, making it a misdemeanor to permit persons under twenty-one years of age to be or remain in a dance house, is a place maintained for promiscuous and public dancing, the rule of admission to which is not based upon personal selection or invitation. *State v. Rosenfield*, 29: 331, 126 N. W. 1068, — Minn. —.

6. A statute declaring that any elector who declares that, because of physical disability or inability to read the English language, he is unable to mark his ballot, "may declare his choice of candidates to the poll clerks, who, in the presence of the 29 L.R.A. (N.S.)

elector and in the presence of each other, shall prepare the ballot." is mandatory in respect to who shall assist in preparing the ballot. *Board v. Dill*, 29: 1170, 110 Pac. 1107, — Okla. —.

Repeal; amendment; revision.

7. A legislative act amending a special section of a general statute regulating traffic in intoxicating liquors, by further restricting the time within which sales may be made, and by including therein the former restrictions, does not constitute an amendment of other laws enacted subsequent to the general law, delegating to municipalities the power to regulate such traffic, within the meaning of the Constitutional provision that no law shall be amended unless the new act contains the section or sections so amended, and the section or section so amended shall be repealed, as such delegated powers are subject to the provisions of the general law, in the absence of express exclusive grant. *Dinuzzo v. State*, 29: 417, 123 N. W. 309, 85 Neb. 351.

8. New Mexico Comp. Laws 1897, § 1427, providing that an authorized person who shall unite in marriage any persons within the prohibited degrees of consanguinity, or males under eighteen and females under fifteen, which marriages are by §§ 1425 and 1426, respectively, declared void, shall be punished by a fine, was not repealed by Comp. Laws 1897, § 1430, providing that no marriage between or with infants under the prohibited ages shall be declared void except by court decree, since the latter statute does not render the prohibited marriages less contrary to law, but simply renders less harsh the operation of the statute upon the participants and their offspring. *Territory v. Harwood*, 29: 504, 110 Pac. 556, — N. M. —.

9. Under a statute providing that, upon the granting of a divorce to a wife, she shall have dower, to be recovered and assigned as if the husband were dead, her rights become fixed upon the granting of the divorce, and are not affected by the subsequent repeal of the statute. *McAllister v. Dexter & P. R. Co.* 29: 726, 76 Atl. 891, — Me. —.

STEAM DREDGE.

Situs of sea-going steam dredge for purpose of taxation, see Taxes, 2.

STOCK.

See Animals.

STREET RAILWAYS.

Evidence in action for injury by collision, see Evidence, 32.

Injury on trolley bridge within limits of highway, see Highways, 10.

STREETS.

See Highways.

SUBROGATION.

One lending money to an insane person with which to purchase real estate,

which is paid over to the vendor, cannot be subrogated to the rights of his debtor against the vendor, so as to compel the vendor to return the purchase money to him. *Murphree v. Clisby*, 29: 933, 52 So. 907, — Ala. —.

SUCCESSION TAX.

See Taxes, 7.

SUIT.

See Action or Suit.

SUNDAY.

Rule as to closing of telegraph office on, see Telegraphs, 2.

SUPERVISION.

Duty to supervise construction of appliance, see Master and Servant, 7.

SURGEONS.

See Physicians and Surgeons.

TAXES.

Validity of contract as to exemption of property from taxation, see Contracts, 6.

Validity of default decree obtained by tax deed holder against partnership in firm name only, see Judgment, 4.

Mandamus to compel municipality to collect taxes on property, see Mandamus.

Bringing in as party owner of property who takes part in attempting to compel municipality to collect tax, see Parties, 5.

Personal liability for local improvement assessments see Public Improvements.

Duty of trustee to pay special assessment, see Trusts, 4.

What taxable.

1. Outstanding accounts are liable to taxation as property where they have their situs. *Standard M. Ins. Co. v. Board of Assessors*, 29: 59, 48 So. 483, 123 La. 717.

(Annotated)

Where taxable; situs.

2. A self-propelling seagoing steam dredge engaged for a long period of time on government work in a particular county of the state where it is located on the day when taxes are assessed is taxable there regardless of where its owner resides or its home port is located. *North American Dredging Co. v. Taylor*, 29: 105, 106 Pac. 162, 56 Wash. 565.

(Annotated)

Assessment; enforcement.

3. An application to the board of assessors and board of revision "to wipe out and reduce to nothing" an assessment is not an application to "reduce" an assessment, within the meaning of the law making an appeal to such boards a condition of the right of appeal to the courts for a reduction, since, in the former case, the applicant denies the existence of taxable property, while

in the latter he admits the existence of such property, but complains of its overvaluation. *Standard M. Ins. Co. v. Board of Assessors*, 29: 59, 49 So. 483, 123 La. 717.

4. That the owner of taxable property has against the city in which the property is taxable a debt equal in amount to the taxes due on the property will not prevent the city from collecting the taxes. *Tarver v. Dalton*, 29: 183, 67 S. E. 929, 134 Ga. 462.

Sale; deed.

5. A tax deed to a county treasurer is not void for indefiniteness of the amount paid where it recites that the land conveyed was offered at the tax sale for the amount due against it, and could not be sold for a stated amount, which was the whole amount, as such recital sufficiently implies that the land was bid off by the county treasurer for the amount for which it had been offered for sale. *Ord v. Neiswanger*, 29: 287, 105 Pac. 17, 81 Kan. 63.

6. A tax deed over five years old, which recites that property was originally bid in by the county treasurer, that thereafter an individual paid him an amount equal to the cost of redemption, and that the "purchaser" afterwards paid the subsequent taxes, is not rendered void because it contains no recital that the county clerk assigned the tax sale certificate, as it may be inferred from the fact that the person paying the money is referred to as the purchaser that the assignment was made. *Ord v. Neiswanger*, 29: 287, 105 Pac. 17, 81 Kan. 63.

Succession tax.

On property in which wife claims community interest under foreign law, see Conflict of Laws, 3.

7. The statutory homestead and allowances set apart by the court to the family of a decedent pending administration of his estate are not within the provisions of a statute providing for a succession tax on property which shall pass by will or by the intestate laws of the state, and in is immaterial that had the property not been so set apart it would have passed to the widow under the will. *Re Kennedy*, 29: 428, 108 Pac. 280, 157 Cal. 517.

(Annotated)

TELEGRAPHS.

Conflict of laws as to, see Conflict of Laws, 2.

Measure of damages for negligence, see Damages, 4.

Telegraph lines in streets, see Highways, 1.

Presumption as to rights in highway, see Evidence, 21.

Duty as to delivery.

Damages for delay, see Damages, 4.

Instructions in action for delay in delivery, see Trial, 23.

Question for jury as to diligence, see Trial, 16.

1. The fact that one party may at will put an end to a continuing contract does not destroy the right to substantial damages

against a telegraph company whose negligent failure to deliver a telegram alone caused its discontinuance. *McMillan v. Western U. Teleg. Co.* 29: 891, 53 So. 329, — Fla. —. (Annotated)

2. A regulation of a telegraph company closing on Sunday an office at which it does only a small amount of business on that day except during two hours in the morning and two in the afternoon, is reasonable and may be enforced, although a person sending a message to that office has no notice of it. *Western U. Teleg. Co. v. Bibb*, 29: 502, 125 S. W. 257, 136 Ky. 817.

3. A telegraph company which receives a message eighteen minutes before the time arrives for closing the office cannot be held negligent in failing to find the addressee before closing hours, where he is not a householder, and his name is not in the city directory. *Western U. Teleg. Co. v. Bibb*, 29: 502, 125 S. W. 257, 136 Ky. 817.

4. A telegraph company which receives an important message after the hours during which it maintains a messenger service must, in case it is connected with the residence of the addressee by telephone which it can use without expense, make reasonable effort to deliver the message by that means. *Western U. Teleg. Co. v. Price*, 29: 836, 126 S. W. 1100, 137 Ky. 758.

(Annotated)

Notice of contents.

5. A telegram reading: "We want some brick. When are you going to ship?" — puts the telegraph company on notice that substantial business loss to the addressee may follow nondelivery. *McMillan v. Western U. Teleg. Co.* 29: 891, 53 So. 329, — Fla. —.

Stipulations and conditions.

6. A rule of a telegraph company that notice of a claim for damages for delay in transmission and delivery of a message must be given within sixty days from the date of the message is reasonable and binding on the addressee, where it appears upon the blank on which the message is delivered, although there is no contractual relation between him and the company. *M. M. Stone & Co. v. Postal-Teleg. Co.* 29: 795, 76 Atl. 762, — R. I. —.

7. A rule of a telegraph company, printed upon the blank upon which messages are delivered, limiting the liability of the company for mistake or delay in transmission of an unrepeatable message to the transmission fee, and limiting the liability for all messages unless they are expressly insured, for which an additional charge is made, is reasonable and binding upon the addressee, to whom a message is delivered on such blank. *M. M. Stone & Co. v. Postal-Teleg. Co.* 29: 795, 76 Atl. 762, — R. I. —.

TELEPHONES.

Right to condemn right of way for telephone line along railroad right of way, see Eminent Domain, 1, 3, 4, 29 L.R.A. (N.S.)

Injunction to prevent construction of telephone line on railroad right of way, see Injunction, 3.

Duty to deliver telegraph message by telephone, see Telegraphs, 4.

Necessity of instructing as to duty to deliver telegram by telephone, see Trial, 23.

TENDER.

Duty of defendant in replevin action to accept tender, see Replevin, 3.

THEFT.

See Larceny.

THREATENED INJURY.

Injunction to prevent, see Injunction, 1, 2.

TIMBER.

1. Although a purchaser of standing timber does not lose his title by failure to remove the timber from the land within the time limited in the conveyance, the court cannot give him authority to enter to remove the timber after the expiration of such time. *Peirce v. Finerty*, 29: 547, 76 Atl. 104, — N. H. —. (Annotated)

2. One who sells land reserving the right to remove the standing timber within a stipulated time does not, by failure to remove during that time timber which he cut before the expiration thereof, forfeit his title thereto, where the deed contains no forfeiture clause, so as to render him liable to the grantor for the value of such timber removed by him after the expiration of the time limited in the conveyance. *Walcutt v. Treisch*, 29: 554, 92 N. E. 423, 82 Ohio St. 263.

TIME.

For appeal, see Appeal and Error, 8.

For taking exceptions, see Appeal and Error, 10, 11.

For notice of claim for damages for delay in telegram, see Telegraphs, 6.

For removal of standing timber, see Timber.

TITLE.

Jurisdiction of matters of, see Courts, 2.
Defects in, on judicial sale, see Judicial Sale, 1.

Of ordinance, see Municipal Corporations, 1, 2.

Of personal property, passing of, see Sale, 1.

Of statutes, see Statutes, 1-3.

TORTS.

Measure of damages for, see Damages, 5.

Matters as to negligence generally, see Negligence.

TOTAL DISABILITY.

See Insurance, 11.

TRANSFER.

Of insurance policy, see Insurance, 7.

TRESPASS.

Municipal authorities who receive permission to enter upon property abutting on a street for the purpose of lowering the grade, constructing a sidewalk, building a retaining wall, and doing other work, do not become trespassers *ab initio* by abandoning the improvements before they are all completed according to the agreement. *Hatch v. Rose*, 29: 774, 77 Atl. 716, — Me. —.

TRIAL.

New trial, see New Trial.

Setting aside verdict on motion, see New Trial.

Statements and arguments of counsel.

1. Where an amended answer has been filed which abandons certain affirmative defenses pleaded in the original answer, plaintiff's counsel should not be permitted in his opening statement to read and comment upon the abandoned issues. *Rasicot v. Royal Neighbors of America*, 29: 433, 108 Pac. 1048, — Idaho, —.

Remarks of court.

2. The rights of one on trial for embezzlement, who is in actual custody at the time, are not invaded by the trial judge saying, upon refusal of accused to answer certain questions upon cross-examination, "If you were not already in jail, I would send you there for contempt." *State v. Hogg*, 29: 830, 53 So. 225, 126 La. 1053.

Sufficiency of evidence to go to jury.

3. Evidence that one partner was induced by his copartner and the agent of the owner of a worthless patent right to sign notes for a part of the purchase price of such patent right by representations that the investment was good, and that such copartner, on whose honesty, good faith, and judgment he relied, was himself investing therein to the same extent, and that after the notes were executed, the payee, pursuant to a prior secret agreement between his agent and the copartner who made the representations as to the investment, returned to such partner unpaid his note and check given in payment for his share of the purchase price of the patent right which he represented that he had purchased, is sufficient, in an action on the note of the innocent partner, to take the case to the jury on the ground of fraud. *Gilpin v. Nctograph Machine Co.* 29: 477, 108 Pac. 382, — Okla. —. (Annotated)

4. Knowledge of suspicious circumstances, or failure to inquire into the consideration on the part of a purchaser of a note which has been secured from the maker by fraud, may be sufficient evidence of bad faith to take that question to the jury, in an action upon the note. *Arnd v. Aylesworth*, 29: 638, 123 N. W. 1000, — Iowa. —.

5. Oral evidence of an agent of a railroad company as to its corporate character 29 L.R.A. (N.S.)

is sufficient to take to the jury an indictment charging larceny from it as a corporation. *State v. Rozeboom*, 29: 37, 124 N. W. 783, — Iowa, —.

Questions of law and fact.

Good faith as question for jury, see Evidence, 30.

6. Where the evidence tended to show that the kingbolt of a wagon broke, letting the whiffletree drop on the horse's heels, causing the horse to jump and run away, throwing out and injuring the plaintiff, the question whether the breaking of the bolt was the proximate cause of the injury was for the jury. *Comer v. Meyer* (N. J. Err. & App.) 29: 597, 74 Atl. 407, — N. J. —.

7. The weight of evidence offered to overthrow the presumption that a fourteen-year old boy has discreet judgment is for the jury. *Baker v. Seaboard A. L. R. Co.* 29: 846, 64 S. E. 506, 150 N. C. 562.

8. Whether or not a release of liability for injury was obtained by a carrier from the injured passenger by deception and fraud is for the jury, where plaintiff introduces evidence tending to show that, although he used as much prudence and circumspection as a man ordinarily would under the same circumstances, he was deceptively induced to sign the release by representations of the carrier, while he was lying on his back in a hospital, suffering from the injury, with his senses deadened by pain and narcotics; that he was made to understand and believe the company was gratuitously giving him the sum named in the release for the sole purpose of paying the hospital charges; that the paper which he was asked to sign was falsely represented to him as a check for that purpose; and that the paper was so folded when presented to him for signature that he was excusably deceived as to its real character; and all of such evidence is flatly contradicted by the company's physician, in whose hospital he was, and who was present at the time the receipt was signed. *Norvell v. Kanawha & M. R. Co.* 29: 325, 68 S. E. 288, — W. Va. —.

9. The question of negligence in an action brought to recover damages for personal injuries alleged to have been caused by defendant's negligence is for the jury, where the evidence is conflicting in relation to the existence of such facts as would show negligence if the facts were undisputed, or the facts admitted to be true are such that reasonable men might draw different conclusions therefrom. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

10. The question of the negligence of a carrier from whose check room a parcel disappears so that it cannot be found is for the jury, where it appears that the check room was left unattended at different times whenever the attendant's services were required at trains. *Fraam v. Grand Rapids & I. R. Co.* 29: 834, 126 N. W. 851, 161 Mich. 556.

11. Whether or not evidence of good condition of track and careful handling of

train is sufficient to overcome the presumption of negligence arising from the derailment and overturning of a passenger coach to the injury of a passenger is a question for the jury. *Southern P. Co. v. Hogan*, 29:813, 108 Pac. 240, — Ariz. —.

12. The negligence of a municipal corporation in constructing under a rural way within its limits a covered culvert which does not extend to the full width of the driveway, but does end abruptly 7½ feet beyond the line of way improved for travel, and which has an unguarded catch-basin 22 inches deep at the end thereof, and an open drain leading thereto, parallel to the way, is for the jury in an action brought to recover damages for personal injuries caused by a pedestrian falling into such drain while attempting in the nighttime to avoid a swiftly moving automobile, where it also appears that, by reason of the condition of the surface of the soil at the side of the way, and the proximity of a substantial bridge over which another highway crossed such way at right angles, it would not reasonably be anticipated that an unguarded drain and culvert would exist in such close proximity to the traveled way. *Neidhardt v. Minneapolis*, 29:822, 127 N. W. 484, — Minn. —.

13. Whether an infant possessed sufficient mental capacity to comprehend and avoid the dangers incidental to his employment, and whether he was aware of his danger, and could have avoided it by the use of such care as might reasonably be expected in one of his age, are questions of fact for the jury in an action brought by one under fourteen years of age, to recover damages for personal injuries received in the course of his employment, the dangers of which it was alleged he had not sufficient mental capacity to comprehend. *Ewing v. Lanark Fuel Co.* 29:487, 65 S. E. 200, 65 W. Va. 726.

14. Whether or not the danger from a defective appliance which the master has promised to repair is so great that a reasonably prudent person would not assume the risk is for the jury. *Comer v. Meyer*, (N. J. Err. & App.) 29:597, 74 Atl. 497, — N. J. —.

15. Whether the acceptance of a wagon with a piece from 5 to 8 inches long broken from the end of the shaft constitutes contributory negligence barring recovery for damages resulting from a runaway caused by the dropping of the shaft from the tug is for the jury, where it appears that the shaft still projected 6 inches beyond the tug, and that assurance was given by the stableman from whom the wagon was hired that the broken shaft did not interfere with the wagon's efficiency. *Opdycke v. Public Service R. Co.* (N. J. Err. & App.) 29:71, 76 Atl. 1032, — N. J. —.

16. The jury must determine whether or not a telegraph company exercises reasonable diligence in delaying for an hour the delivery of an important message received 29 L.R.A. (N.S.)

during the night, after the messenger goes on duty in the morning, where the addressee lives within a few squares of its office. *Western U. Teleg. Co. v. Price*, 29:836, 126 S. W. 1100, 137 Ky. 758.

17. The court cannot say as matter of law that one who shoots another person who, while very drunk, is attempting to attack him with a knife, acts in self-defense, if it might be found that he could easily have avoided the assault. *State v. Dyer*, 29:459, 124 N. W. 629, — Iowa, —.

Directing verdict.

18. Uncontroverted evidence in favor of the bona fides of the purchaser of a note procured from the maker by fraud is not sufficient to authorize a directed verdict for the holder, in an action upon the note, if the inferences to be drawn from all the circumstances are open to different conclusions by reasonable men. *Arnd v. Aylesworth*, 29:638, 123 N. W. 1000, — Iowa, —.

19. The court cannot direct a verdict in favor of the purchaser of a promissory note which was secured from the maker by fraud, unless the testimony in favor of his good faith is such that no fair-minded person can draw any other inference therefrom. *Arnd v. Aylesworth*, 29:638, 123 N. W. 1000, — Iowa, —.

20. A verdict cannot properly be directed where there is a conflict of evidence which makes the material facts so doubtful that a verdict for either party would be sustained. *Norvell v. Kanawha & M. R. Co.* 29:325, 68 S. E. 288, — W. Va. —.

21. The court cannot direct a verdict for plaintiff in an action of forcible entry and detainer to recover possession of real estate upon the admission of counsel in his opening statement that the legal title is in plaintiff. *Pietsch v. Pietsch*, 29:218, 92 N. E. 325, 245 Ill. 454. (Annotated)

Instructions.

First objecting to, on appeal, see Appeal and Error, 17.

Error in admission of evidence cured by, see Appeal and Error, 28.

Prejudicial error as to, see Appeal and Error, 33-38.

22. Refusal of an instruction the substance of which has been given is not error. *Southern P. Co. v. Hogan*, 29:813, 108 Pac. 240, — Ariz. —.

23. Failure to instruct that a telegraph company is not negligent in failing to send a messenger to deliver a telegram received during the night is not error, where the evidence tends to show that it was negligent in failing to deliver the message by telephone. *Western U. Teleg. Co. v. Price*, 29:836, 126 S. W. 1100, 137 Ky. 758.

24. Where, on a prosecution for seduction, there is evidence tending to show that the offense might be barred by the statute of limitations, the court should instruct the jury that, before they can convict, they must find that it was committed within the limitation period. *Thorp v. State*, 29:421, 129 S. W. 607, — Tex. Crim. Rep. —.

25. The court is not bound, in a prosecution for homicide, to submit to the jury the question of guilt of some degree of the offense lower than that of which the evidence shows him to be guilty, if he is culpable at all. *State v. Dyer*, 29: 459, 124 N. W. 629, — Iowa, —.

TRUSTEES.

In general, see *Trusts*, 2-5.

TRUSTS.

Bank's duty as to trust funds, see *Banks*, 2.

Proceeds of property turned into cash by thief, as trust fund for true owner, see *Equity*, 2.

Fiduciary capacity of agent, see *Principal and Agent*, 4, 5.

Executory.

1. A deed to one, his heirs and assigns, in trust, to stand seised and possessed of a certain portion of the property for the use and benefit of a certain person for life, and at his death to transfer it to certain other persons, provided that the grantor is to have the use and enjoyment of the property during his lifetime, is not a covenant to stand seised to uses, but is an executory trust. *Steele v. Smith*, 29: 939, 66 S. E. 200, 84 S. C. 464.

Trustees.

Effect of death of one placing money in hands of trustee on latter's authority, see *Death*, 3.

Liability of estate of trustee to pay special assessment on trust property, see *Executors and Administrators*, 5.

Who competent to testify in action for accounting, see *Witnesses*, 4.

2. Executors who have discharged their duties, paid the debts of the estate, and made a deed to the life tenant, subject to the terms of the will, the remainder estate being vested in children in case of the life tenant, are not entitled to be appointed trustees for the children born and to be born of the life tenant, notwithstanding the vested remainder estate is subject to open and admit any afterborn children of such life tenant during the continuance of the life estate. *Cooper v. Mitchell Investment Co.* 29: 291, 66 S. E. 1090, 133 Ga. 769.

3. One holding as trustee the legal title to real estate, with all the rights and liabilities of the owner except as to the *cestui que trust*, may be made personally liable for an assessment upon the property for public improvements. *Bangor v. Peirce*, 29: 770, 76 Atl. 945, — Me. —.

4. That a statute under which a trustee may be made personally liable for a special assessment for benefits from a public improvement upon the trust property makes no provision for reimbursing him from the trust estate does not indicate that he is not to be so made liable, since he has a right to reimbursement under general rules of law. *Bangor v. Peirce*, 29: 770, 76 Atl. 945, — Me. —.
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5. Title to money distributed by one in whose hands securities were placed to be cared for, by the owner, who has since deceased, to which the owner consented, cannot be questioned after his death. *Mollison v. Rittgers*, 29: 1179, 118 N. W. 512, 140 Iowa, 365.

Liability of trust estate.

6. Where a trustee in order to enable himself to secure funds for his own use and also to pay debts of the trust, the funds which were provided for which he has misappropriated, places, in the bank account of the trust, money belonging to a stranger, and then draws checks upon the fund for his own use and to pay the debts, the checks for his own use, although drawn first, will not be charged against the money already in the account, so as to charge the trust with the loss, but against the fund placed by him in the account, since it was his duty to use the money in the account in payment of the debts. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

7. A trust fund is not liable to make good money transferred to its bank account by the common trustee from another account, to facilitate his applying it to his own use, and checked out by him for private purposes. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

8. A trust fund whose bank account has been depleted by the default of the trustee in applying it to his own use, so that there are not sufficient funds to pay taxes, interest, and simple debts, may be required by equity to replace money belonging to another estate of which the trustee also has charge, and which he applies in satisfaction of such claims. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

9. An accounting three months after a defaulting trustee has placed funds of a stranger in the trust's bank account, and paid them out in satisfaction of its debts, is not sufficient to render the trustee a purchaser for value, so as to entitle it to hold the funds against the true owner,—especially where the fact of the defalcation and attempted repayment is not brought to the notice of the beneficiary. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

Following trust property.

10. That the beneficiaries of a trust have put the trustee in funds with which to pay debts of the trust does not give them a superior equity where he misappropriates the funds, and then replaces them with funds belonging to another trust, with which he pays the debts, so as to justify their refusal to return the funds belonging to the latter trust. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

11. Beneficiaries of a trust and one of its trustees, who receive funds due from it and commissions out of a bank account in which a defaulting trustee has placed funds of another trust to make good his defalcation, are purchasers in good faith,

so that the latter trust cannot recover from them or their trust the amount so misappropriated and paid. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

12. Where a trustee who has misappropriated the funds of the trust attempts to pay his debt by misappropriating those of another trust, and placing them to the credit of the bank account of the former, and then uses them to pay its debts, the money remains the property of the second trust; so that it can recover the amount from the first one. *Newell v. Hadley*, 29: 908, 92 N. E. 507, 206 Mass. 335.

TUBERCULIN TEST.

Statute requiring cows to be subjected to, see Constitutional Law, 6, 9.

UNDISCLOSED PRINCIPAL.

See Parties, 1.

UNITED STATES SUPREME COURT.

Jurisdiction on appeal, see Appeal and Error, 1.

UNREPEATED MESSAGE.

Stipulation as to liability for, see Telegraphs, 7.

USES.

Covenant to stand seised to uses, see Trusts, 1.

USURY.

The reservation of more than the legal rate of interest for the loan of bonds which are subject to fluctuation on the market is not within a statute making void any contract by which shall be reserved more than the legal rate for the loan or forbearance of money, goods, or other things in action. *Title Guaranty & S. Co. v. Klein*, 29: 620, 178 Fed. 689, 102 C. C. A. 189. (Annotated)

VARIANCE.

Between pleading and proof, see Evidence, 58.

VENDOR AND PURCHASER.

Right of one lending money to insane person as against vendor of real estate in which money is invested, see Fraud and Deceit.

Sale by guardian of incompetent, see Incompetent Persons.

Authority of agent to sell land, see Principal and Agent, 1, 3.

Subrogation of one lending money to insane person which is invested in real estate, see Subrogation.

1. A purchaser from an administrator, who is in possession cannot rescind the purchase upon the ground that the deed did not convey the decedent's title, when sued upon a vendor's lien reserved therein, unless he offers to restore the premises, together with the rents and profits which accrued during the time he was in possession. 29 L.R.A. (N.S.)

Zufall v. Peyton, 29: 740, 110 Pac. 773, — Okla. —.

2. Information by one having the record title to real estate, that he has conveyed it to another, together with a record of a mortgage on the property from the latter to him, is not such evidence that the latter is the owner of the property that one relying upon it in purchasing the property from him would be regarded as a bona fide purchaser; and therefore an attaching creditor of the reputed grantee, who, by statute, has the status of such purchaser, acting upon such information, acquires no right to the property superior to that conferred by a prior unrecorded deed, which such grantee had executed and delivered to a stranger. *Jennings v. Lentz*, 29: 584, 93 Pac. 327, 50 Or. 483.

VERDICT.

Direction of, see Trial, 18-21.

VOTERS AND ELECTIONS.

See Elections.

WAIVER.

Of right to appeal, see Appeal and Error, 4-6.

Of objection, see Appeal and Error, 10, 11.

Of error in trial court, see Appeal and Error, 18.

Of fraud in procuring renewal note, see Bills and Notes, 10.

Of rule by carrier, see Carriers, 2.

By insurers, see Insurance, 8-10.

Irregularity in judgment, see Judgment, 1.

By employer of rules, see Master and Servant, 4.

Of right to cash payment on sale, see Sale, 8, 10.

WARNING.

Duty to give, to servant, see Master and Servant, 5, 6.

WARRANTY.

Of genuineness of drawer's signature by indorser, see Bills and Notes, 2.

In insurance contract, see Insurance, 2-6.

On sale of personalty, see Sale, 2-5.

WATERS.

Drains and sewers, see Drains and Sewers.

Compensation for injury resulting from flooding, see Eminent Domain, 2.

Liability of city as to surface water, see Municipal Corporations, 7.

1. One who has appropriated water for the purpose of sale, rental, and distribution to the public, cannot, upon disposing of his water system, reserve to himself a portion of the right which he had appropriated to public use. *Leavitt v. Lassen Irrigation Co.* 29: 213, 106 Pac. 404, 157 Cal. 82.

2. One who, when appropriating water

for sale, rental, and distribution to the public, makes at the same time an appropriation for the benefit of his own land, to be taken through the ditches constructed for the public use, will, after selling his public rights, be limited to the amount of water which he had been actually taking and applying to a beneficial use upon his land. *Leavitt v. Lassen Irrigation Co.* 29: 213, 106 Pac. 404, 157 Cal. 82.

3. The legislature cannot confer upon any particular consumer of water from a public system a preferential right where the Constitution provides that water appropriated for sale or rental shall be a public use. *Leavitt v. Lassen Irrigation Co.* 29: 213, 106 Pac. 404, 157 Cal. 82.

4. One who owns a system for the distribution of water appropriated for sale, rental, and distribution to the public cannot confer upon any consumer a preferential right to the use of any part of the water by contract to supply him in perpetuity with water, and then assign him his own rights under the contract, so that he will hold the right to the water free from any obligation to the public system. *Leavitt v. Lassen Irrigation Co.* 29: 213, 106 Pac. 404, 157 Cal. 82. (Annotated)

WILLS.

Matters concerning executors and administrators, see Executors and Administrators.

Signature of testator.

1. A signature sufficient to meet the statutory requirements is effected by one who, writing his own will, begins by writing his name, with intent that it should stand as his signature to the will when completed, and, after disposing of his property, secures the witnesses' signature to the attestation clause, although he does not sign the will at the end. *Meads v. Earle*, 29: 63, 91 N. E. 916, 205 Mass. 553.

(Annotated)

Nature of estate or interest created.

2. A devise to one for and during his lifetime, and after his death to his issue in fee, and, should he die without issue, to another person designated does not create a fee in the first taker, since the purpose of testator to pass the remainder directly from himself to the issue is manifest. *Kemp v. Reinhard*, 29: 958, 77 Atl. 436, 228 Pa. 143.

(Annotated)

3. A devise "to my children by my first wife, and their children after them," creates a life estate in the living children of testator by such wife, with a vested remainder estate in their children *in esse* at the death of the testator, which is subject to open and let in any afterborn children of the testator's children during the continuance of the life estate, where there is nothing in the will showing a different intent, and especially where estates tail are expressly prohibited by law. *Cooper v. Mitchell Investment Co.* 29: 291, 66 S. E. 1080, 133 Ga. 709.

4. A bequest of stock to be invested and

the income paid to testator's daughter during the term of her natural life, and at her death to be equally divided among her children or legal heirs, does not, under the rule in *Shelley's Case*, vest a fee in the daughter, since the plain intent of the testator is to use the words "legal heirs" as a particular designation of individuals who are to take as purchasers at the death of the first taker. *Hall v. Gradwohl*, 29: 954, 77 Atl. 480, — Md. —.

(Annotated)

5. One to whom a life estate in real property is devised, with remainder to his heirs, by terms which vests the fee in them, cannot defeat the remainder by conveying the property before any children are born. *Westcott v. Meeker*, 29: 947, 122 N. W. 964, — Iowa, —.

6. A devise to one to hold real estate for life and to have the use, rents, and profits thereof, with no power to convey or dispose of the same for any longer period than during his natural life, and at his death to pass to his heirs, who shall have absolute title to the property, vests a life estate only in the first taker. *Westcott v. Meeker*, 29: 947, 122 N. W. 964, — Iowa, —.

(Annotated)

7. A devise of real estate to testator's wife for life, and after her death one half of the fee to her heirs and the other half to another person named, gives, under the rule in *Shelley's Case*, a fee to half the estate to testator's widow. *Ward v. Todd*, 29: 942, 88 N. E. 189, 239 Ill. 402.

(Annotated)

8. The rule in *Shelley's Case*, in its application to wills, will not be permitted to override the intention of the testator clearly expressed by language indicating his purpose that the devisee for life shall not have the power to convey any interest in the property which shall extend beyond the term of his life. *Westcott v. Meeker*, 29: 947, 122 N. W. 964, — Iowa, —.

9. A testator, after devising certain pieces of land to his daughter Catherine, provided thus: "The said lands heretofore given by me to my daughter Catherine are given for and during her natural life; and after her decease I do give and devise the said lands to such person or persons as shall be her heir or heirs of land held by her in fee simple." Held, that the words "heir or heirs" are *designatio personarum* who should take the remainder; that those persons do not take by descent as heirs of Catherine, but take by purchase from the testator; that the rule in *Shelley's Case* does not apply; and that Catherine takes only an estate for life. *Peer v. Hennion*, 29: 945, 76 Atl. 1084, 77 N. J. L. 693.

(Annotated)

WITNESSES.

Discovery by, see Discovery and Inspection.

Competency.

1. An illiterate father is competent to testify in an action by his minor son, who has grown up in the father's home, to re-

cover damages for permanent personal injuries, as to the son's earning capacity in his injured condition, notwithstanding the giving by him of a wrong reason for his estimate. *Ewing v. Lanark Fuel Co.* 29: 487, 65 S. E. 200, 65 W. Va. 726.

2. An officer of a bank may testify to its transactions from his knowledge of its course of business, although he has no personal knowledge of them. *Lilly v. Hamilton Bank*, 29: 558, 178 Fed. 53, 102 C. C. A. 1.

3. One suing on a note which had been obtained from the maker by fraud cannot be permitted to testify that he bought it before it was due, when it is conceded that he never saw it and knew nothing of its terms except as he was informed by one who may have acted as his agent in the transaction. *Arnd v. Aylesworth*, 29: 638, 123 N. W. 1000, — Iowa, —.

4. Persons to whom money has been distributed in alleged accordance with directions of a person since deceased are not interested in the outcome of an action brought to compel the person who made the distribution to account for the amount to such person's estate, so as to prevent their giving testimony of conversations concerning the distribution with such deceased person, under a statute prohibiting persons interested in the event of an action growing out of transactions with a person since deceased to give evidence concerning such transactions. *Mollison v. Rittgers*, 29: 1179, 118 N. W. 512, 140 Iowa, 365. (Annotated)

Examination.

Prejudicial error as to, see Appeal and Error, 26.

5. A written memorandum may not be used to aid or supplement the recollection of a witness, unless its correctness when made is first established. *Territory v. Harwood*, 29: 504, 110 Pac. 556, — N. M. —.

Credibility.

Error in instructions as to credibility, see Appeal and Error, 35.

6. A witness false in one part of his testimony, because mistaken as to the facts, is not within the rule that a witness false in part of his testimony is to be distrusted in other parts. *Simpson v. Miller*, 29: 680, 110 Pac. 485, — Or. —.
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7. The testimony of a witness who is impeached on cross-examination need not be taken as true by the jury, although he is not contradicted, nor his reputation for truth and veracity impeached. *Mee v. Carlson*, 29: 351, 117 N. W. 1033, 22 S. D. 365.

WORSHIP.

Freedom of, see Constitutional Law, 11.

WRIT AND PROCESS.

Review on appeal of damages for abuse of process, see Appeal and Error, 20.

Effect of levy of attachment to give jurisdiction over nonresident served by publication only, see Attachment, 1.

Exemplary damages for abuse of process, see Damages, 1, 6.

Describing members of partnership in publication service by firm name only, see Judgment, 4.

1. Service by publication upon a partnership by its firm name, without specifying the individuals composing it, does not render the service void, where every purpose of the publication summons is subserved by such procedure, as in such case the use of the firm name alone is an irregularity only. *Ord v. Neiswanger*, 29: 287, 105 Pac. 17, 81 Kan. 63. (Annotated)

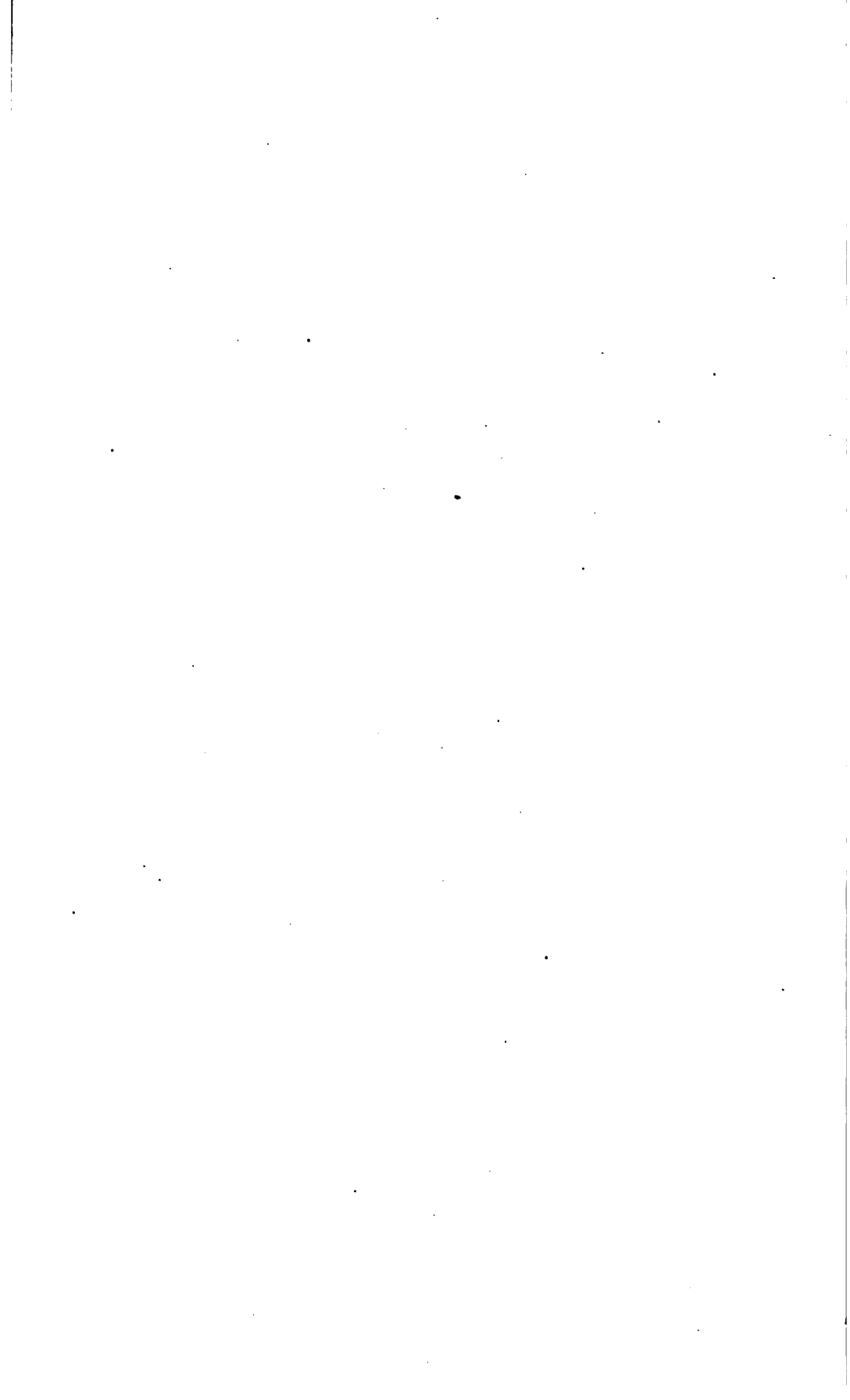
2. Equity may, upon service of process on a nonresident by publication, remove cloud from title to land within its jurisdiction by a decree binding only *in rem* under W. Va. Code, 1906, chap. 124, §§ 11, 12, 13, which provide for service of process on nonresidents by publication or by personal service out of the state, without specially mentioning any class of actions. *Tennant v. Fretts*, 29: 625, 68 S. E. 387, — W. Va. —. (Annotated)

WRIT OF ERROR.

See Appeal and Error.

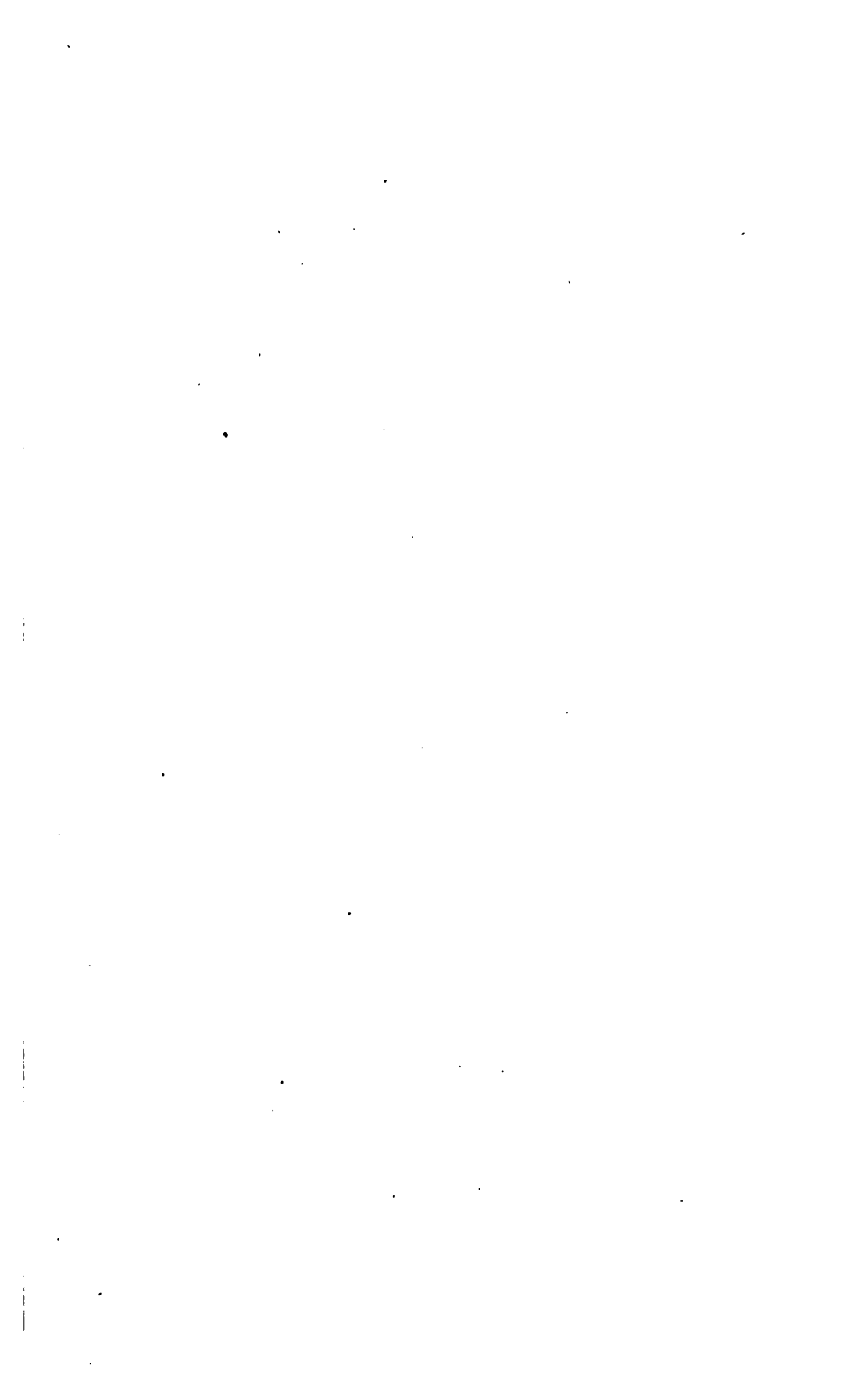
X-RAY.

Negligence in failing to take X-ray photograph, see Physicians and Surgeons.











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